EMPLOYMENT AND LABOR LAW

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I. INTRODUCTION

During the *Survey* period, the Michigan Supreme Court and the Michigan Court of Appeals each confronted a variety of employment law issues with varying approaches.[1] In some instances the courts sidestepped critical issues, such as whether shareholders in a professional corporation are employees for purposes of the Elliot-Larsen Civil Rights Act (ELCRA).[2] In other cases, the courts addressed head-on the

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1. Generally, the *Survey* period extends from June 1, 2011 to May 30, 2012, although several noteworthy decisions subsequent to that time frame also were included.

2. Hall v. Stark Reagan, P.C., 493 Mich. 903; 823 N.W.2d 274 (2012); MICH. COMP. LAWS ANN. §§ 37.2101-2803 (West 2012).

circumstances under which courts can hold an employer vicariously liable for its employee's rape of a third party,[3] and whether an arbitration clause included in a shareholder agreement extends to the age discrimination claims of shareholders whose professional corporations redeemed their shares under the agreement.[4] The court of appeals clarified that the non-retaliation provision of the Worker's Disability Compensation Act (WDCA) does apply to instances in which the employee files a claim for benefits after an employer terminates him, as long as the employee exercises a right to some benefit under the Act prior to the termination.[5] The court of appeals also applied, for the first time, the judicial estoppel doctrine to bar an ELCRA claim brought by a plaintiff who failed to list that claim in her bankruptcy proceeding,[6] and relied on a dictionary to construe language in the Public Employment Relations Act (PERA)[7] and the Sales Representative Commissions Act (SRCA).[8] In an important case interpreting the Whistleblower's Protection Act (WPA), the court of appeals reversed the denial of a judgment notwithstanding verdict (JNOV) motion because it concluded that the plaintiff had acted primarily in his own financial interest in threatening to report an alleged ordinance violation.[9] The Michigan Supreme Court has already heard oral argument on that case, so next year's *Survey* article may include a very different discussion of whether the WPA contains an implicit requirement that the plaintiff act in the public interest, rather than his own.[10]

The Federal Family Medical Leave Act (FMLA) continued to be a fruitful source of litigation during the *Survey* period, as the federal courts resolved issues regarding when a volunteer can be counted as an employee for purposes of employer liability under the FMLA,[11] the type

3. Hamed v. Wayne Cnty., 490 Mich. 1, 9-16; 803 N.W.2d 237 (2011).

4. *Hall*, 493 Mich. at 903.

5. *See generally,* Cuddington v. United Health Servs., 298 Mich. App. 264, 272-74; 826 N.W.2d 519 (2012); MICH. COMP. LAWS ANN. § 418.301(13) (West 2012).

6. *See generally*, Spohn v. Van Dyke Pub. Schs., 296 Mich. App. 470, 479-81; 822 N.W.2d 239 (2012); MICH. COMP. LAWS ANN. §§ 37.2101-2803.

7. *See generally* Pontiac Sch. Dist. v. Pontiac Educ. Ass'n, 295 Mich. App. 147; 811 N.W. 2d 64 (2012), *appeal denied*, 493 Mich. 861; 820 N.W.2d 901 (2012); MICH. COMP. LAWS ANN. § 423.215 (West 2012).

8. *See generally* Radina v. Wieland Sales, Inc., 297 Mich. App. 369, 374-75; 824 N.W.2d 587 (2012); MICH. COMP. LAWS ANN. § 600.2961 (West 2012).

9. *See generally* Whitman v. City of Burton, 293 Mich. App. 220, 228-29; 810 N.W.2d 871 (2011), *leave granted* 491 Mich. 913; 811 N.W.2d 490 (2012) (citing MICH. COMP. LAWS ANN. §§ 15.361-369 (West 2012)).

10. *Id.*; MICH. COMP. LAWS ANN. §§ 15.361-369.

11. *See generally* Mendel v. City of Gibraltar, 842 F. Supp. 2d 1035 (E.D. Mich. 2012); 29 U.S.C.A. § 2601 (West 2010).

of notice that must be provided to employees regarding the method used by the employer for determining the twelve month period for leave entitlement,[12] the applicability of the *McDonnell Douglas*[13] framework to FMLA entitlement claims,[14] and the circumstances under which an employer may raise a good faith belief defense.[15]

II. PLEADING AND PROVING DISCRIMINATION CLAIMS

A. The Prima Facie Case and Direct Evidence

Michigan's Elliott-Larsen Civil Rights Act (ELCRA)[16] prohibits an employer from basing employment decisions on the religion, race, color, national origin, age, sex, height, weight, or marital status of its applicants or employees.[17] Proof of illegal discriminatory treatment can "be established by direct evidence or by indirect or circumstantial evidence."[18] Direct evidence is evidence that "if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions."[19] In addition, direct evidence must provide proof that the discrimination was causally connected to the adverse employment decision.[20] If the plaintiff produces adequate direct evidence, the case should be submitted to the fact-finder for a determination as to whether the plaintiff's claims are true.[21] Summary disposition thus is not appropriate in such cases, because, in essence, direct evidence is an admission of bias or discriminatory intent, leaving the jury to determine only whether the admission actually occurred, and, if so, whether that bias caused the adverse employment action.[22]

If the plaintiff does not provide direct evidence of discrimination, the case is analyzed under a framework first established by the United States

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12. *See generally* Thom v. Am. Standard, Inc., 666 F.3d 968, 973-74 (6th Cir. 2012); 29 U.S.C.A. § 2601.

13. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

14. Donald v. Sybra, Inc., 667 F.3d 757, 762 (6th Cir. 2012); 29 U.S.C.A. § 2601.

15. Seeger v. Cincinnati Bell Tel. Co., 681 F.3d 274, 287 (6th Cir. 2012); 29 U.S.C.A. § 2601.

16. MICH. COMP. LAWS ANN. §§ 37.2201-2804 (West 2012).

17. MICH. COMP. LAWS ANN. § 37.2202.

18. Sniecinski v. Blue Cross & Blue Shield of Mich., 469 Mich. 124, 132; 666 N.W.2d 186 (2003); MICH. COMP. LAWS ANN. § 37.2202.

19. *See Sniecinski*, 469 Mich. at 133 (quoting Hazle v. Ford Motor Co., 464 Mich. 456, 462; 628 N.W.2d 515 (2001)).

20. *Id.*

21. Harrison v. Olde Fin. Corp., 225 Mich. App. 601, 613; 572 N.W.2d 679 (1997).

22. *Id.* at 613-14.

Supreme Court in *McDonnell Douglas Corp. v. Green*,[23] which Michigan courts have since adopted.[24]

Typically, the direct evidence offered by plaintiffs consists of remarks made by supervisors or co-workers that contain some reference to protected categories such as race or gender.[25] It can be difficult to persuade a court that such statements constitute direct evidence, however, under the multi-part test used to analyze whether such statements are admissible evidence or merely "stray remarks."[26] Under this test, courts are to ask:

> (1) Were the disputed remarks made by the decisionmaker or by an agent of the employer uninvolved in the challenged decision? (2) Were the disputed remarks isolated or part of a pattern of biased comments? (3) Were the disputed remarks made close in time or remote from the challenged decision? (4) Were the disputed remarks ambiguous or clearly reflective of discriminatory bias?[27]

Depending on the balance of those factors, a court may admit a statement in support of a claim of discrimination, or exclude it under Michigan Rule of Evidence (MRE) 402 or 403.[28]

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23. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

24. *Sniecinski*, 469 Mich. at 133-34. 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." *Id.* (quoting DeBrow v. Century 21 Great Lakes, 463 Mich. 534, 538; 620 N.W.2d 836 (2001) (citing *McDonnell Douglas Corp.*, 411 U.S. at 802)). To establish this rebuttable prima facie case of discrimination, the plaintiff must come forth with evidence that (1) she is a member of a class protected by the ELCRA, (2) she suffered an adverse employment action, and (3) circumstances exist supporting an inference of unlawful discrimination. *Id.* Once the plaintiff presents the appropriate prima facie case, the employer has the opportunity to offer "a legitimate, non-discriminatory reason for the adverse employment action." *Id.* at 135. To avoid summary disposition, the plaintiff must establish that the proffered reason was merely a pretext for discrimination. *Id.* (citing MICH. COMP. LAWS ANN. §§ 31.2201-2804 (West 2012)).

25. *Id.* at 135.

26. *See generally* Krohn v. Sedgwick James of Mich., Inc., 244 Mich. App. 289, 300-02; 624 N.W.2d 212 (2001); *see also Sniecinski*, 469 Mich. at 136 n.8.

27. *Krohn*, 244 Mich. App. at 292.

28. *Id.* at 302-04; MICH. R. EVID. 402 ("All 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."); MICH. R. EVID. 403 ("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 consideration of undue delay, waste of time, or needless presentation of cumulative evidence.").

The difficulty of establishing direct evidence was apparent during the *Survey* period, in which courts rejected widely varying comments as insufficient to prove discrimination without benefit of inference.[29] For example, in *Macreno v. St. James Capital*,[30] a case alleging gender discrimination under the ELCRA, the court concluded that statements that the male plaintiff needed to "grow a set of balls," was a "flaming faggot" and "acted gay" were not direct evidence because the plaintiff's supervisor did not make the statements, and they were not made in conjunction with the decision to discharge the plaintiff for insubordination.[31] In *Haase v. IAV Automotive Engineering, Inc.*,[32] the plaintiffs were German engineers hired by the defendant's parent company in Germany and assigned temporarily to work in the United States. Disgruntled with their local work assignments, they filed suit under ELCRA, claiming national origin discrimination, based on their supervisor's remark that they could return to Germany if they did not like the conditions at the office.[33] Both the trial and appellate courts rejected this statement as direct evidence, noting that it was not made in the context of any disciplinary decision, and that it appeared to be nothing more than a factual statement that the plaintiffs, who were German nationals, had jobs waiting for them in Germany following their temporary assignment.[34]

A similar result occurred in *Hermann v. MidMichigan Health*, an ELCRA age and gender discrimination suit.[35] Sandra Hermann was vice president of corporate planning for MidMichigan Health, a hospital system.[36] In 2009, after the hospital began to experience financial difficulties, the hospital eliminated Hermann's position and discharged her.[37] The hospital's human resources (HR) director offered to let Hermann prepare the official announcement regarding her discharge (as apparently was the company's policy).[38] The HR director suggested that Hermann "just write down—you know, what we think is a good idea is that you say that you're retiring so you can stay home and play with your

29. *See generally* Macreno v. St. James Capital, No. 298590, 2011 WL 5604062, at *1 (Mich. Ct. App. Nov. 17, 2011).

30. *Id.* at *1.

31. *Id.* at *1; MICH. COMP. LAWS ANN. §§ 37.2201-2804 (West 2012).

32. No. 298348, 2011 WL 6004073 (Mich. Ct. App. Dec. 1, 2011).

33. *Id.* at *1-2; MICH. COMP. LAWS ANN. §§ 37.2201-2804.

34. *Haase*, 2011 WL 6004073 at *2.

35. Hermann v. MidMichigan Health, No. 301048, 2012 WL 205839, at *2-3 (Mich. Ct. App. Jan. 24, 2012); MICH. COMP. LAWS ANN. §§ 37.2201-2804.

36. *Hermann*, 2012 WL 205839 at *1.

37. *Id.*

38. *Id.*

granddaughter."[39] When Hermann declined to say that, the HR director said, "[w]ell, just, you know, just write something . . . because Rick . . . and Donna . . . don't want to say that there is a downsizing."[40]

Hermann sued for age and gender discrimination, and argued that the HR director's comments were direct evidence of age bias.[41] She also argued that a PowerPoint presentation given by the hospital's president at an internal meeting evidenced age bias, because one of the slides listed "aging workforce" as a challenge facing the company.[42]

The trial court dismissed Hermann's claims, and the court of appeals affirmed.[43] Both courts found Hermann's claim of direct evidence unpersuasive.[44] Regarding the PowerPoint presentation, the appellate court observed that Hermann had presented the president's comments out of context, and that while the hospital may have been concerned about the need to replace its aging workforce in the future, it was not reasonable to infer from that concern that the hospital was biased against older employees.[45] As for the HR director's suggestion that the announcement of Hermann's separation from the company referred to her retirement and a desire to play with her grandchildren, the court concluded that it appeared that the director's purpose was to get Hermann to agree to a statement characterizing her termination as voluntary.[46] The court wrote:

> [W]hile one might find the suggested statements to be unseemly under the circumstances, it [is] apparent from the context that Bruchhof was not expressing a bias against older workers, but rather was trying to get Hermann to make a statement that would place a more favorable light on Hermann's departure.[47]

Context again was critical in determining whether a reference to the plaintiff as "this young lady" was direct (or even indirect) evidence of gender discrimination in *Hart v. Goodrich Area Schools*.[48] There, Goodrich Area Schools hired Kimberly Hart as their superintendent in

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39. *Id.* at *6.
40. *Id.*
41. *Id.*
42. *Hermann*, 2012 WL 205839 at *5.
43. *Id.* at *7.
44. *Id.* at *6.
45. *Id.* at *5.
46. *Id.* at *6.
47. *Id.*
48. *Hart v. Goodrich Area Schs.*, No. 301936, 2012 WL 1415128, at *7 (Mich. Ct. App. Apr. 24, 2012).

2004, reporting to the Board of Education.[49] About a year later, the Board elected a new president, Michael Tripp.[50] Tripp was significantly more "hands-on" than the previous Board president, which caused some tension with Hart.[51] For example, Tripp was unhappy with Hart's insistence that communications regarding Board business go through her, even if they involved communications among Board members.[52] In February 2007, Tripp prepared an evaluation critical of Hart, noting that she appeared reluctant to delegate, was not keeping the Board informed, and was resistant to change.[53] Still, Hart negotiated a new contract with the Board in March 2007, extending from July 2007-June 2008.[54] In July 2007, however, the Board voted to suspend Hart with pay, appointed an interim superintendent and began the search for a replacement.[55] Hart responded by beginning a job search of her own, which was quite successful—within weeks she was hired as the superintendent in a different school district at a higher salary, and with a three year contract.[56] Hart did not resign her position with the Goodrich Area Schools, however, and when the Board learned that of a new position, it terminated Hart's contract.[57]

Hart sued, alleging gender discrimination and retaliation under ELCRA.[58] The trial court dismissed the suit, finding that Hart had not experienced an adverse employment action and so failed to present a prima facie case under ELCRA.[59] Hart appealed.[60]

The court of appeals agreed with the trial court that Hart failed to establish a prima facie claim of discrimination or retaliation, because she had not been subjected to an adverse employment action.[61] According to the court, what constitutes an adverse employment action is analyzed on a case-by-case basis using an objective standard; it is not enough that the plaintiff subjectively perceives an action to be adverse.[62] Further, the action must be materially adverse, "akin to termination of employment, a

49. *Id.* at *1.
50. *Id.*
51. *Id.*
52. *Id.* at * 2.
53. *Id.*
54. *Hart*, 2012 WL 1415128 at *3.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at *4.
60. *Hart*, 2012 WL 1415128, at *4.
61. *Id.* (citing Chen v. Wayne State Univ., 284 Mich. App. 172, 201, 208; 771 N.W.2d 820 (2009)).
62. *Id.* (citing *Chen*, 284 Mich. App. at 201-202.)

demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits or significantly diminished material responsibilities."[63]

Applying these principles, the court of appeals found that Hart had not experienced an adverse employment action.[64] While a termination usually would suffice as such, in this case, Hart precipitated her termination by seeking and accepting another position, and by failing to resign her position with the defendant.[65] As the court wrote:

> [T]he undisputed evidence showed that Hart effectively terminated her own employment contract by accepting employment as a superintendent for a new school district in direct contravention of the terms of her employment agreement with Goodrich Schools. Given this evidence, she cannot now shift responsibility for her actions to the school district.[66]

The court further held that the Board's suspension of Hart did not constitute an adverse action because she lost no pay or benefits, and had no expectation of increased compensation or continued employment under her one-year contract.[67] Her suspension also had no impact upon her ability to obtain other employment.[68] While Hart may have viewed her suspension as a negative event, her subjective belief was insufficient to establish this prong of her prima facie case.[69]

Hart's claim also was fatally flawed, according to the appellate court, because she failed to present either direct or circumstantial evidence of gender discrimination.[70] In so doing, the court rejected Hart's contention that Board President Tripp's reference to her as "this young lady" was direct evidence of age discrimination.[71] That statement was made during a contentious Board meeting, in response to criticism from a citizen about problems in the school district.[72] Tripp attempted to deflect that criticism by stating that the Board had hired "this young lady to take care

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63. *Id.* (citing *Chen*, 284 Mich. App. at 202 (internal quotations omitted)).

64. *Id.*

65. *Id.* at *5.

66. *Hart*, 2012 WL 1415128, at *5 n.2 (noting that Hart did not argue that she was constructively discharged, or forced to seek other employment because of the intolerable conditions at Goodrich.).

67. *Id.* at *5.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at *7.

72. *Hart*, 2012 WL 1415128, at *7.

of things."[73] The comment was unrelated to the Board's suspension or termination of Hart, and in fact, the court concluded that Tripp made it an effort to support Hart, and not as an expression of gender bias.[74] Because Hart had no other evidence from which discrimination or a retaliatory motive could be inferred, the court affirmed the grant of summary disposition to the defendant.[75]

B. Affirmative Defenses

The affirmative defense of judicial estoppel prevents a party from benefiting from the assertion of contrary or inconsistent positions in different judicial proceedings.[76] As the Michigan Court of Appeals has stated:

> The doctrine of judicial estoppel precludes a party as a matter of law from adopting a legal position in conflict with one earlier taken in the same or related litigation. It prevents a party from 'playing fast and loose' with the courts and protects the essential integrity of the judicial and administrative processes. The doctrine generally applies to situations in which the party subsequently asserting a contrary position prevailed in an earlier proceeding.[77]

As articulated by the United States Supreme Court, the purpose of the judicial estoppel doctrine is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment."[78]

During the *Survey* period, in *Spohn v. Van Dyke Public Schools,*[79] the Michigan Court of Appeals for the first time applied the doctrine to an ELCRA suit, barring the plaintiff from proceeding with her sexual harassment claim because she had failed to disclose the existence of that claim in her bankruptcy proceeding.[80]

Cindy Spohn, a former secretary for the Van Dyke Public Schools, filed suit against the school system in September 2009, alleging that she

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73. *Id.*

74. *Id.* at *8.

75. *Id.* at *9.

76. Mich. Gas Utils. v. Pub. Serv. Comm'n, 200 Mich. App. 576, 583; 505 N.W.2d 27 (1993).

77. *Id.* (citations omitted).

78. New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001) (citation omitted).

79. 296 Mich. App. 470; 822 N.W.2d 239 (2012).

80. *Id.* at 473; MICH. COMP. LAWS ANN. §§ 31.2201-2804 (West 2012).

had been sexually harassed from September through December 2008, in violation of the ELCRA.[81] In November 2008, however, Spohn and her husband had filed Chapter 13 bankruptcy, but omitted from their list of assets any potential claim against Van Dyke Public Schools, contrary to the requirements of the Bankruptcy Code.[82] Van Dyke Public Schools moved to dismiss Spohn's suit based on judicial estoppel, arguing that in failing to inform the bankruptcy court of her potential discrimination claim, Spohn in essence stated that she had no claim, a position entirely inconsistent with her subsequent claim for damages against the school.[83] Spohn opposed the motion, arguing that at the time of her bankruptcy filing, she was not sure that she did have a claim, and also that she did not benefit in any way from her failure to disclose the potential claim.[84]

The trial court rejected Spohn's arguments, granted summary disposition and denied Spohn's motion for reconsideration.[85] Spohn appealed.[86]

The court of appeals affirmed, concluding that, because Spohn failed to list her ELCRA claim as an asset in her bankruptcy, she was judicially estopped from proceeding with that suit.[87]

The appellate court reached this conclusion by first surveying the parameters of the judicial estoppel doctrine, observing that it "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase,'"[88] and is designed to preserve the integrity of the judicial process and avoid gamesmanship by parties to litigation.[89] Application of the doctrine does not, however, require that the party against whom it is invoked prevail on the merits in the earlier proceeding, but only that the court in that proceeding accept the party's position as true.[90]

The court further noted that federal courts, including the Sixth Circuit Court of Appeals, have widely recognized the doctrine, particularly with respect to bankruptcy proceedings.[91] Those courts have

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81. *Spohn*, 296 Mich. App. at 472, 474; MICH. COMP. LAWS ANN. §§ 31.2201-2804.

82. *Spohn*, 296 Mich. App. at 472-73.

83. *Id.* at 475.

84. *Id.*

85. *Id.* at 476-77.

86. *Id.* at 478.

87. *Id.* at 490; MICH. COMP. LAWS ANN. §§ 31.2201-2804 (West 2012).

88. *Spohn*, 296 Mich. App. at 479 (quoting White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472, 476 (6th Cir. 2010)).

89. *Id.*

90. *Id.* at 480 (citing Paschke v. Retool Indus., 445 Mich. 502, 509; 519 N.W.2d 441 (1994)).

91. *Id.* at 480-81 (citing *White*, 617 F.3d at 478).

developed a multi-pronged approach for assessing judicial estoppel claims, requiring analysis of whether:

> (1) the plaintiff assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) the plaintiff's omission did not result from mistake or inadvertence. In determining whether the plaintiff's conduct resulted from mistake or inadvertence, the reviewing court considers whether: (1) the plaintiff lacked knowledge of the factual basis of the undisclosed claims; (2) the plaintiff had a motive for concealment; and (3) the evidence indicates an absence of bad faith. In determining whether there was an absence of bad faith, the reviewing court will look, in particular, at the plaintiff's 'attempts' to advise the bankruptcy court of the plaintiff's omitted claim.[92]

The court of appeals analyzed Spohn's situation based on this paradigm, concluding first that Spohn had taken contrary positions in the bankruptcy court (that she had no claim against her employer) and in the state court (that she did have a claim against her employer).[93] The court next concluded that the bankruptcy court had adopted Spohn's position when it confirmed her Chapter 13 plan.[94] Addressing whether the omission of Spohn's possible harassment claim could have been inadvertent, the court noted that Spohn admittedly knew of the alleged harassment before she filed bankruptcy, and in fact met with an attorney about a possible ELCRA suit prior to the ultimate confirmation of her Chapter 13 plan.[95] Further, Spohn had a motive to conceal the existence of her claim—if hidden from the bankruptcy court, it would never become an asset of the bankruptcy estate, and Spohn would be able to keep all proceeds of the litigation for herself, rather than sharing them with her creditors.[96]

The appellate court also found unpersuasive Spohn's claim that the doctrine did not apply because her Chapter 13 plan was designed to pay 100% of her debts, observing instead that Spohn's failure to list her harassment claim meant that that no monies generated from her suit

92. *Id.* at 480-81 (quoting *White*, 617 F.3d at 478).
93. *Id.* at 481.
94. *Spohn*, 296 Mich. App. at 483.
95. *Id.* at 484 (citing MICH. COMP. LAWS ANN. §§ 31.2201-2804 (West 2012)).
96. *Id.* at 485.

would have been made available to her creditors.[97] The court also rejected Spohn's argument that because the bankruptcy court ultimately dismissed her bankruptcy, she did not benefit from the concealment of her ELCRA claim, because that dismissal might not have occurred if the bankruptcy court had known about the lawsuit.[98] The court also determined that Spohn had acted in bad faith because she took no steps to inform the bankruptcy court of her potential asset, a conclusion that was not ameliorated by Spohn's "ignorance of the law" defense.[99]

The court therefore found that dismissal of Spohn's ELCRA suit was legally and factually sound, and also consistent with the purpose of the judicial estoppel doctrine—"to protect the judicial process, not the parties."[100]

III. SEXUAL HARASSMENT

During the *Survey* period, the Michigan Supreme Court announced a significant change in Michigan quid pro quo sexual harassment jurisprudence in *Hamed v. Wayne County and Wayne County Sheriff's Department,*[101] overruling its 1996 decision in *Champion v. Nationwide Security,*[102] which held that employers are strictly liable for quid pro quo sexual harassment whenever a supervisor "accomplishes [a] rape through the exercise of his supervisory power over the victim."[103] In *Hamed,* the court clarified that courts cannot find an employer vicariously liable for quid pro quo sexual harassment if the employer's agent acts outside the scope of his employment, unless the employer had "actual or constructive knowledge of prior similar conduct" by the employee, and "actual or constructive knowledge of the employee's propensity to act in accordance with that conduct."[104] Thus, courts require significantly more than evidence that the supervisor exercised some form of authority.[105]

To reach this conclusion, the court examined both the statutory and decisional history of quid pro quo sexual harassment in Michigan, beginning with the ELCRA, which specifically defines such harassment as:

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97. *Id.* at 486.
98. *Id.* (citing MICH. COMP. LAWS ANN. §§ 31.2201-2804).
99. *Id.* at 487-88.
100. *Spohn,* 296 Mich. App. at 489 (citing MICH. COMP. LAWS ANN. §§ 31.2201-2804).
101. Hamed v. Wayne Cnty., 490 Mich. 1; 803 N.W.2d 237 (2011).
102. Champion v. Nationwide Sec., 450 Mich. 702; 545 N.W.2d 596 (1996).
103. *Id.* at 714.
104. *Hamed,* 490 Mich. at 12.
105. *Id.* at 14.

> (i) Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
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> (*i*) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.
>
> (*ii*) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education, or housing.[106]

Prior to *Hamed,* the Michigan Supreme Court had considered quid pro quo sexual harassment claims in a number of cases, the first of which was *Champion v. Nationwide Security,* in which the plaintiff sued for quid pro quo sexual harassment under the ELCRA after being raped by her supervisor.[107] Because there was no dispute that Champion had been subjected to unwelcome sexual conduct under section (*i*) of the statute, the issue was whether the employer had made a decision affecting Champion's employment, based upon her rejection of unwelcome sexual conduct.[108] The supreme court readily concluded that Ms. Champion met this test, finding that her supervisor's decision to assault her was a decision affecting her employment (leading to her forced resignation), made in response to her refusal to submit to her supervisor's sexual demands.[109] The court rejected Nationwide's argument that it was not vicariously liable for the sexual harassment because it had not authorized the supervisor to rape Champion, observing that "[t]his construction of agency principles is far too narrow [and] . . . fails to recognize that when an employer gives its supervisors certain authority over other employees, it must also accept responsibility to remedy the harm caused by the supervisors' unauthorized exercise of that authority."[110] In support of this rather sweeping reformulation of *respondeat superior*, the court referred, by footnote, to Section 219(2)(d) of 1 Restatement Agency, 2d, setting

106. MICH. COMP. LAWS ANN. § 37.2103(*i*)-(*ii*) (West 2012).
107. *Champion*, 450 Mich. at 707.
108. *Id.* at 708-09.
109. *Id.* at 710.
110. *Id.* at 712 (citing Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982)).

forth an exception to the *respondeat superior* where an agent is "aided" in accomplishing the wrongful act by the existence of the agency relationship.[111]

The Michigan Supreme Court next considered *respondeat superior* in the context of sexual harassment in *Chambers v. Trettco, Inc.*, a case with somewhat less wrenching facts than *Champion*.[112] There, the plaintiff alleged both quid pro quo and hostile environment sexual harassment, based on a one week period during which a temporary supervisor subjected the plaintiff to offensive sexual comments and some touching.[113] The Michigan Supreme Court vacated the court of appeals' decision, which in essence had imposed strict liability on the defendant/employer regardless of whether the alleged harasser's actions could be imputed to the employer under common law agency principles.[114] In so doing, the court first stated that the ELCRA defines "employer" as "a person who has 1 or more employees, and includes an agent of that person."[115] According to the court, this represented a specific incorporation of common law agency principles, including *respondeat superior*, into sexual harassment law.[116] Thus, unless an employer is found to be vicariously liable for the acts of its agent under traditional re*spondeat superior* principles, a plaintiff cannot prevail on an ELCRA claim, as a matter of law.[117]

Respondeat superior principles were also the focus of the Michigan Supreme Court's 2006 decision in *Zsigo v. Hurley Medical Center*.[118]

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111. *Id.* at 712 n.6; RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958) states:

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

According to the majority opinion in *Hamed*, this section was removed from the Third Restatement of Agency. *Hamed*, 490 Mich. at 19 n.42.

112. Chambers v. Trettco, Inc., 463 Mich. 297; 614 N.W.2d 910 (2000). For a more detailed discussion of the Supreme Court's decision in *Chambers*, see Patricia Nemeth & Allison Reuter, *Employment and Labor Law, Ann. Survey of Mich. Law*, 48 WAYNE L. REV. 607-11 (2002).

113. *Chambers*, 463 Mich. at 305.

114. *Id.* at 315-16.

115. MICH. COMP. LAWS ANN. § 37.2201(a) (West 2012).

116. *Chambers*, 463 Mich. at 311.

117. *Id.* at 313 (citing MICH. COMP. LAWS ANN. § 37.2201).

118. 475 Mich. 215; 716 N.W.2d 220 (2006). For a more detailed discussion of *Zsigo*, see Patricia Nemeth & Deborah Brouwer, *Employment and Labor Law, Ann. Survey of Mich. Law*, 53 WAYNE L. REV. 247-50 (2007).

There, Marian Zsigo, suffering from bi-polar disorder, was brought to the Hurley Medical emergency room.[119] She was placed in restraints, treated, and then left alone.[120] When a male nursing assistant entered to clean her room, Zsigo—still restrained—made sexually enticing remarks in an attempt to convince the aide to release her.[121] The aide engaged in various sexual acts with Zsigo, who could not stop him because she was restrained.[122] The employee then left the treatment room without releasing Zsigo.[123]

Zsigo sued the hospital, alleging assault, battery and intentional infliction of emotional distress.[124] She argued that the hospital was vicariously liable for the acts of the nursing assistant because his employment with the hospital aided him in the accomplishment of the assault.[125] In making this argument, Zsigo pointed to the "aided in accomplishing" exception, referenced in *Champion*, as supporting her theory of employer liability.[126] The *Zsigo* court rejected this, however, characterizing the reference as having been made "in passing and on the basis of the very distinct facts of that civil rights matter,"[127] and concluding that the *Champion* court had not endorsed the doctrine.[128] Additionally, the court noted that the doctrine had been criticized as a far reaching theory of employer liability, and that its adoption would amount to "an imposition of strict liability upon employers" because "it is difficult to conceive of an instance when the exception would not apply because an employee, by virtue of his or her employment relationship with the employer is always 'aided in accomplishing' the [wrongdoing]."[129] Under the exception, any employee who commits a wrong during working hours is always, to some degree, aided in accomplishing his wrongful act by the employment relationship, a result that was too wide-reaching for the *Zsigo* court.

This was the legal landscape facing the court in *Hamed v. Wayne County and Wayne County Sheriff's Department*.[130] Hamed sued Wayne County and the Wayne County Sheriff's Department for quid pro quo

119. *Zsigo*, 475 Mich. at 217.
120. *Id.* at 218.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 219.
125. *Zsigo*, 475 Mich. at 219.
126. *Id.* at 219 (citing *Champion*, 450 Mich. at 707).
127. *Id.* at 223-24.
128. *Id.* (citing *Champion*, 450 Mich. at 707).
129. *Id.* at 226.
130. *Hamed*, 490 Mich. at 1.

and hostile environment sexual harassment under the public services prong of the ELCRA, after being assaulted by a Wayne County deputy sheriff assigned to the county jail.[131] Hamed had been transferred to the jail after being arrested for outstanding probation violations.[132] While there, she was subjected to sexual comments by the deputy sheriff, who also offered her preferential treatment in return for sexual favors.[133] When she declined, he moved her to a section of the jail without surveillance cameras and assaulted her.[134]

The trial court dismissed Hamed's claims, finding that Hamed had failed to establish that the defendants were vicariously liable for the deputy's actions.[135] The court of appeals reversed on the basis of *Champion v. Nationwide Security,* concluding that the deputy had used his authority as the County's agent to exploit Hamed's vulnerability, resulting in vicarious liability.[136] The Michigan Supreme Court granted the County's application for leave to appeal "to determine the scope of any employer's vicarious liability for quid pro quo sexual harassment."[137]

Initially, the Michigan Supreme Court reiterated that a plaintiff seeking recovery for quid pro quo harassment under the public services section of the ELCRA must establish that she was subjected to unwelcome conduct or communication of a sexual nature and that the public services provider or its agent made submission to that conduct or communication a term or condition of obtaining public services.[138] If the plaintiff alleges that the defendant's agent committed the harassment, then the court must "'determine the extent of the employer's vicarious liability.'"[139]

Under Michigan's common law doctrine of *respondeat superior*, according to the court, an employer is liable only for those torts committed by its employees acting within the scope of their employment.[140] Courts have defined "scope of employment" as actions undertaken in furtherance of the employer's business.[141] An act taken

131. *Id.* at 6-7 (citing MICH. COMP. LAWS ANN. §§ 31.2201-2804 (West 2012)).
132. *Id.* at 6.
133. *Id.*
134. *Id.* The deputy sheriff ultimately was convicted of criminal sexual conduct. *Id.*
135. *Id.* at 7 (citing *Champion* 450 Mich. 702).
136. *Hamed*, 490 Mich. at 7-8.
137. *Id.* at 5.
138. *Id.* at 10 (citing Chambers v. Trettco, Inc., 463 Mich. 297, 310; 614 N.W.2d 910 (2000)). The court also noted that this is the same test used in the employment context. *Id.* at 10 n.19.
139. *Id.* (citing *Chambers*, 463 Mich. at 311).
140. *Id.* at 10-11.
141. *Id.* (citing 475 Mich. 215, 221).

contrary to the employer's instructions can still result in vicarious liability, though, if the act occurs in the furtherance of the employer's interests.[142]

Applying these principles, the court had no trouble at all concluding that the deputy's assault of Hamed fell outside the scope of his employment: "[t]he sexual assault was an independent action accomplished solely in furtherance of Johnson's own criminal interests."[143] The court went on: "In short, there is no fair basis on which one could conclude that the sheriff or county themselves vicariously took part in the wrongful acts."[144]

The court's analysis was not yet complete, however, because of an exception to the general rule of vicarious liability, under which an employer can be held liable for acts outside the scope of employment if "the employer knew or should have known of the employee's propensities and criminal record before the employee committed an intentional tort."[145] Determining if this exception is in play requires examination of whether the employer had "actual or constructive knowledge of prior similar conduct" by the employee, and "actual or constructive knowledge of the employee's propensity to act in accordance with that conduct."[146] The court observed that the temporal proximity of any past conduct in relation to the current complained-of acts is an important aspect of this analysis.[147]

The court found support for the foreseeability analysis in its own jurisprudence,[148] and also in underlying policy considerations, because holding an employer vicariously liable for unforeseen criminal acts not only would be unfair, but "would attempt to further an impossible end by requiring employers to prevent harms they cannot anticipate, which are, in essence, unpreventable. . . . [and so] employers would essentially

142. *Hamed*, 490 Mich. at 11 (citing Barnes v. Mitchell, 341 Mich. 7, 13; 67 N.W.2d 208 (1954)).

143. *Id.* at 11.

144. *Id.* at 11-12.

145. *Id.* at 12 (quoting McClements v. Ford Motor Co., 473 Mich. 373, 381; 702 N.W.2d 166 (2005)).

146. *Id.*

147. *Id.*

148. *Hamed*, 490 Mich. at 12-13 (citing Brown v. Brown, 478 Mich. 545, 554-55; 739 N.W.2d 313 (2007). In *Brown*, a negligence case, the court held that an employer could not be held liable for the rape of a non-employee committed by its employee, because the act was not foreseeable. For a more detailed discussion of *Brown*, see Patricia Nemeth & Deborah Brouwer, *Employment and Labor Law, Annual Survey of Michigan Law*, 54 WAYNE L. REV. 211-17 (2008)).

become insurers responsible for recompensing victims for the criminal acts of their employees."[149]

In *Hamed*, the court determined that the deputy sheriff's assault of Hamed was not foreseeable because nothing in his employment history placed the County on notice that he would engage in such an assault; according to the court, his past misconduct "at most demonstrates that defendants were aware that Johnson had a propensity to disobey work-related protocol and engage in aggressive behavior when provoked."[150] Thus, the court concluded that the defendants were not liable for the rape of Hamed, and so reversed the court of appeals' judgment and reinstated the trial court's grant of summary disposition to the defendants.[151]

The court then considered the continuing viability of its decision in *Champion v. Nationwide Security*, in which the court did not conduct a foreseeability analysis because it instead imposed strict liability on the employer.[152] Because that court had ignored ELCRA's specific incorporation of Michigan agency law, and also failed to properly apply Michigan common law regarding *respondent superior*, the majority in *Hamed* overruled *Champion* as incorrectly decided.[153] The court wrote:

> Michigan law has never imposed liability on an employer for the unforeseeable criminal actions of its employees, except in *Champion.* Nor has Michigan common law incorporated an exception based on an aided-by-agency theory of liability. Accordingly, we conclude that a provider of public services may not be held vicariously liable for quid pro sexual harassment affecting public services on the basis of unforeseeable criminal acts that its employee committed outside the scope of employment.[154]

The dissent disagreed on all counts.[155] In a lengthy opinion supported by Justices Marilyn Kelly and Diane Hathaway, Justice Michael

149. *Hamed,* 490 Mich. at 14-15.

150. *Id.* at 16.

151. *Id.* at 36.

152. *Id.* at 22 (citing *Champion* 450 Mich. at 702).

153. *Id.* (citing *Champion*, 450 Mich. at 702). The court commented that while it had reached this same conclusion in *Zsigo v. Hurley Medical Center,* it would have been improper to overrule *Champion* in that case, because *Zsigo* was a negligence suit, and not a claim brought under ELCRA. *Id.* Instead, the *Zsigo* decision simply limited *Champion* to its specific facts. *Id.* at 21-22 (citing *Champion*, 450 Mich. at 702; *Zsigo* 475 Mich. 215, 221; MICH. COMP. LAWS ANN. §§ 31.2201-2804 (West 2012)).

154. *Hamed,* 490 Mich. at 35-36.

155. *Id.* at 37-38 (Cavanagh, J., dissenting).

Cavanagh argued that the rule unanimously announced in *Champion* was not only correct but necessary in order to meet the remedial purposes of ELCRA.[156] According to the dissent, *Champion* had rejected the traditional vicarious liability analysis, which required a plaintiff to show that the employer's agent was acting within the scope of his employment, because "'an employer rarely authorizes an agent to break the law or otherwise behave improperly.'"[157] To limit vicarious liability to those circumstances would "'create an enormous loophole in the statute' that 'would defeat the remedial purpose underlying this state's civil rights statute and would lead to a construction that is inconsistent with the well-established rule that remedial statutes are to be liberally construed.'"[158] The purpose of ELCRA, as described by the dissent, is to eradicate discrimination, which cannot occur if employers are shielded from liability.[159] Thus, *Champion*'s holding—that an employer is liable for quid pro quo sexual harassment whenever a supervisor accomplishes that harassment through the exercise of his supervisory powers—is a logical and necessary outgrowth of the statute itself.[160]

Not only did the dissent challenge the majority's rejection of *Champion* in favor of a foreseeability analysis, it also criticized the majority's application of that analysis, concluding that the deputy's rape of Hamed was completely foreseeable, given the deputy's previous altercation with a male inmate.[161] Thus, even under the majority's approach, the dissent would have concluded that Hamed had provided sufficient evidence to avoid summary disposition and proceed to trial.[162]

IV. RETALIATION

A. Whistleblower's Protection Act

Michigan's Whistleblower's Protection Act (WPA)[163] provides that:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's

156. *Id.* at 37-38 (Cavanagh, J., dissenting) (citing MICH. COMP. LAWS ANN. §§ 31.2201-2804).

157. *Id.* at 37 (quoting *Champion*, 450 Mich. at 712).

158. *Id.* at 37-38 (Cavanagh, J., dissenting) (quoting *Champion*, 450 Mich. at 713) (citing MICH. COMP. LAWS ANN. §§ 31.2201-2804).

159. *Id.* at 39-40 (citing MICH. COMP. LAWS ANN. §§ 31.2201-2804).

160. *Hamed*, 490 Mich. at 42.

161. *Id.* at 53-54.

162. *Id.* at 59.

163. MICH. COMP. LAWS ANN. §§ 15.361-369 (West 2012).

> compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, 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.[164]

During the three decades since the WPA was enacted, it has spawned innumerable lawsuits and even more debate.[165] Much of the criticism focuses on the potential of employee misuse of the WPA, given the relative ease with which a plaintiff can state a claim under the Act.[166] For example, an employee is not required to report an *actual* violation of the law, as long as the employee believes in good faith that someone violated the law.[167] In fact, the employee does not even have to actually make a report; being "about to" report suffices.[168] And while WPA requires the employee to report to a public body of the state of Michigan, or any law enforcement agency,[169] courts have broadly defined "law enforcement agency" to include entities such as the U.S. Department of Education[170] and the U.S. Office of Federal Contracts Compliance.[171] Further, while WPA does not protect an employee if the employee makes only an internal report to his employer, the Michigan Supreme Court has held that "the WPA does not require that an employee of a public body report violations or suspected violations to an outside agency or higher authority to receive the protections of the WPA."[172] Further, that court determined that "there is no requirement that an employee who reports violations or suspected violations receives the protections of the WPA

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164. MICH. COMP. LAWS ANN. § 15.362.

165. *See, e.g.*, Robert C. Ludolph & Mary K. Deon, *Whistleblowers' Protection Act: Shield and Weapon*, 89 MICH. BAR J. 36 (2009); Tom R. Pabst, *Increased Protection for the Whistleblowers of Michigan*, 91 MICH. BAR J. 36 (2012); Brian D. Young, *The Michigan Whistleblower's Protection Act: A Look at the Statute and Proposed Modification*, 46 WAYNE L. REV. 1691 (2000).

166. Ludolph & Deon, *supra* note 165, at 1; MICH. COMP. LAWS ANN. § 15.362.

167. MICH. COMP. LAWS ANN. § 15.362.

168. *Id.*

169. MICH. COMP. LAWS ANN. § 15.361(d).

170. Ernsting v. Ave Maria Coll., 274 Mich. App. 506, 517; 736 N.W.2d 574 (2007).

171. Robinson v. Radian, Inc., 624 F. Supp. 2d 617 (E.D. Mich. 2008).

172. Brown v. Mayor of Detroit, 478 Mich. 589, 591; 734 N.W.2d 514 (2007).

only if the reporting is outside the employee's job duties."[173] Thus, even internal reports made by public employees can trigger the protection of the WPA, including those reports made as the employee's job duty.[174]

Employer-defendants have had some success, however, in defending against WPA suits by arguing that the whistleblowing activity in question occurred because of the employee's personal interest, rather than in an effort to protect the public.[175] This argument derives from the origins of the WPA and several early cases interpreting the act.[176] Thus, in *Shallal v. Catholic Social Services,*[177] the Michigan Supreme Court stated that with the WPA, the legislature sought to "alleviate 'the inability to combat corruption or criminally irresponsible behavior in the conduct of government or large businesses.'"[178] In *Dolan v. Continental Airlines/Continental Express,*[179] the Michigan Supreme Court noted that the legislature enacted the WPA "largely in response to the accidental PBB-contamination of livestock feed."[180] In light of that history, the court stated that "the act encourages employees to assist in law enforcement . . . It does so with an eye toward promoting public health and safety. The underlying purpose of the act is protection of the public."[181] Without the protections of the WPA, according to the *Dolan* court, "the public would remain unaware of large-scale and potentially dangerous abuses."[182]

During the *Survey* period, in *Whitman v. City of Burton,*[183] the Michigan Court of Appeals applied these principles, reversing denial of a JNOV motion following a jury verdict for the plaintiff, who claimed that the defendant's decision not to reappoint him as police chief violated the WPA.[184]

Whitman was the City of Burton's police chief, but in November, 2007, the mayor declined to reappoint him.[185] Whitman sued the City, alleging that the decision was made because he had complained about the

173. *Id.*
174. *Id.* at 591-92, 596.
175. Shallal v. Catholic Soc. Servs., 455 Mich. 604, 621; 566 N.W.2d 571 (1997).
176. *See, e.g., id.*; Whitman v. City of Burton, 293 Mich. App. 220, 230; 810 N.W.2d 71 (2011), *leave granted,* 491 Mich. 913; 811 N.W.2d 490 (2012).
177. *Shallal,* 455 Mich. at 621.
178. *Id.* at 612 (citation omitted).
179. Dolan v. Cont'l Airlines/Cont'l Express, 454 Mich. 373; 563 N.W.2d 23 (1997).
180. *Id.* at 378.
181. *Id.* (citing House Legislative Analysis, H.B. 5088 (Mich. 1981)).
182. *Id.*
183. 293 Mich. App. 220; 810 N.W.2d 71 (2011), *leave granted,* 491 Mich. 913; 811 N.W.2d 490 (2012).
184. *Id.* at 222.
185. *Id.*

City's refusal to pay him for unused sick and vacation time in 2003, which he claimed violated a city ordinance.[186] Apparently, in March 2003, while experiencing financial problems and a sizeable budget shortfall, the city administrators (including Whitman) agreed to a pay freeze and to forego payment for accrued unused leave time.[187] A city ordinance did provide for such payments, at the option of the employee.[188] An announcement of the administrators' agreement was made to the press.[189] Whitman claimed, however, that soon after the administrators agreed not to request the payments, he wrote to the mayor stating that the benefits that he had obtained throughout his career through collective bargaining were critical, that his "current life style revolve[d] around these very things that have been negotiated for me" and that his family "looks forward to the financial benefits [he received] by not missing time from work."[190] Nothing in the letter said that Whitman would not abide by the agreement made by the City's administrators not to request payment for unused leave time.[191]

In January 2004, however, Whitman demanded to be paid for his accrued sick/vacation time, and threatened to pursue criminal charges if the City did not pay him.[192] Not surprisingly, in light of such a threat, the City paid Whitman.[193]

Three years later, the mayor decided not to re-appoint Whitman to his position, based on several performance issues, including complaints from police officers low morale in the police department, sexually explicit emails sent by Whitman on his city computer, a misleading budget report Whitman made to the city council, and numerous problematic personnel decisions Whitman had made.[194]

Whitman sued, eventually receiving a jury verdict in his favor.[195] The trial court denied the City's JNOV motion and the City appealed.[196]

In a 2-1 decision, the court of appeals reversed, stating that:

> We hold that, as a matter of law, plaintiff could not recover damages under the WPA for the mayor's decision not to

186. *Id.* at 223.
187. *Id.*
188. *Id.*
189. *Whitman*, 293 Mich. App. at 223.
190. *Id.* at 225.
191. *Id.*
192. *Id.* at 225-26.
193. *Id.* at 226.
194. *Id.* at 227-28.
195. *Whitman*, 293 Mich. App. at 223.
196. *Id.* at 222.

> reappoint him because, in threatening to inform the city council or prosecute the mayor for a violation of Ordinance 68-C, plaintiff clearly intended to advance his own financial interests. He did not pursue the matter to inform the public on a matter of public concern.[197]

In reaching this conclusion, the court relied on the supreme court's decisions in *Dolan v. Continental Airlines* and *Shallal v. Catholic Social Services*,[198] writing that "[t]o encourage employees to expose corruption or criminal conduct, the WPA 'prohibits future employer reprisals when an employee reports or is about to report such conduct.'"[199] Moreover, the court stated:

> In order to effectuate the purpose of the WPA, our courts have ruled that, when considering a retaliation claim under the act, a critical inquiry *is* whether the employee acted . . . with a desire to inform the public on matters of public concern . . . To that end, it is well-settled that the Legislature did not intend the Whistleblowers Act to be used as an offensive weapon by disgruntled employees.[200]

In the court's view, Whitman's actions were the antithesis of acting in the public's interests:

> In demanding payment under the ordinance for his sick and personal hours—a payment that the cash-strapped city could ill-afford—plaintiff was decidedly not acting in the public interest, but in the thoroughly personal and private interest of securing a monetary benefit in order to maintain his 'life style.' Plaintiff's claim is not actionable under the WPA because his complaint amounted to a private dispute over [his] entitlement to a monetary employment benefit. Moreover, plaintiff acted entirely on his own behalf. Indeed, nowhere in the voluminous record 'is there any indication that good faith or the interests of society as a whole played any part' in the plaintiff's threatened decision to go to the authorities.[201]

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197. *Id.* at 228-29.
198. *Id.* at 231-31 (citing *Dolan*, 454 Mich. at 373; *Shallal*, 455 Mich. at 612).
199. *Id.* at 229-30 (quoting *Shallal*, 455 Mich. at 612).
200. *Id.* at 230 (quoting *Shallal*, 455 Mich. at 622) (emphasis added).
201. *Whitman*, 293 Mich. App. at 230-31.

In a lengthy dissent, Judge Beckering did not disagree that implicit in the WPA is a requirement that the whistleblowing employee act in the public interest.[202] She did, however, disagree with the conclusion that Whitman had acted totally from self-interest, because in seeking payment for his accrued time, he contended that non-payment would violate an ordinance, and, as a police officer, it was incumbent upon him to point that out.[203]

In May 2012, the Michigan Supreme Court granted Whitman's application for leave to appeal, directing the parties to "include among the issues to be briefed whether *Shallal v. Catholic Social Services* . . . correctly held that the primary motivation of an employee pursuing a whistleblower claim must be a desire to inform the public on matters of public concern, as opposed to personal vindictiveness."[204] Given that the *Shallal* court based its holding on legislative intent rather than on actual language in the statute, it seems quite probable that this supreme court, with its devotion to the words in the statute rather than legislative history, may well overturn *Whitman*.[205]

B. Worker's Disability Compensation Act

Section 301(13) of Michigan's Worker's Disability Compensation Act (WDCA) forbids an employer from retaliating against an employee for seeking worker's compensation benefits.[206] Specifically, that section states:

> A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.[207]

Michigan courts analyze retaliation claims under the WDCA in the same way as other statutory retaliation claims, such as those under the

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202. *Id.* at 247 (Beckering, J., dissenting).

203. *Id.* at 248.

204. Whitman v. City of Burton, 491 Mich. 913; 811 N.W.2d 490 (2012) (citing *Shallal*, 455 Mich. at 622).

205. *Id.*; *Shallal*, 455 Mich. at 622; *Whitman*, 293 Mich. App. at 230-31.

206. MICH. COMP. LAWS ANN. § 418.301(13) (West 2012). Effective December 18, 2011, when other portions of § 418.301 were amended by 2011 PA 206, this subsection was renumbered subsection (13); previously it was subsection (11).

207. *Id.*

ELCRA or the WPA.[208] Thus, to establish a claim of worker's compensation retaliation, a plaintiff must prove that: (1) she asserted her right to worker's compensation benefits; (2) the employer subjected her to an adverse employment action; (3) the employer's stated reason for the employment action was pretextual; and (4) the employer's true reason for the actions was retaliation for the plaintiff's worker's compensation claim.[209]

Based on the language of the WDCA, it is clear that the actual filing of a worker's compensation claim is protected activity under the statute, thereby satisfying the first element of the prima facie case. It has been less clear that an employee who is terminated *before* she files a claim for benefits states a claim under the WDCA.[210] The Michigan Court of Appeals recently clarified the issue in *Cuddington v. United Health Services*,[211] holding that an employee who alleged that his employer fired him in retaliation for seeking medical care for a work-related injury is protected by WDCA, even though he did not submit an actual claim for benefits until after his discharge.[212]

Raymond Cuddington, a delivery technician for United Health Services, was in a motor vehicle accident while on company business on January 7, 2009.[213] After he called the company president, Robert Daniels, to report the accident, Daniels and his wife Rebecca (also an officer of the company) visited Cuddington at the accident scene.[214] Cuddington was bruised from the accident but chose not to go the hospital.[215] Overnight, however, he began to experience shoulder and neck pain and decided to see a doctor.[216] According to Cuddington, his wife called his employer before he was scheduled to begin work, telling a secretary that he was going to see a doctor for the pain caused by his accident.[217] Robert and Rebecca Daniels immediately called Cuddington

208. *See, e.g.*, Taylor v. Gen. Motors Corp., 826 F.2d 452, 455-56 (6th Cir. 1987); MICH. COMP. LAWS ANN. § 418.301(13); MICH. COMP. LAWS ANN. §§ 37.2101-2803 (West 2012); MICH. COMP. LAWS ANN. §§ 15.361-369 (West 2012).

209. Chiles v. Mach. Shop, Inc., 238 Mich. App. 462, 470; 606 N.W.2d 398 (1999)).

210. MICH. COMP. LAWS ANN. § 418.301(13); *see, e.g.*, Griffey v. Prestige Stamping, Inc., 189 Mich. App. 665, 668; 473 N.W.2d 790 (1991); Wilson v. Acacia Park Cemetery Ass'n., 162 Mich. App. 638, 645-46; 413 N.W.2d 79 (1987).

211. Cuddington v. United Health Servs., 298 Mich. App. 264; 826 N.W.2d 519 (2012).

212. *Id.* at 268; MICH. COMP. LAWS ANN. § 418.301(13).

213. *Cuddington*, 298 Mich. App. at 268.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

to find out why he was not coming into work.[218] Rebecca Daniels allegedly told Cuddington that he had seemed fine the night before, and if he did not come to work, he would be fired.[219] Cuddington insisted on seeing his doctor and reiterated that he did not intend to come to work.[220] He was then fired.[221] Cuddington did visit his doctor that day, although the doctor did not actually examine him until January 12.[222] Sometime thereafter, Cuddington filed a claim for worker's compensation benefits, along with a suit claiming retaliatory discharge under the WDCA.[223]

United Health sought summary disposition, arguing that Cuddington had no cause of action for retaliatory termination because he had not filed a claim "for worker's compensation benefits until after he was fired."[224] The trial court agreed, and dismissed the suit.[225] Cuddington appealed.[226]

The court of appeals reversed, holding that Cuddington had "pleaded a cognizable retaliation claim," because his suit did not contend that he was fired in retaliation for filing a claim for benefits, but for exercising a right granted him under the WDCA—a right to medical benefits.[227] Looking to the plain language of the WDCA, which states that "[a] person shall not discharge an employee . . . because of the exercise by the employee . . . of a right afforded by this act," the court of appeals concluded that the WDCA does not limit its protection only to those employees whose employers discriminate against them for the actual filing of a claim.[228] While Cuddington did not file such a claim for benefits before his employer terminated him, he had insisted on missing work in order to see a doctor about his injury.[229] The court therefore analyzed whether seeking medical services for work-related injuries is a "right afforded by [the] act."[230] Acknowledging that the WDCA does not define the word "right," the court observed that Section 315(1) does obligate the employer to provide "reasonable medical, surgical, and hospital services and medicines" to employees who suffer work-related

218. *Id.*
219. *Cuddington*, 298 Mich. App. at 268
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* at 269.
224. *Id.* at 270.
225. *Cuddington*, 298 Mich. App. at 270.
226. *Id.*
227. *Id.*
228. *Id.* at *3 (quoting MICH. COMP. LAWS ANN. § 418.301(13) (West 2012)).
229. *Id.* at 268.
230. *Id.* at 280 (quoting MICH. COMP. LAWS ANN. § 418.301(13)).

injuries.[231] Thus, while a specific employee's need for medical services for a workplace injury is, a "fact-intensive reasonableness inquiry," the court concluded that the WDCA does provide such an injured employee with the right to seek medical services.[232] It follows, then, that an employee who seeks such services, and whose employer then discharges or otherwise discriminates against her as a result, may pursue a retaliation claim under Section 301(13).[233] In further assessing whether Cuddington established a prima facie case of retaliatory discharge, the court noted that causation—whether United Health fired Cuddington because he insisted on seeing a doctor—was central to the case.[234] Because "summary disposition was granted before the parties had an opportunity to adequately explore the issue of causation," the court of appeals returned the case to the trial court.[235]

Before leaving the matter entirely, however, the court of appeals addressed the defendant's argument that earlier decisions bound the court to a contrary result.[236] In *Wilson v. Acacia Park Cemetery Association*[237] and *Griffey v. Prestige Stamping, Inc.*,[238] the courts had affirmed dismissals of retaliatory discharge claims under the WDCA because the plaintiffs argued that their employers terminated them because of an *anticipated* filing of a worker's compensation claims.[239] The *Cuddington* court easily distinguished both cases, noting that the plaintiff in *Wilson* contended that his employer fired him because he might someday be injured on the job and file a claim for benefits, a case quite distinct from Cuddington's claim that he was fired because he had already sought benefits (medical services) to which he was entitled under the WCDA.[240] The *Wilson* court rejected the plaintiff's claim, holding that "retaliatory discharge premised upon the employer's anticipation of a future claim does not state a legally cognizable cause of action" under the WDCA.[241]

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231. *Cuddington*, 298 Mich. App. at 273 (quoting MICH. COMP. LAWS ANN. § 418.315(1)).

232. *Id.* at 274 (citing MICH. COMP. LAWS ANN. § 418.315(1)).

233. *Id.*

234. *Id.* at 278.

235. *Id.*

236. *Id.*

237. Wilson v. Acacia Park Cemetery Ass'n, 162 Mich. App. 638; 413 N.W.2d 79 (1987).

238. Griffey v. Prestige Stamping, Inc., 189 Mich. App. 665; 473 N.W.2d 790 (1991).

239. *Cuddington*, 298 Mich. App. at 278 (citing *Wilson*, 162 Mich. App. at 644-45; *Griffey*, 189 Mich. App. at 666-67).

240. *Id.* at 279 (citing *Wilson*, 162 Mich. App. at 644-45; MICH. COMP. LAWS ANN. § 418.315(1) (West 2012)).

241. *Id.* (quoting *Wilson*, 162 Mich. App. at 646) (citing MICH. COMP. LAWS ANN. § 418.315(1)).

The plaintiff's claim in *Griffey* similarly appeared to be based on the employer's alleged concern that the plaintiff might seek worker's compensation benefits in the future, because the employee did not file a claim for benefits until after he filed his retaliation lawsuit.[242] That court rejected the argument that the WDCA prohibits a termination made in anticipation of a future claim for benefits.[243] This again differed from Cuddington's case, in which he argued that his employer discharged him for a past request for benefits under the Act.[244]

Having disposed of these possibly troubling precedents, the court of appeals in *Cuddington* vacated the trial court's dismissal of the suit and remanded the case for further proceedings.[245]

V. OTHER EMPLOYMENT STATUTES

A. Public Employment Relations Act

In *Pontiac School District v. Pontiac Education Association,*[246] the court of appeals held that a public school district's occupational and physical therapists provided instructional support services and, therefore under the Public Employment Relation Act (PERA),[247] the school district was required to collectively bargain over its decision to contract with a third party for these services. The Pontiac School District sought to privatize services previously provided by occupational therapists (OTs) and physical therapists (PTs) who were employed by the district.[248] The Pontiac Education Association (PEA), which represented the OTs and PTs, argued that the school district could not unilaterally contract these positions out because such an action was a mandatory subject of bargaining under the parties' current collective bargaining agreement.[249] The school district nevertheless laid off the OTs and PTs and contracted with a private entity to provide the same services.[250] The PEA filed an unfair labor practice charge with the Michigan Employment Relations Commission (MERC).[251] An evidentiary hearing was held

242. *Id.* (citing *Griffey*, 189 Mich. App. at 666-67).
243. *Id.* (citing *Griffey*, 189 Mich. App. at 667-69).
244. *Id.* at 279-80.
245. *Cuddington*, 298 Mich. App. at ___; 2012 WL 5290153, *7.
246. Pontiac Sch. Dist. v. Pontiac Educ. Ass'n, 295 Mich. App. 147; 811 N.W.2d 64 (2012), *appeal denied*, 493 Mich. 861; 820 N.W.2d 901(2012).
247. *Id.* at 162; MICH. COMP. LAWS ANN. §§ 423.201-217 (West 2012).
248. *Pontiac Sch. Dist.*, 295 Mich. App. at 149.
249. *Id.*
250. *Id.*
251. *Id.*

before a hearing referee, who recommended that the unfair-labor practice complaint be upheld because "the services provided by OTs and PTs were subject to collective bargaining."[252] The MERC adopted the hearing referee's recommendation.[253] The school district appealed.[254]

At issue before the court of appeals was the proper interpretation of Michigan Compiled Laws Annotated (MCLA) Section 423.215(3)(f), which provides that "[c]ollective bargaining between a public school employer and a bargaining representative of its employees shall *not* include . . . [t]he decision of whether or not to contract with a third party for 1 or more *noninstructional support services*."[255] PERA further provides that "[t]he matters described in subsection (3) are prohibited subjects of bargaining . . . and, for the purposes of this act, are within the sole authority of the public school employer to decide."[256] Stated more succinctly, the question was whether the OTs and PTs provided noninstructional support services; if so, "collective bargaining played no role when the district chose to privatize those services."[257]

Because the case was on review from an agency, the appellate court first addressed the degree of deference afforded to the MERC decision.[258] As stated by the court, "An agency's interpretation of a statute is not binding on the courts, and that interpretation cannot conflict with the Legislature's intent as expressed in the plain language of the statute."[259] However, the reviewing court should give "respectful consideration" to the agency's construction of the statute and provide "cogent reasons" for overruling an agency's interpretation.[260]

The court next observed that, because PERA did not define "noninstructional support services," the terms should be given their plain and ordinary meaning, as "ascertained through use of a dictionary."[261] After consulting *Random House Webster's College Dictionary*, the court concluded that "the term 'instruction' is not ambiguous, but rather is broad in definition [and] . . . applies to 'knowledge or information imparted' without placing qualifications or restrictions on the *type* of

252. *Id.* at 150-51.
253. *Id.* at 151.
254. *Pontiac Sch. Dist.*, 295 Mich. App. at 151.
255. MICH. COMP. LAWS ANN. § 423.215(3)(f) (West 2012) (emphasis added).
256. MICH. COMP. LAWS ANN. § 423.215(4).
257. *Pontiac Sch. Dist.*, 295 Mich. App. at 149.
258. *Id.* at 151-52.
259. *Id.* at 152 (citing *In re* Complaint of Rovas Against SBC Mich., 482 Mich. 90, 103; 754 N.W.2d 259 (2008)).
260. *Id.*
261. *Id.* at 153-54 (citing MICH. COMP. LAWS ANN. § 423.201-217 (West 2012)).

knowledge of information imparted."[262] Therefore, "positions in which individuals impart knowledge or information to students may be subject to collective bargaining under MCLA 423.215(3)(f)."[263]

Using this broad definition, the court applied it to the case before it by reviewing the testimony of an OT and a PT and determining their duties and the nature of the services provided.[264] After reviewing this record, the court stated "[i]t is abundantly clear from the record that OTs and PTs, while not being certified teachers of core curriculum, instruct certain students with respect to addressing and overcoming problems associated with fine and gross motor skills. They work in conjunction with teachers to impart *knowledge and information*."[265] Additionally, the testimony showed that the OTs and PTs offered a wide range of services "to assist schoolchildren in acquiring and developing skills necessary for them to achieve educational goals."[266]

The court found "particularly relevant" that the request for proposals (RFP) prepared by the school district when it sought to subcontract the OT and PT services included services that appeared to be of an "instructional nature."[267] For example, the RFP sought services addressing disabilities "that interfere with learning in the educational environment."[268] The request also required the therapists to plan "services for each individualized education program . . . as a member of a multidisciplinary educational/assessment team," and engage in "consultation and education."[269] The court concluded that whether the services were directly instructional, or merely "instructional support services" need not be addressed because, however labeled, the services clearly were not "noninstructional" in nature.[270] Thus, regardless of conflicting factual evidence provided by the school district, the MERC's decision was supported by "competent, material, and substantial evidence."[271]

The court next addressed the school district's arguments that the MERC had misinterpreted the legislative history of PERA, and that its decision failed to apply "state and federal regulations governing special education that define 'instructional services' and 'related services'

262. *Id.* (emphasis added) (citing RANDOM HOUSE DICTIONARY (2000)).
263. *Pontiac Sch. Dist.*, 295 Mich. App. at 153-54.
264. *Id.* at 154-59.
265. *Id.* at 158 (emphasis added).
266. *Id.* at 159.
267. *Id.* at 159-60.
268. *Id.* at 159.
269. *Pontiac Sch. Dist.*, 295 Mich. App. at 159-60.
270. *Id.* at 160.
271. *Id.*

separately."[272] The court rejected these contentions, stating that legislative history is not utilized as a tool of interpretation "unless a statute is ambiguous."[273] Further, review of the MERC's decision showed that it had not relied on legislative history and had instead focused, correctly, on the "unambiguous language of the statute."[274] Regarding the MERC's failure to apply state and federal regulations defining "instructional services" and "related services," the court held that there was no indication in PERA that the legislature had intended these regulations to apply to public schools for the purposes of PERA.[275] Further, "the cited regulatory terms are not even the same terms at issue here" and were being examined in a different context.[276] The court of appeals therefore affirmed the MERC's finding in favor of the union.[277]

The dissenting opinion by Judge Jansen agreed that a term not defined by the legislature should be given its ordinary meaning.[278] However, the judge did not look to the dictionary for guidance as had the majority, but instead looked to other Michigan statutory and administrative definitions of "noninstructional services."[279] Judge Jansen first looked to the Revised School Code, which lists various noninstructional support services that intermediate school districts must address when issuing reports on the sharing of services.[280] Included is a subsection stating that intermediate school districts must consider "[a]ny other noninstructional services identified by the superintendent of public instruction."[281] Although within the context of special education, the judge noted that the Superintendent of Public Instruction has differentiated between instructional services, occupational therapy, and physical therapy in the Michigan Administrative Code.[282] The judge further stated that the administrative code defines instructional services only as those "provided by teaching personnel."[283] The judge also found that the Michigan Public Health Code, under which PTs and OTs are

272. *Id.* at 160-161.

273. *Id.* at 160 (citing *In re* Certified Question from the United States Court of Appeals for the Sixth Circuit, 468 Mich. 109, 115 n.5; 659 N.W.2d 597 (2003)).

274. *Id.*

275. *Pontiac Sch. Dist.*, 295 Mich. App. at 161.

276. *Id.*

277. *Id.* at 162.

278. *Id.* at 163 (Jansen, J., dissenting).

279. *Id.*

280. *Id.* at 163 (citing MICH. COMP. LAWS ANN. § 380.761(1) (West 2012)).

281. *Pontiac Sch. Dist.*, 295 Mich. App. at 163 (Jansen, J., dissenting) (citing MICH. COMP. LAWS ANN. § 380.761 (1)(m)).

282. *Id.* (citing MICH. ADMIN. CODE R. 340.1701b).

283. *Id.* (citing MICH. ADMIN. CODE R. 340.1701b(a)).

licensed, provided additional evidence that the services they provide are noninstructional in nature.[284]

Based on the statutory and administrative language reviewed, Judge Jansen concluded that the services provided by PTs and OTs are specialized services provided only for certain students with specific types of disabilities and are not a component of the "traditional, instructional environment of the classroom."[285] Therefore, "the functions performed by PTs and OTs are not instructional in nature within the commonly understood meaning of that term."[286]

The Michigan Supreme Court denied the school district's application for leave to appeal.[287]

B. Veteran's Preference Act

During the *Survey* period, the Michigan Court of Appeals, in *Leelanau County Sheriff v. Kiessel*, concluded that the Veteran's Preference Act (VPA) is not an unconstitutional restriction on a sheriff's authority to discharge at will and that the Michigan Legislature intended for the VPA to apply to appointed deputy sheriffs.[288]

The VPA is a remedial statute first enacted in 1897 to provide hiring preferences in public employment for honorably discharged veterans. It also prescribes the offenses for which a veteran may be disciplined or discharged,[289] limited to "official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency."[290] The VPA further outlines specific procedures to be followed in cases of discipline or discharge, including written notice of the reason for the action, and a prompt public hearing, at which the veteran may be represented by counsel.[291] At issue in *Leelanau County Sheriff* was the tension between the VPA and MCLA Section 51.70, which grants county sheriffs the apparently unlimited

284. *Id.* at 163-64. (citing MICH. COMP. LAWS ANN. § 337.17801-.17831).

285. *Id.* at 164.

286. *Id.*

287. Pontiac Sch. Dist. v. Pontiac Educ. Ass'n., 493 Mich. 861; 820 N.W. 2d 901 (2012).

288. Leelanau Cnty. Sheriff v. Kiessel, 297 Mich. App. 285; 824 N.W.2d 576; MICH. COMP. LAWS ANN. §§ 35.401-404 (West 2012).

289. *See* MICH. COMP. LAWS ANN. §§ 35.401-404.

290. *Id.* § 35.402.

291. *Id.*

right to appoint one or more deputy sheriffs, who serve "at the sheriff's pleasure."[292]

Deputy Sheriff James Kiessel, an honorably discharged veteran, was discharged from his position in the Leelanau County Sheriff's department for "severe misconduct" related to his arrest of two persons.[293] Kiessel timely requested a hearing under Section 2 of the VPA.[294] The statutory hearing officer was the Leelanau County Prosecutor.[295] Following the hearing, the prosecutor issued an order that Kiessel's conduct did not constitute "official misconduct" or "serious or willful neglect in the performance of duty" and ordered the sheriff to reinstate Kiessel with full backpay and benefits.[296] In response, the sheriff filed a complaint for a writ of superintending control in the circuit court, asserting that the prosecutor was without jurisdiction to order an elected sheriff to "hire, fire, or reinstate any deputy," because the sheriff's constitutional authority to make such appointments superseded the VPA.[297]

The circuit court remanded the matter to the prosecutor's office to consider whether it had subject matter jurisdiction over Kiessel's claim under the VPA.[298] Subsequently, the prosecutor issued another order and opinion upholding its jurisdiction and confirming the original ruling.[299] The circuit court then concluded that deputy sheriffs do not fall within the provisions of the VPA, because the sheriff's "power to appoint and revoke law enforcement powers . . . override[s] all statutory and contract rights of the deputy."[300] The court noted that the sheriff's authority to appoint or remove a deputy at will under MCLA Section 51.70, was of "constitutional magnitude" and could not be abrogated by statute.[301] The court therefore vacated the prosecutor's order, and denied reconsideration.[302] Kiessel appealed.[303]

The threshold matter on appeal was whether, given the sheriff's status as a constitutional officer, the Michigan Legislature could, through

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292. *Leelanau Cnty. Sheriff*, 297 Mich. App. at 288; MICH. COMP. LAWS ANN. § 51.70 (West 2012); MICH. COMP. LAWS ANN. §§ 35.401-404.

293. *Leelanau Cnty. Sheriff*, 297 Mich. App. at 288.

294. *Id.* (citing MICH. COMP. LAWS ANN. §§ 35.401-402).

295. *Id.*

296. *Id.* (citing MICH. COMP. LAWS ANN. § 35.402).

297. *Id.* at 290 (citing MICH. CONST. art. 7, § 4; MICH. COMP. LAWS ANN. §§ 35.401-404).

298. *Id.* (citing MICH. COMP. LAWS ANN. §§ 35.401-404).

299. *Leelanau Cnty. Sheriff*, 297 Mich. App. at 291.

300. *Id.* (citing MICH. COMP. LAWS ANN. §§ 35.401-404).

301. *Id.* (citing MICH. COMP. LAWS ANN. §§ 35.401-404).

302. *Id.*

303. *Id.*

the VPA, limit a sheriff's common law or statutory power to discharge deputies at will.[304] The Leelanau County Sheriff argued that the Michigan Constitution "imbues the sheriff as a constitutional officer with common-law powers that the Legislature may not limit, including the authority to discharge deputies at will."[305] The pertinent Article and Section of the Constitution provides, "[t]here shall be elected for four-year terms in each organized county a sheriff . . . whose duties and powers *shall be provided by law*."[306]

In analyzing the constitutional nature of the sheriff's office, as well as the impact the legislature may have on that office, the court of appeals looked to its previous decision in *Brownstown Township v. Wayne County*, stating:

> The office of sheriff is a constitutional office with duties and powers provided by law. Const. 1963, art 7, § 4, *Labor Mediation Board v. Tuscola County Sheriff*, 25 Mich. App. 159, 162, 181 N.W.2d 44 (1970) . . . The Legislature may vary the duties of a constitutional office, but it may not change the duties so as to destroy the power to perform the duties of the office.[307]

Further, other court of appeals decisions also have concluded that the legislature may not "vary the duties and powers" of the sheriff in such a way which would change the "legal character of the office."[308]

Focusing on this standard, the court of appeals analyzed "the legal character" and history of the sheriff's office and its common law duties, ultimately deciding that the Leelanau County Sheriff had provided "no authority for the proposition that the sheriff's statutory ability to discharge deputies without cause was among the common-law powers of the sheriff."[309] "[E]ven assuming that the common law recognized . . . such a power," the Leelanau County Sheriff offered "no meaningful argument that the power to discharge" at will was essential to the "character of the office of the sheriff, or that its legislative regulation would destroy the powers of the sheriff" to a degree that would change the legal character of the office.[310] Additionally, the court noted that the

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304. *Id.* at 292.

305. *Leelanau Cnty. Sheriff*, 297 Mich. App. at 297.

306. *Id.* at 292; MICH. CONST. art. 7 § 4. (emphasis added).

307. *Leelanau Cnty. Sheriff*, 297 Mich. App. at 297 (citing Brownstown Twp. v. Wayne Co., 68 Mich. App. 244, 247-48; 242 N.W.2d 538 (1976)).

308. *Id.* (citing Fraternal Order of Police, Ionia Co. Lodge No. 157 v. Bensinger, 122 Mich. App. 437, 444; 333 N.W.2d 73 (1983)).

309. *Id.* at 299.

310. *Id.*

Michigan Constitution "expressly confers on the Legislature the authority to prescribe the 'duties and powers' of the sheriff," and, as such, Michigan's Constitution does not preclude the legislature from limiting the sheriff's authority to discharge deputies at will, "whether that authority emanates from the common law or statute."[311]

Because the court determined that the legislature had the power to limit the sheriff's authority, the remaining issue was whether the legislature intended that the VPA function as "as an exception to a sheriff's authority under MCLA 51.70."[312] The court relied largely on the legislative history and subsequent statutory amendments of both the VPA and MCLA Section 51.70 in its analysis. [313] First, the court looked at the legislative history of MCLA Section 51.70, noting that the statute has remained "essentially unchanged since its adoption in 1848."[314] Second, the court observed that the legislature had drafted the VPA with no exception for deputy sheriffs, and that the only pertinent exceptions added since then, by 1931 PA 67, were for "first deputies."[315] The court stated that because the legislature is presumed to be fully aware of both common law and existing statutes, and because deputy sheriffs had never been exempted from the VPA, this "logically implies" that deputy sheriffs fall within the protections of the VPA.[316] Additionally, the purposeful exemption for first deputies but not for regular deputies "eliminates the possibility of their [sic] being other exceptions under the legal maxim *expressio unius est eclusio alterius*."[317] Therefore, regular deputies are protected by the VPA.[318]

The court also dismissed additional arguments made by the Leelanau County Sheriff, including whether the sheriff is a "public department" under the VPA,[319] and whether the prosecutor's review of a sheriff's

311. *Id.* at 293.

312. *Id.* (citing MICH. COMP. LAWS ANN. §§ 35.401-404 (West 2012); MICH. COMP. LAWS ANN. § 51.40 (West 2012)).

313. *Leelanau Cnty. Sheriff*, 297 Mich. App. at 288 (citing MICH. COMP. LAWS ANN. §§ 35.401-404; MICH. COMP. LAWS ANN. § 51.40).

314. *Id.* (citing MICH. COMP. LAWS ANN. § 51.40; Local 1518, Council No 55, Am. Fed. of State, Co. & Muni. Emps., v. St. Clair Co. Sheriff, 407 Mich. 1, 7; 281 N.W.2d 313 (1979)).

315. *Id.* at 294 (citing MICH. COMP. LAWS ANN. §§ 35.401-404).

316. *Id.* (citing MICH. COMP. LAWS ANN. §§ 35.401-404).

317. *Id.* ("The expression of one thing is the exclusion of another.") (citing Hoerstman Gen. Contracting, Inc. v. Hahn, 474 Mich. 66, 74; 7111 N.W.2d 340 (2006)).

318. *Id.* (citing MICH. COMP. LAWS ANN. §§ 35.401-404).

319. *Leelanau Cnty. Sheriff*, 297 Mich. App. at 296 (citing MICH. COMP. LAWS ANN. §§ 35.401-404). The court noted that the plaintiff had conceded this argument on appeal. However, the court nonetheless briefly analyzed the issue, concluding that as used in the VPA, the term had previously been defined by the Michigan Supreme Court to include a

exercise of discretion to appoint or remove deputies was unconstitutional under the separation of powers doctrine.[320] Lastly, the court stated that any other remaining issues were rendered moot by its conclusion that "the VPA is constitutional as applied to deputy sheriffs and is a reasonable restriction on the otherwise absolute discretion conveyed to sheriffs by MCLA Section 51.70."[321] However, because the merits of the prosecutor's ruling had not been addressed by the circuit court, the court of appeals remanded the matter and vacated the writ of superintending control.[322]

C. Sales Representative Commissions Act

Michigan's Sales Representative Commissions Act (SRCA)[323] 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 principal 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.[324] Failure to comply with these provisions subjects the principal to double damages not to exceed $100,000, as well as costs and attorney fees.[325]

The SRCA does not determine whether the employee is entitled to those commissions, but merely ensures that an employee is paid the commissions that are owed.[326] The terms of the contract between the employer and its sales representative determine entitlement to commissions.[327] Unsurprisingly, given the enhanced damages available under the SRCA, litigation frequently arises over the precise definition of

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distinct part of a governmental organization and so it could not be disputed that a sheriff and a sheriff's employees are covered in this definition. *Id.* at 296. (citing Ellis v. Common Council of Grand Rapids, 123 Mich. 567, 569; 82 N.W. 244 (1900)).

320. *Id.* According to the court, the constitutional principle of the separation of powers does not apply to one executive branch officer (the prosecutor) reviewing whether another executive branch officer (the sheriff) complied with the VPA. *Id.* (citing MICH. COMP. LAWS ANN. §§ 35.401-404).

321. *Id.* at 303.

322. *Id.* at 304.

323. MICH. COMP. LAWS ANN. § 600.2961 (West 2012).

324. *Id.* § 600.2961(4).

325. *Id.* § 600.2961(5), (6).

326. *Id.* § 600.2961.

327. *Id.*

"sales representative," even though the SRCA does provide a definition.[328]

In *Radina v. Wieland Sales, Inc.*,[329] a Michigan Court of Appeals decision released during the *Survey* period, the court examined the definition of a "sales representative" to determine if the solicitation of commercial truck leases constitutes the solicitation of orders for a good.[330] The plaintiff, Kim Radina, began working for Wieland Sales, Inc., a truck dealership, in 1996.[331] Radina agreed to establish a commercial truck rental and leasing business for Wieland and Wieland agreed to pay Radina a salary plus one percent of all lease revenues he generated.[332] Wieland recorded the leases solicited by Radina as "sales."[333] The one percent payments were recorded as "commissions."[334] In response to Wieland's cash-flow concerns, Radina agreed that the commissions would be "paid out over the term of the lease" rather than upon execution of the lease.[335] Notably, Radina did not *sell* any trucks during his employment with Wieland.[336] He was responsible only for soliciting leases.[337]

More than twelve years later, in December 2008, Wieland terminated Radina's employment and stopped making commission payments on the lease revenues he had generated.[338] Radina sued, alleging violation of the SRCA.[339] Wieland sought summary disposition, arguing that Radina was not a "sales representative" under the SRCA because he did not sell goods or solicit "contracts to sell goods at a future time," and therefore was not protected by the SRCA.[340] In contrast, Radina asserted that the sale of leases for the use of goods [(i.e., trucks)] brought him within the SRCA.[341] The trial court agreed with Radina, denied Wieland's motion,

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328. The SRCA defines "sales representative" as, ". . . a person who contracts with or is employed by a principal for the solicitation of orders or sale of goods and is paid, in whole or in part, by commission. Sales representative does not include a person who places an order or sale for a product on his or her own account for resale by that sales representative." *Id.* at (1)(e).

329. 297 Mich. App. 369; 824 N.W.2d 587 (2012).

330. *Id.* at 370-71.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Radina*, 297 Mich. App. at 371.

336. *Id.* (emphasis added).

337. *Id.*

338. *Id.*

339. *Id.* (citing MICH. COMP. LAWS ANN. § 600.2961 (West 2012)).

340. *Id.*

341. *Radina*, 297 Mich. App. at 371. (citing MICH. COMP. LAWS ANN. § 600.2961).

and sent the case to the jury.[342] The jury also sided with Radina, awarding him $63,750 in commissions.[343]

Wieland appealed, arguing that the trial court erred in concluding that Radina was a "sales representative" under the SRCA.[344]

The court of appeals determined that the sole issue was whether the solicitation of commercial truck leases is a "solicitation of orders for a good."[345] The court acknowledged that the terms "order" and "good" are not defined in the SRCA.[346] The court therefore considered dictionary definitions of the terms.[347] *Random House Webster's College Dictionary* defines "goods" as "articles of trade; merchandise, and "order" as "a direction or commission to make, provide, or furnish something."[348] Based on this, as well as the fact that the SRCA does not require a transfer of title to be considered a "solicitation of orders for a good, the court concluded that Radina's job duties amounted to directing, on Wieland's behalf, the furnishing of trucks (i.e., merchandise) to customers who wished to do business with Wieland.[349]

The court also considered and ultimately rejected Wieland's reliance on the definition of "goods" found in Article 2 of the Michigan Uniform Commercial Code (UCC).[350] As the court observed, Article 2 governs *sales* and defines "goods" as "all things . . . which are movable at the time of identification to the contract for sale."[351] Wieland argued that the leased vehicles were not "goods" because there was no *sale*.[352] The court noted, however, that Article 2A of the UCC is more applicable, because it governs *leases* and "defines 'goods' as 'all things that are movable at the time of identification to the lease contract.'"[353] Therefore, the court of appeals affirmed the trial court's denial of Wieland's summary

342. *Id.*

343. *Id.*

344. *Id.* (citing MICH. COMP. LAWS ANN. § 600.2961). On appeal, Wieland also argued that the jury's award of $63,750 was unsupported by the evidence. *Id.* The appellate court held, however, that Wieland had waived this issue on appeal, and even if he had not, sufficient evidence existed for the jury's award of damages. *Id.*

345. *Id.* at 374.

346. *Id.* (citing MICH. COMP. LAWS ANN. § 600.2961).

347. *Radina*, 297 Mich. App. at 374.

348. *Id.* (citing Roberson v. DaimlerChrysler Corp., 465 Mich. 732; 641 N.W.2d 567 (2002); RANDOM HOUSE DICTIONARY 565 (2d ed. 2000)).

349. *Id.* at 374 (citing MICH. COMP. LAWS ANN. § 600.2961).

350. *Id.* at 375 (citing MICH. COMP. LAWS ANN. 440.2105 (West 2012)).

351. *Id.* at 375 n.1 (quoting MICH. COMP. LAWS ANN. § 440.2105(1)).

352. *Id.*

353. *Radina*, 297 Mich. App. at 375 (citing MICH. COMP. LAWS ANN. § 440.2803(1)(h)).

disposition and the jury's verdict for Radina, thereby expanding the definition of "sales representative" under the SRCA.[354]

In *Radina*, the court considered both the dictionary definition and the UCC definition of "goods" and reached the same conclusion under both.[355] Generally, when a term is not defined by statute, courts are to look to the term's "plain and ordinary meaning, taking into account the context in which the words are used."[356] Where does one find the "plain and ordinary meaning," however—in a dictionary or some other source that already defines the term, such as the UCC?[357]

In *Mahnick v. Bell Co.*,[358] (another SRCA case cited in *Radina* for other purposes) the Michigan Court of Appeals looked only to the dictionary definition of the term "goods" and held that a project estimator was not a salesperson who sold "goods."[359] Instead, the court concluded that "as a project estimator, plaintiff assisted [the employer's] efforts to bid to provide *services* to the project owner by providing a professional service to defendant."[360]

In *Klapp v. United Insurance Group Agency*,[361] an SRCA case decided just seven months after *Mahnick*, the court of appeals not only relied on *Mahnick* and reviewed the dictionary definition of "goods," but also looked to the UCC's definition.[362] In *Klapp*, the issue was whether an insurance contract was a "good."[363] Considering the dictionary and UCC definitions together, as the court did in *Radina*, the *Klapp* court concluded that the sale of insurance policies was not the sale of "goods."[364]

It remains unclear whether courts are to look to the dictionary when interpreting terms in the SRCA, to the UCC, or both.[365] It may not matter

354. *Id.* (citing MICH. COMP. LAWS ANN. § 600.2961).

355. *Id.* at 374.

356. *Id.* (citing *DaimlerChrysler Corp.*, 465 Mich. 732, 748).

357. *Compare* Mahnick v. Bell Co., 256 Mich. App. 154, 162; 662 N.W.2d 830 (2003) (relying on dictionary definition) *with* Klapp v. United Ins. Grp. Agency, 259 Mich. App. 467; 674 N.W.2d 736 (2003) (cited by *Radina*, 297 Mich. App. 369 at 372-76).

358. *Mahnick*, 256 Mich. App. at 154.

359. *Id.* at 160, 162 (citing MICH. COMP. LAWS ANN. § 600.2961).

360. *Id.* at 163 (emphasis in original).

361. *Klapp*, 259 Mich. App. at 467; *Mahnick*, 256 Mich. App. at 154.

362. *Klapp*, 259 Mich. App. at 470-71 (citing MICH. COMP. LAWS ANN. § 600.2961).

363. *Id.* at 469.

364. *Id.* at 470-74; *Radina*, 297 Mich. App. 369 at 375.

365. *Compare Radina*, 297 Mich. App. at 375 (using the dictionary and UCC definitions to define SCRA terms) *with Mahnick*, 256 Mich. App. at 154 (using only the dictionary); MICH. COMP. LAWS ANN. § 600.2961.

much, however, because the courts in *Radina* and *Klapp* reached the same conclusion under both definitions.[366]

VI. ARBITRATION

A. Michigan's New Uniform Arbitration Act

Employers continue to rely on arbitration as one option for resolving employment disputes, by including arbitration provisions in employment applications and agreements.[367] Historically, such provisions were enforced through the Michigan Arbitration Act (MAA),[368] which specifically stated that arbitration provisions are "valid, enforceable and irrevocable," provided that the agreement is in writing, and contains a provision stating that the arbitral decision may be entered as a judgment in circuit court.[369] The MAA also provided circuit courts with the jurisdiction to enforce arbitration agreements subject to the Act. [370]

Effective July 1, 2013, however, non-labor arbitrations in Michigan will be governed by the Uniform Arbitration Act, which considerably expands upon the rather barebones MAA.[371] Highlights of the new law include:

- The Act covers "an agreement to arbitrate whenever made," but continues to exempt arbitrations conducted pursuant to collective bargaining agreements.[372]

- Arbitration proceedings are initiated through the provision of notice to the other party, by means specifically described in the Act.[373]

- The existence of an agreement to arbitrate is to be determined by a circuit court.[374] A complaint regarding an

366. *Radina*, 297 Mich. App. 369 at 375; *Klapp*, 259 Mich. App. at 470-71.

367. *See, e.g.*, Hall v. Stark Reagan, P.C., 493 Mich. 903; 823 N.W.2d 274 (2012).

368. MICH. COMP. LAWS ANN. §§ 600.5001-5035 (West 2012), *repealed by* S. 903, 96 Leg., Reg. Sess. (Mich. 2012) (effective July 1, 2013) (to be codified at MICH. COMP. LAWS ANN. §§ 691.1681-1713 (West 2012)).

369. MICH. COMP. LAWS ANN. § 600.5001(1).

370. MICH. COMP. LAWS ANN. § 600.5025.

371. S. 903, 96 Leg., Reg. Sess. (Mich. 2012) (effective July 1, 2013) (to be codified at MICH. COMP. LAWS ANN. §§ 691.1681-1713).

372. MICH. COMP. LAWS ANN. § 691.1683.

373. MICH. COMP. LAWS ANN. § 691.1689.

374. MICH. COMP. LAWS ANN. § 691.1686(2).

agreement to arbitrate is filed and served in the circuit court.[375]

- Prior to selection as an arbitrator, an individual being proposed must disclose to the parties any known facts that may affect the arbitrator's impartiality, including financial interests or relationships with any of the parties, counsel or witnesses.[376]

- Arbitrators are immune from civil suit.[377]

- An arbitrator may set hearings,[378] issue subpoenas for the attendance of witnesses and the production of documents and evidence,[379] permit the taking of depositions and other discovery,[380] and issue protective orders.[381]

- "An arbitrator may decide motions for summary disposition."[382]

- Arbitration awards must be in writing ("inscribed on a tangible medium or stored in an electronic medium").[383]

- An arbitrator can award punitive or exemplary damages if permitted by law, [384] reasonable attorney fees if authorized by law,[385] or other remedies that the arbitrator finds to be just and appropriate.[386]

- A party may request that the arbitrator modify or clarify an award,[387] or may ask the circuit court to vacate the award, on

375. MICH. COMP. LAWS ANN. § 691.1685(2).

376. MICH. COMP. LAWS ANN. § 691.1692.
377. MICH. COMP. LAWS ANN. § 691.1694.
378. MICH. COMP. LAWS ANN. § 691.1695(3).
379. MICH. COMP. LAWS ANN. § 691.1697(1).
380. *Id.* § 691.1697(2)-(3).
381. *Id.* § 691.1697(5).
382. MICH. COMP. LAWS ANN. § 691.1695(2).
383. MICH. COMP. LAWS ANN. § 691.1681(2)(f); MICH. COMP. LAWS ANN. § 691.1699(1).
384. *Id.* § 691.1701(1).
385. *Id.* § 691.1701(2).
386. *Id.* § 691.1701(3).
387. MICH. COMP. LAWS ANN. § 691.1700.

> grounds set forth in the Act,[388] or modify or correct the award.[389]

While it will be some time before the impact of this new legislation is fully explored, its immediate effect undoubtedly will be to provide much needed guidance to the increasing number of parties and attorneys facing an arbitral forum.[390]

B. The Scope of an Arbitration Clause

During the *Survey* period, the Michigan Supreme Court faced its own arbitration question, having to determine whether an arbitration clause in a shareholder agreement extended to a claim of discrimination under the ELCRA.[391] In *Hall v. Stark Reagan, P.C.*,[392] the court found that because the dispute involved the motives of the shareholders in invoking the agreement, a claim of discrimination was "'a dispute regarding the interpretation or enforcement . . . of the parties' rights or obligations' under the Shareholder Agreement."[393] In reaching this decision, the supreme court reversed portions of the court of appeals' decision, and vacated other portions.[394]

Patrick Hall and Ave Ortner were hired as associate attorneys by the Stark Reagan law firm in 2003; in January 2004, they became shareholders.[395] At that time, they signed a shareholder agreement with the following arbitration clause:

> Any dispute regarding interpretation or enforcement of any of the parties' rights or obligations hereunder shall be resolved by binding arbitration according to the rules of the American Arbitration Association in the County of Oakland, State of Michigan. The parties hereby irrevocably submit to personal jurisdiction of any State court in the County of Oakland or the Federal court in the County of Wayne, State of Michigan, in any

388. MICH. COMP. LAWS ANN. § 691.1703(1).

389. MICH. COMP. LAWS ANN. § 691.1704(1).

390. S. 903, 96 Leg., Reg. Sess. (Mich. 2012) (effective July 1, 2013) (to be codified at MICH. COMP. LAWS ANN. §§ 691.1681-1713).

391. *Hall*, 493 Mich. at 903 (citing MICH. COMP. LAWS ANN. §§ 37.2101-2803 (West 2012)).

392. *Id.* at 493.

393. *Id.*

394. *Id.* (*citing Hall*, 294 Mich. App. at 91).

395. *Hall*, 294 Mich. App. at 91, *rev'd in part, vacated in part* Hall v. Stark Reagan, P.C., 493 Mich. 903; 823 N.W.2d 274 (2012).

> action or other legal proceeding to enforce any award made by the arbitrators . . . .[396]

At a shareholders' meeting in January, 2009, another shareholder proposed that Hall's and Ortner's interests in the firm be terminated, ostensibly "to change the demographics of the firm . . . [because] the demographics of the firm was [sic] a problem because older attorneys lose their clients bases . . . and that two younger attorneys had more potential . . ."[397] No decision was made at that meeting, and at the next meeting held to address the subject, Hall and Ortner stated their view that the termination of their employment constituted unlawful age discrimination.[398] Nonetheless, on March 1, 2009, the shareholders voted to redeem Hall's and Ortner's shares, thereby terminating their employment.[399]

Hall and Ortner filed suit in circuit court, alleging violations of ELCRA.[400] The defendants sought summary disposition under MCR 2.116(c)(7), citing the arbitration clause in the shareholder agreement.[401] The defendants also argued that the plaintiffs, as shareholders in the defendant law firm, did not have standing to sue under ELCRA, because they were not employees, but the employer.[402] The trial court granted the motion, finding that the arbitration clause covered ELCRA claims, and that the arbitrator should resolve the issue of standing.[403] The case was ordered to arbitration.[404]

The plaintiffs appealed, and the court of appeals reversed, in a 2-1 decision.[405] The court first noted that a three-part test applies to the determination of whether a certain issue is arbitrable: "1) is there an arbitration agreement in a contract between the parties; 2) is the disputed issue on its face or arguably within the contract's arbitration clause; and 3) is the dispute expressly exempted from arbitration by the terms of the contract."[406] The only issue truly in dispute in the case before the court was whether the arbitration clause in the shareholder agreement extended

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396. *Id.* at 94.
397. *Id.* at 91.
398. *Id.*
399. *Id.*
400. *Id.* (citing MICH. COMP. LAWS ANN. §§ 37.2101-2803 (West 2012)).
401. *Hall,* 294 Mich. App. at 92 (citing MICH. CT. R. 2.116(c)(7)).
402. *Id.*
403. *Id.*
404. *Id.*
405. *Id.* at 90.
406. *Id.* at 93 (quoting *In re* Nestorovski Estate, 283 Mich. App. 177, 184; 769 N.W.2d 720 (2009)).

to claims brought under ELCRA.[407] The court found that it did not, because the scope of that clause was limited to the interpretation or enforcement of the rights or obligations set forth within the shareholder agreement."[408] In its review of the fourteen articles of the shareholder agreement, the court found no reference to any relationship between the parties other than those "created or impacted by the disposition of stock."[409] The court then turned to the plaintiffs' complaint, and found "no allegation that defendants [had] violated a term of the shareholders' agreement" or ignored "the procedures for stock redemptions."[410] The court concluded that:

> Simply put, Hall and Ortner have not advanced any claim or argument germane to the subject matter of the shareholders' agreement, or having its genesis in that agreement. To include an age-discrimination action within the scope of an arbitration provision expressly limited to the 'interpretation or enforcement' of 'rights and obligations' concerning corporate stock would expand the clause's reach beyond that intended by the parties.[411]

As to the plaintiffs' standing to pursue an ELCRA claim, the court held that, even if the plaintiffs were not employees, they had standing to bring a claim under the Act, because the defendants' alleged actions affected a term, condition or privilege of the plaintiffs' employment.[412] It was not entirely clear, however, how the plaintiffs' employment could be affected by the defendants, if plaintiffs were not employees in the first place.[413]

In dissent, Judge Kristen Frank Kelly had a different view of the arbitration clause in light of the plaintiffs' complaint, writing that "[d]istilled to its essence, plaintiffs are contesting the involuntary redemption of shares, which was allegedly the result of unlawful discrimination. The Shareholders' Agreement is inextricably linked to plaintiffs' claims, which cannot be maintained without reference to the agreement."[414]

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407. *Hall*, 294 Mich. App. at 93 (citing MICH. COMP. LAWS ANN. §§ 37.2101-2803 (West 2012)).

408. *Id.* at 95.

409. *Id.* at 96.

410. *Id.*

411. *Id.*

412. *Id.* at 110 (citing MICH. COMP. LAWS ANN. §§ 37.2101-2803).

413. *Hall*, 294 Mich. App. at 108-10.

414. *Id.* at 118 (Kelly, J., dissenting).

The Michigan Supreme Court granted leave, and in a brief order, agreed with Judge Kelly, pithily stating that "[t]he dispute in this case concerns the motives of the defendant shareholders in invoking the separation provision of the Shareholders' Agreement . . . This is a 'dispute regarding interpretation or enforcement of . . . the parties' rights or obligations' under the Shareholders' Agreement and is therefore subject to binding arbitration . . ."[415] In light of that ruling, the court found the court of appeals' holding regarding standing superfluous, and so vacated that portion of the decision.[416]

VII. FAMILY MEDICAL LEAVE ACT

The Family and Medical Leave Act (FMLA)[417] provides eligible employees with unpaid leave for specific reasons enumerated in the statute.[418] Congress enacted the FMLA to assist workers in balancing family, work, and other obligations without fear of losing their jobs.[419] 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 health-related issues or the health issues of family members.[420]

An employee is eligible for leave under the Act if the employee has worked for an employer for a minimum of twelve months, and has worked at least 1,250 hours during the twelve months preceding the leave request.[421] The employee must also work at a location at which the company employs fifty or more employees within seventy-five miles.[422]

In calculating whether an employer employs at least fifty workers at a worksite, only actual employees are considered.[423] During the *Survey* period, in *Mendel v. City of Gibraltar,*[424] the United Stated District Court for the Eastern District of Michigan examined when an individual is a volunteer or an employee for purposes of FMLA eligibility.[425]

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415. *Hall*, 493 Mich. at 903.
416. *Id.* (citing *Hall*, 294 Mich. App. at 92-110).
417. Family and Medical Leave Act of 1993, 29 U.S.C.A. §§ 2601-2654 (West 2010).
418. 29 U.S.C.A. § 2601.
419. *Id.*
420. 29 U.S.C.A. § 2612.
421. 29 U.S.C.A. § 2611(2)(A)(i)-(ii).
422. 29 U.S.C.A. § 2611(2)(B)(i)-(ii).
423. 29 U.S.C.A. § 2612(1).
424. 842 F. Supp. 2d 1035 (E.D. Mich. 2012) (citing 29 U.S.C. §§ 2601-2654).
425. *Id.* at 1036 (citing 29 U.S.C. §§ 2601-2654).

The plaintiff, Paul Mendel, worked for the City of Gibraltar Police Department as a dispatcher.[426] The City had forty-one regular employees.[427] It also relied on volunteer firefighters, but did not consider them employees.[428] Those volunteers received $15 per hour for responding to calls and maintaining equipment.[429] They did not receive health insurance, vacation or sick time, social security benefits, or premium pay.[430] The firefighters were required to attend mandatory trainings and take tests on their own time, but without compensation.[431] Additionally, the firefighters were not required to respond to calls, nor did they work scheduled shifts or staff a fire station.[432]

The City terminated Mendel from his dispatch position after he failed to report to work for five scheduled shifts.[433] According to the City, Mendel failed to provide sufficient medical documentation explaining his absences.[434] Mendel filed suit, alleging that the City had violated the FMLA by failing to designate his absences as FMLA leave, under which he would have been protected from termination.[435] The City sought to dismiss Mendel's claim, arguing that he was not an eligible employee under the FMLA because the City did not employ fifty workers within seventy-five miles of Mendel's worksite.[436]

Thus, the issue for the court was whether the volunteer firefighters were employees under the FMLA.[437] If they were, then the City would meet the FMLA's fifty-employee threshold. In analyzing whether the firefighters were employees, the court first observed that the FMLA relies on the same definition of employee as the Fair Labor Standards Act (FLSA).[438] The FLSA defines "employee" as "any individual employed by an employer."[439] However, the FLSA excludes from that definition any individual who volunteers for a public agency if the individual "receives no compensation or is paid [only] expenses, reasonable benefits, or a nominal fee to perform the [volunteer] services"

426. *Id.*
427. *Id.*
428. *Id.*
429. *Id.*
430. *Mendel*, 842 F. Supp. 2d at 1037.
431. *Id.* at 1036.
432. *Id.*
433. *Id.*
434. *Id.*
435. *Id.* (citing 29 U.S.C. §§ 2601-2654 (2010).
436. *Mendel*, 842 F. Supp. 2d at 1036 (citing 29 U.S.C. §§ 2601-2654).
437. *Id.* at 1039 (citing 29 U.S.C. §§ 2601-2654).
438. *Id.* (citing 29 U.S.C. § 2611(3); 29 U.S.C. § 203(e)(1) (West 2010)).
439. 29 U.S.C.A. § 203(e)(1).

and is not otherwise employed by the agency to perform those same types of services.[440]

The court did not find the FLSA definition of employee, along with its exemption of volunteers, to be determinative regarding the City's status as a covered employer under the FMLA, at least in part because of the varying purposes of the FMLA and FLSA.[441] In so doing, the court rejected Mendel's argument that if the City's firefighters were not volunteers, they had to be employees, noting that other classes of workers, such as independent contractors and student interns, are not employees under the FLSA, but also are not volunteers.[442] The court therefore turned to the traditional tests used in deciding "whether the totality of circumstances suggests an employer-employee relationship."[443] Common to all of these tests is an examination of control and compensation, which became the court's focus.[444]

Applying these factors, the court readily concluded that the totality of the circumstances supported a finding that the volunteer firefighters were not employees because the City exerted no control over them.[445] According to the court, it was significant that the firefighters were not required to respond to fire calls and were not subject to disciplinary actions when they did not respond to a call, work a set schedule or staff the fire station during off hours.[446] The court rejected Mendel's argument that the $15 per hour paid to firefighters, while not nominal, outweighed the lack of control exercised by the City, because it did not take into account the testing, training and certification time expected of the volunteers, all of which was unpaid.[447]

Equally unavailing was Mendel's contention that the court should rely on the economic realities test because, as the court noted, that test usually is used to distinguish between employees and independent

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440. *Mendel*, 842 F.Supp. 2d at 1039 (citing 29 U.S.C. § 203(e)(4)(A)(i), (ii)).

441. *Id.* at 1040 (citing 29 U.S.C. § 2611(3); 29 U.S.C. § 203(e)(1)). After reviewing the legislative history that resulted in the amendment of the FLSA excluding volunteers, the court observed that the intention of that amendment appeared to be to "reduce the overclassification of people as volunteers, but not necessarily to restrict the FLSA language to pertain only to people who were either employees or volunteers, and nothing else between." *Id.* (citing 29 U.S.C. § 2611(3)).

442. *Id.* (citing 29 U.S.C. § 203(e)(1)).

443. *Id.* The court noted that four such tests are typically used: (1) common law agency; (2) primary purpose; (3) economic reality; and (4) a hybrid of common law and economic reality.

444. *Id.*

445. *Id.* at 1041.

446. *Mendel*, 842 F. Supp. 2d at 1042.

447. *Id.*

contractors, and has limited applicability to volunteers.[448] Finally, the court rejected Mendel's claim that "other indicia of employment," including that the City subjected the firefighters to a hiring process, maintained their personnel files, imposed training requirements and promoted or discharged them, supported the position that the firefighters were employees.[449] The court noted that even volunteers required training, were subject to a background check and could be released if the volunteer did not meet certain standards, and so these indicia were not exclusive to employees.[450]

Thus, the court concluded that the firefighters were not "eligible employees" for purposes of Mendel's FMLA claim.[451] The City thus had fewer than fifty employees and so was not an eligible employer under the FMLA.[452]

To qualify for leave protected under the FMLA, an employee must have worked for his employer at least 1,250 hours in a twelve-month period.[453] Such an eligible employee is entitled to twelve weeks of leave during any twelve-month period "because of a serious health condition that makes the employee unable to perform the functions of the position."[454] Under governing FMLA regulations, employers are "permitted to choose any one of the following methods for determining the 12-month period in which the 12 weeks of leave entitlement . . . occurs."[455] The four methods are:

> (1) The calendar year; (2) Any fixed 12-month 'leave year,' such as a fiscal year, a year required by State law, or a year starting on an employee's 'anniversary' date; (3) The 12-month period measured forward from the date any employee's first FMLA leave under paragraph (a) begins; or, (4) A "rolling" 12-month

448. *Id.* The economic realities test looks at six factors:

> (1) the permanency of the relationship between the parties; (2) the degree of skill required for the rendering of the services; (3) the worker's investment in equipment or materials for the task; (4) the worker's opportunity for profit or loss, depending upon his skill; and (5) the degree of the alleged employer's right to control the manner in which the work is performed . . . [and (6)] whether the service rendered is an integral part of the alleged employer's business.

Id. (quoting Donovan v. Brandel, 736 F.2d 1114, 1117-1120 (6th Cir. 1984)).

449. *Id.*

450. *Id.*

451. *Id.* at 1044.

452. *Mendel,* 842 F. Supp.2d at 1043-44.

453. 29 U.S.C.A. § 2611(2)(A)(i)-(ii) (West 2010).

454. 29 U.S.C.A. § 2612(a)(1)(D) (West 2010).

455. 29 C.F.R. § 825.200(b) (2012).) (West 2010).

> period measured backward from the date an employee uses any FMLA leave as described in paragraph (a).[456]

The FMLA regulations, however, are silent on just how an employer should notify its employees of the employer's chosen method.[457] Despite this silence, the Sixth Circuit Court of Appeals emphasized the importance of informing employees how the employer computes leave under the FMLA in *Thom v. American Standard, Inc.*,[458] a case that arose from confusion as to when an employee should return to work after his leave.[459]

The plaintiff, Carl Thom, worked as a molder at American Standard Inc. from July 16, 1969 until he was discharged on June 17, 2005.[460] Thom requested and was granted FMLA leave from April 27, 2005, to June 27, 2005 because of a non-work related shoulder injury.[461] Because Thom's shoulder healed more quickly than expected, his doctor released him to return to light duty work on May 31, and set June 13 as the probable return date for unrestricted work.[462] When Thom returned on May 31, he was sent home by the human resources department under a company policy prohibiting light duty work for non-work related injuries.[463]

Thom did not come to work on June 13 (the date set for his return to unrestricted work), but informed the human resources department that he was experiencing increased pain and so instead planned to return to work on June 27, the end date of his approved FMLA leave.[464] Although Thom obtained a doctor's note on June 17 extending his leave to July 18, American Standard discharged Thom on June 17 by counting his absences between June 13 and June 17 as unexcused.[465] This caused Thom to exceed the absences allowed under the company's absenteeism policy.[466] Thom filed suit, alleging that American Standard interfered with his rights under the FMLA by terminating his employment.[467]

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456. *Id.*
457. *Id.*
458. 666 F.3d 968 (6th Cir. 2012).
459. *Id.* at 971.
460. *Id.* at 972.
461. *Id.*
462. *Id.*
463. *Id.*
464. *Thom*, 666 F.3d at 972.
465. *Id.*
466. *Id.*
467. *Id.* at 971.

In his suit, Thom contended that American Standard had failed to adequately notify him of its method for calculating FMLA leave, because it did not inform him in writing or otherwise that it used a "rolling" method of calculating leave.[468] The "rolling" method calculates an employee's leave year "backward from the date an employee uses any FMLA leave."[469] Under this approach, Thom's twelve month leave eligibility period would have expired on June 13.[470] In contrast, under the "calendar" method, where an employee is eligible for twelve weeks of FMLA leave each calendar year, Thom's allowable leave would have extended through July 14.[471]

American Standard argued that it had always used the "rolling" method for calculating leave and that Thom had constructive notice of this.[472] In granting partial summary judgment to Thom, the district court rejected the constructive notice argument, holding that "an employer is required to take affirmative steps to inform employees of its selected method for calculating leave."[473] The first time that Thom received actual notice that the company was using the rolling method was after he filed his lawsuit.[474] Based on this lack of notice, the district court awarded Thom $104,354.85 in back pay, $99,960 in attorney fees, $2,732.90 in costs, and ordered American Standard to change Thom's termination date to December 31, 2007, so that Thom would be eligible for his pension and retiree health benefits.[475] The court denied Thom's request for "statutory liquidated damages because it found that" American Standard acted in good faith.[476]

On appeal, the Sixth Circuit Court of Appeals affirmed, agreeing with the district court that employers must inform employees in writing of the method to be used to calculating the FMLA leave year.[477] Although there was evidence that American Standard had amended its policy internally in March 2005 to use the "rolling year" method, the Sixth Circuit emphasized that the company had failed to provide Thom with actual notice of the changed policy or tell him that his leave would be exhausted earlier than the June 27 date that the company had

468. *Id.* at 973 (citing *Thom v. Am. Standard Inc.*, 562 F. Supp. 2d 949 (N.D. Ohio 2008)).
469. *Id.* (citing 29 C.F.R. § 825.200(b)).
470. *Thom*, 666 F.3d at 973.
471. *Id.*
472. *Id.*
473. *Id.* at 974 (citing *Thom*, 562 F. Supp. 2d at 953).
474. *Id.* at 973.
475. *Id.* at 972 (citing *Thom*, 562 F. Supp. 2d at 953).
476. *Thom*, 666 F.3d at 973.
477. *Id.* at 974.

approved in writing.[478] Thom therefore was entitled to rely on the calendar method and the June 27 date, and was also entitled to liquidated damages under the statute, based on American Standard's bad faith actions in departing from its "rolling" year policy in approving his leave in the first place.[479]

Under the FMLA, employers are prohibited from interfering with an employee's rights and also are prohibited from retaliating against employees who invoke their FMLA rights resulting in two distinct theories of liability: (1) interference/entitlement claims[480] and (2) retaliation (or discrimination) claims.[481] Interference/entitlement claims require a plaintiff to prove that: (1) he is an eligible employee; (2) the defendant is an employer subject to the FMLA; (3) the employee was entitled to FMLA leave; (4) the employer had notice of the employee's need for FMLA leave; and (5) the employer denied the FMLA benefits that the employee was entitled to receive.[482] Retaliation/discrimination claims require that the plaintiff prove that: (1) she was engaged in an FMLA protected activity; (2) the employer had knowledge of that protected activity; (3) the employer took adverse action against the employee; and (4) a causal connection exists between the protected activity and the adverse employment action.[483]

Thus, while some fact patterns may support both an interference or a retaliation claim (for example, an employee may be terminated in order to prevent him from taking future FMLA leave, or in retaliation for prior FMLA leave), the proofs differ somewhat.[484] Under the retaliation theory, the plaintiff faces a greater burden because he must establish a causal connection between the alleged retaliatory act and some anti-FMLA animus on the part of the employer.[485] Further, while the Sixth Circuit Court of Appeals has long applied the *McDonnell Douglas Corp. v. Green*[486] burden-shifting analysis to FMLA retaliation claims,[487] it has not expressly adopted that approach for FMLA interference claims.[488] *McDonnell Douglas* does place additional hurdles before the plaintiff,

478. *Id.*

479. *Id.*
480. 29 U.S.C.A. § 2615(a)(1) (West 2010).
481. *Id.* § 2615(2).
482. Walton v. Ford Motor Co., 424 F.3d 481, 485 (6th Cir. 2005).
483. Arban v. West Publ'g Corp., 345 F.3d 390, 404 (6th Cir. 2003).
484. *Id.*; *Walton*, 424 F.3d at 485.
485. *Arban*, 345 F.3d at 404.
486. 411 U.S. 792 (1973).
487. Edgar v. JAC Prods., 443 F.3d 501, 508 (6th Cir. 2006).
488. Donald v. Sybra, Inc., 667 F.3d 727, 763 (6th Cir. 2012).

because once she establishes a prima facie case, the defendant/employer is allowed to identify a legitimate business reason for the actions it took regarding the plaintiff.[489] The plaintiff then must prove that the employer's stated reason for its actions was a pretext for its true motive—violation of the plaintiff's FMLA rights.[490] The plaintiff can do this by showing that the employer's stated reason had no basis in fact, did not motivate the action, or was insufficient to warrant the action.[491]

Other circuit courts of appeals have rejected use of the *McDonnell Douglas* framework for FMLA interference claims because the employer's motivation or reasons for its actions is irrelevant to claims for denial of benefits.[492] However, during the *Survey* period, in *Donald v. Sybra, Inc.*,[493] the Sixth Circuit Court of Appeals cleared up what it termed a "morass," and held that, even in interference claims, an employer should be allowed to argue that it had a legitimate reason for the actions it took, unrelated to the plaintiff's request for FMLA benefits.[494]

Notwithstanding application of *McDonnell Douglas* to FMLA interference claims, it still may be advantageous for a plaintiff to have his claims analyzed under the less burdensome interference theory. Presumably, that is what motivated the plaintiff in *Seeger v. Cincinnati Bell Telephone Co.*[495] to argue that the district court had improperly conflated his interference and retaliation claims and analyzed them solely as a retaliation claim.[496] The appellate court disagreed with Seeger, however, concluding that the essence of Seeger's claim was retaliation.[497]

Seeger was a network technician with Cincinnati Bell Telephone (CBT) from September 1979 through October 2007.[498] On September 5, 2007, Seeger began an approved unpaid FMLA leave for pain and numbness in his leg, which eventually was diagnosed as a herniated disc, and which was treated non-surgically with physical therapy and steroid

489. *Edgar*, 443 F.3d at 508 (citing *McDonnell Douglas Corp.*, 411 U.S. at 792).
490. *Id.*
491. *Id.*
492. *See, e.g.*, Colburn v. Parker Hannifin, 429 F.3d 325, 332 (1st Cir. 2005).
493. *Donald*, 667 F.3d at 729.
494. *Id.* at 762 (citing 29 U.S.C. § 2601 (West 2010)).
495. 681 F.3d 274 (6th Cir. 2012).
496. *Id.* at 282.
497. *Id.*
498. *Id.* at 276-77.

injections.[499] Seeger also was approved for short term disability benefits under CBT's disability leave plan.[500]

Later that month, CBT offered to place Seeger on temporary restricted duty, which CBT employees are required to accept, if able, as a condition of receiving short term disability insurance benefits.[501] However, Seeger's doctor advised that Seeger had difficulty changing positions, getting in and out of a chair and walking and could not perform any work, and so Seeger continued on FMLA and paid disability leave, and was not required to perform any work, light-duty or otherwise.[502]

Four days after rejecting the light duty work, Seeger attended an Oktoberfest celebration in downtown Cincinnati, where he was seen by several co-workers.[503] Seeger later conceded that he had walked ten blocks to and from the event.[504] One of Seeger's co-workers was aware that Seeger was on disability leave and reported seeing him to CBT's Human Resources Manager, who initiated an investigation.[505] Based on that investigation, which included interviews of the employees who saw Seeger at Oktoberfest, review of Seeger's medical records and a meeting with Seeger about his health status, CBT concluded that Seeger had "over reported" his symptoms to avoid the light-duty work requirement, and decided to discharge Seeger for disability fraud effective October 31, 2007.[506] Seeger had already returned to work on October 16, 2007, and ultimately was approved for unpaid FMLA leave from September 24 through October 16, 2007, and paid disability leave from September 5, 2007 until September 24, 2007.[507]

Seeger filed suit alleging violation of his rights under the FMLA.[508] The district court granted summary judgment to CBT, writing that because Seeger "ma[de] no distinction between his retaliation and interference claims, . . . the Court will address both claims under the retaliation theory."[509] Using that approach, the district court concluded that Seeger had established the requisite prima facie case, but that CBT

499. *Id.* at 276 (citing 29 U.S.C. § 2601).
500. *Id.* at 277.
501. *Seeger*, 681 F.3d at 276-77.
502. *Id.* at 277-78.
503. *Id.* at 278.
504. *Id.*
505. *Id.*
506. *Id.* at 279-80.
507. *Seeger*, 681 F.3d at 279-80.
508. *Id.* at 281.
509. *Id.*

had articulated a legitimate, non-retaliatory reason for Seeger's discharge (disability fraud) that Seeger had failed to rebut.[510]

Seeger appealed, and among other issues, claimed that the trial court had wrongly ignored his inference claim.[511] The appellate court began its analysis of that issue by first noting that "[g]enerally, a plaintiff has not waived a claim based on the interference theory where the complaint alleged general violations of 29 U.S.C. § 2615 that could apply to both interference and retaliation claims."[512] The court nonetheless rejected Seeger's argument, concluding that the essence of his claim was retaliation, because he had received all of the FMLA leave to which he was entitled and has been allowed to return to work.[513] As the court stated, "CBT did not shortchange his leave time, deny reinstatement, or otherwise interfere with his substantive FMLA rights."[514] Because the facts as alleged by Seeger did not support an interference claim, the district court correctly viewed his allegations as presenting only a retaliation claim.[515]

The court of appeals turned next to whether the district court had correctly determined that Seeger established the prima facie elements of an FMLA retaliation claim.[516] The only disputed element was the causal connection between Seeger's FMLA leave and his discharge, and the lower court held that this element was satisfied by the "nearness in time between Seeger's return from FMLA leave and his termination—three weeks after his reinstatement and less than two months after he first notified CBT of his medical leave."[517]

The appellate court agreed that the temporal proximity of these critical events was "suggestive of retaliation" and so Seeger had established a prima facie case.[518] While timing alone may not ultimately be sufficient to establish retaliation under the FMLA,[519] it can provide an inference of retaliatory motive sufficient to connect a plaintiff's FMLA

510. *Id.*
511. *Id.* at 282.
512. *Id.* (quoting Morris v. Family Dollar Stores of Ohio, Inc., 320 F. App'x 330, 335 (6th Cir. 2006) (citing 29 U.S.C. § 2615 (West 2010)).
513. *Seeger*, 681 F.3d at 283.
514. *Id.*
515. *Id.*
516. *Id.*
517. *Id.*
518. *Id.*
519. *See, e.g.*, Skrjanc v. Great Lakes Power Serv. Co., 272 F.3d 309, 317 (6th Cir. 2001).

leave to a subsequent adverse employment action.[520] Once the employer offers a non-retaliatory reason for its decision, however, more than timing is required for the plaintiff to prevail; other, independent evidence of ill motive is required.[521] In *Seeger*, the court found that the plaintiff had offered no independent evidence refuting CBT's stated reason for his termination—disability fraud.[522] While Seeger argued that he had not committed disability fraud and so CBT's proffered explanation for its decision was simply not true, both the district and circuit courts concluded that CBT honestly believed that Seeger had engaged in such fraud, which insulated the company from liability.[523]

Under the "honest belief rule" (which is not limited to FMLA claims but applicable to any discrimination claim in which the employer's reason for an adverse employment action is at issue), "an employer's proffered reason is considered honestly held where the employer can establish it reasonably reli[ed] on particularized facts that were before it at the time the decision was made."[524] The court does not require that the employer's decision-making process "be optimal or that it left no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action."[525] Further, as long as the employer held an honest belief in its decision, "the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial or baseless."[526]

In *Seeger*, CBT learned that Seeger had been observed walking around at an outdoor festival while on FMLA and paid disability leave.[527] When Seeger returned to work on October 16, 2007, CBT met with him and asked about his back injury, and why he could attend Oktoberfest but was unable to perform light duty work.[528] Seeger explained that it was his doctor's decision that he should not perform light duty work and that he did not question the doctor's assessment.[529] CBT suspended Seeger

520. *Seeger*, 681 F.3d at 283-84 (citing DiCarlo v. Potter, 358 F.3d 408, 421 (6th Cir. 2004); Clark v. Walgreen Co., 424 F. App'x 467, 473 (6th Cir. 2011); Bryson v. Regis Corp., 498 F.3d 561, 571 (6th Cir. 2007)).

521. *Id.* at 285 (citing Donald v. Sybra, Inc., 667 F.3d 737, 763 (6th Cir. 2012); Bell v. Prefix, Inc., 321 F. App'x 423, 431 (6th Cir. 2009)).

522. *Id.* at 287.

523. *Id.* at 286.

524. *Id.* at 285 (quoting Joostberns v. United Parcel Servs., Inc., 166 F. App'x 783, 791 (6th Cir. 2006)).

525. *Id.* (quoting Smith v. Chrysler Corp. 155 F.3d 799, 807 (6th Cir. 1998)).

526. *Seeger*, 681 F.3d at 286 (quoting *Smith*, 155 F.3d at 806).

527. *Id.* at 279.

528. *Id.*

529. *Id.*

pending investigation and offered Seeger the opportunity to submit additional evidence on his behalf.[530] Seeger provided a letter from his doctor stating that it was unreasonable to assume that Seeger could even perform limited duties during an eight-hour day, as well as his own written statement explaining that even though he attended Oktoberfest, he was in pain the entire time.[531]

Based upon the information received during the investigation, as well as a review of Seeger's medical records and interviews with the co-workers who saw Seeger at the festival, CBT terminated Seeger for disability fraud.[532] Based on these facts, the Sixth Circuit concluded that CBT held an honest belief that Seeger engaged in disability fraud, regardless of whether Seeger actually engaged in fraud.[533] The court wrote, "[a]ll in all, the record reflects that CBT made a reasonably informed and considered decision before terminating Seeger. That Seeger or the court might have come to a different conclusion if they had conducted the investigation is immaterial."[534]

Courts reached similar decisions in two other FMLA retaliation cases during the *Survey* period—*Roll v. Bowling Green Metalforming, LLC*[535] and *Donald v. Sybra, Inc.*[536] In each case, the Sixth Circuit Court of Appeals affirmed summary judgment for the employer, even while finding that the plaintiff had established a prima facie case based on the timing of the termination decision.[537] In each case, however, as in *Seeger,* the court ultimately concluded that the defendant/employer had offered a legitimate, non-retaliatory reason for its decision, which the plaintiff had failed to refute.[538]

In *Roll v. Bowling Green,* the plaintiff was a maintenance technician for Bowling Green Metalforming, an automotive supplier.[539] Roll suffered an injury at home and requested and received FMLA leave.[540] When Roll exhausted his twelve weeks of FMLA leave in 2008, he was granted an additional five weeks of leave by Bowling Green

530. *Id.*
531. *Id.* at 279-80.
532. *Seeger*, 681 F.3d at 280.
533. *Id.* at 286-87.
534. *Id.* at 287.
535. 457 F. App'x 458 (6th Cir. 2012).
536. *Donald*, 667 F.3d 757.
537. *Roll*, 457 Fed. Appx. at 460; *Donald*, 667 F.3d at 761-62.
538. *Roll*, 457 F. App'x at 460-61; *Donald*, 667 F.3d at 763.
539. *Roll*, 457 F. App'x at 459.
540. *Id.*

Metalforming.[541] Roll also used all of his FMLA leave in 2009 and was allowed an additional four or five weeks of leave time that year also.[542]

In 2008 and 2009, Bowling Green Metalforming experienced a downturn in business related to a crisis in the auto industry.[543] In response, it significantly reduced its workforce in January 2009.[544] About 60% of the employees in Roll's department were laid off, selected on the basis of "objective criteria such as skills, performance, work history, and overall ability."[545] Roll, who was on leave at the time, was one of the employees selected for lay off.[546] However, Bowling Green permitted Roll to remain on leave rather than terminating him at that time; this allowed Roll to continue receiving a portion of his salary and his health benefits.[547] Roll was finally laid off on February 2, 2009, which was the day he returned from leave.[548]

Roll sued, claiming that his layoff occurred in retaliation for his FMLA leave, and that Bowling Green had also failed to reinstate him to the same or a similar job when he returned from leave.[549] The only evidence he offered in support of his claim, however, was that he had been laid off the day he returned from leave.[550] Based on the paucity of evidence, the district court granted the defendant's dispositive motion and dismissed Roll's claims.[551]

The Sixth Circuit Court of Appeals affirmed, concluding that based on evidence of company-wide layoffs due to the economic downturn, Bowling Green would have terminated Roll's employment without regard to Roll's use of the FMLA.[552] The court held that even though the layoff occurred at the end of Roll's FMLA leave, that close temporal proximity alone did not establish the required causal link between his FMLA leave and his termination, because compelling evidence to the contrary existed, namely the objective selection criteria used by the company to select employees for layoff.[553] Further, the court noted that "it is not unlawful for an employer to terminate an employee who took

541. *Id.*
542. *Id.*
543. *Id.*
544. *Id.*
545. *Roll*, 457 F. App'x at 460.
546. *Id.*
547. *Id.*
548. *Id.*
549. *Id.*
550. *Id.*
551. *Roll*, 457 F. App'x at 459.
552. *Id.* at 461-62 (citing 29 U.S.C. § 2601 (West 2010)).
553. *Id.* at 460 (citing 29 U.S.C. § 2601).

leave under the Act if the termination would have occurred regardless of the employee's exercise of his rights under the Act."[554] In so concluding, the court took note of U.S. Department of Labor regulations providing that an "employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period."[555] Under this regulation, the company could have laid off Roll the same day it dismissed the other employees, even while he was on leave, and it would not have violated the FMLA.[556]

In *Donald v. Sybra, Inc.*,[557] the Sixth Circuit similarly held that, despite temporal proximity supporting a prima face retaliation, the employer's honest belief that the plaintiff has engaged in theft defeated her claim of retaliatory discharge claim under the FMLA.[558] In that case, Gwendolyn Donald was an assistant manager for a fast food restaurant.[559] Shortly after being hired, Donald began experiencing numerous health problems requiring leaves of absence, at least some of which were covered by the FMLA.[560]

On February 14, 2008, while examining receipts from Donald's drive-through window, her manager noticed irregularities in how customers were charged.[561] It appeared that Donald was receiving payment at full price, then modifying the receipts to show a discount and pocketing the difference.[562] While the company was investigating this issue further, Donald took several days off for medical treatment, but did not request FMLA leave for that time.[563] Upon her return to work, her supervisor confronted her regarding the suspected thefts, and fired her that same day.[564]

Donald sued, alleging, among other claims, that Sybra had interfered with her use of FMLA leave and then retaliated against her for taking FMLA leave.[565] The district court dismissed Donald's claims after concluding that despite the timing of her termination (which occurred the very day that Donald returned from leave), Donald had failed to

554. *Id.* at 461 (citing 29 U.S.C. § 2601).
555. *Id.* (quoting 29 C.F.R. § 825.216(a)).
556. *Id.*
557. *Donald*, 667 F.3d 757.
558. *Id.* at 763 (citing 29 U.S.C. § 2601).
559. *Id.* at 759.
560. *Id.* (citing 29 U.S.C. § 2601).
561. *Id.* at 759-60.
562. *Id.*
563. *Donald*, 667 F.3d at 760.
564. *Id.*
565. *Id.*

overcome Sybra's contention that it fired Donald because of her suspicious conduct.[566]

In affirming the district court's decision, the Sixth Circuit again relied on the honest belief rule.[567] The court stated that, while Donald denied the accusation of theft, the focus of the inquiry was not on whether she actually engaged in theft, but on whether Sybra honestly believed its proffered nondiscriminatory reason, that is, whether it "reasonably relied on the particularized facts that were before it at the time the decision was made."[568] Finding that it did, the court affirmed dismissal of Donald's FMLA claims.[569]

The FMLA not only provides for leave for an employee's own serious health condition, but protects eligible employees seeking leave where needed to provide care for certain family members suffering from their own serious health conditions.[570] Questions occasionally arise as to what constitutes "necessary care" under the Act; one such question arose during the *Survey* period in *Romans v. Michigan Department of Human Services*.[571] The dispute went to heart of the social problem that the FMLA was intended to address: an employee's balancing of his job responsibilities and the need to care for an ill family member.[572]

On April 4, 2006, Jerry Romans, a fire and safety officer at a state-run juvenile detention facility, received a call during his shift from his sister that their mother, who was suffering from lung cancer and renal failure, was unlikely to survive the night and that decisions needed to be made about her care including whether to keep her on life support.[573] Romans had previously submitted paperwork to his employer certifying that he was a health care provider and had power of attorney for his mother.[574]

Romans intended to visit his mother after his shift ended, but before that happened, another employee called in sick and Romans was told that he would have to cover that employee's shift.[575] Although Romans was able to find another coworker to cover the extra shift, his supervisor told him that the company rules did not allow such a switch and that he would

566. *Id.* at 761-62.
567. *Id.* at 763.
568. *Id.*
569. *Donald*, 667 F.3d at 763.
570. 29 U.S.C.A. § 2612(a)(1)(c) (West 2010).
571. 668 F.3d 826 (6th Cir. 2012).
572. *Id.* at 826.
573. *Id.* at 831.
574. *Id.*
575. *Id.*

be fired if he left work.[576] Romans left anyway, telling his supervisor "I'm not staying. My mom's dying. I'm leaving."[577] Romans went to the hospital where his mother was a patient, but upon arriving, turned around and returned to work, fearful of losing his job.[578] He eventually was allowed to leave during his extra shift.[579]

Romans received a one-day suspension for leaving the facility and abandoning his shift.[580] He subsequently was terminated for this and other work rule violations.[581] After his termination, Romans filed suit, alleging, among other claims, interference with his rights under the FMLA and retaliation for using FMLA leave.[582]

The trial court dismissed Romans' claim, reasoning that while the FMLA allows leave for an employee who is "needed to care for" a family member, it does not provide for multiple family members to care for the family member at the same time.[583] Because Romans' sister was already with and caring for their mother, Romans was not entitled to FMLA for that purpose.[584]

The Sixth Circuit Court of Appeals disagreed.[585] In analyzing Romans' FMLA interference claim, the court acknowledged that the Department of Labor regulations then in effect entitled an employee to take leave if he is "needed to care for" a family member, which encompasses both psychological comfort and physical care.[586] The regulations further stated that this included situations where the employee may be needed to "fill in for others who are caring for the family member, or to make arrangements for changes in care."[587] Contrary to the district court, the court of appeals concluded that Romans' situation fit within the regulations, because he sought to leave

576. *Id.* at 831-82.

577. *Romans,* 668 F.3d at 831-32.

578. *Id.* at 832.

579. *Id.*

580. *Id.* at 831.

581. *Id.* at 834-35.

582. *Id.* at 835. In addition to his FMLA claims, Romans alleged that his termination was racially motivated in violation of Title VII. Summary judgment was granted as to that claim, a decision that was affirmed on appeal. *Id.* at 840.

583. *Romans,* 668 F.3d at 840.

584. *Id.*

585. *Id.* at 841.

586. *Id.* (citing 29 C.F.R. § 825.116(a) (West 2010)). The FMLA regulations were revised effective January 19, 2009, and § 825.116 is now found at § 825.124. The current rule applicable to Romans's situation, 29 C.F.R. § 825.124(b), now makes it clear that "the employee need not be the only individual or family member available to care for the family member."

587. *Id.* at 840 (quoting 29 C.F.R. § 825.116(b) (2008)).

work to arrange for changes in care, including the removal of life support.[588]

The court buttressed its decision by noting that the regulation in question had recently been clarified by the Department of Labor, with the addition of language stating that the "employee need not be the only individual or family member available to care for the family member."[589] In so doing, the Department of Labor had announced that this did not reflect a change in the law, but merely clarified the law previously in force.[590] Thus, even though Romans's sister was already at the hospital, Romans was still "needed to care for" his mother within the meaning of the regulations and so was entitled to FMLA leave.[591] The appeals court held that summary judgment should not have been granted for the defendant on Romans's FMLA claims, and remanded the case for trial.[592]

VIII. CONCLUSION

Interestingly, the most noteworthy judicial development in Michigan employment and labor law during the 2011-2012 *Survey* Period did not even involve a traditional ELCRA claim by an employee against her employer, but rather a sexual harassment suit brought by a jail inmate against a county jail under the public services portion of ELCRA.[593] This, of course, was *Hamed v. Wayne County and Wayne County Sheriff*,[594] in which Hamed sought to hold Wayne County liable for the assault she suffered at the hands of a deputy sheriff employed by the county.[595] The significance of the case stemmed not only from the Michigan Supreme Court's decision that the county was not liable for its deputy sheriff's actions (because they occurred outside the scope of his employment and were for his, not the county's, benefit, and also because his actions were not reasonably foreseeable) but also because the court repudiated its unanimous decision in *Champion v. Nationwide Security*.[596] In *Champion*, the court in essence imposed strict liability on

588. *Id.*

589. *Romans*, 668 F.3d at 841 (quoting 29 C.F.R. § 825.124(b) (2009)).

590. *Id.* (quoting the Family and Medical Leave Act of 1993, 73 Fed. Reg. § 67934-0 (Nov. 17, 2008)).

591. *Id.*

592. *Id.*

593. Hamed v. Wayne Cnty., 490 Mich. 1; 803 N.W.2d 237 (2011); MICH. COMP. LAWS ANN. §§ 37.2101-2803 (West 2012).

594. *Hamed*, 490 Mich. at 7-8. *See supra* notes 101-111 and accompanying text for further discussion of this decision.

595. *Id.*

596. *Id.*; Champion v. Nationwide Sec., 450 Mich. 702; 545 N.W.2d 596 (1996).

employers for the criminal or illegal acts of its agents (read "supervisors") whenever the supervisor was "aided" in the commission of the illegal act by the authority of his position.[597] Disagreeing that such an "aided by" exception was ever part of Michigan law, the *Hamed* court instead looked to the language of the civil rights statute, which it interpreted as expressly incorporating traditional Michigan common law agency principles and rules.[598] Under that reading, the court limited an employer's vicarious liability to those acts occurring within the scope of employment or those reasonably foreseeable.[599] The decision resulted in much consternation from the plaintiffs' bar, concerned that the pendulum had moved all the way from strict liability to no liability, and that people in Hamed's position have been deprived of all legal recourse (apart, of course, from the criminal justice system).[600] In contrast, the defense bar asks where it is written in Michigan law that the victim of crime is entitled to a monetary recovery against some party other than the criminal, for acts that that the third party (the employer here) had no reason to believe could or would occur.[601] While this is not a debate likely to end soon, we can hope that the fact pattern of this unfortunate case remains an anomaly and not an everyday event.

Looking forward to the next *Survey* period, we can anticipate a decision from the Michigan Supreme Court on the scope of Michigan's Whistleblower's Protection Act, in *Whitman v. City of Burton*,[602] which was argued before the court in November 2012.[603] Given the current court majority's reluctance to look beyond statutory language to determine legislative intent, it would be surprising if the court upheld the lower court's determination that a whistleblower is only protected by the WPA if his primary purpose in reporting a violation of the law is to protect the public, rather than to advance his personal interests.

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597. *Champion*, 450 Mich. at 713-14.

598. *Hamed*, 490 Mich. at 13-16 (citing MICH. COMP. LAWS ANN. §§ 37.2101-2803).

599. *Id.* at 13.

600. *See, e.g.*, Brian Koncius and Eric Pelton, *Closing Arguments: 'Hamed v. Wayne County*, MICH. LAWYERS' WEEKLY, Aug. 12, 2011, http://milawyersweekly.com/news/2011/08/12/closing-arguments-hamed-v-wayne-county/.

601. *Id.*

602. Whitman v. City of Burton, 293 Mich. App. 220; 810 N.W.2d 871 (2011), *leave granted*, 491 Mich. 913; 811 N.W.2d 490 (2012). *See supra* notes 183-197 and accompanying text for further discussion of this decision.

603. *Id.* at 228-29 (citing MICH. COMP. LAWS ANN. §§ 15.361-369 (West 2012)).

Additionally, in 2013, we should begin to see judicial interpretation of the new Uniform Arbitration Act,[604] as well as litigation addressing the flurry of employment-related legislation enacted in Michigan in 2012, such as the new right to work laws,[605] changes to the Public Employment Relations Act limiting certain collective bargaining rights of public employees,[606] and an internet privacy act that prohibits employers from requiring employees to provide social media account access information (i.e, Facebook passwords).[607] As always, it promises to be interesting.

604. S. 903, 96 Leg., Reg. Sess. (Mich. 2012) (effective July 1, 2013) (to be codified at MICH. COMP. LAWS ANN. §§ 691.1681-1713 (West 2012)). *See supra* notes 368-390 and accompanying text for additional discussion of this legislation.

605. S. 116, 96 Leg., Reg. Sess. (Mich. 2012) (*codified at* MICH. COMP. LAWS ANN. §§ 421.1-22 (West 2012)); H.B. 4003, 96 Leg., Reg. Sess. (Mich. 2012) (*codified at* MICH. COMP. LAWS ANN. § 423.201(West 2012)).

606. H.B. 4929, 96 Leg., Reg. Sess. (Mich. 2012) (*codified at* MICH. COMP. LAWS ANN. § 423.210 (West 2012)).

607. H.B. 5523, 96 Leg., Reg. Sess. (Mich. 2012).