CIVIL RIGHTS

JOHN R. RUNYAN JR.†

I. INTRODUCTION

The *Survey* period produced four appellate decisions under the Elliott-Larsen Civil Rights Act[1] and five appellate decisions under the Whistle-blowers' Protection Act,[2] counting separately the court of appeals and supreme court's decisions in *Debano-Griffin v. Lake County*.[3] The court of appeals' decision in *Weishuhn v. Catholic Diocese of Lansing*[4] actually involved claims under both the Elliott-Larsen Civil Rights Act, *supra,* and the Whistle-blowers' Protection Act, *supra*, but other decisions like *Mortimer v. Alpena County Probate Court*[5] also have implications for claims under both statutes.

Only three of the eight court of appeals' decisions involved published opinions, all involving claims under the Elliott-Larsen Civil Rights Act.[6] All but *Weishuhn* arose in the public sector. Continuing a

† Managing Director, Sachs Waldman, P.C.; Adjunct Professor, Wayne State University Law School. A.B., 1969, University of Michigan; J.D. *cum laude*, 1972, Wayne State University.

1. MICH. COMP. LAWS ANN. §§ 37.2101-37.2804 (West 2001 & Supp. 2010).

2. MICH. COMP. LAWS ANN. §§ 15.361-15.369 (West 2004).

3. 486 Mich. 938 (2010), *rev'g* No. 282921, 2009 WL 3321510 (Mich. Ct. App. Oct. 15, 2009).

4. 287 Mich. App. 211 (2010).

5. No. 290958, 2010 WL 2077147 (Mich. Ct. App. May 25, 2010).

6. MICH. COMP. LAWS ANN. §§ 37.2101—.2804.

recent trend, the one supreme court decision issued during the *Survey* period was not the product of full hearing and briefing but a peremptory order issued by the court in lieu of granting leave to appeal.

II. THE ELLIOT-LARSEN CIVIL RIGHTS ACT

A. Campbell v. Department of Human Services

In *Campbell v. Dept. of Human Services*,[7] a panel of the court of appeals affirmed a jury verdict for a female employee of the department who alleged that she had been denied promotion to a center director position at a youth facility because of her gender.[8] The primary issue upon appeal was whether the trial court had properly considered evidence of acts outside the three-year limitations period in denying the department's motion for summary disposition.[9] The trial court rejected the department's suggestion that reliance upon such evidence was foreclosed by the supreme court's decision in *Garg v. Macomb County Community Mental Health Services*,[10] relying instead upon the court of appeals' unpublished, *per curiam* opinion in *Ramanathan v. Wayne State University Board of Governors (Ramanathan II)*.[11]

The court of appeals noted that the Supreme Court's opinion in *Garg* "did not squarely address whether acts or events outside the limitations period can be used as background evidence to establish a pattern of discrimination in order to prove a timely claim."[12] Instead, *Garg* simply overruled the "continuing violations" doctrine recognized in *Sumner v. Goodyear Tire & Rubber Co.*[13] and held that a person must file a claim under the Civil Rights Act within three years of the date upon which his or her cause of action accrues.[14] In addition, the court noted, as had the panel which decided *Ramanathan II*, that the Supreme Court had amended its opinion in *Garg* for the express purpose of deleting a footnote which had stated that acts outside the limitations period could not be used as background evidence of discrimination.[15] Even though the Supreme Court reversed in part the court of appeals' decision in

7. 286 Mich. App. 230 (2009), *appeal dismissed*, 487 Mich. 859 (2010).
8. *Campbell*, 286 Mich. App. at 232.
9. *Id.* at 234.
10. 472 Mich. 263 (2005), *amended by* 473 Mich. 1205 (2005).
11. No. 266238, 2007 WL 28416 (Mich. Ct. App. Jan. 4, 2007), *rev'd in part on other grounds*, 480 Mich. 1090 (2008).
12. *Campbell*, 286 Mich. App. at 236.
13. 427 Mich. 505 (1986).
14. *Garg*, 472 Mich. at 284.
15. *Campbell*, 286 Mich. App. at 236.

Ramanathan II,[16] its opinion remanding the case to the circuit court did not address the "background evidence" issue, an omission decried by Justice Markman in his dissenting opinion.[17]

Accordingly, relying upon (1) the absence of a bright line rule in *Garg*; (2) the supreme court's amendment of its opinion in that case to delete the infamous footnote fourteen, and (3) the Supreme Court's failure to address the "background evidence" issue in *Ramanathan*, the court of appeals held in *Campbell* "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."[18] Both the majority opinion and Judge Murray in his separate opinion, concurring in part and dissenting in part, observed that this holding is consistent with federal law, as reflected in the U.S. Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan*.[19] Thus, the court of appeals concluded that the trial court had not erred in relying upon evidence of acts outside the limitations period in denying the department's motion for summary disposition.[20]

Judge Murray and the remainder of the panel disagreed over whether the trial court should have granted the department's motion for a directed verdict.[21] The majority concluded that the trial court correctly denied the department's motion, rejecting the suggestion that the plaintiff failed to establish the fourth element of a prima facie case of discrimination—namely, that the promotion was given to another under circumstances giving rise to an inference of discrimination.[22] Relying in part upon the evidence of acts outside the limitations period—showing the department's pattern of promoting men who were less qualified than Campbell—the majority also found that the plaintiff had created a triable issue regarding whether the department's stated reasons for promoting the male candidate–objective scoring criteria and a written recommendation–were pretextual.[23] In contrast, Judge Murray concluded (1) that the evidence Campbell proferred did not show that she was clearly the better-qualified candidate; and (2) even if the evidence allowed the jury to determine whether the department promoted the better-qualified candidate, that evidence did not allow the jury to determine whether the department's decision was a *discriminatory* one–

16. Ramanathan v. Wayne State Univ. Bd. of Governors, 480 Mich. 1090 (2008).
17. *Id.* at 1097 (Markman, J., dissenting).
18. *Campbell*, 286 Mich. App. at 238.
19. 536 U.S. 101, 113 (2002).
20. *Campbell*, 286 Mich. App. at 238-39.
21. *Id.* at 239-40.
22. *Id.* at 240.
23. *Id.* at 240-43.

i.e., whether the department's stated reason for promoting the male candidate was a pretext for sex discrimination.[24]

Finally, the majority opinion also addressed two damage issues raised by the department. First, the majority concluded that the jury's award of $328,000 in economic damages to Campbell was reasonably based on the evidence, was not excessive and should not be disturbed.[25] In this regard, because the department had approved the verdict form and because it was impossible to determine with any accuracy from that form what portion of the jury's award, if any, was for future damages, the majority rejected the department's argument that a portion of the jury's award should be reduced to its present-day value in accordance with MCLA section 600.6306.[26] Second, the majority also concluded that Campbell's testimony regarding her own subjective feelings was sufficient to support the jury's award of non-economic damages, rejecting the department's attack upon her supporting medical documentation and concluding that neither objective evidence nor medical testimony was required to substantiate a claim for emotional damages.[27]

Implicated by the court of appeals' decision is the extent to which Michigan courts can and should rely upon federal law in interpreting the Elliott-Larsen Civil Rights Act.[28] Historically, while Michigan courts are not bound by federal law in interpreting the Elliott-Larsen Civil Rights Act, they frequently turned to federal precedent for guidance in reaching their decisions, particularly in interpreting the employment provisions of Article 2.[29] More recently, however, the Michigan Supreme Court has eschewed reliance upon federal precedent in interpreting comparable provisions of Article 2 of Elliott-Larsen. Illustrative are *Elezovic v. Ford Motor Co.*,[30] *Garg v. Macomb Mental Health*,[31] *Lind v. City of Battle Creek*,[32] *Chambers v. Tretto, Inc.*,[33] and *Donajkowski v. Alpena Power Co.*[34]

---

24. *Id.* at 251-52.

25. *Id.* at 243-44.

26. *Campbell*, 286 Mich. App. at 244-45.

27. *Id.* at 245-46.

28. MICH. COMP. LAWS ANN. §§ 37.2101-37.2803 (1976).

29. *See, e.g.*, Radke v. Everett, 442 Mich. 368, 381-82 (1993); Victorson v. Dept. of Treasury, 439 Mich. 131, 142 (1992); Sumner v. Goodyear Tire & Rubber Co., 427 Mich. 505, 525 (1986); Matras v. Amoco Oil Co., 424 Mich. 675, 683-85 (1986).

30. 472 Mich. 408, 421-24 (2005).

31. 472 Mich. 263, 283-84 (2005).

32. 470 Mich. 230 (2004).

33. 463 Mich. 297, 313-16 (2000).

34. 460 Mich. 243, 252 (1999).

B. Hamed v. Wayne County

Hamed v. Wayne County[35] is a case brought under Article 3 of the Elliott-Larsen Civil Rights Act,[36] which makes it unlawful to "[d]eny an individual the full and equal enjoyment of the goods, services, facilities, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex or marital status."[37] Both "place of public accommodation" and "public service" are broadly defined by the statute.[38] However, the definition of public service contains the following exception: "public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment."[39]

On September 7, 2001, Tara Hamed was arrested on an outstanding warrant for unpaid child support in Livingston County.[40] The Livingston County Circuit Court ordered her to enter an inpatient substance abuse treatment program and to report to the Livingston County Jail on September 14, 2001, to begin serving a forty-five-day sentence, unless she enrolled in a drug treatment program.[41]

In the meantime, Hamed was transferred to the custody of Wayne County sheriff deputies, who transported her to the Wayne County Jail pursuant to outstanding warrants for probation violation.[42] At the jail, Deputy Reginald Johnson took custody of Hamed. He allegedly told her that he could "help" her and that she would be indebted to him for his help—statements which she interpreted as an offer of favorable treatment in exchange for sexual favors.[43] In response to her protests upon being assigned to a cockroach-infested cell, Johnson also asked Hamed whether she would be a "good girl."[44]

Johnson released Hamed from her cell and directed her to a surveillance-free office, where he partially removed her clothing, fondled her breasts and buttocks and ejaculated on her clothing, after unsuccessfully attempting to penetrate her.[45] After Hamed reported Johnson's sexual misconduct, his employment was terminated and he

35. 284 Mich. App. 681 (2009).
36. MICH. COMP. LAWS ANN. §§ 37.2301-.2304 (West 1976).
37. MICH. COMP. LAWS ANN. § 37.2302(a).
38. MICH. COMP. LAWS ANN. § 37.2301(a) & (b).
39. MICH. COMP. LAWS ANN. § 37.2301(b).
40. *Hamed*, 284 Mich. App. at 683, *lv. to appeal granted*, 486 Mich. 996 (2010).
41. *Id.*
42. *Id.* at 683-84.
43. *Id.* at 684.
44. *Id.*
45. *Id.*

was convicted of criminal sexual conduct.[46] Defendants, which included Wayne County, the Wayne County Sheriff's Department, Johnson and others, did not dispute that Johnson sexually assaulted Hamed inside the jail.[47]

Hamed appealed from the trial court's orders granting the county and sheriff's departments' motions for summary disposition with respect to her hostile environment and *quid pro quo* sexual harassment claims under Article 3 of Elliott-Larsen.[48] The county and department cross appealed from the trial court's denial of their motion to strike certain allegations in Hamed's amended complaint, as well as from the trial court's rejection of certain of their alternative agreements in support of their motions for summary disposition.[49]

The defendants argued that Hamed was an "individual serving a sentence of imprisonment" within the meaning of the exception to the definition of "public service" contained in Article 3 and therefore should not have been allowed to pursue a claim under Elliott-Larsen.[50] The court of appeals rejected this argument, carefully pointing out that "[t]he exception in MCLA 37.2301(b) does not encompass all legally incarcerated persons [but only] those who are 'serving a sentence of imprisonment' in a state or county correctional facility."[51] The court also rejected Defendant's argument that Hamed was serving a sentence of imprisonment while confined in the Wayne County jail, noting that Hamed was not scheduled to begin serving the conditional sentence imposed by the Livingston County Circuit Court until September 14, 2001, and that her detention by Wayne County authorities was simply the result of the discovery of an outstanding warrant during a routine LEIN (Law Enforcement Information Network) search.[52]

The court of appeals also addressed at length Hamed's argument that the trial court had erred in concluding that Wayne County and the Wayne County Sheriff's Department could not be held liable for Deputy Johnson's actions under a theory of *respondeat superior*.[53] The court saw the issue before it–which it described as "a question of first impression in Michigan"–as whether the rule of strict, vicarious liability for employers, applicable in *quid pro quo* sexual harassment cases under Article 2 of Elliott-Larsen, is equally applicable to a *quid pro quo* sexual harassment

46. *Hamed*, 284 Mich. App. at 684.
47. *Id.*
48. *Id.* at 683.
49. *Id.*
50. *Id.* at 693-94.
51. *Id.* at 694-95.
52. *Hamed*, 284 Mich. App. at 695-97.
53. *Id.* at 685-93.

claim of sexual assault arising under the public accommodation and public service provisions of Article 3.[54] The court noted that the definition of sexual harassment contained in Elliott-Larsen's definitional provisions, MCLA section 37.2103(1), applies across-the-board to claims of discrimination in employment, public accommodations or public services, education or housing and therefore transported to Hamed's claims under Article 3 the standard for establishing a claim of *quid pro quo* harassment in the employment context: "By analogy, a plaintiff claiming *quid pro quo* harassment in the context of public accommodations or public services must show that the provider of those services or accommodations, or the provider's agent, used her submission to or rejection of the unwanted conduct as a factor in a decision affecting the plaintiff's access to the public services or accommodations."[55]

After concluding that Hamed's amended complaint sufficiently alleged a violation of Article 3 of Elliott-Larsen when judged by this standard,[56] the court of appeals turned its attention to the dispute at the heart of the case: the Defendants' vicarious liability for Deputy Johnson's sexual assault.[57] In this regard, Hamed relied upon the Michigan Supreme Court's decision in *Champion v. Nationwide Security, Inc.*,[58] in which the court had held that a supervisor's sexual assault (there rape) of a subordinate employee is a form of *quid pro quo* sexual harassment[59] and that "an employer [is] strictly liable where the supervisor accomplishes the [sexual assault] through the exercise of his supervisory power over the victim."[60] On the other hand, defendants argued that *Champion* was not controlling (1) because the supreme court's holding in *Champion* was "weakened" by the court's subsequent decision in *Zsigo v. Hurley Medical Center*;[61] and (2) because *Champion* applies only to employment discrimination claims arising under Article 2 of Elliott-Larsen.[62]

The court of appeals first reconciled *Champion* and *Zsigo*, pointing out that contrary to the defendants' argument, *Zsigo* did not overrule

54. *Id.* at 685-86.
55. *Id.* at 686-87.
56. *Id.* at 687.
57. *Id.* at 688-93.
58. 450 Mich. 702 (1996).
59. *Id.* at 708-11.
60. *Id.* at 713-14.
61. 475 Mich. 215 (2005).
62. *Hamed*, 284 Mich. App. at 688-91.

Champion "because *Champion*'s holding was not based on Restatement Agency 2d, §219(2)(d)."[63]

In other words, the offender in quid pro quo sexual harassment does not merely use his employment or agency as an opportunity to exploit the victim sexually (as did the nursing assistant in *Zsigo*); rather, his authority over the subordinate is the tool that is instrumental and integral in his commission of the sexual exploitation. The nursing assistant in *Zsigo* did not use authority delegated by his employer to render the plaintiff vulnerable to his abusive conduct. He merely seized the opportunity that arose when he was alone with a restrained patient who was not capable of acting in her own best interests. In contrast, the supervisor in *Champion* used his authority as a means of committing the assault. He selected the plaintiff to be the only security guard with him in the hospital and offered to use his authority to her advantage if she granted him sexual favors. When she refused, he used his managerial authority to direct her to an isolated area where he could lock her in a room, cut her off from outside help, and force himself on her. The *Zsigo* court recognized a distinction between seizing an opportunity to commit unlawful conduct and using one's authority over a subordinate as a means of subjecting that subordinate to abusive and unlawful conduct.[64]

Next, the court recognized that the facts pleaded by Hamed made her situation much more like *Champion*'s than *Zsigo*'s: Deputy "Johnson's managerial authority was an instrument and integral tool in perpetrating the sexual assault."[65] Finally, the court rejected the argument that *Champion*'s holding was limited to actions under Article 2 of Elliott-Larsen as "clearly inconsistent with the plain language of MCLA 37.2103(1), in which each of the three categories of sexual harassment is expressly defined as applying to 'employment, public accommodations or public services, education or housing.'"[66]

In summary, the court of appeals concluded that *Hamed* had established a valid claim for *quid pro quo* sexual harassment in violation of Article 3 of Elliott-Larsen and that the trial court erred in granting summary disposition to Defendants on the ground that Johnson acted outside the scope of his authority when he sexually assaulted her.[67] It also reaffirmed the holding of *Champion* that employers are vicariously liable for acts of *quid pro quo* sexual harassment committed by their

63. *Id.* at 689.
64. *Id.* at 690 (citations omitted).
65. *Id.* at 691.
66. *Id.*
67. *Id.* at 693.

employees when those employees use their supervisory authority to perpetrate the harassment.[68]

C. Ramanathan v. Wayne State University Board of Governors

The Michigan Supreme Court's decision in *Ramanathan v. Wayne State University Board of Governors,* [69] previously discussed in connection with *Campbell v. Department of Human Services,*[70] was also the subject of discussion in both the 2007 [71] and 2008 [72] Surveys. Upon remand from the Supreme Court, Wayne State sought summary disposition for the third time and, for the second time, the Ingham County Circuit Court granted the Defendants' motion.[73] Also for the second time, a panel of the court of appeals reversed the trial court's decision and remanded for further proceedings.[74]

Ramanathan was a social work professor of Asian Indian descent who complained that he had been denied tenure because of his race/national origin and in retaliation for his previous, internal complaints of discrimination.[75] In its third motion for summary disposition, Wayne State attacked the factual support for Ramanathan's retaliation claim, suggesting that the claim was "necessarily limited only to the decision of Tilden Edelstein, Ph.D., the university Provost who denied tenure last" and who had no knowledge of Ramanathan's previous complaints of discrimination.[76] The trial court granted the motion, concluding (1) that Provost and Vice President Tilden G. Edelstein was "the final decision maker regarding tenure;" (2) that Ramanathan failed to demonstrate any causal relationship between his protected activity and the tenure decision, and (3) that Edelstein's "careful and detailed" explanation for denying tenure "manifestly demonstrates" that the decision "was not caused in whole or in part by [Ramanathan's] protected activity."[77]

---

68. *Hamed,* 284 Mich. App. at 693.

69. 480 Mich. 1090 (2008).

70. 286 Mich. App. 230 (2009).

71. Patricia Nemeth & Deborah Brouwer, *Employment & Labor Law, 2007 Ann. Survey of Michigan Law*, 54 WAYNE L. REV. 167, 172-75 (2008).

72. Leonid Feller, *Civil Rights, 2008 Ann. Survey of Michigan Law*, 55 WAYNE L. REV. 119, 129-33 (2009).

73. Ramanathan v. Wayne State Univ. Bd. of Governors, No. 289147, 2010 WL 1330290 (Mich. App. Apr. 6, 2010) (*Ramanathan* III).

74. *Id.* at *13.

75. *Id.* at *1-2.

76. *Id.* at *5.

77. *Id.*

The court of appeals' reversal of the trial court's decision was based in part upon the law of the case doctrine. [78] In *Ramanathan I,* [79] the court of appeals had held that Plaintiff's Elliott-Larsen claims accrued in April 1995, when Provost Marilyn Williamson denied Ramanathan's tenure application. [80] The court of appeals reasoned that the supreme court's subsequent determination that Ramanathan's "sole, actionable claim, by operation of the applicable statute of limitations, is the decision of the provost of Wayne State University to deny the plaintiff's request for tenure" implicitly recognized that Ramanathan had established a cause of action arising from Provost Williamson's denial of tenure.[81] Under the law of the case doctrine, therefore, both the trial court and the court of appeals were bound by the determination that "plaintiff's cause of action accrued when Provost Williamson denied tenure, and not when Provost Edelstein affirmed Provost Williamson's decision." [82]

In addition, the court of appeals emphasized that the "adverse employment action" or wrong of which Ramanathan complained was the denial of tenure and that Provost Williamson's 1995 decision denying tenure, which forced Ramanathan to seek other employment, was the adverse action, not Provost Edelstein's decision a year later denying his grievance and affirming Provost Williamson's decision.[83] Finally, the court of appeals rejected Wayne State' argument that Provost Edelstein's affirmation "sterilized" Provost Williamson's decision denying tenure, eliminating the causal connection with Dean Leon Chestang's retaliatory animus since Edelstein (unlike Williamson) had no knowledge of Ramanathan's internal EEO complaints.[84] It distinguished the cases upon which Wayne State had relied, including one which analyzed the issue under a "cat's paw" theory of liability.[85]

Given the fact that it was addressing Ramanathan's claims for the third time, the court of appeals also took the opportunity to "head off" any issues which it suspected might otherwise precipitate yet another

78. *Id.* at *5-7.

79. No. 227726, 2002 WL 551097 (Mich. App. Apr. 12, 2002).

80. *Id.* at *8-9.

81. *Ramanathan III*, No. 289147, 2010 WL 1330290 at *6 (Mich. App. Apr. 6, 2010).

82. *Id.* at *7.

83. *Id.* at *8-9.

84. *Id. at *9.*

85. *Id.* The "cat's paw theory" is derived from the fable, "The Monkey and the Cat" penned by Jean de La Fontaine, in which a rather clever and unscrupulous monkey persuades an unsuspecting cat to snatch chestnuts from a fire—burning her paws in the process. In today's parlance, a cat's paw is a "tool" or one used by another to accomplish his purposes. *See, e.g.*, Staub v. Procter Hosp., 560 F.3d 647, 655-59 (7th Cir. 2009), rev'd, 131 S. Ct. 1186 (2011).

appeal. First, the court addressed Wayne State's likely challenge on remand to Provost Williamson's *awareness* of Chestang's animus, declaring that Ramanathan "has presented evidence giving rise to a reasonable inference that Chestang's animus impacted Provost Williamson's decision."[86] Second, again invoking the law of the case doctrine, the court of appeals reminded the parties that it had already concluded in *Ramanathan I* that plaintiff had "come forward with sufficient evidence to create a genuine issue of material fact" with respect to the causation element of his *prima facie* case of retaliation.[87] Third, the court also ruled that Ramanathan had raised genuine issues of material fact regarding whether the stated reasons for denying him tenure were pretexts for retaliation.[88] It found that the trial court had "neglected to properly apply the *McDonnell Douglas* burden shifting analysis and engaged in impermissible fact finding" and that a rational fact finder could conclude that Ramanathan was qualified for tenure and that Dean Chestang's views about his scholarship and teaching lacked factual support or were the product of bad faith generated by retaliatory motives.[89] Fourth and finally, the court of appeals rejected the trial court's reliance upon "academic freedom" as a basis for deference to Wayne State's decision, noting that by failing to include in Elliott-Larsen an exception insulating academic institutions from the reach of the statute, the Legislature had "established that it deemed workplace discrimination at colleges and universities no more acceptable than discrimination in other contexts." [90]

D. Weishuhn v. Catholic Diocese of Lansing

In *Weishuhn v. Catholic Diocese of Lansing*,[91] a panel of the court of appeals, after surveying a large body of federal and state case law, recognized a First Amendment-based "ministerial exception," shielding the employment relationship between a religious institution and its ministerial employees from discrimination claims under Article 2 of Elliott-Larsen.[92] The court adopted the Sixth Circuit's straightforward approach to determine whether the exception applies: "First, courts must determine whether the employer is a 'religious institution.' Second,

86. *Ramanathan III*, No. 289147, 2010 WL 1330290, at *10.
87. *Id.* at *11.
88. *Id.* at *12.
89. *Id.*
90. *Id.* at *13.
91. 279 Mich. App. 150 (2008).
92. *Id.* at 173.

courts must determine whether the employee is a 'ministerial employee.'[93]

Because it was undisputed that St. Mary's Elementary School where plaintiff Weishuhn worked was a "religious institution," the critical question was whether Weishuhn was a ministerial employee.[94] The court of appeals concluded that the trial court had properly denied Defendants' motion for summary disposition under MCR 2.116(C)(4) because factual issues remained for trial, but found that resolution of these issues was for the judge and not a jury.[95] Accordingly, the court remanded the case to the trial court for a determination of whether Weishuhn was a ministerial employee, considering the following non-exhaustive list of factors:

> (1) Whether Weishuhn had primarily religious *duties* and *responsibilities* in the sense that her primary *duties* consisted of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship;
>
> (2) Whether Weishuhn's *duties* had religious significance;
>
> (3) Whether Weishuhn's *position* was inherently, primarily, or exclusively religious, whether that *position* entailed proselytizing on behalf of defendants, whether that *position* had a connection to defendants' doctrinal mission, and whether that *position* was important to defendants' spiritual and pastoral mission; and
>
> (4) Whether Weishuhn's *functions* were essentially liturgical, that is, related to worship, and whether those *functions* were inextricably intertwined with defendants' religious doctrine in the sense that Weishuhn was intimately involved in the propagation of defendants' doctrine and the observance and conduct of defendants' liturgy by defendants' congregation.[96]

On remand, the trial court concluded that Weishuhn was a ministerial employee and therefore dismissed her claims under Article 2 of Elliott-

93. *Id.* at 177 (citing Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225 (6th Cir. 2007)).

94. *Id.* at 177.

95. *Id.* at 175-77.

96. *Id.* at 178.

Larsen and Michigan's Whisteblowers' Protection Act pursuant to MCR 2.716(C)(4).[97] A panel of the court of appeals affirmed.[98]

With respect to Weishuhn's Elliott-Larsen claim, the court of appeals found that the trial court had correctly concluded that Weishuhn's duties and responsibilities were primarily religious in nature.[99] Although Weishuhn had been hired in part to teach mathematics, the court found that she also taught religion, was actively involved in planning student masses and other religious activities and that a determination of her ministerial status should not hinge entirely on the number of classes taught.[100] The court also found that Weishuhn incorporated religious teachings into her mathematics classes and that her arguments failed to take into account the amount of classroom time spent by her on each subject, as well as the additional time spent in planning masses and preparing students for confirmation and reconciliation classes.[101] Accordingly, the court of appeals concluded that the trial court had not erred in deciding that Weishuhn's duties were primarily religious, notwithstanding the fact that she had taught four mathematics and two religious classes during her final year of teaching.[102]

With respect to the second factor—whether Weishuhn's duties had religious significance—the court of appeals concluded that this factor also weighed in favor of the determination that Weishuhn was a ministerial employee.[103] In this regard, the court found that "all aspects of [Weishuhn's] work had religious significance," from teaching religion classes, planning masses, preparing students for confirmation and reconciliation services and even incorporating religious instruction into her math classes.[104]

With regard to the third factor, the court of appeals agreed with the trial court that Weishuhn's "position was primarily religious because, as a teacher of religion, she was involved in proselytizing on behalf of the church."[105] In addition, the court observed as the trial court concluded, educating and indoctrinating children is important to the work of the Church and Weishuhn's involvement in planning masses and preparing students for confirmation and reconciliation are connected to

97. Weishuhn v. Catholic Diocese of Lansing, 287 Mich. App. 211, 213-14 (2010).
98. *Id.*
99. *Id.* at 218.
100. *Id.*
101. *Id.*
102. *Id.* at 219.
103. *Weishuhn,* 287 Mich. App. at 219.
104. *Id.*
105. *Id.*

Defendants' doctrinal, spiritual and pastoral mission.[106] Finally, the court of appeals also noted Weishuhn's admission that even in her math classes, she could not separate her religious beliefs and that she talked about God and religion as a part of her mission to promote and reinforce Christian values.[107]

With respect to the fourth factor–whether Weishuhn's functions were essentially liturgical (i.e., related to worship), the court of appeals conceded that this factor presented a "closer question, given that Weishuhn did not assume a liturgical role" with respect to the congregation as a whole.[108] However, the court nevertheless cited the facts (1) that Weishuhn "was intimately involved in liturgical planning of worship services, as well as confirmation and reconciliation services for students," and (2) that "her role as a religion teacher involved propagation" of the church's religious doctrine to students, "which included guidance in worship services" and other rituals.[109]

On an issue of first impression, the court of appeals also ruled that the ministerial exception shielded the employment relationship between religious institutions and its ministerial employees from claims under the Whistle-blowers' Protection Act.[110] The court relied on the fact that the constitutionally-based exception took precedence over statutorily-based claims and that the Whistle-blowers' Protection Act and Elliott-Larsen share the common purpose of preventing "discrimination in employment on the basis of statutorily recognized factors rooted in public policy," warranting parallel treatment.[111] The court of appeals therefore adopted as its position the general consensus that the ministerial exception "operates to bar any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions."[112]

In reaching this conclusion, the court cautioned that the ministerial exception does not apply to all employment decisions by religious institutions nor even to all claims by ministers; instead, it applies only to claims involving a religious institution's choice as to who will perform spiritual functions.[113] The court also emphasized that certain claims by ministers are not foreclosed by the ministerial exception, including

106. *Id* at 219-20.
107. *Id* at 220.
108. *Id.*
109. *Weishuhn,* 287 Mich. App. at 220.
110. *Id.* at 221.
111. *Id.* at 221-22.
112. *Id.* at 225 (citing Petruska v. Gannon Univ., 462 F.3d 294, 307 (3rd. Cir. 2006)).
113. *Id* at 226.

certain "independent" tort and contract actions.[114] However, because Weishuhn's claim alleged that her employment was terminated in retaliation for her protected, "whistle-blowing" activity, and because the trial court correctly concluded that she was a ministerial employee, that court correctly granted summary disposition with respect to her Whistle-blowers' Protection Act claim, albeit for the wrong reason.[115] "Termination of a ministerial employee by a religious institution is an absolutely protected action under the First Amendment, regardless of the reason for doing so."[116]

III. THE WHISTLE-BLOWERS' PROTECTION ACT

A. Mortimer v. Alpena County Probate Court

Another decision which has implications for both Elliott-Larsen and Michigan's Whistle-blowers' Protection Act is *Mortimer v. Alpena County Probate Court*.[117] Jane Mortimer was employed by the Alpena County Probate Court as the probate register.[118] On May 19, 2008, Mortimer was advised (1) that effective immediately, she would no longer be serving as probate register; (2) that she was suspended with pay; and (3) that she had until June 9, 2008, to sign an "employment departure agreement," under which she would agree to "resign with certain financial benefits but subject [also] to certain conditions."[119]

At Mortimer's request, the deadline for accepting the employment departure agreement was once extended.[120] However, Mortimer never signed nor accepted the employment departure agreement.[121] On June 23, 2008, the probate court sent her a letter advising that her employment had been terminated, effective June 21, 2008.[122]

On September 11, 2008, Mortimer filed a complaint under the Whistle-blowers' Protection Act, alleging that her employment had been terminated in retaliation for her challenge to a probate judge's practice of appointing 'standby' guardians in adult guardian proceedings, a practice

---

114. *Id.*
115. *Weishuhn*, 287 Mich. App. at 227.
116. *Id.*
117. Mortimer v. Alpena Cnty. Prob. Ct., No. 290958, 2010 WL 2077147 (Mich. Ct. App. May 25, 2010).
118. *Id.* at *1.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

which she claimed violated the Estates and Protected Individual's Code.[123]

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(7), concluding that Mortimer's claim accrued on May 19, 2008 and that her Whistle-blowers' Protection Act claim was therefore barred by the running of the ninety-day statute of limitations contained in section 3 of the act.[124] In an unpublished, per curiam opinion, a panel of the court of appeals reversed.[125] Although the court acknowledged that a claim of discriminatory discharge normally accrues on the "last day worked," it recognized an exception to that rule where, as here, a claimant's last day worked actually preceded the discharge.[126]

Here, while Mortimer was advised on May 19, 2008, that she would be suspended with pay from her employment as probate register, it had not yet been determined whether her employment would be involuntarily terminated.[127] The Court therefore found distinguishable on its facts its previous decision in *Parker v. Cadillac Gage Textron, Inc.*,[128] where it applied the "last day worked" rule to employees who knew on their last day of work that their employment had been terminated.[129] In contrast, because Mortimer still had the option of resigning as of the last day that she worked and because "a claim for discriminatory discharge cannot arise until a claimant has been discharged,"[130] the court of appeals concluded that Mortimer's Whistle-blowers' Protection Act claim did not accrue until June 21, 2008, the effective date of her termination.[131]

B. Forner v. Robinson Township Board

The court of appeals' unpublished opinion in *Forner v. Robinson Township Board*[132] also involved a statute of limitations issue. As in *Mortimer v. Alpena County Probate Court, supra*, the trial court had granted the Board's motion for summary disposition pursuant to MCR 2.116(C)(7), concluding that Forner's Whistle-blowers' Protection Act

123. *Mortimer*, 2010 WL 2077147, at *1.
124. *Id.*; MICH. COMP. LAWS ANN. §15.363(1) (2004).
125. *Mortimer*, 2010 WL 2077147, at *3.
126. *Id.* at *2.
127. *Id.* at *3.
128. *Id.* at *2-3.
129. *Id.* at *2.
130. *Id.* at *3.
131. *Mortimer*, 2010 WL 2077147, at *3.
132. Forner v. Robinson Twp. Bd., No. 287384, 2009 WL 2515742 (Mich. Ct. App. Aug. 18, 2009).

claim was barred by the running of the ninety-day limitations period.[133] Also as in *Mortimer*, the court of appeals found that the trial court had erred in granting summary disposition on this ground.[134]

Both the trial court and the court of appeals agreed that Forner's claim accrued on July 13, 2005, when the Township's Board ordered him to refrain from performing any inspections in an area which had been damaged by floods and eliminated all of his building inspection responsibilities.[135] Forner commenced an action in federal court under 42 USC section 1983 and the Whistle-blowers' Protection Act on October 7, 2005, eighty-five days later.[136] When the federal court dismissed without prejudice his Whistle-blowers' Protection Act claim on August 8, 2007, Forner waited another 30 days before refiling that claim in the Ottawa County Circuit Court.[137]

The trial court reasoned that irrespective of any tolling while the claim pended in federal court, 115 days had elapsed between the Board's decision on July 13, 2005, and Forner's filing of his circuit court complaint, rendering untimely his Whistle-blowers' Protection Act claim.[138] However, the court of appeals recognized that because Forner requested that the federal court exercise supplemental jurisdiction over his Whistle-blowers' Protection Act claim, 28 USC section 1367(d) required that the applicable limitations period be tolled "while the claim is pending and for a period of 30 days after it is dismissed . . . ."[139] Accordingly, the court of appeals concluded that the trial court had erred in determining that the claim was barred by the running of the ninety-day limitations period.[140]

At the same time, however, the court of appeals concluded that the trial court had properly granted the Board's motion for summary disposition pursuant to MCR 2.116(C)(10).[141] In this regard, although the court agreed with Forner that he had suffered an adverse employment action when the Board relieved him of certain responsibilities, significantly diminished his duties and occasioned a material reduction in his compensation and benefits, it found that he failed to show that the legitimate business reasons which the Board had articulated for its

133. *Id.* at *4.
134. *Id.* at *5.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Forner*, No. 287384, 2009 WL 2515742, at *5.
139. *Id.*
140. *Id.*
141. *Id.* at *9.

actions were pretextual.[142] The court of appeals concluded that "[t]he Board's decision to consolidate all building inspection activities under the auspices of one central entity qualifies as a legitimate business reason for terminating Forner's at-will, independent contractor building inspection responsibilities,"[143] and that Forner failed to proffer evidence creating an issue of fact with respect to whether the Board's stated reason was pretextual.[144]

C. Giffels v. Millington Community Schools

Giffels v. Millington Community Schools[145] is another unpublished opinion of the Michigan Court of Appeals dealing with the issue of causation. Linda and Lawrence Giffels were both employees of Millington Community Schools—Linda a tenured Junior High School teacher and Lawrence as driver education coordinator.[146] The Giffels' employment was terminated when they submitted altered receipts for reimbursement of expenses incurred in attending a driver's education conference in Mount Pleasant, and then lied when interviewed about the discrepancy by the school district.[147]

The trial court denied the school district's motion for summary disposition with respect to the Giffels' claims under the Whistle-blowers' Protection Act, concluding that factual issues remained as to whether the Giffels were discharged because of their false expense reports or instead, as they alleged, in retaliation for a report which they made to the township about the ineligibility of an electee to the school board.[148] In an unpublished, per curiam opinion, the court of appeals reversed.[149] The court concluded that the Giffels had failed to produce evidence sufficient

142. *Id.* at *6-8.

143. *Id.* at *7.

144. *Forner,* 2009 WL 2515742, at *8-9. The Court also found that the business reasons identified for Forner's termination as the township's mechanical inspector—his conflict of interest when inspecting the mechanical work of his competitors—also qualified as legitimate. *Id.* at *7. In addition, the court found that "Forner's letters to the editor and his emails to the Board include scurrilous and inflammatory accusations of personal misconduct against Board members," giving the Board adequate grounds to terminate his position as the Township's mechanical inspector." *Id.* at *9.

145. No. 286785, 2010 WL 1330363 (Mich. Ct. App. Apr. 6, 2010).

146. *Id.* at *1. Linda also challenged the termination of her employment under the Michigan Teacher Tenure Act. That challenge was the subject of a separate decision of the Michigan Court of Appeals. *See* Giffels v. Millington Cmty. Sch. Bd. of Educ., No. 287175, 2010 WL 364196 (Mich. Ct. App. Feb. 2, 2010).

147. *Giffels*, 2010 WL 364196.

148. *Id.*

149. *Id.* at *1.

to establish that their report of illegal activity caused the school district's decision to sanction them, or to create a genuine issue of material fact with respect to that question.[150]

The court of appeals emphasized that "[s]tanding alone, a temporal relationship between protected activity and any adverse employment action does not establish a causal connection."[151] The court also cautioned that when circumstantial evidence is used to prove causation, "the circumstantial proof must facilitate reasonable inferences of causation, not mere speculation."[152] Here, the school district offered evidence that it had legitimate reasons to sanction the Giffels through a process which began well before their report of illegal activity and the Giffels were unable to show that the school district's investigation was a pretext to disguise its retaliatory motives.[153] The court also rejected the Giffels' reliance upon evidence of selective enforcement and disproportionate treatment to establish that the school district's stated reasons for discharging them were pretextual.[154]

D. Debano-Griffin v. Lake County

Cheryl Debano-Griffin was employed as Director of the Lake County 911 department.[155] The county had a contract with Life EMS, Inc., to provide ambulance service.[156] Beginning in 2004, Debano-Griffin expressed concern, including complaints to the Lake County Board of Commissioners, that occasional shortages of ambulances in the County, due to out-of-county transfers being handled by Life EMS, were causing safety violations.[157]

Debano-Griffin also reported to a public body—the Lake County Emergency Telephone System Committee and the Board of Commissioners—that $50,000 authorized by the voters for ambulance service had been transferred from the ambulance fund to the 911 fund.[158] Although this transfer was later reversed, Debano-Griffin discovered about the same time that funding for her position, which had initially

150. *Id.* at *4.
151. *Id.* at *2.
152. *Id.* at *3.
153. *Giffels,* 2010 WL 1330363 at *4.
154. *Id.*
155. Debano-Griffin v. Lake Cnty., No. 282921, 2009 WL 3321510, at *1 (Mich. Ct. App. Oct. 15, 2009).
156. *Id.*
157. *Id.*
158. *Id.*

been included in the county's proposed budget, had been eliminated.[159] Subsequently, Debano-Griffin's position was in fact eliminated, allegedly for budgetary reasons, and her employment with the County was terminated.[160]

Debano-Griffin brought suit under the Whistle-blowers' Protection Act, alleging that the County had terminated her employment because she had reported to a public body a known or suspected violation of law. The trial court denied the County's motion for summary disposition under MCR 2.116(C)(8) and (C)(10), but a panel of the court of appeals, one judge dissenting, reversed.[161] The majority opinion agreed with the county that Debano-Griffin had failed to establish that she was engaged in protected activity within the meaning of the Whistle-blowers' Protection Act and therefore, found it unnecessary to decide whether she had established a causal connection between her complaints and the elimination of her position.[162]

The majority reasoned the following:

> [That because Debano-Griffin] had only a subjective belief that defendants' activities or suspected activities violated unspecified 'governing rules' (which may indeed have just been the suggestions of 911 directors she had been in contact with on how to make sure ambulance service was efficiently provided), and because she could not identify what law, rule or regulation had been violated by the movement of funds from the ambulance account to another county account, she failed to establish the prima facie elements of a claim under the WPA.[163]

In a separate, concurring opinion, Judge Whitbeck suggested that the real question before the court was "with what degree of specificity must an employee describe a violation–whether known or merely suspected–of an actually and contemporaneously existing law" in order to be engaged in protected activity under the Act.[164] Relying in part upon the court of appeals' previous decision in *Roulston v. Tendercare, Inc.*,[165] Judge Whitbeck's answer to that question was that "an employee must provide a description of the connection between the known or suspected violation

159. *Id.*
160. *Id.*
161. *Debano-Griffin*, 2009 WL 3321510, at *8.
162. *Id.* at *4.
163. *Id.*
164. *Id.*
165. 239 Mich. App. 270, 279 (2000).

that the employee reports and an actually and contemporaneously existing law that would give notice to an *objectively reasonable* employer of both the known or suspected violation *and* the actually and contemporaneously existing law."[166]

Applying this standard, Judge Whitbeck concluded that because Debano-Griffin, under an objective standard, "failed to establish that she was engaged in a protected activity under the Act, the trial court erred when it denied summary disposition."[167] He reasoned that "while the Act [did] not require her to prove an actual violation of law, it did require her to give some description, even if expressed in the most basic terms, of an actual law that she knew or suspected that Lake County and its Board of Commissioners had violated.[168] Because under an objective standard, Debano-Griffin failed to do this, summary disposition was appropriate, in Judge Whitbeck's view.[169]

Judge Kelly dissented from the panel's opinion, concluding that "Debano-Griffin presented evidence from which a reasonable trier of fact could conclude that she was engaged in an activity protected under the Whistle-blowers' Protection Act and that [the] termination" of her employment "was causally related to her engagement in protected activity."[170] He rejected the majority's construction of the Whistle-blowers' Protection Act as limited "only to those employees who report . . . suspected violations of specific laws, regulations or rules that are actually known to the employee," suggesting that it would defeat "the remedial purposes of the statute by discouraging employees from reporting a suspected violation of law where the employee is uncertain whether there is a specific law covering the conduct at issue."[171] Judge Kelly concluded that Debano-Griffin had engaged in protected activity when she reported the allegedly inappropriate use of ambulances and the inappropriate transfer of funds in a good faith belief that those actions amounted to a violation of an existing law, regulation or rule or, in the case of the transfer, that it was done with the intent to ultimately use the funds in a manner prohibited by law.[172]

---

166. *Debano-Griffin*, 2009 WL 3321510 at *4.
167. *Id.* at *8.
168. *Id.*
169. *Id.*
170. *Id.* at *9.
171. *Id.* at *10.
172. *Debano-Griffin*, 2009 WL 3321510, at *11. Judge Kelly also rejected the defendant's argument that the trial court should have granted its motion for summary disposition "because [Debano-Griffin] failed to present evidence sufficient to establish a question of fact as to whether her termination was causally related to her protected engagement in a activity." *Id.* at *11.

As has become its wont, in lieu of granting leave to appeal, the Michigan Supreme Court recently entered an order reversing the judgment of the court of appeals and remanding the case for consideration of the issues raised by the defendant but not addressed by the court of appeals during its initial review.[173] The supreme court found that the court of appeals had erred when it decided that Debano-Griffin had failed to establish that she was engaged in protected activity within the meaning of the Whistle-blowers' Protection Act.[174] Relying upon its previous decision in *City of South Haven v. Van Buren County Board of Commissioners,*[175] the Court emphasized that "funds derived from levies must be used for the purpose stated in the ballot."[176] It therefore concluded that when Debano-Griffin reported her concern that the ambulance funds were being used for purposes other than those stated in the ballot, she was reporting a "suspected violation of law," and was engaged in activity protected under the statute.[177] Because the supreme court found that Debano-Griffin "reported a suspected violation of an actual law," it found it unnecessary to determine "whether the reporting of a suspected violation of a *suspected* law constitutes protected activity" under the Whistle-blowers' Protection Act.[178]

IV. CONCLUSION

The *Survey* period produced a number of noteworthy court of appeals' decisions. In *Campbell v. Department of Human Services*, a panel of the Court held that trial courts may rely upon evidence of discriminatory acts occurring outside the limitations period in deciding motions for summary disposition under the Elliott-Larsen Civil Rights Act.[179] In *Hamed v. Wayne County,* another panel borrowed upon principles established under the employment provisions of Article 2 of Elliott-Larsen in deciding that a woman victimized while incarcerated had established a valid claim of *quid pro quo* sexual harassment in violation of the public accommodation provisions of Article 3.[180] In *Weishuhn v. Catholic Diocese of Lansing*, the court of appeals recognized and applied a First Amendment-based "ministerial exception," shielding the employment relationship between a religious

173. Debano-Griffin v. Lake County, 486 Mich. 938 (2010).
174. *Id.*
175. 478 Mich. 518 (2007).
176. *Debano*, 486 Mich. at 938.
177. *Id.*
178. *Id.*
179. 286 Mich. App. 230, 232 (2009).
180. 284 Mich. App. 681, 687 (2009).

institution and its ministerial employees from claims under Elliott-Larsen and the Whistle-blowers' Protection Act.[181] Finally, in *Mortimer v. Alpena County Probate Court*, and *Forner v. Robinson Township Board,* the court of appeals weighed in on issues affecting the application of the Whistle-blowers' Protection Act's short, ninety-day statute of limitations, decisions which may have an ameliorative effect in the future.[182]

For its part, the supreme court issued one decision under the Whistle-blowers' Protective Act, *supra,* reversing a decision of the court of appeals which had narrowly defined the scope of the whistle-blowing activity protected under the statute.[183] The supreme court also granted leave to appeal in *Hamed v. Wayne* County, but its decision on that appeal will have to be the subject of a later *Survey.* An application for leave to appeal is pending in *Campbell v. Department of Human Services,*[184] and it remains to be seen whether that decision or other decisions by the court of appeals during the *Survey* period will prompt further review.

181. 279 Mich. App. 150, 173 (2008).

182. No. 290958, 2010 WL 2077147 (Mich. Ct. App. May 25, 2010); No. 287384, 2009 WL 2515742 (Mich. Ct. App. Aug 18, 2009).

183. *Debano-Griffin*, 486 Mich. at 938.

184. 286 Mich. App. 230 (2009), *lv. pending*, 486 Mich. 960 (2010).