EMPLOYMENT AND LABOR LAW

PATRICIA NEMETH[†]
DEBORAH BROUWER[‡]

I. INTRODUCTION

During the *Survey* period, the Michigan Supreme Court addressed few labor or employment issues of consequence. In a decision that may pave the way for cities to implement restructuring plans for their police and firefighters with greater speed, the court clarified the procedure used

to evaluate a request for a preliminary injunction to halt changes to the status quo during the pendency of an Act 321 arbitration.[1]

In contrast to Michigan's highest court, the court of appeals was presented with a varied menu of employment/labor law cases during the survey period: deciding the proper venue for claims brought under the Elliott-Larsen Civil Rights Act,[2] proscribing a roadmap for class certification of discrimination claims,[3] championing the admissibility of alleged acts of discrimination occurring outside the limitations period as "background evidence,"[4] announcing a statute of limitations for an action to vacate an arbitration award issued under the aegis of a collective bargaining agreement,[5] broadening the scope of "protected activity" under the Whistleblower's Protection Act,[6] adopting the economic realities test for evaluation of an employee/independent contractor's status under the Payment of Wage and Fringe Benefits Act,[7] and examining what constitutes an adverse employment action.[8]

At the federal level, the U. S. Supreme Court determined that a former employee could sue for retaliation under Title VII's opposition clause, even though her only opposition involved answering questions during an internal investigation of harassment.[9] The Sixth Circuit Court of Appeals also considered whether Title VII permits an employee to

---

† Managing Partner, Nemeth Burwell, P.C; B.A., 1981, University of Michigan; J.D., 1984, Wayne State University; L.L.M. (Labor), 1990, Wayne State University.

‡ Partner, Nemeth Burwell, P.C.; B.A., 1973, University of Michigan; J.D., 1980, Wayne State University. Lindsay Baldar, Esq. also contributed significantly to the preparation of this Article.

1. *See generally* Detroit Fire Fighters Ass'n, IAFF Local 344 v. City of Detroit, 482 Mich. 18, 753 N.W.2d 579 (Mich. 2008).

2. *See generally* Brightwell v. Fifth Third Bank of Mich., Nos. 280820, 281005, 2009 WL 961505 (Mich. App. April 9, 2009), *leave to appeal granted*, 772 N.W.2d 427 (Mich. 2009).

3. *See generally* Duskin v. Dep't of Human Services, 284 Mich. App. 400, 775 N.W.2d 801 (2009), *vacated*, 777 N.W.2d 168 (Mich. Ct. App. 2010).

4. *See generally* Campbell v. Human Serv's Dept., 286 Mich. App. 230, 780 N.W.2d 586 (Mich. Ct. App. 2009).

5. *See generally* City of Ann Arbor v. Am. Fed'n of State, County and Mun. Employees Local 369, 284 Mich. App. 126, 771 N.W.2d 843 (Mich. Ct. App. 2009), *leave to appeal denied*, 775 N.W.2d 748 (Mich. 2009).

6. *See generally* Shaw v. City of Ecorse, 283 Mich. App. 1, 770 N.W.2d 31 (Mich. Ct. App. 2009).

7. *See generally* Buckley v. Prof'l Plaza Clinic Corp., 281 Mich. App. 224, 761 N.W.2d 282 (Mich. Ct. App. 2008), *leave to appeal denied*, 483 Mich. 914, 762 N.W.2d 507 (Mich. 2009).

8. *See generally* Chen v. Wayne State Univ., 284 Mich. App. 172, 771 N.W.2d 820 (Mich. Ct. App. 2009), *leave to appeal denied*, 775 N.W.2d 778 (Mich. 2009).

9. *See generally* Crawford v. Metro. Gov't. of Nashville, 129 S. Ct. 846 (2009).

claim discrimination by association,[10] and whether an employer can be subjected to a Title VII retaliation claim for terminating the spouse of an employee engaged in protected activity.[11]

Added to this mix were opinions regarding the enforceability of arbitration fee shifting clauses, the usual governmental immunity decisions, and a healthy dose of Family Medical Leave Act (FMLA) cases (as well as revised FMLA regulations). During this *Survey* period, there surely was something for everyone.

II. PLEADING AND PROVING DISCRIMINATION CASES

A. The Prima Facie Case

Under Michigan's Elliott-Larsen Civil Rights Act (ELCRA),[12] an employer is prohibited from basing employment decisions on the religion, race, color, national origin, age, sex, height, weight, or marital status of its applicants or employees. Proof of illegal discriminatory treatment can be established either by direct evidence or indirect/circumstantial evidence.[13] Direct evidence is evidence that "if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions."[14] If the plaintiff does not provide direct evidence of discrimination, the case is analyzed according to the framework first established by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*,[15] which has since been adopted by Michigan courts.[16]

The *McDonnell Douglas* test allows "a plaintiff to present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful discrimination."[17] To establish this rebuttable prima facie case of discrimination, the plaintiff must offer evidence that: 1) she is a member of a class protected by ELCRA, 2) she experienced an adverse employment action, 3) she

---

10. *See generally* Barrett v. Whirlpool Corp., 556 F.3d 502 (6th Cir. 2009).

11. *See generally* Thompson v. North Am. Stainless, 567 F.3d 804 (6th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3113 (U.S. Sept. 3, 2009) (No. 09-291).

12. MICH. COMP. LAWS ANN. §§ 37.2201-.2804 (West 2001).

13. Sniecinski v. Blue Cross & Blue Shield of Mich., 469 Mich. 124, 132, 666 N.W.2d 186, 192 (Mich. 2003).

14. *Id.* at 133, 666 N.W.2d at 192 (quoting Hazle v. Ford Motor Co., 464 Mich. 456, 462, 628 N.W.2d 515, 520 (Mich. 2001)).

15. 411 U.S. 792 (1973).

16. *Sniecinski*, 469 Mich. at 133-35, 666 N.W.2d at 193-94.

17. *Id.* at 134, 666 N.W.2d at 193 (quoting DeBrow v. Century 21 Great Lakes, Inc. 463 Mich. 534, 538, 620 N.W.2d 836, 837 (Mich. 2001)).

was qualified for the position, and 4) that the circumstances resulting in the adverse employment action give rise to an inference of unlawful discrimination.[18] Once the plaintiff presents an appropriate prima facie case, the employer has the opportunity to offer a legitimate, non-discriminatory reason for the adverse employment action.[19] To avoid summary disposition, the plaintiff must establish that the defendant's proffered reason was merely a pretext for discrimination.[20]

Many cases turn on the second element of the prima facie case—whether the plaintiff has experienced an adverse employment action. Because Michigan law does not provide an exhaustive list of what constitutes an adverse employment action for purposes of employment discrimination claims, courts must analyze each alleged employment action, in context, to determine if the alleged action is an "adverse" employment action sufficient to create a prima facie case.[21] Such an action must be materially adverse to the employee, "more than a mere inconvenience or an alteration of job responsibilities.[22] The action must be looked at objectively; the plaintiff's subjective impressions as to whether the action is material are not controlling.[23] Michigan courts have recognized that materially adverse employment actions include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."[24]

During the *Survey* period, in *Chen v. Wayne State University*,[25] the Michigan Court of Appeals analyzed whether the plaintiff was able to establish the second element of his prima facie case – an adverse employment action. Chen, an American citizen born in China, was hired by Wayne State University (WSU) in 1968.[26] By 1971, Chen was a tenured associate professor for WSU in the Biological Sciences

18. *Id.* at 134, 666 N.W.2d at 193.

19. *Id.*

20. *Id.*

21. *See* Peña v. Ingham Co. Rd. Comm., 255 Mich. App. 299, 312, 660 N.W.2d 351, 358 (Mich. Ct. App. 2003); *see also* Wilcoxon v. Minn. Mining & Mfg. Co., 235 Mich. App. 347, 363, 597 N.W.2d 250, 258 (Mich. Ct. App. 1999).

22. Meyer v. City of Center Line, 242 Mich. App. 560, 569, 619 N.W.2d 182, 188 (Mich. Ct. App. 2000).

23. *Wilcoxon*, 235 Mich. App. at 364, 597 N.W.2d at 258.

24. *Id.* at 363, 597 N.W.2d at 258 (quoting Kocsis v. Multi-Case Mgt., 97 F.3d 876, 886 (6th Cir. 1996)).

25. 284 Mich. App. 172, 771 N.W.2d 820 (Mich. Ct. App. 2009), *leave to appeal denied*, 775 N.W.2d 778 (Mich. 2009).

26. *Id.* at 175, 771 N.W.2d at 825.

Department, specializing in genetics.[27] Beginning in 1972, Chen developed conflicts with each successive department chairperson regarding his teaching style, research, and laboratory space.[28] Chen attributed many of these conflicts to discrimination based on national origin, age, disability, and retaliation due to his protests of discrimination, eventually filing suit (while still employed) alleging the same claims.[29] The trial court dismissed Chen's discrimination and retaliation claims, finding that Chen had failed to establish that he suffered any adverse employment action.[30] Chen appealed his claims of national origin, age discrimination and retaliation.[31]

The court of appeals addressed each of Chen's claims of adverse employment actions separately, analyzing whether he had established a prima facie case of discrimination or retaliation.[32]

First, Chen claimed that WSU failed to "restore" his laboratory after he was forced to relocate from his usual lab during a renovation.[33] As a starting point, the court indicated "that changes in access to a lab can constitute an adverse employment action under some circumstances."[34] In particular, where access to a lab is necessary to engage in "research, obtain extramural funding, direct graduate students, and publish peer-reviewed articles," failure to have a lab could constitute an adverse employment action.[35] However, professors are able to materially contribute to their department and pursue their careers without a lab, by teaching classes and publishing course materials.[36]

In reviewing Chen's employment history, the court observed that Chen was assigned a lab from 1980 to 1988 but had failed to conduct any research, supervise graduate students, or obtain any grants.[37] For the next six years, after he lost his usual lab due to renovations, Chen was first assigned a temporary lab and then, post-renovation, a new lab. He refused to use either, due to his own belief that each lab was unsatisfactory.[38] During this time, however, Chen was nonetheless able

27. *Id.*
28. *Id.* at 176-86, 771 N.W.2d at 825-830.
29. *Id.* at 186, 771 N.W.2d at 830-31.
30. *Id.* at 200, 771 N.W.2d at 838.
31. *Chen*, 284 Mich. App. at 200, 771 N.W.2d at 838.
32. *Id.* at 201-08, 771 N.W.2d at 838-42.
33. *Id.* at 179-80, 202, 771 N.W.2d at 827, 839.
34. *Id.* at 202, 771 N.W.2d at 839 (citing Chuang v. Univ. of Cal. Davis Bd. of Tr., 225 F.3d 1115, 1125-26 (9th Cir. 2000)).
35. *Id.* at 202, 771 N.W.2d at 839.
36. *Id.* at 202-03, 771 N.W.2d at 839-40.
37. *Chen*, 284 Mich. App. at 203, 771 N.W.2d at 840.
38. *Id.*

to perform his work as a WSU professor without using a lab, focusing primarily on teaching.[39] Further, when Chen was finally refused access to a lab in 1994, he failed to explain to the department chairperson why he needed access to a lab.[40] Accordingly, Chen's allegation that WSU had failed to provide him with lab access did not constitute an adverse employment action because Chen produced no objective evidence that the eventual refusal of access to a laboratory was, in fact, adverse.[41] The court thus held that "Chen's subjective belief that access to a lab was essential was, by itself, insufficient to establish a question of fact regarding whether he actually needed a lab in order to perform his duties."[42]

Chen claimed that WSU's second adverse employment action took place in 1995 when the department chairperson, Lilien, allegedly asked Chen to retire, and when he refused, threatened to begin tenure revocation proceedings.[43] Tenure revocation proceedings were never initiated, however, and so Chen could only argue that the threat alone created an adverse employment action.[44] The court held that, "even assuming that a threat of tenure revocation could under some circumstances constitute an adverse employment action, Chen failed to present any evidence that the threat of tenure revocation itself resulted in a materially adverse change in the terms or conditions of his employment."[45]

Chen's third allegation of an adverse employment action took place when Lilien eliminated Chen's general undergraduate courses and suspended his graduate teaching duties.[46] In November 1995, Lilien decided not to assign Chen any additional undergraduate courses after receiving numerous student complaints regarding their inability to understand Chen's English, and Chen's continual refusal to seek help from the university's language institute.[47] Around the same time, Chen's graduate courses were put on hold while a planning group, of which he was a part, developed a new curriculum.[48]

As it had with respect to the alleged removal of lab access, the appellate court agreed that if all of a professor's teaching duties were

39. *Id.*
40. *Id.* at 204, 771 N.W.2d at 840.
41. *Id.*
42. *Id.*
43. *Chen*, 284 Mich. App. at 184, 771 N.W.2d at 829, 840.
44. *Id.* at 204, 771 N.W.2d at 840.
45. *Id.* (citing *Meyer*, 242 Mich. App. at 570, 619 N.W.2d at 189).
46. *Id.* at 205, 771 N.W.2d at 841.
47. *Id.* at 184, 771 N.W.2d at 829.
48. *Chen*, 284 Mich. App. at 184, 771 N.W.2d at 829.

removed, that might rise to the level of an adverse employment action.[49] However, as previously held by Michigan courts, "the mere alteration of job responsibilities — such as the assignment to new or different classes — does not, by itself, constitute an adverse employment action."[50] Thus, the *Chen* court focused on whether the changes to Chen's teaching duties affected his compensation, status, or benefits.[51] During most of Chen's career at WSU, he did not teach any general undergraduate courses at all, an occurrence without any negative impact on his compensation, status or benefits.[52] Even when Chen's graduate courses were suspended, there was no evidence of an adverse impact on his compensation, status or benefits.[53] As such, the court held that the changes in Chen's teaching duties failed to amount to an adverse employment action.[54]

Chen also alleged that he suffered an adverse employment action in 1994, when Lilien refused to change Chen's status from associate graduate faculty to regular graduate faculty, so that Chen could be an advisor to a graduate student.[55] Chen had been downgraded from the regular graduate faculty four years before Lilien became the chairperson as a result of Chen's failure to publish any scholarly papers in the previous years.[56] Further, there was no evidence that Lilien had the ability to exempt Chen from the rule prohibiting associate graduate faculty members from advising graduate students.[57] The court concluded that this was not an adverse employment action, because there was "no evidence that Lilien's actions or omissions with regard to Chen's graduate faculty status and desire to supervise a graduate student had any effect on Chen's employment."[58]

Finally, Chen generally alleged adverse employment actions in his lack of "tools to do research," which, according to him, affected his ability to receive merit increases, and other miscellaneous adverse actions, such as losing his property and telling other faculty members not to help him.[59] As to both assertions, the court held that Chen had failed to

49. *Id.* at 205, 771 N.W.2d at 841.
50. *Id.* at 205, 771 N.W.2d at 841 (citing *Meyer*, 242 Mich. App. at 569, 619 N.W.2d at 188).
51. *Id.* at 205, 771 N.W.2d at 841.
52. *Id.*
53. *Id.*
54. *Chen*, 284 Mich. App. at 205, 771 N.W.2d at 841.
55. *Id.* at 205-06, 771 N.W.2d at 829, 841.
56. *Id.* at 183, 771 N.W.2d at 829.
57. *Id.* at 206, 771 N.W.2d at 841.
58. *Id.*
59. *Id.* at 206-07, 771 N.W.2d at 841-42.

"identify objectively verifiable acts or omissions that adversely affected a term or condition of his employment."[60]

Accordingly, the court upheld the lower court's dismissal of Chen's discrimination and retaliation claims because Chen failed to establish an essential element of the claims — that he suffered any adverse employment action at the hands of WSU.[61]

B. Venue

The ELCRA contains specific language setting forth the appropriate venue for employment discrimination claims arising under that Act. Under the ELCRA, venue lies "in the circuit court for the county where the alleged violation occurred," or in the county where "the person against whom the civil complaint is filed resides or has his principal place of business."[62] In *Brightwell v. Fifth Third Bank of Michigan*,[63] a two-to-one decision released during the survey period, the Michigan Court of Appeals interpreted this provision as requiring that claims under the ELCRA be filed in the county in which the challenged employment decision was made, even if that is not where the employment decision was implemented.[64] This decision promises to be the subject of much interest, because the newly reconstituted Michigan Supreme Court promptly granted the plaintiffs' application for leave to appeal.[65]

In *Brightwell*, the plaintiffs alleged that Fifth Third violated the ELCRA by terminating their employment because of their race.[66] The plaintiffs worked at branch locations in Wayne County, but the termination decisions were made at Fifth Third's corporate headquarters in Oakland County.[67] The plaintiffs each filed suit in Wayne County and, in each case, Fifth Third moved to change venue. The motions were denied by both trial court judges, and Fifth Third sought leave to appeal.[68]

The court of appeals granted leave and consolidated the appeals. Initially, the appellate court observed that the applicable standard for

60. *Chen*, 284 Mich. App. at 207, 771 N.W.2d at 842 (citing *Peña*, 255 Mich. App. at 314, 660 N.W.2d at 359).

61. *Chen*, 284 Mich. App. at 207, 771 N.W.2d at 842.

62. Mich. Comp. Laws Ann. § 37.2801(2) (West 2001).

63. Nos. 280820, 281005, 2009 WL 961505 (Mich. Ct. App. April 9, 2009), *leave to appeal granted*, 772 N.W.2d 427 (Mich. 2009).

64. *Id.* at *1.

65. See Id.

66. *Id.* at *1.

67. *Id.*

68. *Id.*

review of venue decisions was clear error.[69] The court then examined the venue provisions of the ELCRA, noting that, under M.C.L. section 37.2801(2), venue is proper in the county where "the alleged violation occurred."[70] To decide the meaning of "violation," the court turned to a familiar tool, the dictionary. Random House Webster's College Dictionary defines "violation" as "the act of violating or the state of being violated" or "a breach or infringement, as of law or promise."[71] Based on this, the court of appeals concluded that, for purposes of the ELCRA, a "violation" is the decision to illegally discharge an employee. A "violation" of the ELCRA therefore is deemed to occur wherever the decision to illegally terminate is made.[72]

Relying on its earlier decision of *Barnes v. International Business Machines*,[73] which held that "the place of corporate decision making is an appropriate venue" and not the place where the effects of the alleged violation are felt or where the damages accrue,[74] the *Brightwell* court next reviewed the evidence regarding where the employment decisions at issue were made.[75]

According to the appellate court, the plaintiffs produced no evidence that the termination decisions were made in Wayne County,[76] nor did they disprove Fifth Third's assertion that their decisions were made in Oakland County.[77] While both an illegal termination decision *and* damages are required for an ELCRA action, venue is based solely on the site of the decision — not where damages arose.[78] Both of the trial judges had therefore erred in concluding that venue was proper in Wayne County,

Judge Michael Talbot wrote separately, in concurrence, because he "believe[d] the reasoning underlying this decision require[d] further elaboration."[79] Judge Talbot first addressed the court's earlier decision in *Keuhn v. Michigan State Police*,[80] upon which the *Brightwell* dissent

69. *Brightwell*, 2009 WL 961505 at *1 (citing Dimmitt & Owens Financial, Inc. v. Deloitte & Touche, L.L.C., 481 Mich. 618, 624, 752 N.W.2d 37, 40 (Mich. 2008)).
70. *Id.* at *1 (citing MICH. COMP. LAWS ANN. § 37.2801(2)).
71. *Id.* at *1 (quoting RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (1992)).
72. *Id.* at *2.
73. 212 Mich. App. 223, 226, 537 N.W.2d. 265 (1995).
74. *Id.* at 226, 537 N.W.2d. at 266.
75. *Brightwell*, 2009 WL 961505 at *2.
76. *Id.* at *1.
77. *Id.* at *2.
78. *Id.*
79. *Id.* (Talbot, J., concurring).
80. 225 Mich. App. 152, 570 N.W.2d 151 (1997).

relied. According to Judge Talbot, *Keuhn* is readily distinguishable from *Barnes*, upon which the majority relied.[81]

In *Barnes*, a former IBM employee claimed to have been wrongfully discharged due to his race.[82] Like the *Brightwell* plaintiffs, the plaintiff in *Barnes* sued in Wayne County. Defendant IBM moved to change venue to Oakland County, but the trial court denied the motion.[83] Reviewing that decision, the *Barnes* court stated that "[i]t is undisputed that venue in this case would be proper [using either of the two standards permitted in the ELCRA] in Oakland County because that is the location of defendants' corporate headquarters in Michigan and where the allegedly discriminatory and tortious decisions were made."[84] The court did not conclude that venue would have also been proper in Wayne County, even though that is where the alleged damages occurred, writing that "allowing an action to be brought where its effects or damages occur would encourage forum shopping in contravention of the goals of the venue provisions."[85] The court observed that the ELRCA clearly provides that venue is proper "where the alleged violation occurred," which is distinct from where the effects of an alleged violation are felt.[86]

By contrast, the plaintiff in *Keuhn* was a Michigan State Police trooper posted in Livingston County.[87] A decision not to promote Keuhn was made by his local supervisors in Livingston County in conjunction with the State Police Headquarters in Ingham County.[88] Unlike *Barnes*, where the decision to terminate was clearly located within a single county, the decision in *Keuhn* was made in multiple counties.[89] Keuhn demonstrated to the trial court's satisfaction that the decision to not promote him was made in both Ingham and Livingston counties by introducing evidence outlining the promotional process.[90] The first step in that process involved a promotional list compiled at the State Police Headquarters based on promotional exam results.[91] The next step required commanders at the post where the vacancy occurred to submit recommendations.[92] These commanders, who could consult with the

81. *Brightwell*, 2009 WL 961505 at *3 (Talbot, J., concurring).
82. *Barnes*, 212 Mich. App. at 224, 537 N.W.2d at 265.
83. *Id.*
84. *Id.* at 225, 537 N.W.2d at 266.
85. *Id.* at 225-26, 537 N.W.2d at 266.
86. *Id.* at 225, 537 N.W.2d at 265.
87. *Keuhn*, 225 Mich. App. at 153, 570 N.W.2d at 151.
88. *Id.* at 153-54, 570 N.W.2d at 152.
89. *Id.*
90. *Id.* at 155, 570 N.W.2d at 152.
91. *Id.* at 154, 570 N.W.2d at 152.
92. *Id.*

immediate supervisors of the officers considered for promotion, were able to consider race and gender as a factor in making their recommendations.[93] The final selection then occurred at the State Police Headquarters.[94] Based on this evidence of a multiplicity of venues, the court of appeals allowed Keuhn's choice of venue to stand.[95] The court held that venue was proper in Livingston County "because the allegedly discriminatory promotional process included decisions made in that county, not merely because damages from the discrimination resulted in that county."[96] These multiple decision-making sites, according to Judge Talbot, distinguished *Keuhn* from *Brightwell.*

Judge Talbot next addressed court of appeals Judge Elizabeth Gleicher's dissenting opinion in *Brightwell.* In her dissent, Judge Gleicher observed that, while the ELCRA venue provision does state that venue lies where the "violation occurred,"[97] a claim for discriminatory discharge "cannot arise until a claimant has been discharged,"[98] a principle established by past Michigan Supreme Court decisions.[99] Thus, in Judge Gleicher's view, the place of the discharge should dictate venue, and not the site where the decision was made. In *Brightwell,* while the discharge decisions may have been made in Oakland County, they were effectuated in Wayne County. Thus, according to the dissent, venue was proper in Wayne County.

Further, Judge Gleicher claimed *Barnes* and *Keuhn* are consistent with this principle. In *Barnes,* the allegedly discriminatory decisions were not implemented in Wayne County and thus no discrimination occurred in that county.[100] In *Keuhn,* the plaintiff alleged a range of discriminatory decisions, occurring in several counties. Venue was appropriate in the county in which the decision was made, although it also may have been appropriate in other counties.[101] Thus, while courts have held that counties in which both the decision to terminate was made and the act of termination occurred are proper venues, a county in which *only* the decision is made—but no action is taken—may not be.[102]

---

93. *Keuhn,* 225 Mich. App. at 154, 570 N.W.2d at 152.

94. *Id.*

95. *Id.* at 155, 570 N.W.2d at 152.

96. *Id.*

97. *Brightwell,* 2009 WL 961505 at *4 (Gleicher, J., dissenting) (quoting MICH. COMP. LAWS ANN. §37.2801(2) (West 2010)).

98. *Id.* (quoting Collins v. Comerica Bank, 468 Mich. 628, 633, 664 N.W.2d 713, 716 (2003)).

99. *Id.* at *5 (citing *Keuhn,* 225 Mich. App. at 154, 570 N.W.2d.at 152).

100. *Id.* at *5 (citing *Barnes,* 212 Mich. App. at 225-26, 537 N.W.2d at 266).

101. *Id.* at *6.

102. *Id.*

Judge Gleicher found the Michigan Supreme Court decision in *Dimmitt & Owens Financial, Inc. v. Deloitte & Touche, L.L.C.*,[103] to be particularly instructive. In *Dimmitt*, the court addressed M.C.L. section 600.1629(1),[104] the general venue statute applicable to most tort actions.[105] Dimmitt & Owens sued Deloitte & Touche in Wayne County for professional malpractice arising from the defendant's audit of Dimmitt & Owens's Oakland County office.[106] The defendant moved to change venue to Oakland County, arguing that Oakland County was the location where Dimmitt & Owens had engaged the defendant's services. Dimmitt & Owens responded that the report containing the malpractice was generated by the defendant's Wayne County office.[107] The applicable venue statute, M.C.L.A. section 660.1629(1), stated that venue arose in the county "in which the original injury occurred," and further defined "injury" separately from "breach of standard of care."[108] Based on this distinction, the Supreme Court decided that Oakland County was the correct venue, because that was where the report was generated, and that was where Dimmit & Owens was located when it was forced to liquidate, which constituted the "damages" in the case.[109]

---

103. 481 Mich. 618, 752 N.W.2d 37 (2008).

104. MICH. COMP. LAWS ANN. § 600.1629(1) states:

> Subject to subsection (2), in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, all of the following apply: (a) The county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action: (i) The defendant resides, has a place of business, or conducts business in that county. (ii) The corporate registered office of a defendant is located in that county. (b) If a county does not satisfy the criteria under subdivision (a), the county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action: (i) The plaintiff resides, has a place of business, or conducts business in that county. (ii) The corporate registered office of a plaintiff is located in that county. (c) If a county does not satisfy the criteria under subdivision (a) or (b), a county in which both of the following apply is a county in which to file and try the action: (i) The plaintiff resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county. (ii) The defendant resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county. (d) If a county does not satisfy the criteria under subdivision (a), (b), or (c), a county that satisfies the criteria under section 1621 or 1627 is a county in which to file and try an action.

MICH. COMP. LAWS ANN. § 600.1629(1) (West 1996).

105. *Dimmitt*, 481 Mich. at 620, 752 N.W.2d at 38.

106. *Id.*

107. *Id.* at 621, 758 N.W.2d at 39.

108. *Id.* (quoting MICH. COMP. LAWS ANN. § 600.1629(1)(a)).

109. *Id.* at 631, 752 N.W.2d at 44-45.

Harking back to *Dimmitt*, Judge Gleicher in *Brightwell* argued that a "decision" is not the same as a "violation," because a decision that is not carried out creates no violation.[110] Because an actual termination is necessary for a "violation," the "violation" occurs at the same locale as the termination.[111]

Neither the majority nor the concurrence in *Brightwell* found this analysis persuasive, however, with Judge Talbot noting that Judge Gleicher relied heavily on the concurrence in *Dimmitt* rather than the majority, and that a "concurring opinion does not constitute binding authority on this Court."[112] Furthermore, the concurrence concluded that *Dimmitt* was distinguishable because the venue statute at issue in that case differed from the ELCRA venue provision.[113] While the general venue statute provides that venue lies where "the original injury occurred," venue under the ELCRA lies "where the alleged violation occurs."[114] The *Brightwell* court thus determined that the general venue provision is "broader and more encompassing" than under the ELCRA.[115] The court stated that Judge Gleicher thus had focused too much on the "location of the effectuation of the adverse employment decision" and not enough on the "events and factors comprising the procedure leading to the alleged discriminatory actions.[116]

Judge Gleicher's view may have the last word, however. In granting leave, the Supreme Court directed the parties to address the following:

> (1) whether the Court of Appeals correctly decided in [*Barnes*] . . . that an alleged violation of the Elliott-Larsen Civil rights Act "occurred" only when and where the corporate decision affecting the plaintiff's employment was made, MCL 37.2801(2); and (b) that this Court's analysis of MCL 600.1629 from *Gross v General Motors Corp*, 448 Mich. 147 (1995), should be applied to discrimination cases brought under MCL 37.2801(2); and (2) whether the Court of Appeals correctly determined that the alleged violation "occurred" only in Oakland County, where the decision to terminate the plaintiffs was made, rather than in

110. *Brightwell*, 2009 WL 961505 at *6-7 (Gleicher, J., dissenting).
111. *Id.*
112. *Id.* at *3 (Talbot, J., concurring).
113. *Id.*
114. *Id.*
115. *Id.*
116. *Brightwell*, 2009 WL 961505 at *4 (Talbot, J., concurring).

Wayne County, where the plaintiffs worked and where that decision was communicated to the plaintiffs.[117]

C. Class Certification

Michigan and federal courts have long utilized class actions as a means to promote judicial efficiency and economy by litigating in a single case similar claims involving a large number of potential plaintiffs.[118] The ability to act as a representative for a "class" of plaintiffs, however, is not a right, but falls within the trial court's discretion in applying the court rules governing certification of a dispute as a class action.

Michigan Court Rule 3.501 (A)(1)(a)-(e) sets forth the elements for class certification.[119] In general, the rule identifies numerosity, commonality and typicality, adequacy, and superiority as the issues to be analyzed in the trial court's decision whether to certify a class. Given the paucity of Michigan case law interpreting that court rule, however, those Michigan courts faced with class certification issues often rely on the more extensive body of federal law. *Duskin v. Department of Human Services*,[120] decided during the *Survey* period, provides significant guidance—essentially a road map—to trial courts confronting class actions in the employment discrimination context. While the Michigan

---

117. *Brightwell*, 772 N.W.2d 427.

118. *See* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1196 (6th Cir. 1988); Cowles v. Bank West, 476 Mich. 1, 26, 719 N.W.2d 94, 108 (Mich. 2006). *See also* Northview Const. Co. v. City of St. Clair Shores, 44 Mich. App. 614, 617, 205 N.W.2d 895, 897 (Mich. Ct. App. 1973), *judgment rev'd on other grounds*, 395 Mich. 497, 236 N.W.2d 396 (Mich. 1975), *on reh'g*, 399 Mich. 184, 249 N.W.2d 290 (Mich. 1976) ("Class actions were unknown at common law and historically were developed in equity so as to provide a vehicle whereby large groups of individuals with a common cause could enforce their equitable rights or obtain immunity from equitable wrongs." (citations omitted)).

119. MICH. CT. R. 3.501(A) (2009) states:

> (1) One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if: (a) the class is so numerous that joinder of all members is impracticable; (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members; (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (d) the representative parties will fairly and adequately assert and protect the interests of the class; and (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

120. 284 Mich. App. 400, 775 N.W.2d 801 (Mich. Ct. App. 2009), *vacated and remanded*, 777 N.W.2d 168 (Mich. 2010).

Supreme Court, acting on the plaintiffs' application for leave to appeal, vacated and remanded *Duskin* for reconsideration in light of its subsequent decision in *Henry v. Dow Chemical*,[121] the case is still worth a close look, because the outcome on remand is likely to be the same.

Duskin was filed in response to an internal memorandum prepared by the State of Michigan's Department of Human Services (DHS) regarding "barriers that specific groups of [DHS] employees may have in either applying for or being successful in being promoted into."[122] On the basis of data collected by the DHS from its internal leadership academy, hiring data and information from focus groups, the author of the memorandum surmised that disparities existed in the DHS as to the promotion of minority males.[123]

As a result of the memorandum, a proposed class action was filed on May 24, 2006, on behalf of all minority (African-American, Hispanic, Arab, and Asian) male employees of the DHS, covering more than 600 employees in various departments and offices throughout Michigan.[124] The plaintiffs alleged race, ethnicity, and gender discrimination against the DHS regarding management and supervisory promotion decisions.[125]

The plaintiffs moved to certify the class on January 8, 2007.[126] Opposing the motion, the DHS argued that the plaintiffs failed to satisfy the requirements of M.C.R. section 3.501(A)(1) and that their claims were not appropriate for class treatment.[127] The trial court disagreed, relying on the conclusions contained in the DHS's internal study regarding possible state-wide disparities in promotion decisions.[128] The DHS sought interlocutory review, which was granted.[129]

The appellate court, relying upon M.C.R. section 3.501, agreed with the DHS that class certification was not appropriate.[130] The court noted initially that the plaintiffs had the burden of establishing the appropriateness of class certification and of demonstrating that all requirements of the court rule had been met.[131] The court then analyzed whether the plaintiffs had carried their burden.

---

121. 484 Mich. 483, 772 N.W.2d 301 (2009).
122. *Id.* at 406-07, 775 N.W.2d at 806.
123. *Id.* at 407, 775 N.W.2d at 806.
124. *Id.* at 407, 775 N.W.2d at 807.
125. *Id.* at 403, 775 N.W.2d at 805.
126. *Id.*
127. *Duskin*, 284 Mich. App. at 407, 775 N.W.2d at 807.
128. *Id*
129. Id.
130. *Id. at* 426, 775 N.W.2d at 817.
131. *Id.* at 408-09, 775 N.W.2d at 807-08 (citing Neal v. James, 252 Mich. App. 12, 16, 651 N.W.2d 181, 183 (Mich. Ct. App. 2002), *overruled in part by* Henry v. Dow

First, the court examined numerosity, the requirement that the class be so numerous that joinder of all members is impracticable.[132] While the plaintiffs were not required to identify precisely the number of members in the class, it was necessary that they "adequately define the class so potential members can be identified and . . . present some evidence of the number of class members or otherwise establish [the number] by reasonable estimate."[133] Further, the plaintiffs were required to show an actual injury, and that all of the class members suffered that injury.[134] The plaintiffs thus had the burden to "at least raise a presumption that each of the proposed class members suffered a compensable injury."[135] Given that the plaintiffs sought damages for DHS's alleged discriminatory promotional decisions, they were required to show "the approximate number of minority male employees of the DHS who applied for managerial positions for which they were qualified."[136] While the plaintiffs were not required to offer evidence as to each promotional opportunity that each class member should have but did not receive, "it was incumbent upon [them] to adequately define the class and provide sufficient information to discern how many people fall within the group."[137] The court thus instructed that

---

Chem. Co., 484 Mich. 483, 772 N.W.2d 301, 311 (2009)). In *Duskin*, the court discussed the standard applied by federal courts to class certification issues — that a class may only be certified if the trial court, after a rigorous analysis, is satisfied that the requirement of the court rule has been met. *Id.* (quoting Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161 (1982)). In *Henry v. Dow Chemical*, issued less than two months after *Duskin*, the Michigan Supreme Court rejected this "rigorous analysis" standard as insufficiently precise, stating that *M.C.R.* 3.501 provides adequate guidance for Michigan courts assessing motions for class certification. 484 Mich. 483, 502-03, 772 N.W.2d 301, 311 (2009). The Supreme Court also noted that if a plaintiff's pleadings do not make a sufficient case for class certification, the trial court is to look to additional information beyond the pleadings to assess whether class certification is proper. *Id.* at 503, 772 N.W.2d at 311. In so holding, *Henry* overruled those portions of *Neal v. James* that held to the contrary. *Id.* In *Duskin*, however, it appears that both the trial court and the court of appeals looked beyond the pleadings, specifically to the internal DHS memorandum relied on by the plaintiffs. The court of appeals also closely followed the requirements of *M.C.R.* 3.501 in evaluating the trial court's decision, just as the Supreme Court in *Henry* has directed. Given this record, the Supreme Court's subsequent remand of *Duskin* for reconsideration in light of *Henry*, should not alter the final result.

132. *Duskin*, 284 Mich. App. at 408-09, 775 N.W.2d at 807-08 (citing MICH. CT. R. 3.501(A)(1)(a) (2009)).

133. *Id.* (quoting Zine v. Chrysler Corp., 239 Mich. App. 261, 288, 600 N.W.2d 384, 400 (Mich. Ct. App. 1999)).

134. *Id.* at 410, 775 N.W.2d at 808-09 (citing *Zine*, 239 Mich. App. at 265, 600 N.W.2d at 389-90).

135. *Id.* at 413, 775, N.W.2d at 810.

136. *Id.* at 412, 775 N.W.2d at 809.

137. *Id.* at 412, 775 N.W.2d at 809-10.

> absent factual assertions about the plaintiffs' specific circumstances related to denial of advancement opportunities, plaintiffs were required to demonstrate a pattern and practice of discrimination throughout the department. . . . Alternatively, plaintiffs could have shown that the class representatives were denied promotional opportunities for which they were qualified under circumstances giving rise to an inference of discrimination, and then 'establish a factual and legal nexus between their claims and those of the proposed class.'[138]

While the plaintiffs asserted that a presumption of actual injury existed because of the disparity in male/minority management/supervision promotions, the court of appeals stated that more was required, observing that "plaintiffs ha[d] made no factual showing that the DHS engage[d] in systematic discrimination against minority males in order to raise a presumption that every minority male employee suffered discrimination through the denial of promotions or training opportunities."[139] Thus, the court concluded that numerosity had not been established.

The court then turned to the commonality/typicality requirement of M.C.R. section 3.501(A)(1)(b) and (c).[140] "Commonality" requires a showing that "common questions of law or fact . . . predominate over individual questions."[141] The issues presented by the class action therefore must be subject to generalized proof, and must predominate over individualized issues.[142] Similarly, "typicality" requires that "the representative's claim must arise from 'the same event or practice or course of conduct that gives rise to the claims of the other class member . . . [be] based on the same legal theory.'"[143] Further, class certification is inappropriate if the class representatives interests are "antagonistic" to the class members' interests.[144]

The plaintiffs supported their claim of commonality by asserting that common issues among the putative class members predominated,

---

138. *Duskin*, 284 Mich. App. at 413, 775 N.W.2d at 810 (quoting Reyes v. Walt Disney World Co., 176 F.R.D. 654, 658 (M.D. Fla. 1998) (citing Morrison v. Booth, 763 F.2d 1366, 1371 (11th Cir. 1985))).

139. *Id.*

140. For the complete text of this court rule, see *supra*, note 119.

141. *Duskin*, 284 Mich. App. at 414, 775 N.W.2d at 811 (quoting MICH. CT. R. 3.501(A)(1)(b)).

142. *Id.* (citing *Zine*, 236 Mich. App. at 289-90, 600 N.W.2d at 401).

143. *Id.* (quoting *Neal*, 252 Mich. App. at 21, 651 N.W.2d at 186).

144. *Id.* (quoting Bobbitt v. Acad. of Ct. Reporting, Inc., 252 F.R.D. 327, 342 (E.D. Mich. 2008)).

"because causes for the disparity [in promotions] include[d] ineffective communication, a non-gender-neutral promotion process, inconsistent policy application, inconsistent application and screening criteria, lack of accountability, and failure to target minority males in recruiting efforts."[145] The trial court had agreed, finding the following common questions of law and/or facts: "the DHS's alleged failure to implement gender neutral criteria for promotion, screening criteria, statistical feedback and accountability."[146]

The court of appeals soundly rejected the lower court's conclusions as to commonality and typicality. Noting that claims of disparate impact are more likely to satisfy the commonality and typicality requirements than disparate treatment claims,[147] the appellate court held that, while the plaintiffs alleged disparate impact, their claims actually were more akin to disparate treatment. The plaintiffs did not present evidence of a policy or practice of discrimination by the DHS, which would have indicated that common questions predominated over individual employment decisions.[148] The plaintiffs alleged only a general "culture" of discrimination without providing factual support for such claims. It is not sufficient that the class representative establish only his individual claim; he must go further and "bridge the gap" by presenting evidence that his treatment is typical of the employer's practices, was motivated by a pervasive policy of discrimination, which is reflected in other employment practices.[149] The evidence offered by the plaintiffs – the internal DHS memo — did not, according to the appellate court — establish that a discriminatory policy existed. The memo merely observed that disparities existed, based in part on the perceptions of the focus group that participated in the survey, without evidence that even the members of the focus group had sought but were denied promotions for which they were qualified.[150]

Thus, the appellate court determined that the class representatives' only common question was "whether the individuals involved were discriminated against because of their race."[151] The individualized nature

145. *Id.* at 416, 775 N.W.2d at 811-12.

146. *Id.* at 416, 775 N.W.2d at 812.

147. This is because disparate treatment claims, which challenge specific employment decisions, "are highly individualized and are, therefore not generally susceptible to class treatment." *Duskin*, 284 Mich. App. at 417, 775 N.W.2d at 812 (quoting Reyes v. Walt Disney World Co., 176 F.R.D. 654, 658 (M.D. Fla. 1998)). In contrast, disparate impact claims challenge broad policies or practices.

148. *Id.* at 417-18, 775 N.W.2d at 812-13.

149. *Id.* at 420, 775 N.W.2d at 813 (quoting *Falcon*, 457 U.S. at 157-58).

150. *Id.* at 420, 775 N.W.2d at 814.

151. *Id.*

of the question undercut the claim of commonality, establishing that the dispute was not appropriate for class certification.[152]

The court of appeals also found the plaintiffs' claims to be ill-suited for class resolution on the issue of typicality, noting that the proofs and law necessary to show, for example, that the DHS discriminated against a Hispanic male in favor of an African-American female differed from those necessary to establish that the agency discriminated against an African-American male in favor of an Arab female.[153] According to the court, "the law and the evidence necessary to prove and defend the myriad claims at issue differ significantly, making class treatment unsound."[154] Moreover, the court wrote, "that plaintiffs simply share the common characteristics of being male and belonging to a racial or ethnic minority is insufficient to show that the claims of the representative plaintiffs are typical of the class."[155]

The court next considered the requirement of "adequacy," which focuses on the adequacy both of the named representatives and their attorneys to represent the interests of the class.[156] The appellate court noted that the proposed class was not homogenous and that conflicts would necessarily arise as one class member was pitted against another class member with respect to their claims that each should have been selected for a specific position at issue.[157] The court stated that, "it is exceedingly likely that more than one class member will claim that he is entitled to a particular appointment or that he, rather than a fellow class member, should be compensated for an appointment for which they previously competed."[158] While it is not necessary for each class member to allege identical damages, "their claims must not diverge."[159]

Lastly, the court examined the requirement of "superiority."[160] Superiority requires a showing that "maintenance of the action as a class

152. *Id.* at 423.

153. *Duskin*, 284 Mich. App. at 420, 775 N.W.2d at 814.

154. *Id.*

155. *Id.* at 422, 775, N.W.2d at 815.

156. *Id.* (citing MICH. CT. R. 3.501(A)(1)(d) (2009)).

157. *Id.* at 424-25, 775 N.W.2d at 816.

158. *Id.*

159. *Duskin*, 284 Mich. App. at 425, 775 N.W.2d at 816 (citing *Neal*, 252 Mich. App. at 22, 651 N.W.2d at 186).

160. MICH. CT. R. 3.501(A)(2) sets forth a non-exhaustive list of factors for the court to consider in determining if superiority is met: (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or

action will be superior to other available methods of adjudication."[161] Like commonality and typicality, cases alleging individualized claims do not generally meet the superiority requirement.[162] The court identified three fatal weaknesses in the plaintiffs' contention that the proposed class met the superiority requirement: 1) the claims were too individualized and would require fact-specific analysis for each individual plaintiff's circumstances; 2) the defenses would be individualized with respect to the facts applicable to each plaintiff; and 3) a verdict would bind the entire class, which could be unfair if some but not all members had viable individual claims of disparate treatment.[163]

The court of appeals thus reversed the trial court's certification of the class, concluding that because no policy affecting all class members had been alleged and because the plaintiffs' claims necessarily required highly individualized analysis, class action was inappropriate.[164]

D. Evidentiary Issues

During the survey period, the Michigan Court of Appeals addressed two important evidentiary issues in employment discrimination cases: the use of evidence of alleged discriminatory acts occurring outside the limitations period, and the use of prior verdicts against the employer.

In *Campbell v. Department of Human Resources*,[165] the court of appeals considered the admissibility of evidence of alleged discrimination occurring outside the applicable limitations period as "background evidence" to support a timely claim of discrimination. This issue had been plagued by uncertainty since the Michigan Supreme Court disavowed the continuing violations doctrine in *Garg v. Macomb County*

---

substantially impair or impede their ability to protect their interests; (b) whether the final equitable or declaratory relief might be appropriate with respect to the class; (c) whether the action will be manageable as a class action; (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions; (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

161. *Duskin*, 284 Mich. App. at 408-09, 775 N.W.2d at 807 (quoting MICH. CT. R. 3.501(1)(e)).

162. *Id.* (citing *Zine*, 236 Mich. App. at 289 n.14, 600 N.W.2d at 401 n.14).

163. *Id.* at 425-26, 775, N.W.2d at 816-17.

164. *Id.* at 426, 775 N.W.2d at 817.

165. 286 Mich. App. 230, 780 N.W.2d 586 (2009).

Community Mental Health Services.[166] In subsequent decisions, lower courts had inconsistently addressed the admissibility of such evidence.

In *Garg*, the Michigan Supreme Court abrogated the "continuing violations" doctrine for ELCRA claims, established in *Sumner v. Goodyear Tire & Rubber Co.*,[167] because it contradicted the plain language of the three-year statute of limitations period contained in ELCRA.[168] As such, the court determined that a plaintiff cannot recover damages for any claim based on acts that occurred outside that limitations period.[169] Importantly, when the court initially issued its opinion on May 11, 2005, it included the now-infamous "footnote 14," which stated that alleged acts of discrimination occurring outside the limitations period were not admissible even as "background evidence" in support of a timely claim.[170] In the footnote, the court indicated that to allow such evidence "would essentially resurrect the 'continuing violations' doctrine of *Sumner* through the back door. It would bar an employee from *directly* recovering for untimely acts of discrimination, but allow the employee to *indirectly* recover for the same acts."[171] Nearly two months later, however, in lieu of granting the plaintiff's motion for rehearing, the court amended its opinion by striking footnote 14, providing no explanation or rationale for the change.[172] To add to the confusion, despite its removal of footnote 14, the court retained language in the original opinion indicating that it would not consider acts occurring outside the limitations period as support for Garg's timely claims. For instance, the following statements remained: "[b]ecause we conclude that, *once evidence of acts that occurred outside the statute of limitations period is removed from the consideration*, there was insufficient evidence of retaliation . . ."[173] and,

---

166. 472 Mich. 263, 696 N.W.2d 646 (Mich. 2005), *amended* 473 Mich. 1205, 699 N.W.2d 697 (Mich. 2005). For a detailed analysis of *Garg*, see Patricia Nemeth & Deborah Brouwer, *Emp't & Labor Law, Ann. Survey of Mich. Law*, 52 WAYNE L. REV. 565, 575-580 (2006).

167. 427 Mich. 505, 398 N.W.2d 368 (1986).

168. *Garg*, 472 Mich. at 281-84, 696 N.W.2d at 657-59 (citing MICH. COMP. LAWS. ANN. §§ 600.5808, .5827 (West 2000)).

169. *Id.* at 284, 696 N.W.2d at 659.

170. The full text of the original footnote 14 can be found in the May 11, 2005 slip opinion initially issued by the Supreme Court. *See* Garg v. Macomb County Cmty. Mental Health Serv., No. 121361 (Mich. 2005), *available at* http://courtofappeals.mijud.net/documents/opinions/final/sct/20050511_s121361_103_garg1nov04-op.pdf (last visited June 22, 2010).

171. *Id.*

172. Michigan Supreme Court Order dated July 18, 2005.

173. *Garg*, 472 Mich. at 266, 696 N.W.2d at 650 (emphasis added).

> [d]espite the statute of limitations, both the trial court and the Court of Appeals permitted plaintiff to recover on the basis of untimely acts . . . under the so-called 'continuing violations' doctrine adopted in *Sumner*. We conclude that, *absent evidence of these acts*, there is insufficient evidence to establish a causal link between the 1987 grievance and any retaliatory acts occurring within the limitations period.[174]

Some scholars and practitioners speculated that the removal of "footnote 14" indicated the court's approval of Justice Cavanagh's dissent in the May 2005 order. In that dissent, Justice Cavanagh rejected the majority's per se exclusion of acts occurring outside the limitations period and stated that "the decision whether to admit certain evidence is within the trial court's sound discretion. . . ."[175]

For almost two years following *Garg*, courts struggled to ascertain the Supreme Court's intent regarding evidence of untimely acts as "background evidence" for timely claims. Many erred on the side of caution, following the language that remained in *Garg*, and refused to consider such evidence.[176] As time passed without clarification from the Supreme Court, the lower courts reversed course, rejecting a per se exclusion of such evidence.[177]

This crystallized in *Ramanathan v. Wayne State University Board of Governors*,[178] an unpublished opinion in which the Michigan Court of Appeals held that *Garg* did not create a per se exclusion of evidence of acts occurring outside the limitations period.[179] In rendering its decision, the court attempted to extrapolate a conclusion from the Supreme Court's removal of footnote 14.[180] The court stated:

---

174. *Id.* at 278, 696 N.W.2d at 655 (emphasis added).

175. *Id.* at 304, 696 N.W.2d at 670.

176. *See* Spink v. MacSteel Mich., Docket No. 263140, 2005 WL 3500954 (Mich. App. Dec. 22, 2005); Greenfield v. Sears, Roebuck & Co., Docket No. 04-71086, 2006 WL 508655 (E.D. Mich. Mar. 2, 2006); Allen v. DaimlerChrysler Corp., Docket No. 265427, 2006 WL 626239 (Mich. App. Mar. 14, 2006); Seldon-Whittaker v. HCR Manor Care, Docket No. 05-70641, 2006 WL 2583249 (E.D. Mich. Sept. 7, 2006); Hill v. PBG Mich., L.L.C., Docket No. 268692, 2006 WL 2872581 (Mich. App. Oct. 10, 2006).

177. *See, e.g.*, Conti v. Am. Axle & Mfg., Inc., Docket No. 05-CV-72335, 2006 WL 3500632 (E.D. Mich. Dec. 4, 2006).

178. No. 266238, 2007 WL 28416 (Mich. Ct. App. Jan. 4, 2007). *Ramanathan* was discussed in greater detail in Patricia Nemeth & Deborah Brouwer, *Employment & Labor Law, 2008 Ann. Survey Mich. Law.*, 54 WAYNE L. REV. 167, 172-75 (2008).

179. *Ramanathan*, 2007 WL 28416 at *2-3.

180. *Id.*

> [d]espite the language in *Garg*, referencing limitations on the admissibility of evidence in that case, we cannot read the amended opinion so broadly as to exclude per se all background evidence of alleged discriminatory or retaliatory acts occurring outside the limitations period. Absent clear guidance in this regard from the Supreme Court, we conclude that this evidence is subject to the rules of evidence and other applicable governing law, and its admissibility is within the discretion of the trial court.[181]

When the Michigan Supreme Court ordered oral argument on Wayne State's application for leave, in *Ramanathan*, it appeared that the Court might address the footnote 14 issue. Instead, in lieu of granting leave, the Court remanded the case for trial on Ramanathan's retaliation claim only, thus failing to provide any direction on this evidentiary issue.[182] Following the Supreme Court's remand, *Ramanathan* remained an unpublished opinion and thus was not binding on subsequent courts.[183] Courts therefore continued to struggle with allowing the evidence.[184]

The issue resurfaced before the court of appeals in *Campbell*. In that case, the plaintiff, Christonna Campbell, had been employed by the Michigan Department of Human Services since 1985, working with adjudicated youths.[185] When Campbell was denied a promotion to the director's position at the Arbor Heights youth facility in October 2002, she sued, alleging gender discrimination in violation of the ELCRA.[186] [187] As part of her supporting evidence, Campbell sought to introduce evidence of previous positions for which she had applied, but which were instead filled by males.[188] Some of those promotions arose more than three years before Campbell filed suit.[189] While she did not seek recovery

---

181. *Id.* at *3.

182. Ramanathan v. Wayne State Univ. Bd. of Governors, 478 Mich. 910, 733 N.W.2d 21, 22 (2008).

183. MICH. CT. R. 7.215(C)(1).

184. *See* Hall v. Detroit Forming Inc., Docket No. 274059, 2008 WL 81268, *1 (Mich. App. Jan. 8, 2008) ("It is unclear whether and to what extent a trial court (or finder of fact) may consider evidence of racially hostile conduct that occurs outside the period of limitations."); Calderon v. Ford Motor Credit Co., 300 F.App'x 362, 367 (6th Cir. 2008) ("An open question remains as to whether acts falling outside the three-year statute of limitations may be used as evidence of hostile work environment.").

185. *Campbell*, 286 Mich. App. at 232, 780 N.W.2d at 589.

186. *Id.*

187. MICH. COMP. LAWS. ANN. § 37.2202(1)(a) (West 2000).

188. *Campbell*, 286 Mich. App. at 248-49, 780 N.W.2d at 597-98.

189. *Id.*

for those allegedly discriminatory promotion decisions, she did seek to introduce those decisions into evidence as "background" information.[190]

The Department of Human Services (DHS), relying on *Garg*, opposed the introduction of such background evidence, arguing that acts occurring beyond the limitations period could not properly be considered in support of Campbell's claim.[191] Campbell, in turn, relied on the court of appeals' decision in *Ramanathan*, which held "that *Garg* does not mandate the exclusion from evidence of acts outside the limitations period in order to show a pattern of discrimination, as long as the claim itself is based on an act within that period."[192] The trial court elected to follow *Ramanathan*, concluding that it had "discretion to consider acts that occurred outside the limitations period as background evidence in order to establish a pattern of discrimination."[193]

Based on the evidence of Campbell's prior job applications and rejections, the trial court found that a genuine issue of fact existed as to whether Campbell's gender was a motivating factor in the DHS's failure to promote her to the director position.[194] Campbell's claim thus proceeded to trial, resulting in a jury award of $328,000 in economic damages and $50,000 in noneconomic damages.[195] The DHS appealed, arguing that the court should have excluded evidence of acts occurring outside the statute of limitations period from the trial.[196]

On appeal, the court of appeals first noted that the abrogation of the continuing-violations doctrine by *Garg* was not in dispute, affirming that a "plaintiff cannot recover for any injuries that occurred outside the three-year limitations period applicable to CRA claims."[197] The court also recognized that *Garg* did not address the issue presented by *Campbell* — whether evidence of acts outside the limitations period could be used as background evidence for a claim occurring within the limitations period.[198] The court did observe, however, that "[t]here is a difference, of course, between *allowing recovery* for an injury outside the limitations period and simply allowing such an injury to be used as background evidence to establish a claim associated with an injury occurring within the limitations period."[199]

---

190. *Id.*
191. *Id.* at 234-36, 780 N.W.2d at 590-91.
192. *Id.* at 233, 780 N.W.2d at 590.
193. *Id.* at 234, 780 N.W.2d at 590.
194. *Campbell*, 286 Mich. App. at 232, 780 N.W.2d at 589.
195. *Id.* at 234, 780 N.W.2d at 590.
196. *Id.* at 234-36, 780 N.W.2d at 590-91.
197. *Id.* (citing *Garg*, 472 Mich. at 282, 696 N.W.2d at 658).
198. *Id.*
199. *Id.*

In reaching its conclusion, the court found support for its reliance on *Ramanathan* in the Supreme Court's failure to address the issue on appeal:

> [g]iven the absence of a bright-line rule set forth in *Garg*, given the deletion of the footnote, and given the Supreme Court's failure to address the 'background evidence' issue in *Ramanathan* . . . , we decline to read *Garg* as holding that injuries occurring outside the limitations period may never be used as evidence to support a claim for an injury occurring within the limitations period.[200]

The court held therefore, "that acts occurring outside the limitations period, although not actionable, may, in appropriate cases, be used as background evidence to establish a pattern of discrimination."[201] Further, as the *Ramanathan* court had also concluded, the admission of such evidence is to be determined under the rules of evidence and the court's discretion.[202]

Finally, in looking at the trial court's decision to allow evidence of Campbell's prior promotion denials, the court of appeals found that "[t]he evidence was admissible as background evidence, and in light of its clear probative value, we conclude that the trial court did not abuse its discretion in admitting it."[203] By indicating the "clear probative value" of the evidence, the court of appeals made a cursory acknowledgement of the ongoing issue regarding the admission of acts occurring outside the limitations period to support timely claims — whether the prejudicial value outweighs the probative value of such evidence and whether a trier of fact can bifurcate its knowledge of such incidents in finding liability for timely claims and awarding damages. Since the court failed to engage in a meaningful analysis of the probative value of Campbell's "background evidence," however, the struggle for clarity on this issue may continue.

In *Martuch v. St. Mary's Medical Center*,[204] the Michigan Court of Appeals considered the admissibility of a prior verdict against St. Mary's Medical Center in a subsequent litigation against St. Mary's. The plaintiff, Leeann Martuch, worked for St. Mary's in its human resources

200. *Campbell*, 286 Mich. App. at 238, 780 N.W.2d at 592.
201. *Id.*
202. *Id.*
203. *Id.*
204. No. 274267, 2008 WL 3876191 (Mich. Ct. App. Aug. 21, 2008).

department.[205] During her employment, she befriended Geraldine Sobek, a manager in the department, who was terminated in February 2000 along with several other managers.[206] Sobek sued St. Mary's, claiming that she was wrongfully terminated because of her age and also in violation of St. Mary's employment policies.[207] Later that year, St. Mary's also terminated Martuch.[208]

More than a year after Sobek filed suit against St. Mary's, and after Martuch's termination, Sobek's age discrimination claim was dismissed on motion, leaving only her breach of policy claim for trial.[209] Two months later, Martuch filed her own suit against St. Mary's.[210] Martuch contended that she was terminated in violation of the ELCRA's anti-retaliation provision because she "encouraged Sobek to pursue her legal action against defendant, and continued to socialize with Sobek in defiance of defendant's instructions."[211] Shortly thereafter, Sobek received a $2,188,723 jury verdict in her breach of policy claim against St. Mary's.[212] After St. Mary's appealed the verdict, the case was settled.[213]

After the *Sobek* verdict, St. Mary's preemptively filed a motion in limine in Martuch's case to exclude evidence of the Sobek verdict, arguing that it was irrelevant to Martuch's claims and, thus, inadmissible.[214] Under the Michigan Rules of Evidence: "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible."[215] "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[216] St. Mary's thus argued that the *Sobek* verdict did not have the tendency to prove that St.

205. *Id.* at *1.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Martuch*, 2008 WL 3876191 at *1.
211. *Id.* (citing MICH. COMP. LAWS ANN. § 37.2701 (West 2010).
212. *Id.* at *1.
213. *Id.*
214. *Id.*
215. MICH. R. EVID. 402.
216. MICH. R. EVID. 401.

Mary's terminated Martuch in retaliation for her support of Sobek's lawsuit.[217]

The trial court denied St. Mary's motion, finding that Sobek's jury verdict was "relevant to defendant's motivation to retaliate against plaintiff for her support of Sobek."[218] Although the trial court's basis for its holding is not entirely clear from the subsequent court of appeals' decision, it appears that the trial court had relied upon M.R.E. 404(b) regarding "other crimes, wrongs, or acts." That rule states:

> Evidence of other crimes, wrongs, or acts is *not admissible* to prove the character of a person in order to show action in conformity therewith. It may, however, be *admissible for other purposes*, such as *proof of motive*, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.[219]

The trial court presumably concluded that a jury verdict that St. Mary's had wrongfully terminated Sobek in violation of its policies was relevant to show St. Mary's motivation in terminating Martuch for supporting Sobek. St. Mary's sought and was granted an interlocutory appeal.[220]

The appellate court focused on the trial court's analysis of the evidence under the "other acts" rule, concluding that the lower court had incorrectly analyzed the verdict under an exception to the rule excluding character evidence.[221] According to the court of appeals, the prior verdict did not fall within the "other crimes, wrongs, or acts" category relied upon by the trial court.[222] The alleged wrongful act committed by St. Mary's — Sobek's termination — occurred three years before the verdict

---

217. *Martuch*, 2008 WL 3876191 at *2.

218. *Id.* at *1.

219. MICH. R. EVID. 404(b)(1) (emphasis added).

220. *Martuch*, 2008 WL 3876191 at *2. The interlocutory appeal also addressed the trial court's refusal to permit St. Mary's to amend its answer to include an affirmative defense arguing that after-acquired evidence might limit Martuch's damages. *Id.* at *1. The appellate court reversed the trial court's denial of St. Mary's motion for leave to amend as futile, finding that a question of fact existed as to whether Martuch would have been discharged for the alleged breach of confidentiality that was discovered after her termination. *Id.* at *1, 4.

221. *Id.* at *2. *See* MICH. R. EVID. 404(b).

222. *Martuch*, 2008 WL 3876191 at *2.

in her trial.[223] The verdict itself was not a wrongful act by St. Mary's, to be admitted under Rule 404 as an "other act."[224]

Additionally, the court determined that the jury verdict was not relevant as to St. Mary's motivation to terminate Martuch, because the "events that occurred in 2003 [were] too remote in time to explain defendant's motives for decisions and actions it made in 2000."[225] The appellate court explained that "the proper focus of plaintiff's retaliation claim is defendant's alleged motive in 2000 to shield itself from the risk of an uncertain outcome."[226] Further, the court reasoned that a jury verdict as to Sobek's breach of policy had no relevance regarding Martuch's ELCRA retaliation claim because supporting Sobek in her breach of policy claim was not protected activity under the non-discrimination statute.[227]

Alternatively, the court of appeals held that, even if the *Sobek* verdict was generally admissible as relevant evidence to establish Martuch's claim, it was rendered inadmissible by the danger of unfair prejudice under M.R.E. 403,[228] which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[229]

The court noted that the verdict alone portrayed St. Mary's as an unjust employer, and the size of the nearly $2.19 million jury verdict further exaggerated that portrayal.[230] "Were we to hold the fact of the verdict had some marginal relevance to defendant's motivation regarding plaintiff's employment, the remoteness of the verdict to plaintiff's termination persuades us that any possible relevance of this evidence would be far outweighed by its potential to inflame the jury."[231]

On the other hand, as to the general facts surrounding Sobek's employment with St. Mary's and her subsequent lawsuit, the court of

---

223. *Id.*
224. *Id.*
225. *Id.* (citing Stranahan v. Genesee Farmers Mut. Ins. Co., 242 Mich. 413, 416, 218 N.W. 688, 689 (1928)).
226. *Id.*
227. *Id.*
228. *Martuch*, 2008 WL 3876191 at *3 (citing MICH. R. EVID. 403).
229. MICH. R. EVID. 403.
230. *Martuch*, 2008 WL 3876191 at *3.
231. *Id.*

appeals concluded that a "blanket exclusion of evidence relating to Sobek's termination and her subsequent lawsuit [was] not proper, because some of this evidence [was] highly pertinent to plaintiff's claim that defendant retaliated against her for supporting Sobek's civil rights action."[232]

The court thus reversed the trial court's decision regarding the admissibility of the *Sobek* verdict, and remanded the case for trial.[233]

III. DISCRIMINATION AND RETALIATION CLAIMS

A. Associational Discrimination

The federal civil rights statute, known as Title VII,[234] offers covered employees protection from a "workplace permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive.'"[235] Claims of discrimination may be asserted under this statute by employees alleging discrimination on the basis of their own race or other protected classification, as well as by employees alleging discrimination arising from their association with protected employees.[236] The latter is often referred to as "associational discrimination."[237] The Sixth Circuit Court of Appeals recently addressed the necessary *degree* of association between a plaintiff and the persons with whom that plaintiff is associated, in *Barrett v. Whirlpool Corp.*[238]

In *Barrett*, three Caucasians sued their employer, Whirlpool, alleging a hostile work environment arising from their association with African-American co-workers, as well as retaliation based upon their advocacy for those co-workers.[239] Barrett, a Caucasian female, alleged that she was "friendly" with African-American employees.[240] She claimed that her African-American co-workers suffered offensive and inappropriate language, including racial slurs, racist jokes and graffiti, and that because of her relationships with those workers, she was shunned at work.[241] Barrett also claimed that some of these slurs were directed at her, or

232. *Id.* at *4.
233. *Id.*
234. 42 U.S.C.A. §§ 2000e-2000e17 (West 2010).
235. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65, 67 (1986)).
236. Barrett v. Whirlpool Corp., 556 F.3d 502, 512 (6th Cir. 2009).
237. *See id.*
238. 556 F.3d 502 (6th Cir. 2009).
239. *Id.* at 507.
240. *Id.* at 508.
241. *Id.* at 507-08.

made within her hearing.[242] Barrett also alleged that she saw racial graffiti in the restroom at Whirlpool.[243] Finally, Barrett contended that a human resources manager directed desirable work away from her because the manager disapproved of Barrett's friendship with an African-American employee.[244]

Melton, another Caucasian plaintiff, also alleged that she was discriminated and retaliated against because of her relationship with African-American co-workers.[245] Like Barrett, Melton allegedly heard racial slurs, although the comments were not always directed at her.[246] Melton claimed that she was harassed for being "friendly" with African-American co-workers, including being asked how she could "stand the smell" of an African-American woman with whom she ate lunch, and that white employees would "walk around" her in the hallway or give her "strange looks" because of her relationship with other African-American employees.[247] Melton was terminated in late 2006 or early 2007 after being placed on a physical layoff resulting from a surgery that limited her capabilities to work.[248]

The third plaintiff, Nickens, also a Caucasian female, similarly claimed that she was discriminated and retaliated against because of her relationship with African-American employees at Whirlpool.[249] Nickens also alleged that she heard white employees use racial slurs, and that she was denied an opportunity to apply for a higher-paying position with Whirlpool because of her relationship with an African-American co-worker, claiming that her supervisor told her that she "would never get the job," and that her group leader even removed a job posting after she expressed interest in the position.[250]

All three plaintiffs claimed that they were subjected to a hostile work environment in violation of Title VII and Section 1981,[251] and were retaliated against in violation of Title VII.[252] All claims were dismissed by the district court on motion by Whirlpool.[253] As to Barrett, the trial court held that her Title VII hostile work environment and retaliation

242. *Id.*
243. *Id.*
244. *Barrett*, 556 F.3d at 508.
245. *Id.*
246. *Id.* at 508.
247. *Id.* at 509.
248. *Id.* at 508.
249. *Barrett*, 556 F.3d at 509.
250. *Id.* at 509-10.
251. 42 U.S.C.A. § 1981 (West 2010).
252. *Barrett*, 556 F.3d at 506.
253. *Id.* at 510.

claims were time-barred because the alleged incidents of discrimination did not take place within 300 days of her EEOC filing.[254] While the court determined that Barrett's Section 1981 claim was not time-barred, it found that she "had not shown a sufficient level of association with black co-workers to sustain an association discrimination claim; rather, she had merely shown that she was friendly with some African-American co-workers while at work."[255] The court further concluded that the conduct alleged by Barrett was not "severe and pervasive," but was "sporadic, isolated, and not directed" at her.[256]

Regarding Melton's claims, the district court concluded that she too had failed to establish an associational discrimination claim because she did not show that her relationship with African-American co-workers "rose above the level of workplace collegiality."[257] Melton's retaliation claim also failed because she did not establish a causal connection between her alleged opposition activities and alleged adverse treatment by Whirlpool.[258]

The district court viewed Nickens's claims similarly and concluded that she too had failed to establish a sufficient degree of association, and that there was "insufficient[] 'severe and pervasive' incidents of alleged harassment," and no evidence of a causal connection in support of the retaliation claim.[259] In response, all three plaintiffs appealed to the Sixth Circuit Court of Appeals.

On appeal, the Sixth Circuit first noted that associational discrimination claims are based on conduct directed against the employee because of his/her own race, as a result of differences between the plaintiff's race and that of the persons with whom the plaintiff is associating.[260] This was explained in *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*,[261] in which a white employee alleged that he was discriminated against because he had a biracial child. In that opinion, the court wrote that "'[a] white employee who is discharged because his child is biracial is discriminated against on the basis of *his* race, even though the root animus for the discrimination is

254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Barrett*, 556 F.3d at 511.
259. *Id.*
260. *Id.* at 512.
261. 173 F.3d 988 (6th Cir. 1999).

prejudice against the biracial child."[262] Framing the conduct in this matter places the alleged discriminatory conduct within Title VII's prohibition against discrimination "because of such individual's race."[263]

While recognizing that it had not previously "addressed the degree of association required for non-members of a protected class to bring suit under Title VII," the Sixth Circuit nonetheless disagreed with the district court's conclusion that the nature of the plaintiffs' association with their African-American co-workers was insufficient to support their discrimination claims.[264] The district court did note, correctly, that the relationship at issue "need not necessarily be familial or intimate," but nonetheless required that the plaintiffs establish that the relationships were more than casual workplace friendships.[265]

The appellate court rejected Whirlpool's argument that only a significant association, one extending beyond the workplace, can support an association claim.[266] The court observed that, while many of the cases recognizing associational Title VII violations involved more than casual work friendships, such as familial or romantic relationships, the cases did not turn on the degree of closeness between the plaintiff and the co-worker.[267] Associational discrimination has been found where the relationship consisted only of a casual social relationship or an association with a community.[268]

The Sixth Circuit thus adopted the Seventh Circuit's position in *Drake v. 3M*,[269] stating that "[i]f a plaintiff shows that 1) she was discriminated against at work 2) because she associated with members of a protected class, then the degree of the association is irrelevant" to establish protection under Title VII.[270] The court noted further that:

---

262. *Barrett*, 556 F.3d at 512 (emphasis added) (citing *Tetro*, 173 F.3d at 994; *see also* Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d Cir. 2008); Troy v. Suburban Mgmt. Corp., No. 89-1282, 1990 WL 97490 at *5 n.5 (6th Cir. July 13, 1990)).

263. *Id.* at 512.

264. *Id.* at 512-13.

265. *Id.* at 512.

266. *Id.* at 512-13.

267. *Id.* at 513 (citing to Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 589 (5th Cir. 1998), *vacated in part on other grounds by* Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999) (interracial dating); *Tetro*, 173 F.3d at 988 (interracial parent-child relationship); Parr v. Woodmen of World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) (interracial marriage)).

268. *Barrett*, 556 F.3d at 513 (citing Drake v. 3M, 134 F.3d 878, 884 (7th Cir. 1998) (friendship); Reiter v. Ctr. Consol. Sch. Dist., 618 F. Supp. 1458, 1460 (D. Colo. 1985) (association with Hispanic community); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (casual social relationship); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1118 (9th Cir. 2004) (friendships)).

269. 134 F.3d 878 (7th Cir. 1998).

270. *Id.* at 513 (citing *Drake*, 134 F.3d at 884).

> While one might expect the degree of an association to correlate with the likelihood of severe or pervasive discrimination on the basis of that association[,] . . . that goes to the question of whether the plaintiff has established a hostile work environment, not whether he is eligible for the protections of Title VII in the first place.[271]

Because the plaintiffs in *Barrett* also claimed that they were discriminated against because of their advocacy on behalf of their African-American co-workers, the court then considered the standard applicable to those claims.[272] Noting that, "while the key questions are whether Plaintiffs were discriminated against, and whether the reason for the discrimination was their advocacy for protected employees. . . as long a plaintiff provides proof that she was, in fact, discriminated against *because* she advocated for protected employees, she may state a discrimination claim under Title VII."[273]

Having established that Barrett, Melton, and Nickens could assert associational discrimination claims based on their friendships with and advocacy for their African-American co-workers, the court assessed the factual support for their claims. The United State Supreme Court has defined a hostile work environment as a "workplace [] permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . . ."[274] Further, the "conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as abusive."[275] Initially, the Sixth Circuit observed that the district court appeared to have required, erroneously, that the plaintiffs prove that they were subjected to incidents that were both severe *and* persuasive, rather than severe *or* pervasive, as required under the Supreme Court's decision in *Harris v. Forklift*.[276]

The court clarified that because all three plaintiffs relied on circumstantial, rather than direct, evidence to establish their claims, the

---

271. *Id.* at 513.

272. *Id.*

273. *Id.* at 514 (citing Johnson v. Metro. Gov't of Nashville & Davidson County, Tenn., 129 S. Ct. 846, 850-51 (2009)) (emphasis in original).

274. *Id.* at 514 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

275. *Barrett*, 556 F.3d at 514 (citing Jackson v. Quanex Corp., 181 F.3d 647, 658 (6th Cir. 1999)).

276. *Id.* (discussing Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 333 (6th Cir. 2008)).

McDonnell Douglas[277] burden-shifting analysis applied. The plaintiffs were required to establish a prima facie case of discrimination, the first prong of which requires evidence that the plaintiff is a member of a protected class.[278] In association cases, the plaintiff's association with a member of a protected class is sufficient to establish the first prong.[279] The second and third prongs, requiring evidence that the plaintiff was subjected to unwelcome harassment based on race, were satisfied by evidence of "unwelcome racial comments as a result of her association with or advocacy for protected employees . . . ."[280]

The fourth prong, proof that the harassment interfered with the plaintiff's work performance, required analysis of the totality of the circumstances to determine whether the conduct at issue "'amount[ed] to a change in the terms and conditions of employment' . . . ."[281] "[S]imple teasing, . . . offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."[282] Importantly, the *Barrett* court made it clear that "only harassment that was directed toward Plaintiffs themselves or toward others who associated with or advocated on behalf of African-American employees is relevant . . . and only to the extent that Plaintiffs were aware of it."[283]

Viewing each plaintiff in turn, the appellate court agreed with the trial court's conclusion that that Barrett's Title VII harassment and retaliation claims were time-barred.[284] The court also agreed that Barrett had failed to state a hostile environment claim under Section 1981, because "[of] the discriminatory comments and acts that Barrett claims she witnessed in her time at Whirlpool, few were directed at her or toward those who associated with or advocated for African Americans; rather they were harassing toward African-Americans themselves."[285] Further, the alleged instances of harassment directed at her — being "snubbed" or receiving the "cold shoulder" — were not objectively severe.[286] Viewing the totality of the circumstances, the court concluded that Barrett has not established conduct sufficient to constitute a hostile

277. *McDonnell Douglas Corp.*, 411 U.S. at 802.
278. *Barrett*, 556 F.3d at 515 (citing Hafford v. Seidner, 183 F.3d 506, 512 (6th Cir. 1999)).
279. *Id.* at 515.
280. *Id.*
281. *Id.* (citing Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)).
282. *Id.*
283. *Id.* (citing Bermudez v. TRC Holdings, 138 F.3d 1176, 1180 (7th Cir. 1998)).
284. *Barrett*, 556 F.3d at 511.
285. *Id.* at 517.
286. *Id.*

work environment, and so her claims had been appropriately dismissed.[287]

The court reached a similar conclusion as to Melton's claims, finding that she did not experience direct discrimination and thus did not have a cause of action.[288] Most of the incidents alleged by Melton were unrelated to her association with or advocacy for her African-American colleagues.[289] The comment by one co-worker, asking Melton how she could "stand the smell" of her African-American friend, while deeply offensive to Melton, was not directed at Melton but rather toward her friend.[290] Further, the racial slurs that Melton overheard were not directed at her nor did they suggest discrimination against Melton herself. [291] A closer question was presented by evidence that Melton heard coworkers use the term "nigger lover," which on its face constitutes harassment of employees associating with or advocating for African-Americans.[292] Melton testified, however, that she never heard a supervisor or manager use the term, was not even sure that she ever heard a non-supervisor use it, and may not have heard the term used in reference to herself.[293] Because Melton failed to provide evidence of severe or pervasive harassment directed towards her as a result of her association or advocacy on behalf of African-Americans, she failed to state a claim of discrimination.[294]

In contrast, the Sixth Circuit found that Plaintiff Nickens had alleged sufficient evidence to withstand summary judgment of her hostile work environment claim.[295] Unlike Barrett and Melton, Nickens offered evidence of hostile behavior directed at her personally.[296] She received physical threats of violence, was told to keep to her own kind, and was the target of racially derogatory comments from supervisors criticizing her association with an African-American co-worker.[297] According to the court, these incidents occurred because of Nickens's race, since if she were not Caucasian, she would not have been harassed for her

287. *Id.* at 518.
288. *Id.*
289. *Id.*
290. *Barrett*, 556 F.3d at 518.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* The court of appeals also affirmed the district court's dismissal of Melton's retaliation claim because she had failed to establish a casual connection between any alleged adverse employment actions and her advocacy activities. *Id.* at 519.
295. *Barrett*, 556 F.3d at 519.
296. *Id.*
297. *Id.*

association with African-Americans.[298] Because the conduct also was severe or pervasive, the court concluded that the district court erred in dismissing Nickens's hostile work environment claim.[299]

The Sixth Circuit thus affirmed the district court's dismissal of all claims, except Nicken's Title VII associational discrimination claim, which was remanded to proceed with trial.[300]

B. Retaliation Under Title VII

Section 704(a) of Title VII of the federal Civil Rights Act prohibits retaliation by employers for two types of activity: opposition and participation.[301] The statute states that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[302]

Faced with claims by employees seeking to expand the parameters of this provision, courts have been forced to consider exactly what constitutes opposition or participation, and the extent to which Title VII protects persons other than those who engage in protected activity.

In *Crawford v. Metropolitan Government of Nashville*,[303] reversing the Sixth Circuit Court of Appeals, the U.S. Supreme Court addressed the nature of "opposition" under Title VII, concluding that opposition can be passive, such as answering questions posed by the employer in internal investigation not instigated by that employee.[304]

The case arose as the result of Metropolitan Government of Nashville's (Metro) investigation of alleged sexual harassment by Hughes, the employee relations director of the Metro Schools.[305] In conducting the investigation, Metro questioned all employees who had worked with the alleged harasser, including the plaintiff, Vicky

298. *Id.*

299. *Id.* at 519. Nickens's retaliation claim was not as successful, however, because her alleged instances of discrimination "were based on her association with black employees not on opposition to unlawful conduct," as required for retaliation claims brought under Title VII or Section 1981. *Id.* at 520.

300. *Barrett*, 556 F.3d at 519.

301. 42 U.S.C.A. § 2000e-3(a) (West 1964).

302. *Id.*

303. 129 S. Ct. 846 (West 2009).

304. *Id.* at 848.

305. *Id.* at 849.

Crawford.[306] Responding to questions as to whether she had ever witnessed Hughes engage in inappropriate behavior, Crawford described incidents in which Hughes had made sexually suggestive remarks and gestures to her while at work.[307] Subsequent to the investigation, the three employees who had indicated that Hughes had engaged in sexually harassing behavior, including Crawford, were discharged, purportedly on legitimate, unrelated grounds.[308] According to Crawford, no action was taken against Hughes.[309]

Crawford sued Metro, claiming that she had been fired in violation of Title VII, for opposing Hughes's behavior by answering questions during the harassment investigation, and by participating in the investigation itself.[310] A prima facie case of unlawful retaliation under Title VII requires that the plaintiff demonstrate that she engaged in activity protected by the Act, that her employer knew of that protected activity, that she suffered an adverse employment action, and that a casual connection linked the protected activity to the adverse employment action.[311]

The district court dismissed Crawford's suit after concluding that she could not establish a prima facie retaliation claim because she had not engaged in protected activity under Title VII.[312] The court applied Sixth Circuit precedent holding that Title VII's participation clause extends only to participation by the plaintiff in investigations arising from pending EEOC charges, and not to an internal investigation unrelated to such a charge.[313] Because the internal investigation in which Crawford was involved was unrelated to a pending EEOC charge, the district court rejected her participation clause claim.[314] As to Crawford's "opposition

306. Crawford v. Metro. Gov't of Nashville, 211 F. App'x 373, 374-75 (6th Cir. 2006).

307. *Id.* at 375. For example, when Crawford asked Hughes "Hey Dr. Hughes, what's up?," he allegedly grabbed his crotch and said "You know what's up." Hughes also was alleged to have grabbed Crawford's head and pulled it to his crotch. *Id.* at n.1.

308. *Id.*

309. *Id.*

310. *Id.*

311. Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000) (citing Abbott v. Crown Motor Co., 348 F.3d 537, 543 (6th Cir. 2003)).

312. Crawford v. Metro. Gov't of Nashville/Davidson County, No. 03-0996, 2005 WL 6011557 at *1 (M.D. Tenn. Jan. 6, 2005).

313. *Id.* at *2 (citing *Abbott*, 348 F.3d at 543). This interpretation apparently is based on the precise language of the Act, which prohibits retaliation against an employee who participates "in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C.A. § 2000e-3(a). The Sixth Circuit's position appears to be that the only investigations that arise "under this subchapter" are investigations conducted in conjunction with a pending EEOC charge. *Crawford I*, 2005 WL 6011557 at *2 (citing *Abbott*, 348 F.3d at 543).

314. *Crawford I*, 2005 WL 6011557 at *2.

clause" claim, the court concluded that such claims arise only when the plaintiff herself initiates an investigation by filing a complaint or reporting allegedly unlawful conduct.[315] Crawford had not initiated any such actions, but instead had answered questions posed to her during an internal investigation initiated by the employer.[316] The district court, therefore, concluded that Crawford had not engaged in protected activity under the Act and dismissed her claims.[317] Crawford appealed, and the Sixth Circuit affirmed.[318]

The Sixth Circuit agreed that Crawford had not engaged in protected activity under the Act.[319] With respect to the "opposition clause," the court of appeals determined that Crawford's alleged protected activity did not involve the type of conduct previously held by the court as constituting opposition.[320] Prior instances of protected activity included "complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer — e.g., former employers, union, and co-workers."[321] No such actions occurred in Crawford's case.[322]

Most importantly, the court opined that the protected activity had to include "active, consistent 'opposing' activities to warrant . . . protection against retaliation."[323] Because Crawford's actions did not amount to "overt opposition," her opposition clause claim failed.[324]

As for Crawford's participation clause claim, the Sixth Circuit declined the suggestion that it should reassess its previous decisions limiting participation clause cases to those in which the plaintiff participates in a investigation growing out of an EEOC charge, and affirmed the trial court's dismissal of that claim too.[325]

---

315. *Id.*
316. *Id.*
317. *Id.*
318. *Crawford*, 211 Fed. App'x at 374.
319. *Id.*
320. *Id.* at 376.
321. *Id.* at 376 (citing Johnson v. Univ. of Cincinnati, 215 F.3d 561, 579 (6th Cir. 2000)).
322. *Id.*
323. *Id.* (citing Bell v. Safety Grooving and Grinding, L.P., 107 Fed. App'x 607, 610 (6th Cir. 2004)).
324. *Crawford*, 211 F. App'x at 376.
325. *Id.* at 376-77 (citing *Abbott*, 348 F.3d at 543).

Crawford sought and was granted certiorari to the United States Supreme Court, which, after concluding that the lower courts had interpreted the opposition clause too narrowly, reversed.[326]

In its analysis of Crawford's opposition clause claim, the Court began with the language of Title VII, which precludes retaliation against an employee because that employee "opposed any practice made . . . unlawful . . . by this subchapter."[327] Because the term "oppose" is not defined by Title VII, the Court concluded that the word should carry its ordinary meaning.[328] To ascertain that meaning, the Court turned to Webster's New International Dictionary, which offered the following: "to resist or antagonize . . .; to contend against; to confront; resist; withstand."[329] The Court observed that nothing in this definition suggested that opposition arises only on the initiative of the person opposing, and further stated that "nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question."[330] According to the Court, "Crawford's description of the louche goings-on would certainly qualify in the minds of reasonable jurors as 'resist[ant]' or 'antagoni[stic].'"[331] Thus, the Court rejected the Sixth Circuit's contention that "answering questions fell short of opposition" because it was passive rather than active, and instead adopted the EEOC's position that, "'[w]hen an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication' virtually always 'constitutes the employee's *opposition* to the activity.'"[332]

Addressing concerns that a broad interpretation of "opposition" could deter internal investigations into employee misconduct, the Supreme Court opined that the desire to avoid vicarious liability for the actions of its employees provided sufficient incentive for an employer to

---

326. *Crawford*, 129 S. Ct. at 849. The Court granted certiorari in part because the Sixth Circuit's position, especially its opposition clause analysis, conflicted with that of other circuits. *Id.* at 850 (citing, in example, McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996)).

327. *Id.* at 850 (quoting 42 U.S.C.A. § 2000e-3(a) (West 2010)).

328. *Id.* (citing Perrin v. United States, 444 U.S. 37, 42 (1979)).

329. *Id.*

330. *Id.* at 850-51.

331. *Crawford*, 129 S. Ct. at 851.

332. *Id.* at 850-51 (quoting Brief for the United States as Amicus Curiae, *Crawford*, 129 S. Ct. at 851) (citing 2 EEOC Compliance Manual §§ 8-II-B(1) & (2), at 614:0003 (Mar. 2003)).

investigate sexual harassment complaints.[333] The Court recognized that because an affirmative defense to vicarious liability is available to the employer that promptly corrects conduct resulting in a hostile work environment, such an employer has a "strong inducement to ferret out and put a stop to discriminatory activity."[334] Conducting a thorough investigation is certainly one way in which an employer can "ferret out and put a stop to" harassment. The Court went to observe that "[t]he possibility that an employer might someday want to fire someone who might charge discrimination traceable to an internal investigation does not strike us a likely to diminish the attraction of an *Ellerth-Faragher* affirmative defense."[335]

In support of its relatively broad reading of "opposition," the Court stated that, to rule otherwise would not only undermine the *Ellerth/Faragher* affirmative defense, but also Title VII's prime objective, which is to protect employees.[336] Thus, finding that Crawford's actions fell within the protection of its understanding of the "opposition clause," the Court reversed the circuit court and remanded the case to the district court for further analysis of Metro's other asserted defenses.[337]

Justice Alito wrote separately in concurrence to question what he described as dicta in the lead opinion.[338] In addressing the various dictionary definitions of "oppose," the majority opinion (written by Justice Souter) noted that in ordinary discourse, opposition can be silent, offering as examples persons who philosophically opposed slavery or who oppose the death penalty.[339] Justice Alito accurately observed that defining opposition under Title VII to include silent opposition was not necessary to resolve Crawford's case, because Crawford had not been silent — she spoke out when questioned by her employer.[340] Justice Alito expressed doubt as to whether silent opposition would (or should) be covered under the Act, noting that such a ruling would have "important practical implications" such as opening "the door to retaliation claims by

333. *Id.* at 852.

334. *Id.* (citing Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998) and Faragher v. Boca Raton, 524 U.S. 775, 807(1998)).

335. *Id.* at 852.

336. *Id.*

337. *Crawford*, 129 S. Ct. at 851. Given the Court's resolution of Crawford's opposition clause, it declined to address her participation clause claim, including the contention that the Sixth Circuit may have "misread" that clause as well. *Id.* at 853.

338. *Id.* at 853 (Alito, J., concurring).

339. *Id.* at 851.

340. *Id.* at 854 (Alito, J., concurring).

employees who never expressed a word of opposition to their employers."[341] Those issues apparently have been left for another day.

The Sixth Circuit faced another challenging Title VII retaliation issue in *Thompson v. North American Stainless LP*,[342] in which it concluded that the Act does not protect a third party from retaliation unless that party personally engages in oppositional or participating behavior. Avoiding a split among the circuits (which would have virtually guaranteed another Supreme Court review), the court granted en banc review and vacated its previous decision.[343] In so doing, the Sixth Circuit joined the Fifth,[344] Third,[345] and Eighth[346] Circuits in finding that "the authorized class of claimants is limited to persons who have personally engaged in protected activity by opposing a practice, making a change, or assisting or participating in an investigation."[347]

The case involved Eric Thompson, a metallurgical engineer for North American Stainless (N.A. Stainless).[348] In 2000, N. A. Stainless hired Miriam Regalado, whom Thompson began dating shortly thereafter.[349] In September 2002, Regalado filed an EEOC charge, alleging that N. A. Stainless discriminated against her because of her gender.[350] Three weeks after N.A. Stainless learned of the charge, it terminated Thompson's employment.[351] At the time of his discharge, it was common knowledge at N.A. Stainless that Thompson and Regalado were engaged.[352] Thompson sued under Title VII, claiming that his termination was caused by his relationship with Regalado, while N.A. Stainless claimed that it had discharged Thompson for performance reasons.[353] On N.A. Stainless's motion, the district court dismissed Thompson's suit for failure to state a discrimination or a retaliation claim.[354] Thompson appealed to the Sixth Circuit.[355]

---

341. *Id.*
342. 567 F.3d 804 (6th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3113 (U.S. Sept. 3, 2009) (No. 09-291).
343. *Id.* at 805.
344. Holt v. JTM Industries, Inc., 89 F.3d 1224 (5th Cir. 1996).
345. Fogleman v. Mercy Hosp. Inc., 283 F.3d 561 (3d Cir. 2002).
346. Smith v. Riceland Foods, Inc., 151 F.3d 813 (8th Cir. 1998).
347. *Thompson*, 567 F.3d at 805.
348. *Id.* at 806.
349. *Id.*
350. *Id.*
351. *Id.*
352. *Id.*
353. *Thompson*, 567 F.3d at 806.
354. *Id.* at 807.
355. *Id.*

The panel that initially heard the case concluded, in a two-to-one decision, that, while the language of Title VII's non-retaliation provision appeared to limit protection to those persons who themselves engage in protected activity, the purpose of the Act would be thwarted if an employer could retaliate against a friend or family member of the employee who actually opposed discrimination or participated in proceedings under the Act.[356] This decision met with a strong dissent from Circuit Judge Robert Griffin, who accused the majority of disregarding the plain text of the statute and thereby rewriting the law.[357] Judge Griffin cautioned that "[f]rom time to time, we should remind ourselves that we are judges, not legislators."[358] According to Judge Griffin, Thompson did not fall within the plain language of the statute because he himself did not oppose an unlawful employment practice, make a charge or participate in an investigation.[359] As such, he failed to state a prima facie case of retaliation.

N.A. Stainless requested and received en banc review of this decision.[360] The Sixth Circuit issued a new decision, authored by former dissenter Judge Griffin.[361] This time, relying on classic statutory interpretation, the court held that the only persons protected by the opposition and participation clauses are those who personally oppose discriminatory behavior or participate in an investigation.[362]

The court began by examining the language of section 2000e-3(a) of Title VII of the Civil Rights Act of 1964, which states:

> [i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . *because he has opposed* any practice made unlawful employment practice by this subchapter, or *because he has made a charge, testified, assisted, or participated* in any manner in an investigation, proceeding, or hearing under this subchapter.[363]

356. Thompson v. N. American Stainless, LP, 520 F.3d 644, 647 (6th Cir. 2008), *reh'g en banc granted, op. vacated* (July 28, 2008).

357. *Id.* at 650 (Griffin, J. dissenting).

358. *Id.*

359. *Id.* at 651 (Griffin, J., dissenting).

360. *Thompson*, 567 F.3d at 806.

361. *Id.* at 805.

362. *Id.* at 806.

363. *Id.* at 806-07 (citing 42 U.S.C.A. § 2000e-3(a) (West 2010)).

The court noted that, in *Caminetti v. United States*,[364] the United States Supreme Court had directed lower courts charged with interpreting statutes to first examine the language of the statute, and "if that is plain . . . the sole function of the courts is to enforce it according to its terms."[365] Here, the Sixth Circuit did just that, concluding that the text of section 2000e-3(a) plainly limited its protection to that plaintiff who is able to demonstrate that his employer discriminated against *him* because of *his* opposition to a practice or participation in an investigation.[366] In so holding, the court noted that the Fifth, Third, and Eighth Circuit courts had adopted this same conclusion, and that no circuit court has adopted the view that a person is protected by Title VII solely due to his relationship with a person who has engaged in protected activities.[367]

Applying this standard to Thompson's allegations, the court deemed it significant that Thompson never alleged that he had opposed discrimination or participated in an investigation. Indeed, in his complaint, Thompson expressly claimed that "Plaintiff's relationship to Miriam [Relgado] Thompson was the sole motivating factor in his termination."[368] Because Thompson, by his own admission, did not himself participate in any activity that would bring him within the scope of the Act, his claim was precluded.[369]

The majority opinion, preemptively, took care to distinguish the case before it from recent Supreme Court decisions in *Crawford* [370] and *Burlington Northern & Santa Fe Railway v. White*.[371] While *Crawford* broadly interpreted the word "oppose" in Title VII's non-retaliation section, the facts in that case differed significantly from those in

364. 242 U.S. 470 (1917).

365. *Thompson*, 567 F.3d at 807 (quoting *Caminetti*, 242 U.S. at 485).

366. *Id.* at 809.

367. *Id.* at 809-11(citing *Holt*, 89 F.3d at 1226, which held that while prohibiting third party retaliation "'might eliminate the risk that an employer will retaliate against an employee for their spouse's protected activities,' it would 'contradict the plain language of the statute . . .'"; *Smith*, 151 F.3d at 819, which stated that protecting third parties from retaliation "is neither supported by the plain language of Title VII nor necessary to protect third parties . . ." as "Title VII already offers broad protection to such individuals by prohibiting employers from retaliating against employees for 'assist[ing] or participat[ing] in any manner' in a proceeding under Title VII;" *Fogleman*, 283 F.3d at 568-69, reviewing an Americans With Disabilities Act case, in which the ADA and Title VII have "nearly identical" statutory language, finding that the plain language of the statute prohibits third party retaliation claims).

368. *Thompson*, 567 F.3d at 807-08.

369. *Id.* at 808.

370. *Crawford*, 129 S. Ct. 846. *See supra* notes 303-310 and accompanying text.

371. 548 U.S. 53 (2006).

Thompson, because Crawford herself had personally engaged in behavior for which she claimed retaliation.[372] *Crawford* thus did not, and could not, address the third party retaliation claim at issue in *Thompson*.[373] This limited holding was recognized by Justice Alito in his concurrence in *Crawford*, which stated "[t]he question whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us in this case."[374] *Crawford* therefore did not require the *Thompson* court to alter its decision in any way.[375]

As to *Burlington Northern*, in which the Supreme Court held that the anti-retaliation provision of Title VII is "not limited to discriminatory actions [by employers] that affect the terms and conditions of employment,"[376] the Sixth Circuit noted that the Court's decision in that case addressed only the scope of actionable retaliation, and not the protected activity of the employee.[377] Further, *Burlington Northern* was also based on the language of the statute, with the Supreme Court explicitly noting the statute did not contain any words limiting the scope of retaliatory acts.[378] In contrast, the statutory language at issue in *Thompson* did expressly limit the persons protected under the Act, leaving no room for expansive judicial interpretation. The court wrote:

> The statutory language of § 704(a) pertinent to the present case is not silent regarding who falls under the umbrella of its protection. It explicitly identifies those individuals who are protected-employees who 'opposed any practice made an unlawful employment practice' or who 'made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing' under Title VII. Section 704(a) thus clearly limits the class of claimants to those who actually engaged in the protected activity.[379]

Circuit Judge Rogers concurred, agreeing with the majority's result but not its reasoning.[380] Judge Rogers opined that, in light of *Burlington's* expansive view of the types of adverse employment actions viewed as illegal retaliation under the Act, discharge of an employee's spouse could readily constitute a violation of Title VII's non-retaliation

372. *Thompson*, 567 F.3d at 812-13.
373. *Id.* at 813.
374. *Id.* (quoting *Crawford*, 129 S. Ct. at 855).
375. *Id.* at 812.
376. *Burlington Northern*, 548 U.S. at 64.
377. *Thompson*, 567 F.3d at 815.
378. *Id.* at 815.
379. *Id.*
380. *Id.* at 816 (Rogers, J., concurring).

provisions.[381] In that case, however, Mrs. Thompson, not Mr. Thompson, would be the aggrieved party, with standing to sue for the Title VII violation.[382]

As befitting en banc review, three circuit judges — Moore, Martin and White — vigorously dissented.[383] Judge Moore — who was in the original majority in the now-vacated opinion — echoed the views of that original majority, focusing primarily on the need to interpret Title VII consistently with its stated purpose.[384] Also critical in Judge Moore's view was the U.S. Supreme Court's recently expansive view of claims raised under non-retaliation statutes.[385]

While the en banc majority in *Thompson* avoided a split among circuits, that may not have been enough to avoid U.S. Supreme Court review, given the Court's seeming interest in broadening the circumstances under which employees may seek redress for alleged retaliatory acts by their employers.[386] Thompson has sought certiorari; his petition is pending.

C. Retaliation Under Michigan's Whistleblower's Protection Act

Under Michigan's Whistleblower's Protection Act (WPA),[387] an employer may not

> discharge, threaten, or otherwise discriminate against an employee . . . because the employee . . . reports or is about to report . . . a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state . . . to a public body . . . *or* because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.[388]

---

381. *Id.*

382. *Id.* at 817 (Rogers, J., concurring).

383. *Thompson*, 567 F.3d at 818-22 (Moore, J., dissenting).

384. *Id.* at 820-23 (Moore, J., dissenting).

385. *Id.* at 823-26 (Moore, J., dissenting).

386. *See, e.g.*, *Crawford*, 126 S. Ct. 846; *Burlington Northern*, 548 U.S. 53; CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008) (holding retaliation claims may be brought under 42 U.S.C.A. § 1981 (West 2010), despite the absence of language authorizing such claims in the Act); Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008) (finding that despite the absence of a non-retaliation provision in the Age Discrimination in Employment Act, retaliation claims may be raised under the Act).

387. MICH. COMP. LAWS ANN. §§ 15.361-369 (West 2010).

388. MICH. COMP. LAWS ANN. § 15.362 (emphasis added).

An individual alleging a violation of the WPA must file suit "within 90 days after the occurrence of the alleged violation," or her claim will be barred.[389]

During the *Survey* period, the Michigan Court of Appeals addressed two different aspects of the WPA: whether certain alleged conduct constituted protected activity under the Act, and whether the Act provides for individual liability.

In *Shaw v. Ecorse*,[390] the court again broadened the concept of "protected activity," focusing on its 1999 decision in *Henry v. Detroit* [391] and its 2008 decision in *Kimmelman v. Heather Downs Mgt. Ltd.*[392] In *Shaw*, John Bedo, an employee of the Ecorse Fire Department since 1973, alleged that he was forced to retire as fire captain in violation of the WPA.[393] Bedo's alleged protected activity was his trial testimony in a co-worker's discrimination suit against the city.[394] In contrast, the city claimed that Bedo had voluntarily retired, following an insubordination hearing that resulted from a report Bedo gave to the city's fire chief.[395]

That report had been submitted by Bedo on June 9, 2006, after the fire chief reduced the number of firefighters required to be on duty.[396] Bedo objected to the reduction as jeopardizing public safety and the safety of firefighters.[397] Bedo indicated in his report that he would hold the mayor and fire chief responsible in the event of his injury or death due to the reduction.[398]

Four days later, on June 13, 2006, Bedo (and another fire captain) testified, pursuant to subpoena, in a race discrimination and breach of contract case brought by the city's former fire chief, Ronald Lammers.[399] Bedo provided testimony that contradicted several defense witnesses and substantiated Lamar's race discrimination claims.[400] Bedo later alleged that, on June 20, 2006, after a $600,000 verdict was entered against the city in favor of Lammers, the fire chief and the former president of the

389. MICH. COMP. LAWS ANN. § 15.363(1).

390. 283 Mich. App. 1, 770 N.W.2d 31 (2009), *leave to appeal denied*, No. 138774-5, 2010 WL 3517382 (Mich. Sept. 9, 2010).

391. 234 Mich. App. 405, 594 N.W.2d 107 (1999).

392. 278 Mich. App. 569, 753 N.W.2d 265 (2008). For a discussion of the court's decision in *Kimmelman*, see Patricia Nemeth & Deborah Brouwer, *Employment & Labor Law, Ann. Survey of Mich. Law*, 55 WAYNE L. REV. 251, 262-65 (2009).

393. *Shaw*, 283 Mich. App. at 3-4, 770 N.W.2d at 34.

394. *Id.* at 4, 770 N.W.2d at 35.

395. *Id.* at 16, 770 N.W.2d at 41.

396. *Id.* at 3, 770 N.W.2d at 34.

397. *Id.*

398. *Id.*

399. *Shaw*, 283 Mich. App. at 3, 770 N.W.2d at 34.

400. *Id.* at 13, 770 N.W.2d at 40.

firefighters' union told Bedo that he was "in trouble" and that the city would "go after [him]" because of the testimony he had provided.[401]

Three days later, on June 23, 2006, Ecorse Mayor Larry Salisbury filed departmental charges against Bedo, accusing him of: "(1) conduct unbecoming an officer; (2) insubordination; (3) failing to follow a chain of command; (4) dissuading firefighters from performing their duties; and (5) criticism/ridicule."[402] Police chief George Anthony conducted three disciplinary hearings regarding the charges during June and July 2006, with the evidence focusing on the report Bedo had submitted to the fire chief, and on evidence suggesting that Bedo was responsible for the death of a firefighter in the early 1990s.[403]

In late July 2006, after the disciplinary hearings, Bedo retired.[404] He alleged that he was forced to do this as a result of the "stress created by the mayor's actions after [he] testified for the Plaintiff against the City of Ecorse in [the] Lammers trial."[405] After the city denied several of Bedo's requests relating to his pension, Bedo sued, claiming that the city had violated the WPA when it "brought departmental charges against him, subjected him to the disciplinary hearings, forced him to retire, [and] withheld his benefits because of his testimony at the Lammers trial."[406]

The city sought summary disposition, arguing, in part, that Bedo had not engaged in activity protected by the WPA.[407] The trial court agreed, analogizing Bedo's actions to those of the plaintiff in *Henry v. Detroit*.[408] *Henry* involved deposition testimony by Charles Henry, a former commander in the Detroit Police Department and chairman of the department board of review, regarding the Police Department's investigation of the 1992 death of Malice Green while in police custody.[409] The chief of police allegedly kept the board of review from properly investigating the incident, which resulted in several officers being held responsible for Green's death.[410] After one of the charged officers was acquitted of criminal charges, he filed suit against the city.[411] As part of the officer's lawsuit, Henry was subpoenaed to provide

401. *Id.* at 3, 770 N.W.2d at 34.
402. *Id.* at 4, 770 N.W.2d at 34-35.
403. *Id.* at 4, 770 N.W.2d at 35.
404. *Shaw*, 283 Mich. App. at 4, 770 N.W.2d at 35.
405. *Id.*
406. *Id.*
407. *Id.* at 8, 770 N.W.2d at 37.
408. *Id.* at 9-11, 770 N.W.2d at 37-38 (citing *Henry*, 234 Mich. App. 405, 594 N.W.2d 107).
409. *Henry*, 234 Mich. App. at 407, 594 N.W.2d at 109.
410. *Id.*
411. *Id.*

deposition testimony.[412] In his deposition, Henry testified that "the department rules concerning the board of review were violated and the board of review was not allowed to perform its duties."[413]

The trial court hearing Bedo's claim analyzed the content of Henry's deposition testimony, and determined that he was reporting a violation of law committed by the Department and, therefore, there were "[w]histleblower activities that he testified to in a court proceeding," entitling him to whistleblower protection.[414] On the other hand, the trial court concluded that Bedo's testimony at the Lammers trial did not "clearly establish[] any violation of the law or suspected violation of the law" and therefore was not whistleblowing activity.[415] The trial judge stated: "as I read over Mr. Bedo's testimony, he talked about a lot of political stuff, but I don't really recall seeing him or reading that he reported some kind of violation of the law against that current administration."[416] Therefore, the trial court granted the City's motion.[417] Bedo appealed, claiming that he had engaged in protected activity by testifying under subpoena in a court proceeding where the city's conduct was at issue.[418]

The court of appeals disagreed with the lower court's analysis of *Henry*, viewing that decision more broadly. The appellate court wrote:

> [t]he plain language of the statute provides protection for two types of 'whistleblowers': (1) those who report, or are about to report, violations of law, regulation, or rule to a public body, and (2) those who are requested by a public body to participate in an investigation held by that public body or in a court action. . . . [W]e see type 1 whistleblowers as initiators, as opposed to type 2 whistleblowers who participate in a previously initiated investigation or hearing at the behest of a public body. If a plaintiff falls under either category, then that plaintiff is engaged in a 'protected activity' for purposes of presenting a prima facie case.[419]

412. *Id.*
413. *Id.*
414. *Shaw*, 283 Mich. App. at 9, 770 N.W.2d at 37.
415. *Id.*
416. *Id.*
417. *Id.*
418. *Id.* at 2, 9-10, 770 N.W.2d at 38.
419. *Id.* (citing *Henry*, 234 Mich. App. at 409-10, 594 N.W.2d at 110-11).

Specifically, the court noted that, under the WPA, a "public body" includes "[t]he judiciary and any member or employee of the judiciary."[420] In *Henry*, the court had concluded that

> a deponent who (a) is an employee of the entity whose conduct is at issue, (b) has provided testimony by a deposition and, thereby, has 'participated in a court proceeding', and (c) would be subject to a court-ordered subpoena to compel his attendance in any event, meets the definition of a type 2 whistleblower. . . . Indeed, as a deponent, plaintiff's attendance and testimony were compelled, which is certainly a higher standard than requested. We therefore find plaintiff's testimony to be an activity protected by the WPA.[421]

With this analysis as its backdrop, the court in *Shaw* concluded that "neither the plain language of MCL 15.362 nor this Court's interpretation of the statute in *Henry* requires a type 2 whistleblower to report or testify regarding a violation or suspected violation of the law, regulation, or rule."[422] As such, the court held that the trial court had improperly imposed an additional requirement on Bedo, by demanding that his testimony involve a violation or suspected violation.[423]

The *Shaw* court also addressed its more recent decision in *Kimmelman v. Heather Downs Management*,[424] holding that the plain language of the WPA did not limit the Act's "applicability to violations of law *by the employer* or to investigations *involving the employer*."[425] The court found that Bedo could be a type 2 whistleblower by testifying under subpoena, "i.e., at the request of a public body, at a court proceeding."[426] The court did note, however, that while Bedo did not testify about a "specific violation of law, regulation, or rule committed" by the city, Bedo did testify "that he heard city council members say that they wanted to "get rid of Lammers," that the city council hired people for positions in the fire department who were not qualified for their positions, that both he and Lammers had been mistreated by the city

---

420. *Shaw*, 283 Mich. App. at 10, 770 N.W.2d at 38 (citing MICH. COMP. LAWS ANN. § 15.361(d)(vi) (West 2009)).

421. *Id.* at 11, 770 N.W.2d at 38-39 (citing *Henry*, 234 Mich. App. at 412-13, 594 N.W.2d at 107).

422. *Id.* at 11, 770 N.W.2d at 39.

423. *Id.* at 12, 770 N.W.2d at 39.

424. 278 Mich. App. 569, 753 N.W.2d 265 (2008).

425. *Shaw*, 283 Mich. App. at 12-13, 770 N.W.2d at 39 (citing *Kimmelman*, 278 Mich. App. at 574-75, 747 N.W.2d at 265).

426. *Id.* at 13, 770 N.W.2d at 40.

council, and that he heard a city council member refer to the fire department as being "lily white."[427]

Therefore, the court held that Bedo had engaged in protected activity under the WPA by testifying at trial under subpoena, and so reversed the trial court's grant of summary disposition for the city.[428]

The court of appeals addressed individual liability under the WPA in *Glover v. Pontiac Housing Commission*.[429] Plaintiffs Belinda Glover and Angela Speaks, employees of the Pontiac Housing Commission (PHC), were terminated due to alleged budget deficits.[430] Glover and Speaks responded with a WPA suit against PHC and Janice Tipton, PHC's board president.[431]

Tipton, who was friendly with Glover and Speaks, encouraged them to apply for employment with the PHC, and assisted them through the interview process.[432] In fact, a number of PHC employees were Tipton's friends and relatives, as part of her stated goal of assembling a "dream team" of employees at PHC.[433]

Glover and Speaks were hired as PHC's Section 8 Administrator and Human Services Administrator, respectively.[434] During their first year of employment, however, their positions did not generate the hoped-for income to cover their salaries.[435] This was problematic, because PHC was already experiencing budget deficits.[436] During this same period, Tipton started to act as if she were Glover's and Speaks's supervisor, even though, as a board member, she had no such authority.[437] On one occasion, "Tipton barged into Glover's office, closed the door and pointed her finger in Glover's face while loudly cursing at her."[438] Glover, feeling threatened by the incident, reported Tipton to the local

427. *Id.* at 13-14, 770 N.W.2d at 40.

428. *Id.* at 16, 770 N.W.2d at 41. The court also found that a material question of fact existed regarding the casual connection between Bedo's alleged protected activity and the alleged adverse employment action, based on the close temporal connection between Bedo's testimony and the disciplinary charges, as well as the threat that the city was going to "go after" him, setting the disciplinary hearing by the mayor instead of Bedo's department head, and the city's denial of his pension requests. *Id.* at 14-16, 770 N.W.2d at 40-41.

429. Glover v. Pontiac Housing Comm'n, No. 281737, 2008 WL 5431174 (Mich. App. Dec. 30, 2008).

430. *Id.* at *2.

431. *Id.*

432. *Id.* at *1.

433. *Id.*

434. *Id.*

435. *Glover*, 2008 WL 5431174 at *1.

436. *Id.*

437. *Id.*

438. *Id.*

police, filed a complaint with the city, contacted the city's human resources director, and reported Tipton to the Detroit United States Department of Housing and Urban Development (HUD) office.[439]

One month later, after concluding that Tipton might be engaging in improper credit card, cell phone and PHC vehicle use, Speaks reported these suspicions to a HUD auditor.[440] Not only did Tipton become angry and call Speaks to complain, but that same month, "unsigned, typewritten letters that included highly personal and embarrassing information about both plaintiffs began arriving in the mailboxes of PHC employees, the local school board, and at Pontiac Central High School."[441] After a linguistics expert determined that Tipton was the author of the letters, Speaks reported Tipton to the police and the city, complaining of "harassment and intimidation, defamation, and interfering" with her job.[442]

Four months after Glover's complaint, and three months after Speaks's complaint, Tipton allegedly told a friend that she had figured out a way to fire Glover and Speaks by writing them out of the PHC budget.[443] Two months later, PHC's executive director and budget director recommended that Glover's and Speaks's positions be eliminated in order to deal with the budget shortfall.[444] PHC's five-member board, which included Tipton, approved the decision, and Glover and Speaks were terminated.[445]

Glover and Speaks sued PHC and Tipton, alleging, among other claims, that they had been terminated in violation of the WPA for reporting Tipton to the police, the city, and HUD.[446] The defendants moved for summary disposition, which was granted.[447] The trial court found that Glover and Speaks had failed to establish the required causal connection between their protected activity and their termination.[448] The court also dismissed the claim against Tipton because she was not an "employer" under the WPA.[449] Glover and Speaks appealed.[450]

---

439. *Id.*
440. *Id.*
441. *Glover*, 2008 WL 5431174 at *1.
442. *Id.*
443. *Id.*
444. *Id.* at *2.
445. *Id.*
446. *Id.*
447. *Glover*, 2008 WL 5431174 at *2.
448. *Id.* at *2-3.
449. *Id.* at *5.
450. *Id.* at *2.

The court of appeals initially considered whether a causal connection existed between Glover and Speaks's protected activity and their termination. In particular, the court observed that Tipton's anger intensified after the complaints made by Glover and Speaks and, shortly thereafter, they were terminated.[451] Further, although the elimination of their positions was recommended by the executive director and budget director, Glover and Speaks produced evidence that Tipton had the ability to influence the executive director's decision-making and, in fact, he had never refused to do anything that Tipton asked of him.[452] Additionally, Tipton herself admitted that the board never questioned staff cuts recommended by the executive director.[453] Therefore, the court found a genuine issue of fact on the causal connection between Glover's and Speaks's protected activity and their subsequent termination, based on Tipton's actions and her power and influence within the PHC.[454]

Next, the court considered whether Tipton was an "employer" under the WPA, thereby exposing her to individual liability.[455] The WPA prohibits only the "employer" from discriminating against an employee because of protected activity,[456] and defines an "employer" as "a person who has 1 or more employees. Employer includes an agent of an employer . . . ."[457]

Recognizing that "whistleblower statutes are analogous to antiretalation provisions of other employment discrimination statutes," and have been awarded parallel treatment by the court in the past,[458] the *Glover* court looked to the Michigan Supreme Court's decision in *Elezovic v. Ford Motor Co.*[459] In *Elezovic*, the court interpreted a similar definition of "employer"[460] under ELCRA.[461] *Elezovic* held that "because employers can be held liable under the ELCRA, and because agents are considered employers, agents can be held liable, as individuals, under the ELCRA."[462] On remand, the court of appeals in *Elezovic* held that:

---

451. *Id.* at *3.
452. *Id.* at *4.
453. *Glover*, 2008 WL 5431174 at *4.
454. *Id.*
455. *Id.* at *5.
456. MICH. COMP. LAWS ANN. § 15.362 (West 2010).
457. MICH. COMP. LAWS ANN. § 15.361(b) (West 2010).
458. *Glover*, 2008 WL 5431174 at *4 (citing Roulston v. Tendercare, Inc., 239 Mich. App. 270, 280, 608 N.W.2d 525 (2000)).
459. 472 Mich. 408, 697 N.W.2d 851 (2005).
460. MICH. COMP. LAWS ANN. § 37.2201 (West 2010). "Employer" is defined as "a person who has 1 or more employees, and includes an agent of that person." *Id.*
461. *Glover*, 2008 WL 5431174 at *5.
462. *Elezovic*, 472 Mich. at 422, 697 N.W.2d at 859.

> [It] is through [the] delegation of general supervisory power and authority that one becomes an "agent" [for the purposes of ELCRA].
>
> Specifically, persons to whom an employing entity delegates supervisory power and authority to act on its behalf are "agents," as distinguished from co-employees, subordinates, or coworkers who do not have supervisory powers or authority, for purposes of the ELCRA.[463]

Within this framework, PHC and Tipton thus argued that Tipton was a co-employee of Glover and Speaks, with no control over PHC's day-to-day operations, and thus was not a supervisor that could be considered an "employer."[464] The court rejected this argument, observing that "while this may be how the PHC [was] supposed to operate, evidence sufficient to survive a motion for summary disposition indicate[d] that, in reality, Tipton had wide-ranging authority over day-to-day operations including hiring, general supervision and possibly firing of employees."[465] Specifically, Glover and Speaks offered evidence that Tipton had exercised significant influence over PHC operations, such as her involvement in PHC's hiring process, and also had repeatedly engaged in supervisory behavior over Glover and Speaks, trying to exclude them from meetings and calling them regarding PHC matters.[466] [467] The court therefore concluded that Glover and Speaks had presented sufficient evidence to establish that Tipton did engage in supervisory actions, allowing her to be individually liable as an "employer."[468]

IV. PUBLIC SECTOR EMPLOYMENT

A. Labor Relations

Public labor relations in Michigan are governed by the Public Employment Relations Act (PERA).[469] Under PERA, a public labor union may not strike in order to accomplish its collective bargaining

---

463. Elezovic v. Bennett, 274 Mich. App. 1, 731 N.W.2d 452 (2007); *Glover*, 2008 WL 5431174 at *5 (citing *Elezovic*, 274 Mich. App. at 10, 731 N.W.2d at 458).

464. *Glover*, 2008 WL 5431174 at *6.

465. *Id.*

466. *Id.*

467. Further, the court held that even if Tipton was acting outside the scope of her authority as board president of PHC, there was a question of fact as to whether she was acting with apparent authority based on the nepotism within PHC and Tipton's supervisory actions. *Id.*

468. *Id.*

469. MICH. COMP. LAWS ANN. §§ 423.201-.217 (West 2010).

goals.[470] To offset the loss of this leverage, the Michigan legislature supplemented PERA with Act 312,[471] directed specifically at police and firefighter unions. Under Act 312, if a public employer and a police or firefighter union are unable to reach agreement on a mandatory subject of bargaining, either party may demand binding arbitration.[472] During the pendency of an Act 312 arbitration, "existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other."[473] This status quo provision was intended to maintain the balance between the public employer and its police and firefighter unions and prevent either side from gaining an unfair advantage during Act 312 arbitration.

In 2001, the collective bargaining agreement between the City of Detroit and the Detroit Fire Fighters Association expired.[474] When the parties could not agree on a new labor contract, the union invoked the binding arbitration provision under Act 312.[475] While the dispute was in arbitration, the City of Detroit encountered significant budgetary issues, forcing the city in 2005 to restructure its fire department and lay off sixty-five firefighters.[476] The union viewed the layoffs as a violation of Act 312's status quo provision, and sought to enjoin the departmental reorganization.[477] By summer 2008, the dispute was before the Michigan Supreme Court, which in *Detroit Fire Fighters Association IAFF Local 344 v. City of Detroit*,[478] vacated the injunction first issued by the trial court three years previously.

In its preliminary injunction action, the union argued that the city's proposed restructuring plan required "unilateral alteration of minimum staffing, job duties, seniority, parity, and emergency medical service requirements," which, according to the union, affected firefighter safety and were mandatory subjects of bargaining under PERA.[479] After a

---

470. MICH. COMP. LAWS ANN. § 423.202.

471. MICH. COMP. LAWS ANN. §§ 423.231-.247 (West 2010).

472. MICH. COMP. LAWS ANN. § 423.233.

473. MICH. COMP. LAWS ANN. § 423.243. MCLA section 423.243 states that: "During the pendency of proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his rights or position under this act." *Id.*

474. Detroit Fire Fighters Ass'n IAFF Local 344 v. Detroit, 482 Mich. 18, 23, 753 N.W.2d 579, 581 (2008).

475. *Id.* at 24, 753 N.W.2d at 582.

476. *Id.* at 25, 753 N.W.2d at 582.

477. *Id.*

478. *Id.* at 21, 753 N.W.2d at 580.

479. *Id.* at 25, 753 N.W.2d at 582. In an earlier Act 312 case, the Michigan Supreme Court observed that safety is a condition of employment, and hence a mandatory subject

hearing on the motion, the circuit court concluded that factual issues existed regarding whether the layoffs would affect safety.[480]

The trial court then sent the case to the Act 312 arbitrator assigned to the parties' bargaining dispute, so that he could resolve the issues of fact.[481] The arbitrator concluded, however, that he did not have jurisdiction to resolve the safety issue, and returned the case to the circuit court.[482] That court reissued the preliminary injunction, observing that "there is a serious question of fact as to whether the restructuring plan would have an impact on fire fighters' safety."[483] The city appealed.[484]

The court of appeals upheld the issuance of the preliminary injunction, agreeing with the trial court that "where . . . proposed layoffs may impact the safety of working conditions for firefighters, those proposals are mandatory subjects of bargaining."[485] Notably, the court of appeals made no finding that the layoffs in question actually did pose safety concerns, but merely echoed the trial court's conclusion that the layoffs "may" impact safety.[486] The city again appealed, and the Michigan Supreme Court granted leave.[487]

In a six-to-one decision, the court reversed the judgment of the court of appeals affirming the trial court's entry of a preliminary injunction, vacated the injunction and remanded to the circuit court for resolution of the merits of the status quo claim.[488]

The Supreme Court's criticism of the actions taken by the lower courts centered on two issues: the trial court's failure to resolve the safety claim on its merits (by deciding whether the proposed layoffs did implicate safety issues) and its entry of a preliminary injunction without applying the traditional standards for granting such relief.[489]

---

of bargaining. *Id.* at 30-31, 753 N.W.2d at 585-86 (citing Metro. Council No. 23 and Local 1277, Am. Fed'n of State, County and Mun. Employees (AFSCME) AFL-CIO v. City of Center Line, 414 Mich. 642, 661-64, 327 N.W.2d 822, 830-31 (Mich. 1982) (Center Line II)).

480. *Detroit Fire Fighters Ass'n*, 482 Mich. at 25, 753 N.W.2d at 582.

481. *Id.* at 26, 753 N.W.2d at 583.

482. *Id.*

483. *Id.*

484. 271 Mich. App. 457, 722 N.W.2d 705(Mich. Ct. App. 2006).

485. *Id.* at 461, 722 N.W.2d at 707.

486. *Id.*

487. Detroit Firefighters Ass'n, I.A.F.F. Local 344 v. Detroit, 477 Mich. 927, 723 N.W.2d 455 (Mich. 2006). Decision on the merits was delayed when after oral argument, the court requested supplemental briefing and then ordered reargument. 478 Mich. 1201 (2007).

488. *Detroit Fire Fighters*, 482 Mich. at 35-36, 753 N.W.2d at 588.

489. *Id.* at 23, 753 N.W.2d at 581.

As to the first issue, the court observed that "the central problem with the circuit court's decision in this case, and by extension the Court of Appeals decision to affirm it, is that it only found the defendant's layoff and restructuring plan 'may' implicate a mandatory subject of bargaining."[490] The court continued,

> [g]iven the magnitude of a decision to restrain an employer's exercise of a management prerogative, this level of uncertainty in a circuit court ruling is untenable. By its terms, this injunction was to remain in place until the conclusion of the Act 312 arbitration, but a determination on the merits would never have been made.[491]

In effect, according to the court, the preliminary injunction sought by the union had morphed into a permanent injunction, with no resolution by the court of the underlying issue — whether the city's restructuring plan violated the status quo provisions of Act 312.[492]

The trial court and the court of appeals both appeared to accept, without challenge, the union's position that layoffs *might* affect safety, and therefore, because safety is a mandatory subject of bargaining, the city's proposed layoffs automatically changed conditions of employment.[493] This result was reached at least in part through the application of an incorrect standard (or perhaps no standard at all) for determining whether "an employer's challenged action actually violates the status quo provision by altering [a] condition of employment."[494] The supreme court addressed this oversight by explicitly adopting the standard applied by a different panel of the court of appeals in *Oak Park Public Safety Officers Association v. Oak Park*,[495] an unfair labor practices dispute brought under PERA. That court concluded that a staffing proposal must be "inextricably intertwined with safety" to be a mandatory subject of bargaining.[496] The Supreme Court adopted this standard for use in *Detroit Fire Fighters*, stating that "[t]he circuit court must conclude that the employer's challenged plan is 'so inextricably intertwined with safety' that its implementation would impermissibly

---

490. *Id.* at 33, 753 N.W.2d at 587.
491. *Id.*
492. *Id.* at 33-34, 753 N.W.2d at 587.
493. *Id.*
494. *Detroit Firefighters*, 482 Mich. at 22, 753 N.W.2d at 581.
495. 277 Mich. App. 317, 745 N.W.2d 527 (2007). This case was discussed in depth at Nemeth & Brouwer, *supra* note 392.
496. *Id.* at 329, 745 N.W.2d at 535.

alter the status quo by altering this 'condition' of employment."[497] Further, the court instructed the trial court to "make thorough factual findings supporting such a conclusion."[498]

The court next addressed the trial court's failure to comply with the usual four-step process for granting preliminary injunctive relief: an evaluation of whether the moving party has demonstrated irreparable injury, harm to the moving party outweighed by that suffered by the opposing party, a likelihood of success on the merits, and public harm if no injunction is entered.[499] In clarifying this as the mandatory procedure for issuance of a preliminary injunction to prevent a status quo violation, the supreme court overruled *Detroit Police Officers Ass'n v. Detroit*.[500] In that case, the court of appeals concluded that traditional injunctive relief standards did not apply when an injunction is sought to address a violation of the status quo provision.[501] According to the supreme court, Michigan public policy requires that extraordinary writs such as injunctions be issued only upon a showing of violence, irreparable injury or breach of the peace, and status quo injunctions should not be treated differently.[502]

In the case before it, the supreme court concluded that the circuit court utterly failed to make these findings.[503] The trial court was directed, on remand, to consider first whether the union had satisfied its burden of proof as to the four elements required for a preliminary injunction, "particularly that [the union] has demonstrated a likelihood of success on the merits that the plan is 'inextricably intertwined with safety' and made a showing of irreparable harm."[504] Then, if a preliminary injunction were issued, the court was to promptly make a specific, factual determination whether the challenged actions are so "inextricably intertwined with safety" so that the action alters a condition of employment.[505]

---

497. *Detroit Fire Fighters*, 482 Mich. at 23, 32-33, 753 N.W.2d at 581, 586-87.

498. *Id.*

499. *Id.* at 34, 753 N.W.2d at 587.

500. 142 Mich. App. 248, 369 N.W.2d 480 (1985).

501. *Id.* at 252, 369 N.W.2d at 482.

502. *Detroit Fire Fighters*, 482 Mich. at 34 n.31, 753 N.W.2d at 587 n.31 (citing Holland Sch. Dist. v. Holland Ed. Ass'n, 380 Mich. 314, 326, 157 N.W.2d 206 (1968)). Justice Kelly, in her partial concurrence in *Detroit Fire Fighters*, disagreed with the decision to overrule *Detroit Police Officers Association*, writing that, if a trial court concludes that a party is likely to succeed on the merits of a status quo violations claim, the court then can presume that irreparable injury will occur, absent an injunction. *Id.* at 36-37, 753 N.W.2d at 588-89 (Kelly, J., concurring in part and dissenting in part).

503. *Id.*

504. *Id.* at 35, 753 N.W.2d at 588.

505. *Id.*

A distinctly different labor issue – the limitations period applicable to actions seeking to vacate arbitration awards – was addressed during the *Survey* period, in *City of Ann Arbor v. Amer. Fed. Of State, County, and Municipal Employees (AFSCME) and its Affiliated Local 369*.[506] In that case, the court of appeals determined that in the absence of statutory authority, an action to vacate an arbitration award was subject to a six-year limitation period, rather than the six-month period urged by the union.[507]

The arbitration award in question arose from a collective bargaining dispute following the expiration of the parties' 1998-2001 agreement. That agreement contained a "me too" clause, which stated that any wage increase provided to another city bargaining unit would also be provided to members of Local 369.[508] In 2001, when the contract expired, the city and the union were unable to agree on a new contract, but did agree to certain "ground rules," which provided that the previous agreement would remain in effect until a successor agreement was ratified by both parties.[509] During the negotiations for a successor contract, the union filed a grievance claiming that the city had violated the "me too" provision by failing to provide raises to Local 369's members, which were provided to other bargaining units. That grievance was eventually arbitrated, and an award was issued on October 28, 2005, ordering the city to provide certain longevity increases to Local 369.[510] The city was uncertain whether those increases also had to be paid during the period between the 1998-2001 agreement's expiration date and the ratification date of the successor agreement, and therefore sought clarification from the arbitrator.[511] New hearings were held and a second opinion was issued by the arbitrator on April 24, 2007.[512] On May 16, 2007, the city filed a complaint in circuit court seeking to vacate the arbitrator's award, arguing that the arbitrator had exceeded his authority by concluding that the "me too" provision extended to the period between contracts.[513] The union opposed the action, arguing that the suit was untimely because the city failed to bring its suit within six months of the arbitrator's initial decision granting the grievance and also that the arbitrator had not

506. 248 Mich. App. 126, 771 N.W.2d 843 (2009), *leave to appeal denied*, 485 Mich. 1009, 775 N.W.2d 748 (2009).

507. *Id.* at 142, 771 N.W.2d at 853.

508. *Id.* at 128, 771 N.W.2d at 845.

509. *Id.*

510. *Id.* at 128-129, 771 N.W.2d at 845.

511. *Id.* at 129, 771 N.W.2d at 845.

512. *City of Ann Arbor*, 284 Mich. App. at 129, 771 N.W.2d at 845.

513. *Id.*

exceeded his authority.[514] The trial court granted the city's motion for summary disposition and the union appealed.

The court of appeals first noted that the parties agreed that no applicable statute or court rule provided a limitations period for actions to vacate labor arbitration awards.[515] The union therefore argued that, under analogous Sixth Circuit law, a six-month period should be applied,[516] while the city contended that the six-year residual statute of limitations contained in M.C.L.A. section 600.5813 was applicable. [517]

First addressing the union's reliance on *Badon v. General Motors*,[518] the court of appeals noted that neither *Badon* nor any of its Michigan progeny involved an action to vacate, enforce or modify an arbitration agreement; rather, they all involved claims that the union had breached its duty of fair representation to its member, usually raised in conjunction with a wrongful termination claim directed against the employer.[519] The court thus found the union's argument unpersuasive.

The court next turned to *Walkerville Education Association v. Walkerville Rural Communities School*,[520] a private-sector action to enforce an arbitration award. In that case, after noting that Michigan law did not specify a limitations period for such claims, the court of appeals applied a somewhat analogous provision from PERA, setting a six-month limitation period for unfair labor practices complaints.[521] As the *City of Ann Arbor* court noted, however, a subsequent Michigan Supreme Court decision refused to apply *Walkerville*, holding that actions to enforce *arbitration awards* are *not* analogous to unfair labor practice claims, and instead are breach of contract claims, governed by the statutory six-year limitation period.[522] Recognizing the tension between this result and state

514. *Id.* at 130-131, 771 N.W.2d at 846.

515. *Id.* at 132, 771 N.W.2d at 847.

516. *Id.* at 133, 771 N.W.2d at 847 (discussing Badon v. General Motors Corp., 679 F.2d 93 (6th Cir. 1982)).

517. MICH. COMP. LAWS ANN. § 600.5813 (West 2010) states: All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes.

518. *Badon*, 679 F.2d 93 (6th Cir. 1982).

519. *City of Ann Arbor*, 284 Mich. App. at 135-136, 771 N.W.2d at 849-850 (citing *Badon*, 679 F.2d at 99; Romero v. Paragon Steel Div., Portec, Inc. (On Remand), 129 Mich. App. 566, 572-73, 341 N.W.2d 546, 548 (1983); Ogletree v. Local 79, Serv. Employees Int'l Union, 141 Mich. App. 738, 739-40, 743, 368 N.W.2d 882, 884-85 (1985); and Meadows v. Detroit, 164 Mich. App. 418, 434-35, 418 N.W.2d 100, 107 (1987)).

520. 165 Mich. App. 341, 345, 418 N.W.2d 459, 461 (Mich. Ct. App. 1987).

521. *Id.* at 345, 418 N.W.2d at 461 (citing MICH. COMP. LAWS ANN. § 432.216(a) (West 2010)).

522. *City of Ann Arbor*, 284 Mich. App. at 138, 771 N.W.2d at 850 (citing Rowry v. Univ. of Michigan, 441 Mich. 1, 9-11, 490 N.W.2d 305, 308 (1992)).

and federal policies favoring the prompt resolution of labor disputes, the *Rowry* court urged the Michigan Legislature to provide a specific statute of limitations for the enforcement or vacation of arbitration awards.[523]

Based on this survey of applicable legislation and case law, the court of appeals wrote that "[c]onsidering the Supreme Court's analysis in *Rowry* and the lack of legislative action thereafter, defendant [union] can offer no compelling substantive legal basis to support the application of a six-month limitations period."[524] The court therefore held that the city's action, filed well within the six-year limitations period, was timely.[525]

B. Governmental Immunity

Under Michigan's Governmental Tort Liability Act (GTLA),[526] governmental agencies and public officials are generally immune from tort liability. That statute provides that, "[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function."[527] The statute further provides that "[a] judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority."[528] Only an express statutory enactment, within either the GTLA or another statute, or a necessary inference from a statute, can create an exception to governmental immunity not already expressly provided in the GTLA.[529]

In two unpublished Michigan Court of Appeals decisions during the *Survey* period, the appellate courts continued to recognize broad immunity from employment-related tort claims.

---

523. *Id.* at 141-42, 771 N.W.2d at 852-53 (citing *Rowry*, 441 Mich. at 18 n.1, 490 N.W.2d at 312 n.1).

524. *Id.* at 143, 771 N.W.2d at 853.

525. *Id.* at 143-44, 771 N.W.2d at 858-54. The appellate court nonetheless reversed the trial court's grant of summary disposition to the City of Ann Arbor, however, finding that the arbitrator had acted within his authority in concluding that the "me too" provision remained in place even after the expiration of the 1998-2001 agreement, because the parties had agreed to an extension of that contract in their "ground rules." Summary disposition therefore should have been entered for the union. *Id.* at 147-48, 771 N.W.2d at 855-56.

526. MICH. COMP. LAWS ANN. §§ 691.1401-.1419 (West 2010).

527. MICH. COMP. LAWS ANN. § 691.1407(1).

528. MICH. COMP. LAWS ANN. § 691.1407(5).

529. State Farm Fire & Cas. Co. v. Corby Energy Services, Inc., 271 Mich. App. 480, 485, 722 N.W.2d 906, 910 (2006).

In *Bricker v. AuSable Valley Community Mental Health Services*,[530] the court analyzed whether a private group home, funded in part by Medicaid, was a governmental agency protected by governmental immunity.[531] AuSable Valley Community Mental Health Services (AuSable) operates group homes for developmentally and emotionally disabled individuals.[532] Nancy Bricker, an employee at AuSable, was discharged after a resident of the home died from burns received in a scalding hot shower.[533] Bricker's shift supervisor also was fired for the incident.[534] Plaintiff sued AuSable, as well as three of the home's managers, alleging violations of Michigan's Health Code, violation of public policy, and intentional infliction of emotional distress.[535] The managers were sued in their individual capacities.[536]

The defendants sought summary disposition, arguing that Bricker's claims were barred by governmental immunity.[537] Bricker opposed the motion, arguing that the individual defendants had committed intentional torts, to which governmental immunity did not apply.[538] Bricker further contended that AuSable was not immune for its gross negligence and *ultra vires* conduct.[539] The trial court denied AuSable's motion for summary disposition, generally finding "factual disputes," while granting summary disposition to the individual defendants.[540] AuSable and Bricker both appealed the court's decisions.[541]

On appeal, the court of appeals first addressed the trial court's denial of AuSable's motion for summary disposition.[542] AuSable argued that it was immune from tort liability because it was engaged in a governmental function.[543] Bricker, on the other hand, claimed that AuSable was not engaged in a governmental function, and had exceeded the scope of its authority.[544] Bricker further argued that AuSable had engaged in *ultra vires* conduct, and was grossly negligent.[545]

---

530. No. 281736, 2009 WL 211883 (Mich. App. Jan. 29, 2009).
531. *Id.* at *1.
532. *Id.*
533. *Id.*
534. *Id.*
535. *Id.*
536. *Bricker*, 2009 WL 211883, at *1.
537. *Id.*
538. *Id.*
539. *Id.*
540. *Id.*
541. *Id.*
542. *Bricker*, 2009 WL 211883, at *2.
543. *Id.*
544. *Id.*
545. *Id.*

In analyzing AuSable's position, the court observed that the GTLA defines "governmental function" as "an activity expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law."[546] As such, the court readily concluded that AuSable was a governmental agency performing a governmental function "because it provides community mental health services as authorized by law."[547] Further, the court noted that the focus of a court's "governmental function" analysis is "on the general activity and not the specific conduct involved at the time of the tort."[548] Because AuSable was a governmental entity, its employees were public employees.[549] Under Michigan law, the hiring, supervision, discipline and discharge of such employees is itself the exercise of a governmental function.[550] Because the conduct challenged by Bricker involved supervision and discipline — governmental functions — AuSable was immune.[551]

The court moved next to Bricker's argument that AuSable had engaged in *ultra vires* acts.[552] In contrast to performing a governmental function, as defined above, *ultra vires* acts are those not expressly or implicitly authorized by law.[553] Here, the court reasoned that, because AuSable was performing a governmental function (i.e., providing community mental health services), it was "expressly or impliedly authorized by law to hire, supervise, and discipline its employees."[554] Thus, when the defendants supervised and disciplined Bricker, they were performing a governmental function, not an *ultra vires* act.[555]

Bricker finally argued an exception to governmental immunity based on gross negligence.[556] As provided in M.C.L.A. sections 691.1407(2) and (3), officers and agents of governmental agencies are not immune from liability for intentional torts.[557] As pointed out by the court, this exception to governmental immunity does not apply to government

546. *Id.* (citing MICH. COMP. LAWS ANN. § 691.1401(f) (West 2010)).

547. *Bricker*, 2009 WL 211883, at *2.

548. *Id.* (citing Tate v. Grand Rapids, 256 Mich. App. 656, 661, 671 N.W.2d 84, 87 (2003)).

549. *Id.* (citing MICH. COMP. LAWS ANN. §§ 330.1204a(3), 330.1230 (West 2010)).

550. *Id.* (citing Galli v. Kirkeby, 398 Mich. 527, 537, 248 N.W.2d 149, 152 (Williams, J., concurring) (1976)).

551. *Id.*

552. *Bricker*, 2009 WL 211883, at *3.

553. *Id.* (citing Richardson v. Jackson Co., 432 Mich. 377, 381, 385-87, 443 N.W.2d 105, 106, 108-09 (1989)).

554. *Bricker*, 2009 WL 211883, at *3.

555. *Id.*

556. *Id.*

557. *Id.* (citing MICH. COMP. LAWS ANN. § 691.1407 (West 2010)).

agencies themselves.[558] Rather, an agency is "vicariously liable for the torts of its employees only if (a) an exception to the governmental immunity applies and (b) the employees were acting within the scope of their employment."[559] Because Bricker failed to establish a valid exception to governmental immunity for AuSable, its immunity remained intact and it could not be held liable for its employees' gross negligence or intentional torts.[560]

Having found against Bricker on all of her arguments against governmental immunity, the court of appeals remanded the matter for entry of judgment in favor of AuSable on governmental immunity grounds.[561]

Governmental immunity also protected the defendant employee in *Dean v. City of Bay City.*[562] The plaintiff, Eric Dean, was the Director of Power and Technology for Bay City.[563] Then-city manager James Palenick provided Dean with a poor performance review, giving him six out of thirty-three possible points, and recommended that Dean be terminated immediately.[564] Before this could be effectuated, Palenick himself was terminated by the city commission.[565] Robert Belleman was then named the new city manager.[566] Three months after being appointed, Belleman evaluated Dean's performance and scored him even more negatively than Palenick, rating him nine out of thirty-three points.[567] Belleman's evaluation contained specific examples of Dean's job deficiencies, including allegations of unethical behavior, lies, and

558. *Bricker*, 2009 WL 211883, at *3.

559. *Id.* (citing Ross v. Consumers Power Co. (On Rehearing), 420 Mich. 567, 625, 363 N.W.2d 641, 663 (1984)).

560. *Id.* at *3. The court also held that, while the individually named defendants could be held liable pursuant to the exception to governmental immunity for individuals and intentional torts, Bricker's claim failed because she could not establish that the actions taken by the individual defendants were sufficiently outrageous to constitute an intentional infliction of emotional distress. *Id.* at *6-8.

561. *Id.* at *1. The court of appeals also held that AuSable's motion for summary disposition as to Bricker's claimed violations of Michigan's Mental Health Code and public policy should have been granted because Bricker failed to present sufficient evidence to rebut AuSable's explanation for her termination (responsibility for injury and death of resident). *Id.* at *5-6.

562. No. 281847, 2009 WL 1439002 (Mich. Ct. App. May 21, 2009).

563. *Id.* at *1.

564. *Id.*

565. *Id.*

566. *Id.*

567. *Id.*

generally poor performance in managing the department.[568] Based on the performance evaluation, Dean was discharged.[569]

Dean filed suit in federal court, with his complaint eventually settling in Bay County Circuit Court.[570] He alleged, along with several other claims, defamation and invasion of privacy as to Bay City, Palenick and Belleman, tortious interference with a business relationship as to Palenick, and intentional infliction of emotional distress as to all defendants, including two additional individual defendants.[571] After the trial court dismissed all of Dean's tort claims based on governmental immunity, he appealed, alleging that the defendants had been engaged in a proprietary, rather than a governmental, function and, therefore, were not immune.[572]

On appeal, the Michigan Court of Appeals concluded that the trial court had properly dismissed Dean's state law claims based on governmental immunity.[573] The court based its conclusion on the fact that control of light and power utilities is a governmental function under the statutory definition.[574]

Next, the court focused on whether that immunity extended to Palenick and Belleman, as the city managers of Bay City.[575] Under M.C.L. section 691.1407(5), "the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority."[576] The court took notice of the factors to be considered in evaluating whether actions were taken within the scope of an executive's authority set forth in *Marrocco v. Randlett*:[577]

> [t]he determination whether particular acts are within a highest executive official's authority depends on a number of factors, including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority,

568. *Dean*, 2009 WL 1439002 at *1-3.
569. *Id.* at *3.
570. *Id.* at *5.
571. *Id.* at *4-5, 13.
572. *Id.* at *13, 17.
573. *Id.* at *13 (citing Nawrocki v. Macomb County Rd. Comm'n, 463 Mich. 143, 156, 615 N.W.2d 702, 710-11 (2000)).
574. *Dean*, 2009 WL 1439002, at *14.
575. *Id.*
576. MICH. COMP. LAWS ANN. § 691.1407(5) (West 2010).
577. 431 Mich. 700, 433 N.W.2d 68 (1988).

> and the structure and allocation of powers in the particular level of government.[578]

Central to Dean's tort claims against Palenick and Belleman were actions taken while each was city manager, including hiring and allowing a private investigator to conduct surveillance of Dean to determine if he was using drugs or alcohol while on the job, and making critical comments about Dean's performance.[579] Palenick, as the individual who hired the investigator, testified that he did so because the city had failed to perform a background check prior to Dean's hiring, and also to discover whether Dean was engaging in inappropriate conduct during work hours.[580] Belleman allowed the surveillance to continue after Palenick's termination for the same reasons.[581]

Although the court recognized that hiring an investigator was not explicitly authorized by the city charter, it stated that a function implicitly mandated or authorized can still be a governmental function under the GTLA.[582] Because the city charter did authorize Palenick and Belleman, as city managers, to "appoint, discipline, suspend or terminate all city employees," they implicitly were authorized to conduct surveillance in order to carry out their express functions.[583] Relying upon the same rationale, the court held that Belleman acted within the scope of his implied authority in criticizing Dean's performance.[584] While Dean argued that Belleman had acted outside the scope of his authority by acting in bad faith, the court noted that under the Michigan Supreme Court's decision in *American Transmissions, Inc. v. Attorney General*,[585] there is no bad faith exception to governmental immunity.[586] Therefore, Belleman was protected by governmental immunity because he acted within the scope of his implied authority.[587]

Alternatively, Dean argued that Bay City was engaging in a proprietary function by providing electricity to residents for money and, thus, governmental immunity did not protect the defendants.[588] As

---

578. *Dean*, 2009 WL 1439002, at *13 (citing *Marrocco*, 431 Mich. at 711, 433 N.W.2d at 73).
579. *Id.* at *14.
580. *Id.* at *15.
581. *Id.*
582. *Id.* (citing MICH. COMP. LAWS ANN. § 691.1401(f) (West 2010)).
583. *Id.* at *14-16.
584. *Dean*, 2009 WL 1439002, at *14-16.
585. 454 Mich. 135, 143, 560 N.W.2d 50, 53 (1997).
586. *Dean*, 2009 WL 1439002, at *18.
587. *Id.*
588. *Id.* at *17.

defined by the statute, a proprietary function is "any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees . . . ."[589] The statute further states that "[t]he immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function . . . ."[590] Because Dean was not seeking damages for bodily injury or property damage, the proprietary function exception was inapplicable to all defendants, and the court upheld the dismissal of all tort claims against Bay City, Palenick, and Belleman.[591]

V. WAGES

A. Michigan Wages and Fringe Benefits Act

Michigan's Payment of Wages and Fringe Benefits Act[592] ensures that employees receive their earned wages and fringe benefits after their employment ends, whether voluntarily or involuntarily. Regarding the payment of wages after voluntarily termination of employment, the Act states that "[a]n employer shall pay to an employee voluntarily leaving employment all wages earned and due, as soon as the amount can with due diligence be determined."[593] The Act defines "employee" as "an individual employed by an employer," and "employer" as "an individual, sole proprietorship, partnership, association, or corporation, public or private . . . or an individual acting directly or indirectly in the interest of an employer who employs 1 or more individuals."[594] In contrast, an independent contractor is "one who, carrying on an independent business, contracts to do work without being subject to the right of control by the employer as to the method of work but only as to the result to be accomplished."[595] Independent contactors are not covered by the Act.

Under the Act, an employee may file a complaint with the Michigan Department of Labor and Economic Growth (DLEG) to obtain unpaid

589. MICH. COMP. LAWS ANN. § 691.1413 (West 2010).
590. *Id.*
591. *Dean*, 2009 WL 1439002, at *17, 19.
592. MICH. COMP. LAWS ANN. § 408.471-490 (West 2010).
593. MICH. COMP. LAWS ANN. § 408.475(1).
594. MICH. COMP. LAWS ANN. § 408.471(c)-(d).
595. Kamalnath v. Mercy Mem'l Hosp. Corp., 194 Mich. App. 543, 553, 487 N.W.2d 499, 505 (1992) (citing Parham v. Preferred Risk Mut. Ins. Co., 124 Mich. App. 618, 622-23, 335 N.W.2d 106, 108 (1983)).

wages and fringe benefits within thirty days of the alleged violation.[596] The DLEG may make a determination of wages due, and award the former employee not only those wages, but also a penalty interest rate of 10 percent on the amount due from the time the employer is notified of the complaint, and a civil penalty of no more than $1,000.[597] If the employer disputes the DLEG's determination, it may request a departmental hearing.[598] If the employer disputes the hearing officer's determination, the employer may appeal to the circuit court "where the employee is a resident, where the employment occurred, or where the employer has a principal place of business."[599]

During the *Survey* period, the Michigan Court of Appeals considered the appropriate test for determining whether a person is an employee or an independent contractor. In *Buckley v. Professional Plaza Clinic Corp.*,[600] the plaintiff, Alice Buckley, a physician, entered into a written agreement to provide medical services to patients at Professional Plaza Clinic Corp. (PPCC).[601] In the agreement, Buckley was referred to as both an "employee" and an "independent contractor."[602] The agreement's preamble stated that Buckley would be referred to throughout the agreement as "employee," and defined "employee" as "a person over whom Employer has control as to time or attendance and the employee is engaged in furtherance of Employer's business."[603] The agreement, however, also included an "independent contractor" provision, stating that the "[e]mployee is encouraged to consult IRS code related to an independent contractor, mainly 'whose control' and 'whose business' tests."[604] In the signature block of the agreement, "independent contractor" was used below where Buckley was to sign.[605]

The agreement provided that PPCC would pay Buckley $130,000 for a one-year term, approximately $2,500 per week.[606] It also stated that PPCC would determine the "employee's specific duties," including discretion to set the days of the week and hours that the "employee" was to perform her duties.[607]

---

596. MICH. COMP. LAWS ANN. § 408.481(1) (West 2010).
597. MICH. COMP. LAWS ANN. § 408.488(a), (c)-(d) (West 2010).
598. Mich. Comp. Laws Ann. § 408.481(4).
599. Mich. Comp. Laws Ann. § 408.481(9).
600. 281 Mich. App. 224, 761 N.W.2d 284 (2008).
601. *Id.* at 226, 761 N.W.2d at 286.
602. *Id.*
603. *Id.*
604. *Id.*
605. *Buckley*, 281 Mich. App. at 227, 761 N.W.2d at 286.
606. *Id.*
607. *Id.*

In addition to the agreement, Buckley also signed IRS Form W-9, the form usually used for independent contractors, under which PPCC was to make no withholding from Buckley's paycheck and under which Buckley was to be solely responsible for all taxes on her earnings.[608] Indeed, Buckley paid her 2004 taxes using IRS Form 1099 Form used by independent contractors.[609]

Although there was contradictory testimony from the parties, Buckley claimed that she controlled her own hours, but was supposed to, and did, work from 9:00 a.m. to 5:00 p.m., in November and December 2004, excluding days she took off for personal reasons and holidays.[610] However, in January 2005, Buckley began limiting her hours because PPCC was behind in its payments to her.[611] On February 11, 2005, Buckley voluntarily stopped working for PPCC because of its failure to pay her, and subsequently filed a complaint with the DLEG's Wage and Hour Division.[612]

The DLEG investigated Buckley's complaint, ultimately determining that PPCC had violated the Payment of Wages and Fringe Benefits Act.[613] Buckley was awarded $15,979.14 for the wages she had earned, but was not paid, from November 1, 2004 to February 11, 2005, plus 10 percent annual interest to the amount.[614] The DLEG also ordered PPCC to pay a $1,000 civil penalty if it refused to pay Buckley the amount due voluntarily.[615] PPCC responded that Buckley was an independent contractor, not an employee, and appealed the determination to a department hearing referee.[616]

At the hearing, PPCC's CEO testified that the written agreement was not intended to create an employment relationship, despite its use of the term "employee", but rather was a general document to be used for the employment of new doctors.[617] The CEO also stated that although PPCC did not pay Buckley her full salary each month between November 2004 and February 2005, Buckley was paid for the days on which she provided services to the facility.[618] The CEO testified further that PPCC

608. *Id.*
609. *Id.*, 761 N.W.2d at 286-88.
610. *Id.* at 299, 761 N.W.2d at 288.
611. *Buckley*, 281 Mich. App. at 227, 761 N.W.2d at 288-89.
612. *Id.*
613. *Id.*
614. *Id.*
615. *Id.*
616. *Id.*
617. *Buckley*, 281 Mich. App. at 227-28, 761 N.W.2d 287.
618. *Id.* at 228, 761 N.W.2d at 287.

did not dictate Buckley's work hours, and that Buckley had full control over her patients.[619]

In contrast, PPCC's office manager testified that she believed that Buckley was a salaried employee to be paid on a weekly basis while employed.[620] The manager also admitted that Buckley worked the expected forty hours a week in November and December 2004, but decreased her hours in January and February 2005 because she was not getting paid.[621]

In a written decision, the hearing referee concluded that Buckley in fact was an employee and affirmed the DLEG's determination.[622] While acknowledging that the agreement occasionally referred to Buckley as an independent contractor, the hearing referee analyzed the relationship between Buckley and PPCC under the economic reality test.[623] The economic reality test is commonly used to determine whether an employer-employee relationship exists by evaluating the following factors: (1) control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal.[624]

With this framework, the hearing referee "found it significant that the employment agreement outlined the parties' responsibilities and set forth Dr. Buckley's duties, hours, compensation, and vacation time" and therefore concluded that Buckley was an employee.[625] Pursuant to its rights under the Act, PPCC appealed the hearing referee's decision to the circuit court.[626]

On appeal, PPCC maintained that Buckley was an independent contractor, and argued that the DLEG should have used the Internal Revenue Service's test, which assesses numerous factors "examin[ing] behavioral control, financial control, and the relationship of the parties."[627] The DLEG countered, arguing that Buckley was an employee

---

619. *Id.*

620. *Id.* at 228-29, 761 N.W.2d at 287.

621. *Id.* at 228, 761 N.W.2d at 287.

622. *Id.* at 229-30, 761 N.W.2d at 288. The hearing referee did adjust the amount owed to Buckley to $15,500, plus ten percent annual interest. *Id.* at 230, 761 N.W.2d at 288.

623. *Buckley*, 281 Mich. App. at 229, 761 N.W.2d at 288.

624. Askew v. Macomber, 398 Mich. 212, 217-28, 247 N.W.2d 288, 290 (1976). For a thorough explanation of historical use of the economic reality test in Michigan case law, see McKissic v. Bodine, 42 Mich. App. 203, 205-208, 201 N.W.2d 333, 334-35 (1972).

625. *Buckley*, 281 Mich. App. at 229-30, 761 N.W.2d at 288.

626. *Id.* at 230, 761 N.W.2d at 288.

627. *Id.*; *see* Rev. Rul. 87-41, 1987-1 C.B. 296; *see also* Internal Revenue Service, Independent Contractor (Self-employed) or Employee?,

because her agreement used the term "employee," and because PPCC had the ability to control Buckley's duties and hours, and was responsible for providing her with the necessary facility and equipment to provide medical services to patients.[628] The DLEG also noted that the agreement contained a termination for cause provision and a noncompetition clause, arguing that neither would be necessary if Buckley truly was an independent contractor.[629]

The circuit court used neither test to determine Buckley's employment relationship with PPCC, but rather "found it significant that PPCC did not withhold income taxes for Dr. Buckley and that she paid her own taxes as an independent contractor."[630] The court dismissed the importance of the agreement's reference to Buckley as an employee, concluding instead that PPCC treated Buckley as an independent contractor because it did not control her duties and hours.[631] The circuit court reversed the hearing referee's decision.[632] The DLEG and Buckley appealed.[633]

The court of appeals began by noting that "governmental agencies and courts have developed different tests, depending on the circumstances, to ascertain the true nature of an employment relationship."[634] The appellate court recognized the economic reality test as one frequently used to determine whether an employment relationship exists, particularly in evaluating matters based upon remedial legislation, such as workers' compensation benefits.[635] The four factor economic reality test, according to the court, considers the totality of the circumstances of the work performed.[636] No one factor is dispositive, and the court is permitted to take other factors into account when necessary.[637] Appellate courts have recognized, however, that "weight

---

http://www.irs.gov/businesses/small/article/0,,id=99921,00.html (last visited June 22, 2010).

628. *Buckley*, 281 Mich. App. at 230, 761 N.W.2d at 288.

629. *Id.*

630. *Id.* at 231, 761 N.W.2d at 288.

631. *Id.*

632. *Id.*, 761 N.W.2d at 288-89.

633. *Id.*, 761 N.W.2d at 289.

634. *Buckley*, 281 Mich. App. at 234, 761 N.W.2d at 290 (citing Mantei v. Mich. Pub. Sch. Emps. Ret. Sys.; *see also* Mich. Pub. Sch. Emps. Ret. Bd., 256 Mich. App. 64, 76, 663 N.W.2d 486, 493 (2003)).

635. *Buckley*, 281 Mich. App. at 234, 761 N.W.2d at 290.

636. *Id.* at 235, 761 N.W.2d at 291 (citing Rakowski v. Sarb, 269 Mich. App. 619, 625, 713 N.W.2d 787, 793 (2006); *Mantei*, 256 Mich. App. at 79, 663 N.W.2d at 495).

637. *Id.*

should be given to those factors that most favorably effectuate the objectives of the statute in question."[638]

The *Buckley* court then analyzed the Payment of Wages and Fringe Benefits Act to determine the test that best addressed the Act's objectives. Remedial laws are those providing a "means to enforce rights or redress injuries" or those "passed to correct or modify an existing law."[639] The court thus recognized that "[t]he payment of wages act is remedial in that it provides a means to enforce rights with respect to wages and fringe benefits and prescribes remedies for violations of these rights."[640] Further, because the economic reality test takes into account the payment of wages, the use of that test did not conflict with the plain language of the Act.[641] The court therefore held that the hearing referee had properly used the economic reality test in establishing that Buckley was an employee for PPCC.[642]

Addressing PPCC's argument that the hearing referee should have applied the IRS test, the court noted that PPCC had urged reliance on the test without providing any authority justifying its use in place of the longstanding economic reality test.[643]

Noting that the circuit court had clearly erred by not applying, or not properly applying, the economic reality test, the court of appeals next looked to whether the substantive evidence presented by the parties at the departmental hearing provided a sufficient basis for the determination that Buckley was an employee of PPCC.[644] Of importance to the court was the fact that PPCC's own office manager had testified that Buckley was a salaried employee expected to work 40 hours per week, and was paid the same amount each week, regardless of whether she worked over or under forty hours.[645] Further, the court highlighted that the written agreement contained numerous references to Buckley's status as an employee, including the termination for cause and noncompetition clauses.[646] The court concluded that this evidence was adequate to support the hearing referee's determination.[647] The court therefore

638. *Id.* (citing *Rakowski*, 269 Mich. App. at 626, 713 N.W.2d at 793).
639. *Id.* (citing Black's Law Dictionary (8th ed.)).
640. *Buckley*, 281 Mich. App. at 235, 761 N.W.2d at 291.
641. *Id.*
642. *Id.* at 235-36, 76 N.W.2d at 291.
643. *Id.*
644. *Id.* at 236-37, 761 N.W.2d at 291-92.
645. *Id.* at 237, 761 N.W.2d at 292.
646. *Buckley*, 281 Mich. App. At 237, 761 N.W.2d at 292.
647. *Id.*

reversed the circuit court's decision and reinstated the hearing referee's determination against PPCC.[648]

B. Employment Security Act

The Michigan Employment Security Act (MESA),[649] was enacted to "provide relief to those persons 'able and available' to perform work but who are prevented from doing so by economic forces beyond their control."[650] However, not all employees involuntarily unemployed are covered by the MESA. For example, section 27 of the act, also known as the "school denial period," states:

> With respect to service performed in other than an instructional, research, or principal administrative capacity for an institution of higher education as defined in section 53(2) or for an educational institution other than an institution of higher education as defined in section 53(3), benefits shall *not* be paid based on those services for any week of unemployment beginning after December 31, 1977 that commences during the period between 2 successive academic years or terms to any individual *if* that individual performs the service in the first of the academic years or terms and if there is a reasonable assurance that the individual will perform the service for an institution of higher education or an educational institution other than an institution of higher education in the second of the academic years or terms.[651]

In simpler terms, section 27 states that "employees working for an educational institution, who are not teachers, researchers, or principal administrators, may not receive unemployment benefits during summer break if they have a reasonable assurance that they will be working in the academic year that follows the summer break."[652]

In *Petrelius v. Houghton-Portage Township Schools*,[653] the Michigan Court of Appeals addressed the applicability of the school denial period

---

648. *Id.* at 239, 761 N.W.2d at 293.

649. MICH. COMP. LAWS ANN. §§ 421.1-.75 (West 2009).

650. Watson v. Murdock's Food & Wet Goods, 148 Mich. App. 802, 805, 385 N.W.2d 693, 694 (Mich. Ct. App. 1986) (citing I.M. Dach Underwear Co. v. Employment Sec. Comm'n, 347 Mich. 465, 472, 80 N.W.2d 193, 197 (Mich. 1956)).

651. MICH. COMP. LAWS ANN. § 421.27(i)(2) (emphasis added).

652. Adams v. W. Ottawa Sch., 277 Mich. App. 461, 463, 746 N.W.2d 113, 115 (2008).

653. 281 Mich. App. 520, 761 N.W.2d 395 (2008).

to William Petrelius, a custodian for the school district.[654] During the summer of 2005, Petrelius sought unemployment benefits for the six weeks during which he was laid off.[655] The Unemployment Security Board of Review granted Petrelius benefits for that time period, and after the school district appealed by right to the circuit court, the circuit court upheld the board's decision.[656] The school district appealed to the court of appeals, arguing that the plain language of the school denial period provision precluded an award of unemployment benefits.[657] The court agreed with the district.[658]

In reversing the circuit court, the court of appeals focused on the language of the school denial period provision and its application to Petrelius's claim.

It is undisputed that the period of unemployment at issue occurred between two successive academic years, that claimant performed services for the school district in the first of those academic years, and that claimant was given reasonable assurance that he would perform services for the school district in the second of those academic years.[659]

Given Petrelius's circumstances, the court explained that the "unambiguous" language of section 27 "denote[d] a mandatory, rather than a discretionary" denial of benefits.[660]

Petrelius argued that applying the school denial period provision this way would unfairly burden him, because he would be denied benefits while unemployed — the same thing the Act was designed to prevent.[661] The court acknowledged this, but noted that the school denial period was "an expression of legislative intent not to protect all persons who might be in a position to claim involuntary unemployment."[662] Even though Petrelius argued that the general purpose of the statute is remedial and therefore is to be construed broadly, the court stated that such construction cannot ignore the express limitations of the statute.[663]

Petrelius also argued that the school denial period provision should not apply because, in prior years, he was employed throughout the

654. *Id.* at 521, 761 N.W.2d at 398.
655. *Id.*
656. *Id.*
657. *Id.*
658. *Id.*
659. *Petrelius*, 281 Mich. App. at 522-23, 761 N.W.2d at 398.
660. *Id.* at 523, 761 N.W.2d at 399.
661. *Id.*
662. *Id.* (citing Paynes v. Detroit Bd. of Ed., 150 Mich. App. 358, 367, 388 N.W.2d 358, 362 (1986)).
663. *Id.* at 524, 761 N.W.2d at 398.

summer and was paid for a full year of employment.[664] The court pointed out, however, that the school denial period:

> neither provides an exception for employees who may have been offered employment for the period between two successive academic years in years past, nor does it permit considerations of an employee's subjective expectations regarding the possibility of continued employment between two successive academic years.[665]

Therefore, whether Petrelius's layoff was customary or traditional was irrelevant to the court's analysis under the express language of the statute.[666] As such, the court of appeals reversed the circuit court's decision and remanded the matter to the board of review for entry of an order denying Petrelius unemployment benefits.[667]

C. Sales Representative Commissions Act

Michigan's Sales Representative Commissions Act (SRCA)[668] supplements the common law right of a sales representative to be paid commissions under a sales representative agreement, by requiring that all commissions due upon termination of the contract between the principle and sales representative be paid within forty-five days, and that all commissions due after the termination of the contract be paid within forty-five days after such commissions become due.[669] Failure to comply with these provisions subjects the principal to double damages not to exceed $100,000, as well as costs and attorney fees.[670]

The Act does not determine whether the employee is entitled to those commissions, but merely ensures that an employee is paid the commissions that are owed. Entitlement to commissions is determined under the terms of the contract between the employer and its sales representative.

In *Reicher v. SET Enterprises, Inc.*,[671] a Michigan Court of Appeals decision released during the *Survey* period, the court considered the effect of a settlement agreement regarding commission payments on a

664. *Id.*
665. *Petrelius*, 281 Mich. App. at 524., 761 N.W.2d at 398-99.
666. *Id.*
667. *Id.*
668. MICH. COMP. LAWS ANN. § 600.2961 (West 2007).
669. MICH. COMP. LAWS ANN. § 600.2961(4).
670. MICH. COMP. LAWS ANN. §§ 600.2961(5) & (6).
671. 283 Mich. App. 657, 770 N.W.2d 902 (2009).

subsequent claim brought under the SRCA. The plaintiff, Reicher, began as a sales representative for Jebco Manufacturing, Inc., an automotive parts manufacturer, in 1972.[672] Pursuant to an oral agreement with Jebco, Reicher received sales commissions for the life of the parts that he sold.[673] In August 1999, Jebco entered into an agreement to sell substantially all of its assets and business to Noble Metal Forming, which later became S.E.T. Enterprises, Inc.[674] As a result of this sale, Reicher's agreement with Jebco was terminated.[675] Noble assumed Jebco's obligation to pay commissions to Reicher for products sold prior to the sale, but for which Jebco had not yet received payment.[676] Noble also agreed to pay Reicher commissions for future sales.[677]

Approximately five months later, Noble terminated its sales representation agreement with Reicher, and refused to fulfill its obligation to pay life-of-the-part sales commissions due him.[678] Reicher filed an SRCA suit against Noble in March 2000.[679] The suit was settled in February 2001 with a written agreement, under which Noble agreed to pay commissions due Reicher for a limited time period, in exchange for a mutual release of claims.[680] Several years later, Noble became S.E.T. Enterprises, Inc.[681] S.E.T. began making late commission payments to Reicher.[682]

In response to these late payments, Reicher initiated another lawsuit, this time seeking penalty damages and attorney fees, but again premised on the SRCA.[683] Upon S.E.T.'s admission that it made multiple late payments, Reicher sought summary disposition, arguing that S.E.T. had violated the SRCA by failing to make commission payments within the time limits prescribed by the Act.[684] S.E.T. countered that Reicher's claim was barred by the earlier settlement agreement.[685] The trial court agreed with S.E.T., denied Reicher's motion, and granted summary

672. *Id.* at 658, 770 N.W.2d at 904.
673. *Id.*
674. *Id.*
675. *Id.* at 658-59, 770 N.W.2d at 904-05.
676. *Id.*
677. *Reicher*, 283 Mich. App. 658, 770 N.W.2d at 904.
678. *Id.* at 660, 770 N.W.2d at 905.
679. *Id.*
680. *Id.*
681. *Id.* at 661, 770 N.W.2d at 905-06.
682. *Id.*
683. *Reicher*, 283 Mich. App. at 661, 770 N.W.2d at 906.
684. *Id.*
685. *Id.*

disposition for S.E.T.[686] Reicher appealed, arguing that he did not waive his commission claims under the settlement agreement.[687]

The court of appeals viewed the question of whether the release was a bar to Reicher's claim as a simple contract issue, because Michigan courts enforce unambiguous contracts as written.[688] The court determined that the settlement agreement clearly stated that S.E.T. agreed to make certain commission payments, in exchange for Reicher's release of all potential claims, including penalty damages for late payments under the SRCA.[689] The court specifically held that the SRCA did not prohibit the compromise entered into by Reicher and S.E.T., stating that Reicher "could have continued the litigation and may have recovered a judgment in full, but he also could have lost the prior litigation and recovered nothing, on the basis that the shipment of parts at issue was not included within the liabilities that Noble assumed when it succeeded Jebco."[690]

Therefore, because the settlement agreement did not provide for late penalties, "the release bar[red] the claims under the SRCA."[691] The court of appeals thus affirmed the trial court's grant of summary disposition for S.E.T.[692]

VI. CONTRACTS

A. Arbitration Clauses in Employment Contracts

As conflicts overseas continue and military personnel previously deployed for months or years return home, more attention is focused on the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA),[693] which guarantees service members the right to return to their civilian jobs at the conclusion of their service obligations.[694] USERRA also prohibits employers from discriminating against service members in employment or reemployment because of

686. *Id.* at 662, 770 N.W.2d at 906.

687. *Id.* Reicher also argued that, even if he had waived his rights under the settlement agreement, the SRCA voided such a waiver. *Id.* The appellate court held, however, that "the SRCA applies only to a contract between a principal and a sales representative. . . [t]herefore, . . . by its clear intent and import, the SRCA prohibition applies only to waivers contained in sales representation contracts." *Id.* at 663, 770 N.W.2d at 907.

688. *Reicher*, 283 Mich. App. at 664, 770 N.W.2d at 907 (citing Quality Products & Concepts Co. v. Nagel Precision, Inc., 469 Mich. 362, 666 N.W.2d 251 (2003)).

689. *Id.* at 665, 770 N.W.2d at 907-08.

690. *Id.*

691. *Id.*

692. *Id.*

693. 38 U.S.C.A. §§ 4301-4334 (West 2009).

694. 38 U.S.C.A. § 4312.

their service.[695] As more individuals assert their statutory right to return to work under USERRA, some employers are attempting to protect themselves from costly litigation by requiring that USERRA claims be arbitrated. This issue was addressed during the *Survey* period in *Landis v. Pinnacle Eye Care, L.L.C.*,[696] in which the Sixth Circuit Court of Appeals considered for the first time the question of whether mandatory arbitration agreements are enforceable as they relate to USERRA claims.

Timothy Landis, an optometrist, was employed by Pinnacle Eye Care (d/b/a VisionFirst) when, in April 2004, he was ordered to report for active duty in Afghanistan as a member of the Indiana National Guard.[697] According to Landis, when he received his orders, he negotiated an oral agreement with Pinnacle's office manager, John Schmitt, guaranteeing him the right to reemployment upon his return, ensuring that additional optometrists would be hired to care for his patients in his absence, and arranging for payments to be made on his overdraw debt owed to Louisville Optometric Centers, Pinnacle's parent company, from the proceeds of his practice.[698] This agreement was never added to Landis's written employment agreement, however. That earlier agreement required that Landis "resolve any controversy, dispute or disagreement arising out of or relating to [the] Agreement or the breach of any provision of [the] Agreement" through arbitration.[699]

When Landis returned from Afghanistan, Schmitt refused to honor the terms of their oral agreement. Instead, Landis alleged, VisionFirst demoted him and threatened that any further involvement with the military would adversely affect his career.[700] Landis sued Pinnacle, alleging discrimination based on military service in violation of USERRA. [701] In response, Pinnacle moved to stay to the matter pending arbitration, pursuant to Landis's original employment agreement.[702] The trial court granted the motion, holding that Landis's USERRA claim was arbitrable, and within the scope of the parties' agreement.[703] Landis appealed.[704]

---

695. 38 U.S.C.A. § 4311.

696. 537 F.3d 559 (6th Cir. 2008).

697. *Id.* at 560.

698. *Id.* at 560-61.

699. *Id.*

700. *Id.* at 561.

701. *Id.* Landis also alleged age discrimination in violation of KY. REV. STAT. § 344.040 (2009), and the unlicensed practice of optometry by Schmitt and VisionFirst, in violation of KY. REV. STAT. § 320.300 (2009). *Id.*

702. *Landis*, 537 F.3d at 561.

703. *Id.*

704. *Id.*

The Sixth Circuit first considered whether Landis's employment discrimination complaint fell within the purview of his original employment agreement. Because the agreement explicitly stated that it pertained to the "employment relationship" between the parties, the court concluded that Landis's claims were covered by the agreement, and so it moved on to the issue of whether USERRA preempted the agreement's arbitration clause.[705]

Relying on *Gilmer v. Interstate/Johnson Lane Corp.*,[706] the court noted that the U.S. Supreme Court has repeatedly held that statutory claims are arbitrable,[707] and "[a]lthough all statutory claims may not be appropriate for arbitration, having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[708] Accordingly, the party opposing an arbitration agreement has the burden of showing that Congress intended to preempt arbitration clauses by precluding waiver of a judicial forum.[709] "If such an intention exists, it will be discoverable (1) in the text of the statute, (2) the legislative history, or (3) an inherent conflict between arbitration and the statute's purposes."[710]

In performing this analysis, the Sixth Circuit relied heavily upon the Fifth Circuit's decision in *Garrett v. Circuit City Stores, Inc.*,[711] the only other court of appeals decision addressing the USERRA-arbitration issue. In that case, the Fifth Circuit concluded that USERRA claims were arbitrable.[712] The *Garrett* court focused first on a specific provision in USERRA stating that:

> This chapter supersedes any State law (including any local law or ordinance), *contract*, *agreement*, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the

---

705. *Id.*

706. 500 U.S. 20 (1996).

707. The U.S. Supreme Court has held that claims under the following statutes are arbitrable: the Age Discrimination Act (29 U.S.C.A. §§ 621-634), the Sherman Anti-trust Act (15 U.S.C.A. §§ 1-7), the Securities Exchange Act (15 U.S.C.A. § 78j(b)), the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C.A. §§ 1961-1968), and the Securities Act of 1933 (15 U.S.C.A. § 77 l(2)). *Landis*, 537 F.3d at 561-62 (citing *Gilmer*, 500 U.S. at 23, 26).

708. *Landis*, 537 F.3d at 562 (citing *Gilmer*, 500 U.S. at 26).

709. *Id.*

710. *Id.*

711. 449 F.3d 672 (5th Cir. 2006).

712. *Landis*, 537 F.3d at 561.

> establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.[713]

As the *Garrett* court pointed out, this language precludes only a waiver of the "right or receipt" of the benefits of USERRA. By agreeing to arbitration, however, a party does not "forego the substantive rights provided by the statute, but rather it submits its claims to an arbitral forum instead of a judicial forum."[714] Further, USERRA does not specifically preclude mandatory arbitration, despite the fact that Congress is assumed to have been aware of the Supreme Court's *Gilmer* decision, allowing arbitration of statutory claims absent clear intent otherwise.[715] As such, the *Garrett* court held that the text of USERRA itself did not express an intent to preclude arbitration.[716]

Next, the *Landis* court looked to whether the legislative history of USERRA indicated an intent to prohibit arbitration of claims, finding, as in *Garrett*, that it did not.[717] As stated in *Garrett*, because "the text of USERRA was unambiguous . . . resort[ing] to legislative history [is] unnecessary."[718] Further, even looking at the legislative history and the totality of the circumstances, *Garrett* concluded that "Congress intended § 4302(b) only to prohibit the limiting of USERRA's substantive rights by union contracts and collective bargaining agreements, and that Congress did not refer to arbitration agreements between an employer and individual employee."[719]

Finally, again relying on *Garrett*, the *Landis* court found that, under the third *Gilmer* prong, there was no inherent conflict between arbitration of USERRA claims and the Act's ultimate purpose.[720] In *Garrett*, the court had determined that, while USERRA granted administrative and enforcement authority to the Department of Labor and the Attorney General, this did not conflict with arbitration because nothing in the arbitration process precluded the Attorney General from representing the injured individual.[721]

---

713. 38 U.S.C.A. § 4302(b) (West 2009) (emphasis added).
714. *Landis*, 537 F.3d at 562 (citing *Garrett*, 449 F.3d at 677).
715. *Id.*
716. *Id.* (citing *Garrett*, 449 F.3d at 674-75).
717. *Id.* at 562-63.
718. *Id.* (citing *Garrett*, 449 F.3d at 679).
719. *Id.* at 563 (citing *Garrett*, 449 F.3d at 679-80).
720. *Landis*, 537 F.3d. at 563 (citing *Garrett*, 449 F.3d at 680).
721. *Id.* (citing *Garrett*, 449 F.3d at 68-81).

Therefore, consistent with *Garrett*, the *Landis* court held that USERRA claims are arbitrable.[722] The court affirmed the trial court's decision to stay the proceedings and order the matter to arbitration.[723]

While agreeing with the result reached by the court's majority, Circuit Court Judge R. Guy Cole, Jr. wrote a concurring opinion to address what he felt was an "odd result."[724] Judge Cole interpreted the language of Section 4302(b) ("[t]his chapter supersedes any . . . contract, agreement . . . that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit"), as relating solely to the substantive terms and conditions of employment, and not to the procedures used to resolve such disputes, such as arbitration or federal court litigation.[725] In Judge Cole's view, the latter clause, which precludes "the establishment of additional prerequisites," was intended to stop employers from requiring "additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals."[726]

As such, according to Judge Cole, the language of USERRA distinguishes between an agreement that creates a prerequisite to filing in federal court, from one that substitutes arbitration for federal court proceedings.[727] Judge Cole summarized the conflict as follows:

> If Landis's contract required him to arbitrate any employment dispute under USERRA before bringing suit in federal court, Section 4302(b) expresses an opinion that such an arbitration would be hostile to USERRA's underlying structure and purpose. Yet if Landis's contract requires him to waive his right to federal court altogether, we must defer to the strong federal policy favoring arbitration.[728]

Finding this to be an incongruous result, albeit one required by the plain language of the Act, Judge Cole wrote that "if Congress intends to

---

722. In so doing, the court expressly rejected two contrary district court opinions, each holding that USERRA preempted arbitration agreements: *Breletic v. CACI, Inc.-Federal*, 413 F. Supp. 2d 1329 (N.D. Ga. 2006) and *Lopez v. Dillard's, Inc.*, 382 F. Supp.2d 1245 (D. Kan. 2005). *Landis*, 537 F.3d at 563.

723. *Landis*, 537 F.3d at 563-564.

724. *Id.* at 564.

725. *Id.*

726. *Id.*

727. *Id.*

728. *Landis*, 537 F.3d at 564.

preclude arbitration as a substitute for a judicial forum in the future, I encourage it to do so with language that is unmistakably clear."[729]

While Landis did not succeed in his effort to avoid arbitration of his employment claims, the plaintiff in *Vanderlaan v. Michigan Medical, P.C.*[730] (decided by the Michigan Court of Appeals during the *Survey* period) was able to defeat his former employer's attempt to enforce an arbitration clause.

Dr. Ronald Vanderlaan had entered into an employment agreement with Michigan Medical, P.C., stating:

> If there is *any dispute between Employer and Employee arising under or relating in any manner to this Agreement*, . . . such dispute shall be resolved by binding arbitration pursuant to the rules for commercial arbitration of the American Arbitration Association, which arbitration shall be final and binding upon the parties and enforceable in a court of competent jurisdiction . . .[731]

After Vanderlaan was suspended following his objections to his employer's billing practices, he sued under Michigan's Whistleblower's Protection Act (WPA).[732] The defendants sought summary disposition, asserting that Vanderlaan's claims were covered by the arbitration agreement.[733] The trial court denied the motion, finding that Vanderlaan's claims fell outside the scope of the arbitration clause.[734] The defendants appealed, arguing that Vanderlaan's claims did relate to his employment, or the termination of his employment and, thus, constituted disputes "arising under or relating in any manner" to his employment agreement.[735] They further argued that that the arbitration clause was sufficiently specific to provide notice to Vanderlaan that he was waiving his right to a judicial forum.[736]

Given the arbitration clause, the issues for the court were: (1) whether WPA claims are arbitrable; and (2) whether Vanderlaan's employment agreement provided sufficient notice that a prospective WPA claim would be subject to the mandatory arbitration provision.[737]

---

729. *Id.* at 564-65.
730. No. 284678, 2009 WL 2003328 (Mich. App. July 9, 2009).
731. *Id.* at *1.
732. MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 2009).
733. *Vanderlaan*, 2009 WL 2003328 at *1.
734. *Id.*
735. *Id.*
736. *Id.*
737. *Id.* at *1-3.

Relying on a prior court of appeals decision in *Stewart v. Fairlane Community Mental Health Center*,[738] which held that WPA claims are similar to statutory civil rights claims for purposes of arbitration agreements because they similarly prohibit the adverse treatment of employees who act in accordance with a statutory right or duty, the court in *Vanderlaan* held that WPA claims are arbitrable and "should be regarded in the same way that a statutory discrimination claim would be regarded."[739]

The court next addressed whether Vanderlaan's employment contract effectively waived his right to a judicial forum. In *Rembert v. Ryan's Family Steak Houses*,[740] the court of appeals had previously concluded that arbitration clauses were enforceable only to the extent "that the agreement waives no substantive rights, and that the agreement affords fair procedures."[741] The *Rembert* court announced five requirements as to fair procedures: (1) [c]lear notice to the employee that he is waiving the right to adjudicate discrimination claims in a judicial forum and opting instead to arbitrate these claims; (2) the right to be presented by counsel; (3) a neutral arbitrator; (4) reasonable discovery; and (5) a fair arbitral hearing."[742]

The crux of Michigan Medical's argument that the agreement was enforceable was that the agreement did provide "clear notice" to Vanderlaan that he was prospectively agreeing to arbitrate a WPA claim. Addressing this argument, the court of appeals cited *Arslanian v. Oakwood United Hospitals, Inc.*,[743] which held that a collective bargaining agreement did not provide sufficient notice of arbitration.[744] That court had relied on the United States Supreme Court decision in *Wright v. Universal Maritime Service Corp.*,[745] where the Court concluded that an arbitration clause covering "matters under dispute" was too general to require arbitration of statutory antidiscrimination claims.[746] The *Arslanian* court thus found that a clause providing that an employee could grieve "an alleged violation of a specific article or

738. 225 Mich. App. 410, 571 N.W.2d 542 (Mich. Ct. App. 1997).

739. *Vanderlaan*, 2009 WL 2003328 at *2 (citing *Stewart*, 225 Mich. App. at 421-22, 571 N.W.2d at 547).

740. 235 Mich. App. 118, 596 N.W.2d 208 (1999).

741. *Vanderlaan*, 2009 WL 2003328 at *1 (citing *Rembert*, 235 Mich. App. at 124, 596 N.W.2d at 211).

742. *Id.* (citing *Rembert*, 235 Mich. App. at 161-62, 596 N.W.2d at 228).

743. 240 Mich. App. 540, 618 N.W.2d 380 (2000).

744. *Vanderlaan*, 2009 WL 2003328 at *2 (citing *Arslanian*, 240 Mich. App. at 551-52, 618 N.W.2d at 385).

745. 525 U.S. 70 (1998).

746. *Id.* at 80.

working condition or section of [the] Agreement" was too general to require arbitration of a statutory discrimination claim.[747] The *Arslanian* court held that, to be sufficient notice of mandatory arbitration, a provision must be a "clear and unmistakable waiver of the right to bring a statutory discrimination claim in court."[748]

Following suit, the court of appeals concluded that the language in Vanderlaan's employment agreement did not constitute an effective waiver of his right to pursue his WPA claim in court because it did not constitute a "clear and unmistakable" waiver to do so.[749] Specifically, the court found that the applicable language, that "any dispute between Employer and Employee arising under or relating in any manner to this Agreement," was too general to constitute notice of waiver. [750] The court wrote that,

> while the language could be construed to mean any dispute relating in any way to plaintiff's employment with defendants, it could also be construed to mean that it pertained solely to dispute relating in any way to the terms of the agreement . . . such as compensation, benefits, duties, and termination for cause.[751]

Because the agreement failed to specifically mention a whistleblower claim or the WPA, it simply was not clear enough for the court to find an effective waiver.[752]

The appellate court therefore affirmed the trial court's denial of the defendant's motion for summary disposition as it related to the WPA claim.[753]

During the *Survey* period, two noteworthy cases discussed the enforceability of fee-related provisions in arbitration agreements. In *Cash v. D & J Spartan Tire, Inc.*,[754] the Michigan Court of Appeals considered the validity of a fee-splitting provision in an arbitration

747. *Arslanian*, 240 Mich. App. at 551-52, 618 N.W.2d at 385.

748. *Id.*

749. *Vanderlaan*, 2009 WL 2003328 at *3.

750. *Id.*

751. *Id.*

752. *Id.*

753. Strangely enough, the court did find that Vanderlaan's tort claims — tortious interference with advantageous business relations, tortious interference with contractual relations, and intentional infliction of emotional distress — were subject to the arbitration clause because they were not statutory claims, and related in some manner to his suspension and termination. Thus, those claims fell within the scope of the arbitration clause. *Id.* at *1, 3.

754. No. 278174, 2008 WL 4604064 (Mich. App. Oct. 26, 2008).

agreement. In *Cash*, the employee manual provided for arbitration of "all disputes arising out of or relating to the employee's employment with Spartan Tire."[755] Applicability of this clause became an issue when Cash claimed that he was wrongfully terminated because of his age, and submitted a claim under the company's arbitration policy.[756] Although Cash did not generally challenge the applicability of the agreement to his claim, he did take issue with the fee-splitting provision, which required that "the cost of the arbitrator and court reporter, if any, shall be shared equally by the parties."[757] When the parties initiated the arbitration process, they thus could not agree as to who was responsible for the costs of the arbitration.[758]

Cash argued that the provision "effectively prevent[ed] him and others similarly situated from pursuing their claims because they cannot afford to pay an arbitrator's fees" and, thus, the provision was unenforceable under federal law requiring employers to bear the costs of arbitration.[759] On the other hand, Spartan Tire claimed that Michigan law supports equally shared costs in arbitration.[760]

The dispute was presented to the arbitrator, who concluded that because the parties disputed essential terms and conditions of the arbitration agreement itself, he lacked the authority to decide the fee splitting issue.[761] The arbitrator therefore stayed the arbitration proceedings pending resolution of the disagreement in court.[762]

Cash then filed a complaint in circuit court, which was followed by the defendants' motion for summary disposition, arguing that the arbitration agreement, including the fee splitting provision, was enforceable.[763] Cash opposed the motion by asserting that he was precluded from participating in the arbitration proceeding because he was required to pre-pay the arbitration fees even though he was financially unable to do so.[764] The parties agreed that the court should rule solely as to the validity of cost-splitting provision, and not on the consequences of Cash's alleged claim of indigency.[765] The court granted the defendants' motion, holding that the cost-splitting provision was

755. *Id.* at *1.
756. *Id.* at *5.
757. *Id.* at *1.
758. *Id.* at *3-4.
759. *Id.* at *1, 4.
760. *Cash*, 2008 WL 4604064, at *4.
761. *Id.*
762. *Id.*
763. *Id.* at *5.
764. *Id.*
765. *Id.* at *5-7.

valid under Michigan law.[766] Cash appealed, still arguing that the fee-splitting provision was cost prohibitive and, therefore, unenforceable under federal law.[767]

The appellate court, citing *Rembert v. Ryan's Family Steak House, Inc.*[768] as the controlling authority in Michigan on fee-splitting provisions in arbitration agreements, stated that "employer[s] [are] not required to pay the entire arbitration fee in order for the arbitration agreement to be upheld."[769] In doing so, the court expressly rejected Cash's reliance on *Cole v. Burns International Security Service*,[770] a District of Columbia Circuit Court of Appeals case, which held that arbitration fees must be borne solely by the employer when the arbitration is imposed by the employer at the employer's option.[771]

The *Cash* court further found that "*Rembert's* silence on the prohibitive cost defense implicitly establishes that an employee's inability to pay an arbitrator's fees does not render the fee-splitting provision unenforceable."[772] The court then noted that other fee splitting avenues exist for a plaintiff, such as M.C.R. 3.602,[773] and statutory attorney fee award provisions,[774] thereby making it less likely that individuals would be financially deterred from pursuing their claims.[775]

Cash also argued, however, that enforcing the fee-splitting provision would foreclose him from using the arbitration process, as was argued before the United States Supreme Court in *Green Tree Financial Corp. v. Randolph*.[776] In *Green Tree*, the Supreme Court observed that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as [the plaintiff] from effectively vindicating her federal statutory rights in the arbitral forum."[777] The *Cash* court was not

766. *Cash*, 2008 WL 4604064, at *7.

767. *Id.*

768. 235 Mich. App. 118, 596 N.W.2d 208 (1999).

769. *Cash*, 2008 WL 4604064, at *2 (citing *Rembert*, 235 Mich. App. at 162, 596 N.W.2d at 228).

770. 105 F.3d 1465 (D.C. Cir. 1997).

771. *Cash*, 2008 WL 4604064, at *1 (citing *Cole*, 105 F.3d at 1485).

772. *Id.* at *2.

773. MICH. CT. R. 3.602(M) states: The costs of the proceedings may be taxed as in civil actions, and, if provision for the fees and expenses of the arbitrator has not been made in the award, the court may allow compensation for the arbitrator's services as it deems just. The arbitrator's compensation is a taxable cost in the action.

774. *See, e.g.*, Michigan's Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. § 37.2802 (West 2009); Title VII, 42 U.S.C.A. § 2000e-5(k) (West 2010); Section 1981 of the Civil Rights Act, 42 U.S.C.A. § 1988 (West 2010); Americans With Disabilities Act, 42 U.S.C.A. § 12205 (West 2010).

775. *Cash*, 2008 WL 4604064, at *2.

776. 531 U.S. 79 (2000).

777. *Id.* at 90-91.

persuaded by this argument, however, because the arbitration fees in Cash's dispute were not due until the hearing was concluded. Because the arbitration process was already under way at the time of the litigation, Cash failed to establish that the fee-splitting provision denied him access to that process.[778] The court therefore upheld the trial court's grant of the defendants' motion for summary disposition, enforcing the fee-splitting provision.[779]

The Sixth Circuit Court of Appeals reached the opposite conclusion, however, in *Mazera v. Varsity Ford Management Services, L.L.C.*[780] Omari Mazera was a car porter for Varsity Ford, an automobile dealership, earning approximately $20,000 per year.[781] Varsity's employee handbook contained a mandatory complaint procedure, ultimately ending in arbitration.[782] Before an employee's complaint could proceed to arbitration, however, the employee was required to pay a $500 deposit (or five days pay, whichever was less) no more than ten days after the unfavorable decision being appealed to arbitration.[783] The provision did permit an employee to request a waiver of the deposit requirement from the dealership.[784]

When Mazera was terminated from his position, he filed suit in federal court claiming race and age discrimination.[785] Varsity Ford asserted in response that the lawsuit was barred under the arbitration provision.[786] Mazera then sought a declaratory judgment that the arbitration agreement was unenforceable.[787] The district court held that the arbitration agreement generally was enforceable, but that the deposit provision was not, because it was "prohibitively expensive" and "unreasonable," and acted to deter a "substantial number of similarly situated persons . . . from seeking to vindicate their federal statutory rights."[788] The court severed the fee splitting provision from the agreement and dismissed Mazera's suit.[789] Varsity Ford appealed to the Sixth Circuit Court of Appeals.[790]

---

778. *Cash*, 2008 WL 4604064, *3.
779. *Id.*
780. 565 F.3d 997 (2009).
781. *Id.* at 999, 1003.
782. *Id.* at 1000.
783. *Id.*
784. *Id.*
785. *Mazera*, 565 F.3d at 999.
786. *Id.*
787. *Id.*
788. *Id.*
789. *Id.*
790. Mazera also appealed, claiming that the enforceability of the arbitration agreement, in general, was an issue for the jury. *Id.* Mazera argued that the agreement

In determining the validity of the cost-splitting provision, the court referred to the standard set forth in *Morrison v. Circuit City Stores, Inc.*[791] In *Morrison*, the Sixth Circuit held that cost-splitting issues were subject to a "case-by-case basis inquiry into whether 'the potential costs of arbitration are great enough to deter potential litigants and similarly situated individuals from seeking to vindicate their federal statutory rights in the arbitral forum.'"[792] Further, "[r]eviewing courts must 'define the class of similarly situated potential litigants by job description and socioeconomic background,' and 'look to average or typical arbitration costs' weighed against 'the potential costs of litigation.'"[793] Specifically, if the additional cost of arbitration to a potential litigator, as compared to the cost of litigation, is substantial enough to deter potential litigants from resorting to the arbitration process, the fee-splitting provision is unenforceable.[794]

Applying these factors, the Sixth Circuit in *Morrison* invalidated a cost-splitting provision that required the employee to contribute up to 3 percent of her pay (approximately $1,622) within ninety days of the arbitration award.[795] Although the *Morrison* court noted that the issue was a close one, it nonetheless held that, because the plaintiff would likely be out of work, the provision could deter potential litigants who would need to risk "scarce resources," necessary to pay for the necessities of life, "in the hopes of an uncertain benefit."[796]

The *Mazera* court thus compared Mazera's situation with that of the plaintiff in *Morrison*.[797] While the cost to Mazera was only 31 percent of that required in *Morrison*, Mazera received only 37 percent of the pay Morrison received.[798] Further, the court in *Morrison* had stressed that the plaintiff in that case only had ninety days to pay her portion of the

---

was unenforceable because he lacked bargaining power, did not have an attorney, did not understand English well, and did not understand the difference between a jury trial and arbitration. *Id.* at 1002. The Sixth Circuit quickly dismissed these arguments as immaterial "with respect to the validity of the arbitration agreement," relying on previous rulings that such bases were insufficient to invalidate an arbitration agreement or contract. *Id.* (citing to *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991); *Par-Knit Mills Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 55 (3d Cir. 1980); *Komraus Plumbing & Heating, Inc. v. Cadillac Sands Motel, Inc.*, 387 Mich. 285, 291, 195 N.W.2d 865, 868 (1972)).

791. 317 F.3d 646 (6th Cir. 2003) (en banc).

792. *Mazera*, 565 F.3d at 1003 (citing *Morrison*, 317 F.3d at 663).

793. *Id.* (citing *Morrison*, 317 F.3d at 663-64).

794. *Id.* (citing *Morrison*, 317 F.3d at 664).

795. *Id.* (citing *Morrison*, 317 F.3d at 669-70).

796. *Id.*

797. *Mazera*, 565 F.3d at 1004.

798. *Id.*

arbitration costs.[799] In the present action, Mazera had even less time – ten days – to provide the $500 deposit.[800] The court therefore held that a substantial number of similarly situated plaintiffs would find the deposit requirement prohibitively expensive, and so found the provision to be unenforceable against Mazera.[801]

Unlike the trial court, however, the Sixth Circuit did not sever the fee-splitting provision. Instead, the court noted that the arbitration agreement allowed for Varsity Ford to waive the deposit, effectively saving the enforceability of the fee-splitting provision as a whole.[802] The Court therefore remanded the case to allow Varsity Ford the opportunity to waive the deposit.[803]

B. Non-Compete Agreements

The Michigan Court of Appeals recently revisited the enforceability of non-compete agreements, with a specific focus on the sales profession. In *Edwards Publications, Inc. v. Kasdorf*,[804] defendant Kasdorf was a sales representative for Edwards Publications (Edwards), a company that produced and circulated "shoppers," publications with business advertisements and classified ads provided free of charge to consumers.[805] Kasdorf's job duties included contacting and maintaining relationships with businesses in order to sell advertising space in the publications.[806] During her employment, Kasdorf entered into two employment agreements with Edwards, both of which contained non-compete provisions.[807]

After thirteen years of employment with Edwards, Kasdorf left to work for Bilbey Publications (Bilbey), a direct competitor of Edwards.[808] Edwards filed a suit against Kasdorf, alleging a breach of contract with respect to the non-compete provision.[809] The trial court concluded that the non-compete was unenforceable under Michigan law and granted

799. *Id.*
800. *Id.* (citing *Morrison*, 317 F.3d at 669).
801. *Id.* at 1004.
802. *Id.*
803. *Mazera*, 565 F.3d at 1005.
804. No. 281499, 2009 WL 131636 (Mich. Ct. App. Jan. 20, 2009).
805. *Id.* at *1.
806. *Id.*
807. *Id.*
808. *Id.* at *1.
809. *Id.* Edwards also alleged breach of contract with respect to a non-disclosure provision in Kasdorf's employment agreements. *Id.* The court found no evidence that Kasdorf did, in fact, disclose Edwards' customer list and, thus, found no breach as to that provision. *Id.* at *5.

summary disposition in Kasdorf's favor.[810] Edwards appealed as of right.[811]

In its analysis, the court of appeals first outlined the basic statutory and common law principles governing non-compete agreements. The Michigan Antitrust Reform Act (MARA)[812] generally prohibits contracts that serve as a restraint of trade.[813] Section 4a(1) of MARA, however, specifically authorizes non-compete agreements that "protect[] an employer's reasonable competitive business interests . . . if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business."[814] As applied to the case before it, the trial court held that the non-compete provision in Kasdorf's employment agreement only protected Edwards from competition in general, and not Edwards's "reasonable competitive business interests," thus violating MARA as a restraint of trade.[815]

As such, the appellate court had to determine whether Edwards had a reasonable competitive business interest in restraining Kasdorf's ability to work for a direct competitor. The court looked to *St. Clair Medical, P.C. v. Borgiel*,[816] in which the court interpreted the non-compete exception to MARA, as applied to a medical setting:

> Because the prohibition on all competition is in restraint of trade, an employer's business interest justifying a restrictive covenant must be greater than merely preventing competition. To be reasonable in relation to an employer's competitive business interest, a restrictive covenant must protect against *the employee's gaining some unfair advantage in competition with the employer*, but not prohibit the employee from using general knowledge or skill. In a medical setting, a restrictive covenant can protect against unfair competition by preventing the loss of patients to departing physicians, protecting an employer's

---

810. *Edwards*, 2009 WL 131636, at *1.

811. *Id.*

812. MICH. COMP. LAWS ANN. §§ 445.771-.788 (West 2009).

813. MICH. COMP. LAWS ANN. § 445.772.

814. MICH. COMP. LAWS ANN. § 445.774a(1).

815. *Edwards*, 2009 WL 131636 at *3.

816. 270 Mich. App. 260, 715 N.W.2d 914 (2006). For a detailed discussion of the court's decision in *St. Clair Medical*, see Patricia Nemeth & Deborah Brouwer, *2009 Employment & Labor Law, Ann. Survey of Mich. Law*, 53 WAYNE L. REV. 223, 279-84 (2007).

> investment in specialized training of a physician, or protecting an employer's confidential business information or patient lists.[817]

The court in *Kasdorf* thus narrowed its focus to whether Kasdorf would have an unfair advantage by going to Bilbey. In finding that Kasdorf would have an unfair advantage, the court specifically noted the unique nature of the sales profession.[818] Notably, Kasdorf had worked for Edwards for thirteen years, during which time she "developed and nurtured close and personal relationships with numerous business customers . . . learning much about their operations, tendencies, and leanings."[819] In *St. Clair Medical*, the court found that a departing physician was in a position to unfairly appropriate the goodwill that he had formed through established patient contacts and relationships.[820] Similarly, as a result of Kasdorf's employment with Edwards, once she moved to Bilbey, she would be able to continue her already-established relationships with many of the same businesses, instead of having to start from a clean slate.[821]

Accordingly, the court stated that "[w]hile we are not dealing with a medical setting, the fundamental principle flowing from *St. Clair* is that where an employee establishes unique contacts, relationships, and goodwill through employment, it is reasonable to bar that employee, through use of a sound non-compete agreement, from using those accomplishments to the possible detriment of the past employer and for the benefit of a new employer."[822] Because Kasdorf's sales position was driven by the "development and cultivation of close relationships," the court held that Edwards's non-compete was enforceable.[823]

C. Severance Agreements

During the *Survey* period, the Michigan Court of Appeals also addressed whether an employee handbook created a contractual right to severance pay, in *Eftink v. Herman Miller, Inc.*[824] Russell Etfink was employed by Global Customer Solutions (GCS), a subsidiary of Herman Miller, which provided "on-site furniture and space management

---

817. *Edwards*, 2009 WL 131636, at *3 (citing *St. Clair Medical*, 270 Mich. App. at 266, 715 N.W.2d at 919) (emphasis added; internal citations omitted in *Edwards*).

818. *Id.* at *4.

819. *Id.*

820. *Id.* (citing *St. Clair Medical*, 270 Mich. App. at 268, 715 N.W.2d at 920).

821. *Id.*

822. *Id.* at *5.

823. *Edwards*, 2009 WL 13136 at *4-5.

824. No. 274281, 2008 WL 4276447 (Mich. App. Sept. 16, 2008).

services" to Whirlpool Corporation's headquarters.[825] During Elfin's employment with Herman Miller, the employee handbook in force contained a policy entitled the "Working Together Guide," which stated:

> *As long as business conditions permit, severance is provided for an employee at separation as the result of job elimination* to assist him/her with the transition between employment and reemployment. Providing severance is intended to reduce the financial concerns so an employee can focus on his/her search for another job.[826]

When Whirlpool terminated its management contract with Herman Miller, Eftink was notified that his position with GCS had been eliminated and he would not be offered a different position within the company.[827] When Eftink was unable to immediately secure a position with the company that had assumed the Whirlpool contract (Jones Lange LaSalle (JLL)), he contacted Herman Miller's human resources manager to request severance pay under the severance provision in the handbook.[828] Specifically, he stated:

> While I have had discussions with [JLL], we have not been able to reach an agreement concerning employment opportunities to join their team. I do not anticipate an agreement prior to March 01, therefore I will be unemployed as of March 01 and will need the temporary protection of the severance package.

The human resources manager responded by informing Eftink that he was eligible for twelve weeks of severance.[829]

Subsequently, Herman Miller extended Eftink's employment to March 4.[830] Etfink accepted employment with JLL, effective March 7.[831] Eftink thus had no unpaid days.[832] Based on this, Herman Miller's human resources manager informed Eftink that, due to his immediate reemployment, he was not eligible for severance pay from Herman Miller.[833]

---

825. *Id.* at *1.
826. *Id.*
827. *Id.*
828. *Id.*
829. *Id.*
830. *Etfink*, 2008 WL 4276447, at *1.
831. *Id.*
832. *Id.*
833. *Id.*

Eftink filed suit against Herman Miller, alleging that the company's handbook created a contractual right to severance pay.[834] Herman Miller sought summary disposition, disputing any such contractual obligation.[835] The circuit court denied the motion, and then determined in a bench trial that the provision constituted an implied contract, requiring Herman Miller to pay Eftink.[836] Herman Miller appealed.[837]

The court of appeals first recognized that, under *Toussaint v. Blue Cross & Blue Shield of Michigan*,[838] "an employer's policy statements may give rise to an employee's contractual rights."[839] In *Toussaint*, the Michigan Supreme Court held that a company policy providing for termination only upon just cause required that termination comply with the procedures provided in its policy.[840] Specifically, the *Toussaint* court stated: "[i]n short, the adoption of the described policies by the company constituted an offer of a contract. This offer ... 'the plaintiff accepted ... by continuing in its employment beyond the five-year period ...'"[841] This theory was then extended to policies other than those relating to discharge, such as a compensation policy, in *Dumas v. Auto Club Insurance Association*.[842]

The *Eftink* court observed, however, that "an employment contract is just a contract"[843] and, thus, the goal in interpreting the contract is to implement the intent of the parties.[844] In reviewing the Herman Miller severance pay provision at issue, the court concluded that "[t]he plainly expressed purpose of defendant's severance pay policy is to afford a financial cushion to employees whose jobs have been eliminated and who endure a period of unemployment."[845] This was supported by the testimony of Herman Miller's human resource manager, who stated that severance pay was meant to be a "bridge" for employees to find a

834. *Id.*
835. *Id.* at *2.
836. *Eftink*, 2008 WL 4276447, at *2.
837. *Id.*
838. 408 Mich. 579, 292 N.W.2d 880 (1980).
839. *Eftink*, 2008 WL 4276447, at *2 (citing *Toussaint*, 408 Mich. at 614-15, 292 N.W.2d at 892).
840. *Toussaint*, 408 Mich. at 614-15, 292 N.W.2d at 892.
841. *Id.* at 616, 292 N.W.2d at 893 (citing Cain v. Allen Electric & Equip. Co., 346 Mich. 568, 579-80, 78 N.W.2d 296, 302 (1956)).
842. 437 Mich. 521, 529, 473 N.W.2d 652, 655-56 (1991).
843. *Eftink*, 2008 WL 4276447, at *3 (citing Thomas v. John Deere Corp., 205 Mich. App. 91, 93, 517 N.W.2d 265, 266 (1994)).
844. *Id.* (citing Rasheed v. Chrysler Corp., 445 Mich. 109, 127 n. 28, 517 N.W.2d 19, 29 n. 28 (1994)).
845. *Id.* at *3.

replacement job.[846] Further, Eftink's written request for severance pay revealed that he too viewed it as a "bridge," given his admission that he needed the pay because he had been unable to reach an employment agreement with JLL at that time, and thus faced unemployment.[847]

Accordingly, the appellate court held that, because Eftink immediately transitioned into a new position performing the same duties, he was not entitled to severance pay.[848] The court thus reversed the lower court and remanded the case for entry of summary disposition for Herman Miller.[849]

VII. FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act (FMLA)[850] provides eligible employees with unpaid leave for reasons enumerated in the statute. The FMLA was enacted to assist workers in balancing family, work, and other obligations without fear of job loss.[851] Under the Act, an eligible employer must permit eligible employees to take annual leave of up to twelve weeks (or twenty-six weeks in the case of a covered service member), to address their own health issues or those of family members.[852]

A. Revised FMLA Regulations

In January 2009, the Department of Labor's (DOL) long-anticipated revisions to its 1985 FMLA regulations went into effect, clarifying important questions regarding employee eligibility, covered employers, employer notice requirements, and the medical certification and authentication process.[853] The regulatory changes were extensive, and employers were expected to be compliant with the new regulations as of January 16, 2009.[854] These were the first revisions to the regulations

846. *Id.*
847. *Id.*
848. *Id.* at *4.
849. *Etfink*, 2008 WL 4276447 at *4.
850. Family and Medical Leave Act of 1993, 29 U.S.C.A. §§ 2601-2654 (West 2009).
851. 29 U.S.C.A. § 2601 (West 2010).
852. 29 U.S.C.A. § 2612 (West 2010).
853. 29 C.F.R. § 825 (2008). The revised regulations were published on November 17, 2008, but did not go into effect until January 16, 2009. The complete revised regulations are available at http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_825/toc.htm (last visited June 22, 2010).
854. 29 C.F.R. § 825 (2008).

since the DOL initially issued its regulations in April 1995.[855] The new regulations change and clarify some of the agency's former interpretations of the act, and renumber and reorganize certain other provisions. For example, the revised regulations clarify that, while the twelve months of employment required before an employee is eligible for FMLA leave need not be consecutive, a break-in-service of seven years or more need not be considered in calculating the twelve-month period.[856] In addition, an employee who is not FMLA-eligible and is on a non-FMLA leave must be afforded FMLA protection as soon as he becomes FMLA-eligible, even if that occurs in the middle of the non-FMLA leave.[857] This contrasts with court decisions holding that eligibility is determined only once, as of the date the initial leave commences.[858]

The regulations also clarify that outsourcing vendors, commonly known as "Professional Employer Organizations" or "PEOs," which contract with employers to provide administrative services such as payroll or benefits, are not joint employers with their clients, as long as the PEO has no authority to hire, fire, assign or direct the clients' employees.[859]

While the regulations continue to require the employer to inquire further of an employee requesting leave, in order to determine if the employee's condition is FMLA-qualifying,[860] the revisions now state that simply calling in "sick," without stating more, does not put the employer on notice of a possible FMLA leave.[861]

Also significant are the revised notice requirements. Individual notice requirements now include two phases: notice of eligibility rights

855. According to the DOL Wage and Hour Division, in crafting the revised regulations, the DOL considered over 4,600 public comments received in response to its Notice of Proposed Rulemaking issued in February 2008, as well as several U.S. Supreme Court and lower court decisions invalidating portions of the previous regulations, and an extensive review of the DOL's experience in administering the Act during its first fifteen years. The review also included public comments received in response to a Request for Information, which was summarized in detail as part of the new regulations. *See* United States Department of Labor, Wage and Hour Division (WHD), Revised Final Regulations Under the Family and Medical Leave Act (RIN 1215-AB35), http://www.dol.gov/whd/fmla/finalrule.htm (last visited June 22, 2010).

856. 29 C.F.R. § 825.110(b)(1).

857. *Id.* § 825.110(d).

858. *See* Butler v. Owens-Brockway Plastic Prods., Inc., 199 F.3d 314, 316 (6th Cir. 1999); Ricco v. Potter, 377 F.3d 599, 604 (6th Cir. 2004).

859. 29 C.F.R. § 825.106(b)(2).

860. *Id.* §§ 825.302(c), 825.303.

861. *Id.* § 825.303(b).

and notice of leave designation.[862] When an employer receives a request for leave or reasonable notice that an absence may be FMLA-qualifying, within five business days the employer must provide the employee with notice that she is FMLA-eligible and that she has specific rights and obligations under the FMLA.[863] Once the employer has sufficient information to determine whether the leave is FMLA-qualifying, written notice designating the leave as an FMLA leave must be provided.[864] In conjunction with the issuance of the revised regulations, the DOL issued two new forms (WH-381 and WH-382) to be used for these purposes.[865]

The revised regulations also clarify certain terms contained in the Military Family Medical Leave Act (MFMLA),[866] which became effective in January 2008. Employers now are required to provide up to twelve weeks of unpaid leave for "a qualifying exigency" arising out of a covered family member's call to military service.[867] The statute did not, however, define "qualifying exigency," leaving that task to the DOL, which now has determined that "a qualifying exigency" is one of the following:

1. Short-notice deployment . . . .
2. Military events and related activities . . . .
3. Childcare and school activities . . . .
4. Financial and legal arrangements . . . .
5. Counseling . . . .
6. Rest and recuperation . . . .
7. Post-deployment activities . . . .
8. Additional Activities. To address other events which arise out of the covered military member's active duty or call to active duty statues, provided the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave . . . .[868]

---

862. *Id.* § 825.300.

863. *Id.*

864. *Id.*

865. U.S. DEPT. OF LABOR, EMP. STANDARDS ADMIN. WAGE & HOUR DIV., FORMS WH-381 & WH-382 (2009), *available at* http://www.dol.gov/whd/forms (last visited Mar. 5, 2010).

866. Military Family Medical Leave Act, Pub. L. No. 110-181, § 585 (2008). For more details on the MFMLA, see Nemeth & Brouwer, *supra* note 392, at 196-97.

867. 29 U.S.C.A. § 2612(a)(1)(e) (West 2008).

868. United States Department of Labor, 19 CFR 825.126 – Leave because of a qualifying exigency, http://www.dol.gov/dol/allcfr/title_29/Part_825/29CFR825.126.htm (last visited June 23, 2010).

In addition to the twelve weeks of leave traditionally provided under the FMLA, the MFMLA requires employers to provide up to twenty-six weeks of leave for a covered family member to care for a service member who has an injury or illness arising from service.[869] The regulations clarify, however, that an eligible employee taking leave under this provision is not entitled to a combined total of FMLA leave days in excess of twenty-six weeks in a single twelve-month period.[870] Further, that single twelve month period commences on the date an employee first takes leave to care for a covered service member with a serious injury or illness.[871]

Leave to care for an injured service member under the MFMLA is granted to a spouse, parent, son, or daughter as well as a person who is the next of kin to a service member.[872] The service member may designate, in writing, as "next of kin," a blood relative who is not her spouse, parent, son, or daughter.[873] If no such designation is made, and multiple family members within the same level of kinship to the covered service member exist, all such family members may be considered as "next of kin" and may take MFMLA to provide care either consecutively or simultaneously.[874]

As employers work to comply with these revisions, and as the changes, as applied, percolate through the judicial system, courts will begin to weigh in on whether the DOL has acted outside the scope of its discretionary authority, and whether its clarification efforts have succeeded.

B. Court Decisions

While the new DOL regulations may have seized most of the FMLA headlines in the past year, courts have continued to offer their interpretation of the FMLA. Issues addressed during the *Survey* period ranged from successor liability to what constitutes a serious health condition and when an employee can argue equitable estoppel.

869. 29 U.S.C.A. § 2612(a)(3).
870. 29 C.F.R.§ 825.127(c)(3) (2008).
871. *Id.* § 825.127(c)(1).
872. 29 U.S.C.A. § 2611(18).
873. 29 C.F.R. § 825.127(b)(3).
874. *Id.*

1. Successor Liability

In *Finnerty v. Wireless Retail, Inc.*,[875] the United States District Court for the Eastern District of Michigan analyzed whether a successor to Wireless Retail, Inc. (WRI) could be held liable for an alleged violation of the FMLA. WRI, the original defendant, was a national retail chain engaged in the sale of cellular phones and services at kiosks in shopping malls and retail stores such as Sam's Club and Wal-Mart.[876] Finnerty worked for WRI as a Field Manager, managing several of its kiosks.[877] Finnerty claimed that, after she notified WRI that she was pregnant and would need time off, her supervisors intimidated her into working longer hours than she had prior to her pregnancy.[878] Even though Finnerty requested a demotion so that she could decrease her hours, her new supervisor continued to demand that Finnerty work additional hours.[879]

While WRI did not have a maternity leave policy, Finnerty was eligible for FMLA leave, which was approved to begin on November 1, 2002.[880] On the first of her final three scheduled shifts prior to her leave, Finnerty experienced difficulty standing or sitting without bladder incontinence.[881] As a result, before her next shift, Finnerty requested an early start to her leave. According to Finnerty, her supervisor approved this request.[882] Several days later, however, when Finnerty submitted her medical certification to WRI, she was informed that she had been terminated due to three "no-call-no-shows."[883]

Approximately eighteen months after her termination, Finnerty filed suit against WRI for alleged FMLA violations, as well as pregnancy discrimination in violation of the ELCRA.[884] Fewer than three months later, WRI entered into an asset purchase agreement with RadioShack, under which RadioShack purchased "fixtures, information systems, training and distribution assets, and inventory" used by WRI to operate business within Sam's Club stores.[885] As part of the agreement, WRI terminated its contract with Sam's Club, thereby allowing RadioShack to

875. 624 F. Supp. 2d 642 (E.D. Mich. 2009).
876. *Id.* at 645.
877. *Id.*
878. *Id.*
879. *Id.*
880. *Id.* at 645-46.
881. *Finnerty*, 624 F. Supp. 2d at 646.
882. *Id.*
883. *Id.*
884. *Id.*
885. *Id.*

negotiate its own contract. WRI also terminated all of its employees assigned to Sam's Club kiosks, so that RadioShack could hire those same employees pursuant to its own pre-employment procedures and policies.[886]

The asset purchase agreement specifically excluded a number of liabilities, such as "any claims or obligations relating to any employee of WRI and not expressly assumed by RadioShack in the agreement."[887] The agreement specifically identified Finnerty's lawsuit against WRI as a liability that RadioShack did not assume in the transaction.[888] Importantly, the agreement also stated that "based on a reputable third party's opinion and WRI's review, WRI believes that RadioShack is paying fair value, in an arms'-length transaction for the Purchased assets . . . [and] immediately after giving effect to the consummation of the transactions contemplated by this Agreement, WRI will not have unreasonably small capital with which to conduct its present or proposed business."[889] A third-party auditor verified WRI's assertion in a letter attached to the agreement.[890]

Fifteen months after execution of the asset purchase agreement, WRI's defense counsel advised Finnerty that the company was out of business and that WRI had "no intention of defending or otherwise retaining representation with respect to any further proceedings" in the matter.[891] Finnerty sought leave to amend her complaint to add RadioShack as a party, as a successor to WRI.[892] When that motion was granted, RadioShack sought summary judgment, arguing that it was not a "successor in interest" to WRI with respect to Finnerty's claim.[893] Several months after the district court denied RadioShack's motion as premature, Finnerty filed her own motion for summary judgment on the issue of successor liability, arguing that the "multi-factor test for successor liability weigh[ed] in favor of imposing such liability" on RadioShack.[894] In turn, RadioShack renewed its summary judgment

886. *Id.* at 646-47.
887. *Finnerty*, 624 F. Supp.2d at 647.
888. *Id.*
889. *Id.*
890. *Id.* at 648.
891. *Id.*
892. *Id.*
893. *Finnerty*, 624 F. Supp.2d at 648-49. RadioShack also requested summary judgment on statute of limitations grounds. *Id.* at 649.
894. *Id.*

motion, again arguing that it was not a successor in interest to Finnerty's lawsuit against WRI.[895]

The district court dismissed Finnerty's action against RadioShack based on the statute of limitations,[896] but also took the unusual step of analyzing the successor liability issue, recognizing that "very few courts . . . have addressed successor liability in the context of the FMLA in a meaningful way."[897] For its analysis, the court relied on *Cobb v. Contract Transport, Inc.*,[898] one of the few cases to have addressed successor liability in the FMLA context.[899]

Citing *Cobb*, the district court laid out the framework for the analysis, first noting that successor liability under the FMLA applies "an equitable, policy driven approach" derived from labor not corporate law.[900] The labor law concept of successor liability requires that courts balance the equities of imposing a particular legal obligation in a particular situation, considering 1) the interests of the defendant-employer, 2) the interests of the plaintiff-employee, and 3) federal policy embodied in the relevant federal statutes.[901]

Further, as outlined in the Department of Labor's FMLA regulations, eight factors are to be considered when analyzing successor liability: "(1) substantial continuity of the same business operations; (2) use of the same plant; (3) continuity of the work force; (4) similarity of jobs and working conditions; (5) similarity of supervisory personnel; (6) similarity in machinery, equipment, and production methods; (7) similarity of products or services; and (8) the ability of the predecessor to provide relief."[902]

Whether the successor has notice of the allegations also "may be relevant" when the plaintiff seeks to hold a successor liable for an alleged violation by the predecessor.[903] However, while the nine DOL

---

895. *Id.* RadioShack also argued that Finnerty's claim was barred by the applicable statute of limitations because the amended complaint naming RadioShack as a party was served on RadioShack on April 26, 2006, well beyond the limitation period applicable to FMLA claims, which accrued on November 4, 2002. *Id.* RadioShack also argued, successfully, that the amended complaint did not relate back under Fed. R. Civ. Pro. 15(c). *Id.* at 651.

896. *Id.* at 651-56.

897. *Id.* at 656-67.

898. 452 F.3d 543 (6th Cir. 2006). For an analysis of *Cobb*, see Nemeth & Brouwer, *supra* note 816, at 261-65.

899. *Finnerty*, 624 F. Supp. 2d at 656-57.

900. *Id.* at 656 (citing *Cobb*, 452 F.3d at 551).

901. *Id.* (citing *Cobb*, 452 F.3d at 552).

902. *Finnerty*, 624 F. Supp. 2d at 656 (citing 29 C.F.R. § 825.107(a)).

903. *Id.* at 656.

factors may provide assistance to the court, they "are still only part of the 'overarching, three-part test'" laid out by *Cobb*.[904]

Having established the ground rules, the court analyzed the business deal between WRI and RadioShack, as well as RadioShack's resulting business.

Because the court felt that RadioShack's notice of Finnerty's lawsuit was of "particular relevance," it began its review with this factor.[905] In its analysis of RadioShack's statute of limitations defense, the court had observed that RadioShack received notice of Finnerty's lawsuit against WRI at the time of the asset purchase, because it was listed in the agreement with WRI.[906] Given the entire agreement with WRI, the court held that "the evidence can only support a finding that RadioShack was on notice that it would *not* be required to defend the claim."[907] This conclusion was supported by the facts that RadioShack had specifically excluded liability for Finnerty's lawsuit; that after the purchase was concluded, it appeared to RadioShack that WRI was actively defending the suit; and that the asset purchase had been an arm's length agreement, with assurances from a third party that WRI would continue to have sufficient assets after the sale to operate its remaining business.[908] Therefore, the court held that the notice factor strongly supported a finding that imposing successor liability on RadioShack would be inappropriate.[909]

The court then moved on to whether RadioShack "substantially continued WRI's business operations" after the asset purchase agreement.[910] Notably, the "Sixth Circuit has explicitly held that a merger is not a precondition to finding liability for a successor corporation under the FMLA."[911] As such, although RadioShack replaced all of WRI's kiosks with its own shortly after the purchase, although WRI continued on as a separate business, the court held that RadioShack did substantially continue WRI's business operations because it "employed a majority of WRI's former employees, operated all the Sam's Club kiosk operations, purchased WRI's fixtures, information systems, training assets, distribution center and assets, customer lists and

---

904. *Id.* at 656 (citing Grace v. USCAR, 521 F.3d 655, 672 (6th Cir. 2008)). For a discussion of the court's decision in *Grace* regarding the issue of joint employers, see Nemeth & Brouwer, *supra* note 392, at 298-302.

905. *Finnerty*, 624 F. Supp. 2d at 657.

906. *Id.* at 653-54, 657.

907. *Id.* at 657.

908. *Finnerty*, 624 F. Supp. 2d at 657.

909. *Id.*

910. *Id.* at 658.

911. *Id.* (citing *Cobb*, 452 F.3d at 550).

inventory relocated to the Sam's Club kiosks, and assumed the Scottsdale, Arizona office complex lease interests of WRI."[912] Therefore, this factor weighed in favor of imposing successor liability.[913]

Regarding whether RadioShack used the same plant as had WRI, the court viewed this factor of limited relevance, given that neither entity engaged in manufacturing.[914] However, "to the extent that the factor could generally refer to the companies' use of the same physical space and production methods to accomplish the business goals," the court held that it had already considered this issue within the continuity of operations analysis.[915]

The court next examined the "continuity of workforce" factor, noting that the appropriate focus was whether there was a continuity of the workforce as a whole.[916] Because the court had previously concluded that RadioShack continued to employ a majority of the WRI employees working at Sam's Club kiosks, it moved onto the next issue — continuity of supervisory personnel.[917] Under the WRI/RadioShack purchase agreement, no officers of WRI became RadioShack officers, and only one WRI executive manager was employed by RadioShack, and that was only for a brief period of time.[918] Further, none of the WRI employees involved in the alleged FMLA violations against Finnerty were hired by RadioShack.[919] Despite the lack of continuity of supervisory personnel, however, the court nonetheless held that the factor was "equivocal and favor[ed] neither position."[920]

As for "continuity of working conditions; machinery, equipment and methods of production; products and services," the court again found that this factor to be of marginal relevance, given that the factor appeared applicable to a manufacturing setting.[921] As applied to a non-manufacturing setting, and RadioShack in particular, the court recognized that "RadioShack purchased the rights to use the kiosks, the property associated with the kiosks, the inventory and software utilized by WRI in selling products at the Sam's Club kiosks . . . [and] continued to sell the same products sold by WRI from the kiosks."[922] However, the

912. *Finnerty*, 624 F. Supp. 2d at 657.
913. *Id.* at 658.
914. *Id.*
915. *Id.*
916. *Id.*
917. *Id.*
918. *Finnerty*, 624 F. Supp. 2d at 659.
919. *Id.*
920. *Id.*
921. *Id.*
922. *Id.*

court again held that these facts had been taken into consideration in the continuity of business operations factor.[923]

Finally, the court addressed whether WRI had the ability to provide relief for its alleged FMLA violations.[924] Finnerty argued that she had only recently learned that WRI would no longer defend the case and allegedly had debts greater than its assets and, thus seemed unlikely to be able to provide any relief.[925] RadioShack pointed out, however, that their allegations were unsubstantiated by evidence.[926] WRI had received $57 million from its RadioShack sale, and had sufficient operational funds for fifteen months before Finnerty brought RadioShack into the suit.[927] Finnerty also had failed to show that WRI or any of its management were truly unable to provide relief, since the company had not filed for bankruptcy.[928] Further, Finnerty had failed to investigate other avenues of relief, such as a potential joint employer argument.[929]

Noting that it is an "open question as to the relevant time period that should be examined when considering whether the predecessor is able to provide relief, at the time of the sale of the assets or at the time of the successor motion," the court considered both time periods.[930] At the time of the sale of assets, according to the court, WRI was able to provide relief.[931] Further, at the time of the successor liability motion, Finnerty "failed to demonstrate that WRI or any other potentially liable entity [was] actually unable to provide relief."[932] Despite these conclusions, the court again held that this factor did not favor either party's position.[933]

Considering the above factors as a whole, the court recognized that the "relevance of each factor . . . must be considered and weighed in light of the legal obligation at issue,"[934] and held that notice and the continuity of business operations were the more relevant factors.[935] In particular, while RadioShack clearly carried on WRI's business operations in a substantially similar manner, RadioShack did not have "meaningful notice that it could be held liable for plaintiff's claims," and, in fact, was

923. *Id.*
924. *Finnerty*, 624 F. Supp. 2d at 659.
925. *Id.*
926. *Id.*
927. *Finnerty*, 624 F. Supp. 2d at 660.
928. *Id.* at 659.
929. *Id.* at 659-60.
930. *Finnerty*, 624 F. Supp. 2d at 660-61 (citing EEOC v. Nichols Gas & Oil, Inc., 518 F. Supp. 2d 505, 514 (S.D.N.Y. 2007)).
931. *Id.* at 661.
932. *Id.*
933. *Finnerty*, 624 F. Supp. 2d at 661.
934. *Id.* at 662 (citing *Cobb*, 452 F.3d at 554).
935. *Id.*

"under the informed understanding that they were not liable for her existing suit."[936] Further, the court acknowledged that " [t]he overall test for imposing a particular legal obligation on a potential successor is a balancing of the equities when consider: (1) the interests of the plaintiff-employee, (2) the interests of the defendant-employer, and (3) the federal policy goals of the statute."[937] Additional emphasis on the first prong is warranted, given the "FMLA's focus on the individual employee."[938] Applying this test, the court concluded that Finnerty had an interest in being able to take a necessary medical leave due to her pregnancy and that WRI's alleged interference contrasted with the FMLA's objectives.[939] Finnerty also had an interest in receiving compensation for her harm from either WRI or RadioShack, because she had no involvement in WRI's sale of assets to RadioShack or the failure of WRI as a business.[940]

On the other hand, RadioShack had entered into a clear agreement providing that WRI would remain liable for Finnerty's claim, and to override that would be "grossly unfair."[941] Further, although "the FMLA may, in some instances, provide that justification, it does not for the limited purpose of holding RadioShack liable for WRI's alleged discrimination."[942] The court also noted that it would be "entirely inconsistent with the principles of equity to require RadioShack, a corporation that took significant efforts to protect itself in this transaction, to now defend the case on the merits without the benefit of such evidence."[943]

Also important to the court was the absence of any evidence that RadioShack had benefited in any way from WRI's alleged illegal conduct against Finnerty, since RadioShack had not hired any of the decision makers.[944] Further, there was no "evidence that the termination had a continuing deterrent effect upon the employees of either company," or how the facts in this case would any way encourage companies to evade liability for illegal acts of discrimination by staging corporate transfer of ownership.[945] Accordingly, the court held that

936. *Id.*
937. *Id.* (citing *Grace*, 521 F.3d at 672).
938. *Id.* (citing *Grace*, 521 F.3d at 675).
939. *Finnerty*, 624 F. Supp. 2d at 662.
940. *Id.*
941. *Id.*
942. *Finnerty*, 624 F. Supp. 2d at 663-64.
943. *Id.*
944. *Id.*
945. *Id.*

imposing successor liability against RadioShack was inappropriate and dismissed Finnerty's claims against the company.[946]

2. Serious Health Conditions

In *Johnson v. Kmart*,[947] the United States District Court for the Eastern District of Michigan considered the question of whether caring for a child with a health condition that did not last three consecutive days was protected under the FMLA. The plaintiff, Edward Johnson, was a loss prevention associate for Kmart.[948] Kmart tracked absenteeism and tardiness using a six-point infraction system, under which Kmart could terminate any employee who accrued six points within any six-month period, with unexcused absences being assigned one point and tardiness assigned one half-point.[949] At the time in question, Johnson had accumulated five and one-half points during a six-month period.[950] On a Saturday afternoon, prior to his shift, Johnson received a telephone call indicating that his son's eye had been cut by a dog.[951] Consistent with company policy, Johnson contacted the assistant store manager to say that he would not be able to work his shift because he had to take his son to the emergency room.[952]

The emergency room physician told Johnson that his son might have a ruptured globe (a tear in the outer surface of the eyeball), and that he needed to be seen immediately by an ophthalmologist.[953] Johnson took his son to a second hospital to be seen by this specialist, who determined that the child did not have a ruptured globe, but a less serious cut on his eye, with a collection of blood around the cut.[954] Johnson's son was discharged, with an eye patch and antibiotics, and instructions for a follow-up visit.[955] When Johnson returned home, only two hours remained in his scheduled shift, and so he did not report to work.[956]

The next day, Johnson reported to work as scheduled.[957] He offered to provide paperwork from the hospital, but Kmart's human resources

946. *Id.*
947. 596 F. Supp. 2d 1045 (E.D. Mich. 2009).
948. *Id.* at 1047.
949. *Id.*
950. *Id.*
951. *Id.* at 1047-48.
952. *Id.* at 1048.
953. *Johnson*, 596 F.Supp.2d at 1048.
954. *Id.*
955. *Id.*
956. *Id.*
957. *Id.*

manager told Johnson not to worry about it.[958] The human resources manager nonetheless notified Johnson's store manager that Johnson's absence on the prior day was his sixth point under the absence control policy.[959] The store manager then contacted the district manager for approval to terminate Johnson for accumulating his sixth infraction point.[960] Knowing nothing of the circumstances surrounding Johnson's most recent absence, the district manager approved Johnson's discharge.[961] During his termination meeting, Johnson again offered to provide documentation of his son's hospital visit, but the store manager refused to accept the paperwork.[962]

Johnson filed suit against Kmart, alleging a violation of the FMLA.[963] Kmart moved for summary judgment, arguing primarily that Johnson's absence was not protected by the FMLA because the injury to his son was not a "serious health condition" under the Act.[964]

The court began with the Act's definition of a "serious health condition," as "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider."[965] The court also considered the DOL's regulations regarding what constitutes "serious health condition." [966]

---

958. *Id.* The HR Manager testified that she told Johnson to bring the doctor's note in the next time that he worked, but he failed to do so. *Id.*

959. *Johnson*, 596 F. Supp. 2d at 1049.

960. *Id.*

961. *Id.*

962. *Id.*

963. *Id.*

964. *Johnson*, 596 F. Supp.2d at 1050. Kmart also argued that, even if Johnson's son did have a serious health condition, Johnson's failure to come to work for the remaining two hours of his shift was a legitimate, nondiscriminatory reason for his termination, and that Johnson's failure to provide a medical certification precluded an action under the FMLA. *Id.* The court readily rejected both arguments, finding that Johnson's testimony that he stayed home with his son during the final two hours with his shift while his wife went to the pharmacy to fill a prescription, constituted "caring for" a family member with a serious health condition under 20 C.F.R. § 825.116. The court also held that Johnson's failure to provide a medical certification did not preclude his claim because Kmart failed to provide him with notice of the need to do so, as required by 29 C.F.R. § 825.301(c)(2). *Id.*

965. *Id.* at 1051 (citing 29 U.S.C.A. § 2611(11) (West 2010)).

966. Those regulations state:

For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves: (2) Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following: (i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery

Kmart argued that the child's injuries did not meet the definition of a "serious health condition" because there was no evidence that the child was "incapacitated for a period of more than three days and that he was treated two or more times or was treated at least once resulting on a regiment of continuing treatment," under 29 C.F.R. § 825.114(a)(2)(i).[967] The court, however, held that this was not Johnson's only argument, because his son's injury could meet the definition of a serious health condition as described by 29 C.F.R. § 825.114(a)(2)(v), which does not require any specific period of incapacity.[968] Subsection (a)(2)(v) provides that a "serious health condition" includes "[a]ny period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider . . . for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment."[969]

The court concluded that Johnson met the first two requirements – multiple treatments by a health care provider — because Johnson's son was seen by at least two doctors on the day of his injury, and then had a

---

therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves: (A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or (B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider. (v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis). (b) Treatment for purposes of paragraph (a) of this section includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

Id. (quoting 29 C.F.R. § 825.114).

967. *Johnson*, 596 F. Supp. 2d at 1052.

968. *Id.*

969. *Id.* at 1053 (citing 29 C.F.R. § 825.114(a)(2)(v)).

follow-up appointment with his pediatrician several days later.[970] The issue then became whether Johnson could meet the third requirement — that his son was treated "for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment."[971]

Johnson argued that the court "should look at the plaintiff's knowledge at the time he requested leave, and his belief, supported by the objective medical opinion."[972] In Johnson's case, the doctor at the first hospital thought that his son might have a ruptured globe, which could lead to blindness if left untreated.[973] It was this diagnosis that led Johnson to take his son to a second hospital to be seen by an ophthalmologist.[974]

Kmart, on the other hand, argued that the court "should only consider how serious the injury turned out to be in actuality."[975] In Johnson's case, his son's injury turned out to be a laceration on his eye, not a ruptured globe, and there was no evidence that the condition would result in incapacitation for more than three days if left untreated.[976]

The court rejected the argument that FMLA protection only occurs if the employee actually suffered from a serious health condition,[977] finding that this conclusion was consistent with decisions from other courts.[978] The court therefore held that, based on the seriousness of the injury, Johnson had a reasonable basis to believe that his son's injury could lead to a period of incapacitation lasting more than three days if he did not pursue medical treatment. Thus, the medical examinations needed to evaluate the injury fell within the meaning of "treatment" for a serious health condition under the FMLA.[979] As such, Johnson met the requirement of caring for a child with a "serious health condition" and his absence was protected by the FMLA.[980]

---

970. *Id.* at 1053.
971. *Id.*
972. *Id.*
973. *Johnson*, 596 F. Supp. 2d at 1053.
974. *Id.*
975. *Id.*
976. *Id.*
977. *Id.*
978. *Id.* (citing Thornson v. Gemini, 205 F.3d 370 (8th Cir. 2000) and Woodman v. Miesel Sysco Food Service Co., 254 Mich. App. 159, 657 N.W.2d 122 (Mich. Ct. App. 2002)).
979. *Johnson*, 596 F. Supp. 2d at 1054.
980. *Id.*

3. Employee Eligibility for Intermittent Leave

The FMLA permits employees to take FMLA leave on an intermittent or reduced schedule basis, meaning that the employee can take separate, sporadic blocks of leave — even for just a few hours — because of his own or a family member's serious health condition (but not in conjunction with the birth or adopting of a child).[981]

In *Davis v. Michigan Bell Telephone Company*,[982] the Sixth Circuit Court of Appeals addressed the continuing confusion regarding the calculation of eligibility for employees on intermittent leave. Candice Davis was a customer service representative for Michigan Bell.[983] In 1999, approximately two years after she began working for Michigan Bell, Davis began suffering from depression.[984] Because an employee is not eligible for FMLA leave unless the employee works at least 1,250 hours in a twelve-month period, Davis was not eligible for FMLA leave until September 24, 2004.[985] Once she did become eligible, Davis requested and was approved intermittent leave for her depression.[986]

Between September 24, 2004, and December 13, 2004, Davis took several discrete absences from work due to her depression, each time receiving approval from Michigan Bell as intermittent leave.[987] On December 13, 2004, however, Davis began a non-intermittent leave that continued into January 2005.[988] Davis did not submit the required certification for this leave. After Davis had been absent six days, Michigan Bell filed a claim for short-term disability benefits for her, and also advised Davis that she had the right to seek FMLA benefits if she was denied short-term disability benefits.[989]

On January 7, 2005, Davis's doctor informed Michigan Bell that Davis could have returned to work on January 3, 2005. Michigan Bell therefore notified Davis on January 12 that any absences after January 2 would be considered unexcused, unless Davis sought and received FMLA approval for such absences.[990] Davis also was informed that if she did not return by January 14, she would be deemed a voluntary quit.[991]

---

981. 29 U.S.C.A. § 2612(b)(1) (West 2010).
982. 543 F.3d 345 (2008).
983. *Id.* at 347.
984. *Id.*
985. *Id.*; *see also* 29 U.S.C.A. § 2611(2)(A); 26 C.F.R. § 825.110(a).
986. *Davis*, 543 F.3d at 347.
987. *Id.*
988. *Id.* at 348.
989. *Id.*
990. *Id.*
991. *Id.*

Davis did not return to work until January 15. When she did, she was suspended pending dismissal under Michigan Bell's attendance policy. Because Davis had already been disciplined on three previous occasions for poor attendance, Michigan Bell's policy required that she be terminated.[992]

During her suspension, Davis sought to have her unexcused absences from January 3, 2005 to January 14, 2005 approved as part of her intermittent FMLA leave granted in September 2004.[993] Because Michigan Bell measures FMLA eligibility on a calendar year basis, Michigan Bell concluded that Davis was not eligible for FMLA leave for the 2005 absences, because she did not work 1,250 hours in the twelve months prior to January 3, 2005.[994] As such, Michigan Bell denied Davis's request to convert the unexcused absences to FMLA leave, and Davis was terminated.[995]

Davis sued, claiming that Michigan Bell had retaliated against her for asserting her FMLA rights, interfered with her FMLA rights by denying her leave, and failed to properly notify her of her ineligibility.[996] Both parties moved for summary judgment.[997] Davis argued that "because her absences in January of 2005 were part of a continuous absence that began in 2004, the absences in January of 2005 were part of the intermittent FMLA leave that had been approved in September of 2004," and therefore, she was eligible for FMLA leave for her January 2005 absences.[998]

Michigan Bell countered that, under the FMLA, "eligibility for intermittent leave cannot be carried over from one twelve-month FMLA period to the next."[999] As such, because Michigan Bell's twelve-month FMLA period started over again in January 2005, Davis's eligibility needed to be re-evaluated at that time, and by then, she was no longer eligible.[1000]

The district court agreed with Michigan Bell and dismissed Davis's claims, concluding that she was not eligible for FMLA leave and therefore Michigan Bell could not have interfered with FMLA rights that she did not have, which in turn precluded Davis's retaliation claim.[1001]

---

992. *Davis*, 543 F.3d at 348-49.
993. *Id.* at 349.
994. *Id.*
995. *Id.*
996. *Id.*
997. *Id.*
998. *Davis*, 543 F.3d at 349-50.
999. *Id.* at 350.
1000. *Id.*
1001. *Id.*

The court also held that Davis could not maintain a claim on the basis that Michigan Bell allegedly failed to provide her with proper notice of ineligibility.[1002] Davis appealed the district court's determination that she was not eligible for FMLA leave in January 2005.[1003]

The Sixth Circuit isolated the issue on appeal as a determination of the date on which Davis's leave "commenced," because under applicable FMLA regulations, FMLA eligibility must be determined "as of the date leave commences."[1004] If Davis's 2005 leave actually "commenced" in September 2004, when she began her intermittent leave, then she would have been eligible for her January 2005 leave because she was eligible in September 2004. If, however, her January 2005 leave was a new leave, then her eligibility was re-calculated as of that date, by which time she was no longer eligible, having worked fewer than 1,250 hours in the preceding twelve months.[1005] The court observed that "[w]hen an employee has a chronic health condition for which intermittent FMLA leave has been approved, the leave commences upon the occurrence of the first absence caused by that condition, and it extends to cover every other absence caused by the condition during the same twelve-month FMLA period."[1006] However, the court stated, a series of absences taken as part of one period of intermittent leave "can only extend to the end of the twelve-month FMLA period in which it began."[1007] All absences taken after a new twelve-month FMLA period begins, even if due to the same chronic condition, constitute a new period of intermittent FMLA leave.[1008] To hold otherwise, according to the court, would mean that an employee would never have to reestablish eligibility for FMLA leave, leaving the employee "perpetually entitled to twelve weeks of FMLA leave per year based on a single eligibility determination."[1009]

Thus, Davis's January 2005 leave occurred in a new twelve-month FMLA period and she needed to re-qualify for leave under the FMLA.[1010] Michigan Bell had properly re-evaluated Davis's eligibility in January 2005 and properly determined that she was ineligible.[1011]

The appellate court opined further that the argument that it was improper to re-evaluate Davis's eligibility in the middle of her leave

---

1002. *Id.*
1003. *Id.* at 347, 350.
1004. *Davis*, 543 F.3d at 350 (citing 29 C.F.R. § 825.110(d)).
1005. *Id.* at 350.
1006. *Id.* (citing Barron v. Runyon. 11 F. Supp. 2d 676, 681 (E.D. Va. 1998)).
1007. *Id.* at 350-51 (citing *Barron*, 11 F. Supp. 2d at 681-83).
1008. *Id.* (citing *Barron*, 11 F. Supp. 2d at 681).
1009. *Id.* (citing *Barron*, 11 F. Supp. 2d at 682-83).
1010. *Davis*, 543 F.3d at 351.
1011. *Id.*

revealed a fundamental misunderstanding of intermittent leave, namely that a continuous period of absence should be considered a single period of leave.[1012] Rather than being made up of a single continuous absence, intermittent leave actually is a period of leave in and of itself, which must end at some time.[1013] While Davis argued that her intermittent leave should end at some arbitrary time, that is, when she returned to work on January 15, the court held that logic required that her period of intermittent leave concluded at the end of the twelve-month FMLA period, because "the FMLA speaks in terms of twelve-month periods."[1014] Accordingly, the Sixth Circuit held that the district court had correctly granted summary judgment for Michigan Bell.[1015]

4. Equitable Estoppel

Certain FMLA plaintiffs have argued equitable estoppel in response to the employer-defendant's claims that the plaintiff was not entitled to the requested leave. In such instances, the plaintiff contends that the employer is precluded, or estopped, from contesting the plaintiff's entitlement to leave due to the employer's alleged failure to comply with the Act.[1016] Such arguments are predicated on the common law doctrine of equitable estoppel, which the Sixth Circuit has recognized as a "judicial doctrine of equity which operates apart from any underlying statutory scheme."[1017] Consequently, "even in the absence of a formal regulation, the doctrine of equitable estoppel itself may apply where an employer who has initially provided notice of eligibility for leave later seeks to challenge that eligibility."[1018] In the Sixth Circuit, however, two lines of cases have developed, applying two different approaches to equitable estoppel claims under the FMLA. The first approach, adopted in *Sorrell v. Rinker Materials Corp.*,[1019]arose from the U.S. Supreme Court's decision in *Heckler v. Community Health Services of Crawford County, Inc.*[1020] In *Heckler*, the Supreme Court described the "core

1012. *Id.*
1013. *Id.*
1014. *Id.* at 351-52.
1015. *Id.* at 352-53.
1016. *See, e.g.*, Sorrell v. Rinker Materials Corp., 395 F.3d 332, 336 (6th Cir. 2005).
1017. Mutchler v. Dunlap Mem'l Hosp., 485 F.3d 854, 861 (6th Cir. 2007)(quoting Kosakow v. New Rochelle Radiology Assocs., P.C., 274 F.3d 706, 724 (2d Cir.2001)).
1018. *Id.* at 861 (quoting Woodford v. Community Action of Greene County, Inc., 268 F.3d 51, 57 (2d Cir. 2001)).
1019. *Sorrell*, 395 F.3d at 336.
1020. 467 U.S. 51 (1984).

principles" of equitable estoppel as "tolerably clear."[1021] Adopting in essence the principle set forth in *Restatement (Second) of Torts* section 894(1), the Court held that a

> party claiming the estoppel must have relied on its adversary's conduct in such a manner as to change his position for the worse, and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading.[1022]

This in essence was the rule applied by the Sixth Circuit in *Sorrell*, albeit without elaboration.[1023]

Subsequent to *Sorrell*, the Sixth Circuit applied a different analysis in *Mutchler v. Dunlap Memorial Hospital*,[1024] essentially adopting the equitable estoppel standard applied in ERISA cases.[1025] Under this standard, a claimant asserting equitable estoppel must show: (1) conduct or language amounting to a representation of material fact; (2) awareness of true facts by the party to be estopped; (3) an intention on the part of the party to be estopped that the representation be acted on, or conduct toward the party asserting the estoppel such that the latter has a right to believe that the former's conduct is so intended; (4) unawareness of the true facts by the party asserting the estoppel; and (5) detrimental and justifiable reliance by the party asserting estoppel on the representation.[1026]

The Sixth Circuit's next foray into equitable estoppel/FMLA disputes occurred in *Davis v. Michigan Bell Telephone*.[1027] That court rejected Davis's claim that Michigan Bell should be estopped from denying that she was ineligible for FMLA leave because the company failed to provide her with notice of ineligibility, finding that Michigan Bell had never made any representations to Davis about her future FMLA eligibility.[1028] Given this factual finding, the court did not have cause to address which equitable estoppel analysis should be applied.

An opportunity to clarify the standard was presented, however, in *Dobrowski v. Jay Dee Contractors, Inc.*,[1029] decided during the *Survey*

1021. *Id.* at 57.
1022. *Id.* at 59.
1023. *Sorrell*, 395 F.3d at 336.
1024. *Mutchler*, 485 F.3d at 861.
1025. *Id.*
1026. *Id.*
1027. 543 F.3d 345 (6th Cir. 2008); *see supra* notes 982-1015 and accompanying text.
1028. *Id.* at 353.
1029. 571 F.3d 551 (6th Cir. 2009).

period. Dobrowski was a mechanical engineer assigned to a joint-venture project relating to the Detroit Wastewater Treatment Plant.[1030] As a child, Dobrowski was diagnosed with epilepsy, and while the disease was controlled with a variety of mitigating measures, he experienced occasional seizures as an adult.[1031] Consequently, in consultation with his doctor, Dobrowski decided to undergo an elective surgery to treat his epilepsy. In mid-July 2004, he scheduled his surgery for October of 2004.[1032]

After scheduling this surgery, Dobrowski informed his employer, Jay Dee Contractors, Inc. (Jay Dee), of the date. Because subsequent conversations suggested that the parties were confused about the length of leave Dobrowski required, Dobrowski met with his supervisor and Jay Dee's president to discuss the leave.[1033] Following this meeting, Dobrowski was provided with the necessary paperwork to request FMLA leave, and was granted such.[1034] Dobrowski utilized his medical leave and returned to work in December 2004.[1035] However, upon Dobrowski's return, he was informed that his services were no longer needed because the work to which he had been assigned was winding down.[1036]

Following his termination, Dobrowski filed suit against Jay Dee, alleging violations of the FMLA.[1037] Jay Dee moved for summary judgment, claiming that Dobrowski was not eligible for FMLA leave because Jay Dee did not employ the requisite number of employees (fifty employees within a seventy-five-mile radius) in order to be considered a covered "employer" under the Act.[1038] In response, Dobrowski argued that Jay Dee should be equitably estopped from denying his eligibility for FMLA leave because, before his surgery, Jay Dee told Dobrowski that he was eligible for leave and granted him leave.[1039] The lower court

1030. *Id.* at 552-53.
1031. *Id.* at 553.
1032. *Id.*
1033. *Id.*
1034. *Id.*
1035. *Dobrowski*, 571 F.3d at 553.
1036. *Id.*
1037. *Id.* at 554. Dobrowski's suit was initially filed in state court, alleging a violation of Michigan's Handicapper's Civil Rights Act. The suit was later amended to add an FMLA claim, which caused Jay Dee to remove the action to federal court. *Id.* The district court declined to exercise supplemental jurisdiction over Dobrowski's state claim, however, and remanded that claim to state court, leaving only Dobrowski's FMLA claim to be decided by the district court. *Id.*
1038. *Dobrowski*, 571 F.3d at 554. *See* 29 U.S.C.A. § 2611(2) (West 2010).
1039. *Dobrowski*, 571 F.3d at 554.

rejected Dobrowski's argument, and granted summary judgment for Jay Dee.[1040] Dobrowski appealed.[1041]

The Sixth Circuit Court of Appeals focused on whether Jay Dee's initial acknowledgement of Dobrowski's eligibility and its approval of his FMLA request equitably estopped the company from subsequently denying that Dobrowski was protected by the FMLA.[1042] Observing that the Sixth Circuit "recognizes that in certain circumstances equitable estoppel applies to employer statements regarding an employee's FMLA eligibility, preventing the employer from raising non-eligibility as a defense,"[1043] the court then addressed which of the two different formulations of the rule — *Sorrell/Heckler* or *Mutchler* — should be used.[1044] The court noted that the *Sorrell/Heckler* and *Mutchler* standards were manifestly different, because the latter required evidence that the party asserting estoppel was aware of the "true facts" and/or evidence that the other party intended the statement to be relied upon.[1045] The court highlighted the impact of this greater standard on Dobrowski's claim, writing that "Jay Dee [likely] was not intentionally or recklessly misleading Dobrowski. It simply was mistaken as to how many employees it had near the Wastewater plant."[1046]

The court therefore found the *Sorrell/Heckler* standard to be the better approach, because the *Mutchler* standard "risks making the doctrine intolerably unclear" by "impos[ing] an additional knowledge or bad faith requirement."[1047] Further, the court held that the *Heckler* standard properly "allocate[d] the risk of a mistaken statement of FMLA eligibility to the employer and not the employee" because the employer is in the better position to know the employee's eligibility.[1048] "[A] rule requiring the employee to know her status regardless of what an employer says is especially perverse because the employer may have exclusive control over employee data such that an employee could not — even if she wished — review the employer's assertion of eligibility prior to taking leave."[1049]

1040. *Id.*
1041. *Id.*
1042. *Id.*
1043. *Id.* at 544.
1044. *Id.*
1045. *Dobrowski*, 511 F.3d at 556.
1046. *Id.*
1047. *Id.*
1048. *Id.* at 557.
1049. *Id.*

Applying this analysis to Dobrowski, the court concluded held that Jay Dee did in fact misrepresent to Dobrowski that he was eligible for FMLA leave, when in fact he was not.[1050] Dobrowski's claim nonetheless failed because he was unable to show that he detrimentally relied upon Jay Dee's misrepresentation.[1051] Dobrowski failed to present evidence that he "'changed his position' in reliance on the belief that his leave would be FMLA-protected."[1052] Dobrowski could have met this burden by

> point[ing] to some action or statement that indicated that his decision to have the surgery was contingent on his understanding of his FMLA status; or perhaps evidence that raises an inference of such contingency – for example, a record that he made an inquiry as to his rights, asked for written confirmation of his leave arrangement, or changed his behavior after being told he was eligible. . . . At the very least, Dobrowski could have placed an affidavit on the record stating that he would have forgone the surgery but for his belief that his job status was protected by the FMLA.[1053]

The court found not only that Dobrowski failed to present such evidence, but that the evidence actually showed that Dobrowski decided to have the surgery and scheduled it before any discussion with Jay Dee regarding his eligibility for FMLA leave.[1054] The court therefore affirmed the district court's grant of summary judgment to Jay Dee.[1055]

5. Retaliation Claims

In *Daugherty v. Sajar Plastics, Inc.*,[1056] the Sixth Circuit held that a manager's statements relating to an employee's medical leave constituted direct evidence of discrimination in violation of the FMLA. James Daugherty worked for Sajar Plastics as a maintenance technician from 1991 until he was laid off on January 5, 2004.[1057] Daugherty maintained buildings and equipment for Sajar, often using hand and power tools. He also operated dangerous machinery including forklifts, drill presses, and

1050. *Id.*
1051. *Dobrowski*, 571 F.3d at 557.
1052. *Id.* (citing *Heckler*, 467 U.S. at 61).
1053. *Id.* at 558.
1054. *Id.*
1055. *Id.* at 559.
1056. 544 F.3d 696 (6th Cir. 2008).
1057. *Id.* at 699.

overhead cranes.[1058] In 2000 and 2001, Daugherty suffered flare-ups of a previous back injury, for which he was prescribed Oxycontin and Duragesic (both opiate-based medications).[1059] During this time, Daugherty requested and was granted intermittent FMLA leave.[1060] In October 2003, Sajar's Human Resources Director, Ronald Alexander, allegedly told Daugherty that he "faced the choice of either taking disability retirement or losing his job."[1061] In November 2003, Daugherty requested a leave of one to two months, supported by medical certification stating a return to work date of January 2004.[1062] Daugherty alleged that when he asked for this extended leave, Alexander told him that if he took the extended leave "there would not be a job waiting for [him] when [he] returned."[1063]

Soon after Daugherty went on leave, Sajar began a period of layoffs resulting from decreases in its business.[1064] Daugherty was the least senior of the maintenance workers and Sajar therefore laid him off in January 2004, upon his return from leave.[1065]

In February 2004, Sajar experienced an upturn in its business and recalled Daugherty, contingent upon the successful completion of a physical examination conducted by a doctor who was routinely used by the company.[1066] The doctor determined that Daugherty was physically able to perform the functions of the position, but expressed concern that the medication Daugherty was taking could "cause an impairment of perception or judgment which might lead to an injury to himself or others."[1067] The HR Director called Daugherty and told him that if he provided documentation regarding a "reduction in his medications," the company would consider re-employing him.[1068] Daugherty failed to provide the required documentation.[1069] After requesting the necessary information twice, Human Resources sent Daugherty a letter stating that his position had been filled, but he could be considered for future positions, if he provided the requested information.[1070] Daugherty never

1058. *Id.*
1059. *Id.*
1060. *Id.*
1061. *Id.*
1062. *Daugherty*, 544 F.3d at 699.
1063. *Id.*
1064. *Id.*
1065. *Id.* at 700.
1066. *Id.*
1067. *Id.*
1068. *Daugherty*, 544 F.3d at 701.
1069. *Id.* at 701.
1070. *Id.*

supplied the information and was therefore terminated because he failed to return to work within six months of being placed on layoff status.[1071]

Daugherty filed suit in an Ohio state court, alleging disability discrimination as well as termination in retaliation for his FMLA leave.[1072] The federal district court granted Sajar's motion for summary judgment on both claims, and Daugherty appealed.[1073]

On appeal, the Sixth Circuit Court of Appeals found that Sajar's decisions regarding Daugherty's employment did not violate the ADA.[1074] However, the Sixth Circuit reversed the district court's dismissal of Daugherty's FMLA claim.[1075] The court determined that the district court had incorrectly analyzed Daugherty's FMLA retaliation claim under the *McDonnell-Douglas* burden-shifting analysis, because Daugherty had provided direct evidence of FMLA retaliation, based on the "unambiguous" threat made by Daugherty's supervisor.[1076] The court therefore concluded that a jury could find a "clear connection" between the FMLA leave and Sajar's decision to terminate Daugherty's employment, despite Sajar's contention that absent any discriminatory motive, it still would have made the same decision to lay off and not rehire Daugherty.[1077]

VIII. CONCLUSION

After several years of relative quiet on the employment law front, this survey period was seemingly one of transitions — the transition to a newly-reconstituted Michigan Supreme Court, new guidance from the U.S. Supreme Court and the Sixth Circuit on the scope of retaliation and discrimination claims, and newly implemented FMLA regulations. These developments may well offer new opportunities for aggrieved employees and new challenges for labor and employment law practitioners. Additional changes may well be on the horizon; the Michigan Supreme Court has already granted leave in the *Brightwell* venue decision, and leave applications are pending in several other cases addressed in this article. The times, they are a-changing.

1071. *Id.*

1072. *Id.* The case was removed to federal district court on the basis of federal question jurisdiction. *Id.*

1073. *Daugherty*, 544 F.3d at 702.

1074. *Id.* at 703-706. Daugherty's ADA claims are outside the scope of this article and therefore are not discussed in detail.

1075. *Id.* at 708.

1076. *Id.*

1077. *Id.* at 709-710.