EMPLOYMENT AND LABOR LAW

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I. INTRODUCTION

During this *Survey* period,[1] courts weighed in on the impact of legislative changes to the Public Employment Relations Act,[2] whether

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the Michigan Medical Marihuana Act[3] prohibits an employer from discharging an employee for testing positive for marijuana,[4] whether an employer's directive that an employee seek psychological counseling violates the Americans with Disabilities Act,[5] and the circumstances under which bullying morphs into an actionable sexual harassment claim.[6] Michigan courts were most active, however, in resolving a wide range of issues under the Whistleblowers' Protection Act,[7] including whether the plaintiff's motivation in blowing the whistle is relevant to his claim,[8] whether failure to renew a contract is an adverse employment action under the Act,[9] whether a plaintiff can create direct evidence with deposition testimony contradicted by other record evidence,[10] and what evidence is necessary to establish causation.[11]

The Family Medical Leave Act[12] (FMLA)—two decades old in 2013—also saw a wide range of decisions, including ones addressing the applicable standard for FMLA retaliation claims,[13] how often and when an employer may request medical certification,[14] an employer's rights when it suspects fraudulent FMLA use,[15] when volunteer firefighters are employees,[16] and sovereign immunity.[17]

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1. Generally, the *Survey* period extended from June 1, 2012 to May 30, 2013, although several noteworthy decisions subsequent to that time frame are included in this article.

2. *See generally* MICH. COMP. LAWS ANN. §§ 423.201-.217 (West 2013); Bailey v. Callaghan, 715 F.3d 956 (6th Cir. 2013).

3. MICH. COMP. LAWS ANN. §§ 333.26421-.26430 (West 2013).

4. *See generally* Casias v. Wal-Mart Stores, Inc., 695 F.3d 428 (6th Cir. 2012).

5. *See generally* 42 U.S.C.A. §§ 12112-12117 (West 2013); Kroll v. White Lake Ambulance Auth., 691 F.3d 809 (6th Cir. 2012).

6. *See generally* Wasek v. Arrow Energy Servs., 682 F.3d 463 (6th Cir. 2012).

7. MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 2013).

8. *See generally* Whitman v. City of Burton, 493 Mich. 303; 831 N.W.2d 223 (2013).

9. *See generally* Wurtz v. Beecher Metro. Dist., 298 Mich. App. 75; 825 N.W.2d 651 (2012), *appeal granted*, 494 Mich. 862; 831 N.W.2d 235 (2013).

10. *See generally* Fuhr v. Trinity Health Corp., No. 309877, 2013 WL 1629301 (Mich. Ct. App. Apr. 16, 2013), *rev'd*, 495 Mich. 869; 837 N.W.2d 275 (2013).

11. *See generally* Debano-Griffin v. Lake Cnty., 493 Mich. 167; 828 N.W.2d 634 (2013).

12. 29 U.S.C.A. §§ 2601-2654 (West 2013).

13. *See generally* Crawford v. JP Morgan Chase & Co., 531 F. App'x 622 (6th Cir. 2013).

14. *See generally* Kinds v. Ohio Bell Tel. Co., 724 F.3d 648 (6th Cir. 2013); Smith v. City of Niles, 505 F. App'x 482 (6th Cir. 2012).

15. *See generally* Jaszczyszyn v. Advantage Health Physician Network, 504 F. App'x 440 (6th Cir. 2012); Hall v. Ohio Bell Tel. Co., 529 F. App'x 434 (6th Cir. 2013).

16. *See generally* Mendel v. City of Gibraltar, 727 F. 3d 565 (6th Cir. 2013).

17. Diaz v. Mich. Dep't of Corr., 703 F.3d 956 (6th Cir. 2013).

II. RETALIATION

Those who practice law in the employment arena quickly learn that while employers often are successful in defending against claims of discrimination or harassment, it is much more difficult for the employer to prevail on retaliation claims. It is simple human nature to wish to punish someone who accuses you of making a racist comment, or of breaking the law, or of being a harasser. Additionally, it may be easier for a jury to conclude that an employer retaliated against one of its workers because that determination does not require the jury to decide that the employer was racist or biased. Further, while there are only two major statutes in Michigan addressing discrimination—the Elliott Larsen Civil Rights Act (ELCRA)[18] and the Persons with Disabilities Civil Rights Act (PWDCRA)[19]—there are numerous avenues, by statute and under the common law, for an aggrieved employee to argue that he suffered retaliation for engaging in activity protected by the law. Thus, it is not particularly surprising that retaliation claims proved to be the most fertile area for noteworthy decisions during this *Survey* period.

A. Public Policy Claims

Michigan courts have recognized an exception to at-will employment that prohibits an employer from discharging an employee for a reason that is contrary to established public policy. In *Suchodolski v. Michigan Consolidated Gas Co.*,[20] the Michigan Supreme Court articulated three situations in which "public policy" proscribes termination of at-will employment: (1) "adverse treatment of employees who act in accordance with a statutory right or duty," (2) an employee's "failure or refusal to violate a law in the course of employment," or (3) an "employee's exercise of a right conferred by a well-established legislative enactment."[21]

Michigan courts also have recognized that, as a general rule, "when a statute creates a new right or imposes a new duty having no counterpart in the common law, the remedies provided for in the statute for its violation are exclusive and not cumulative."[22] Public policy claims thus declined somewhat after the enactment of specific anti-retaliation statues,

18. MICH. COMP. LAWS ANN. §§ 37.2101-.2804 (West 2013).
19. MICH. COMP. LAWS ANN. §§ 37.1101-.1607 (West 2013).
20. 412 Mich. 692; 316 N.W.2d 710 (1982).
21. *Id.* at 695-96.
22. *See* Shuttleworth v. Riverside Osteopathic Hosp., 191 Mich. App. 25, 27; 477 N.W.2d 453 (1991).

such as the Whistleblowers' Protection Act (WPA),[23] which prohibits retaliation against an employee for reporting (or being about to report) a suspected violation of the law by his employer to a public agency,[24] and section 301(13) of Michigan's Workers' Disability Compensation Act (WDCA),[25] which forbids an employer from retaliating against an employee for seeking workers' compensation benefits. Further, the ELCRA and the PWDCRA each prohibit retaliation for complaining about violations of those acts.[26] Under Michigan law, if a plaintiff's claims fall within the scope of these statutes, that plaintiff may not bring a public policy claim.[27]

Those laws address very specific situations, however. The WPA protects only external reports, not complaints made internally,[28] while the WDCA is limited to workers' compensation claims.[29] Both the ELCRA and the PWDCRA require that the protected activity involve an alleged violation of those civil rights laws.[30] An employee who believes that she was treated adversely in a way that offends established public policy, other than the policies inherent in these specific anti-retaliation statutes, must clearly identify the source of that public policy.[31]

In *Berrington v. Wal-Mart Stores, Inc.*,[32] the plaintiff was unable to persuade the Sixth Circuit Court of Appeals that Michigan law provides a public policy claim based on a refusal to hire an employee because he had filed for unemployment benefits.[33] William Berrington had been employed by Wal-Mart for a number of years and had frequently requested and received leaves of absence.[34] One such leave was scheduled to end on April 30, 2007, but Berrington did not return to work or request an extension of his leave by that date.[35] In May 2007, prompted by the company's personnel department, Berrington did request an extension[36] but was told in response that, under company policy, he was being discharged for failing to return to work at the end of

23. MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 2013).
24. *See* MICH. COMP. LAWS ANN. § 15.362.
25. MICH. COMP. LAWS ANN. § 418.301(13) (West 2013).
26. *See* MICH. COMP. LAWS ANN. §§ 37.2701(a), .1602(a) (2013).
27. *Shuttleworth*, 191 Mich. App. at 27.
28. *See* MICH. COMP. LAWS ANN. § 15.362.
29. *See* MICH. COMP. LAWS ANN. §§ 418.101-.941.
30. *See* MICH. COMP. LAWS ANN. §§ 37.2701(a), 418.301(13).
31. Kimmelman v. Heather Downs Mgmt. Ltd., 278 Mich. App. 569, 576-77; 753 N.W.2d 265 (2008).
32. Berrington v. Wal-Mart Stores, Inc., 696 F.3d 604 (6th Cir. 2012).
33. *See id.* at 610.
34. *Id.* at 606.
35. *Id.*
36. *Id.*

his approved leave.[37] He also was told that he could reapply to the company after ninety days.[38]

Berrington then applied for unemployment benefits, claiming that he had been involuntarily discharged; Wal-Mart protested his application, arguing that Berrington had voluntarily quit by failing to return to work at the end of his leave.[39] During the pendency of this dispute, and after ninety days had passed, Berrington reapplied to Wal-Mart.[40] He was not hired.[41]

Berrington eventually sued Wal-Mart in state court, alleging that Wal-Mart's failure to rehire him occurred because he had filed for unemployment benefits, which violated public policy.[42] Specifically, Berrington contended that he had a claim under *Suchodolski* because he had been retaliated against for "exercising a right conferred by a well-established legislative enactment"[43]—the Michigan Employment Security Act (MESA).[44]

Wal-Mart removed the action to the U.S. District Court for the Western District of Michigan on diversity grounds and filed a motion to dismiss in lieu of an answer.[45] The district court granted the motion, concluding that no Michigan court had or would recognize Berrington's cause of action.[46] Berrington appealed.[47]

The Sixth Circuit agreed with the district court, noting that even if MESA was viewed as a "well-established legislative enactment" sufficient to support a public policy claim, there was no basis for concluding that Michigan law recognized a cause of action for failure to hire.[48] Responding to Berrington's argument that refusing to hire someone because the applicant had sought unemployment benefits is as violative of public policy as discharging an employee for the same reason, the appellate court noted that the "common denominator in all the recognized public policy exceptions to at-will employment is the existence of an employment relationship."[49] A prospective employee

37. *Id.*
38. *Berrington*, 696 F.3d at 606-07.
39. *Id.*
40. *Id.* at 607.
41. *Id.*
42. *Id.* at 607.
43. *Id.* at 609 (quoting Suchodolski v. Mich. Consol. Gas Co., 412 Mich. 692, 695-96; 316 N.W.2d 710 (1982)).
44. MICH. COMP. LAWS ANN. §§ 421.1-.75 (West 2013).
45. *Berrington,* 696 F.3d at 607.
46. *See id.*
47. *Id.*
48. *Id.* at 609-10.
49. *Id.* at 609.

does have that relationship, and as the court observed, the parties had not identified any decision from Michigan or any other jurisdiction in which the failure to *rehire* had formed the basis of an actionable public policy retaliation claim.[50] The Sixth Circuit declined the opportunity to be the first court to do so, particularly given that it would be taking that step on behalf of the Michigan Supreme Court while sitting in diversity.[51] Instead, the court affirmed the district court's dismissal of Berrington's suit.[52]

B. The Whistleblowers' Protection Act

The WPA provides that

> [a]n employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's 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.[53]

Absent direct evidence of retaliation,[54] a plaintiff alleging a WPA violation must offer evidence in conformity with the *McDonnell Douglas* burden-shifting framework.[55] The first stage of the *McDonnell Douglas* analysis is the prima facie case, which requires a WPA plaintiff to show that: (1) she "engaged in protected activity as defined by the [WPA]"; (2)

50. *Id.* at 610.

51. *Berrington*, 696 F.3d at 610.

52. *Id.*

53. MICH. COMP. LAWS ANN. § 15.362 (West 2013).

54. Direct evidence is evidence that, "if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." Hazle v. Ford Motor Co., 464 Mich. 456, 462; 628 N.W.2d 515 (2001) (quoting Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 926 (6th Cir. 1999)).

55. Debano-Griffin v. Lake Cnty., 493 Mich. 167, 175-76; 828 N.W.2d 634 (2013). See *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), for the United States Supreme Court's discussion of the burdens of production and proof applicable at the dispositive motion stage in employment discrimination cases.

she experienced an adverse employment action; and (3) "'a causal connection exists between the protected activity' and the adverse employment action."[56]

Once the plaintiff presents an appropriate prima facie case, the employer has the opportunity to offer a legitimate, non-discriminatory reason for the adverse employment action.[57] To avoid summary disposition, the plaintiff must establish that the defendant's proffered reason was merely a pretext for discrimination.[58]

During the *Survey* period, the Michigan Supreme Court issued a number of important decisions addressing these aspects of WPA litigation, as did the Michigan Court of Appeals.

1. Direct Evidence

In *Fuhr v. Trinity Health Corp.*,[59] in lieu of granting leave to appeal, the Michigan Supreme Court reversed a judgment of the court of appeals, which in turn had reversed the trial court's granting of summary disposition to the defendants.[60] At issue was whether the plaintiff, Todd Fuhr, provided direct evidence of retaliatory motive when Fuhr testified at deposition that a hospital manager told him that he was being discharged for reporting a violation of the law to the U.S. Attorney's office.[61]

Fuhr was hired in 2007 to oversee and control Trinity Health's surgical inventory; in that role, he oversaw a number of subordinates.[62] Throughout his tenure at the hospital, those subordinates complained to Fuhr's supervisor that Fuhr was unprofessional and played favorites. [63] In 2009, the hospital hired a "coach" to help Fuhr address these interpersonal problems.[64] In addition, the inventory problems that Fuhr was hired to correct continued, although Fuhr's performance reviews were generally positive.[65]

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56. *Debano-Griffin*, 493 Mich. at 175 (citing Chandler v. Dowell Schlumberger, Inc., 456 Mich. 395, 399; 572 N.W.2d 210 (1998)).

57. *See id.* at 176.

58. *Id.*

59. Fuhr v. Trinity Health Corp., 495 Mich. 869; 837 N.W.2d 275 (2013).

60. Fuhr v. Trinity Health Corp., No. 309877, 2013 WL 1629301, at *6 (Mich. Ct. App. Apr. 16, 2013), *rev'd,* 495 Mich. 869; 837 N.W.2d 275 (2013).

61. *Id.* at *4-5.

62. *Id.* at *1.

63. *Id.*

64. *Id.*

65. *Id.*

In April 2010, the hospital's chief financial officer asked another employee if she would be interested in assuming Fuhr's position, if it became available.[66] Emails and other evidence suggested that a decision to remove Fuhr was made by the hospital during the first week of April, 2010.[67]

Around this same time, Fuhr learned that one of the hospital's vendors may have engaged in illegal overbilling, and on April 15, 2010, he reported his suspicions to the U.S. Attorney's office.[68] The next day, he told the hospital's "integrity officer" about the suspected overbilling.[69]

On May 10, 2010, Fuhr was discharged in a meeting with his supervisor and Trinity Health's vice president.[70] According to the vice president, he did not provide Fuhr with any specific reason for the termination decision.[71] This was confirmed by Fuhr himself in an email that he sent to the integrity officer right after the termination meeting.[72]

Fuhr sued under the WPA[73] and claimed at his deposition that during the termination meeting, Trinity's vice president told him that he was being fired because of his call to the U.S. Attorney's office.[74] However, the trial court granted Trinity Health's motion for summary disposition even though Fuhr argued that this testimony was direct evidence of retaliation.[75] In its decision, the trial court noted that there was substantial evidence that Trinity made the decision to discharge Fuhr before his call to the U.S. Attorney.[76] The court also viewed Fuhr's deposition testimony skeptically, wondering why neither his contemporaneous email to the integrity officer or the complaint he filed contained any mention of such an incendiary admission by Trinity's Vice President. [77] Addressing why she did not find the deposition testimony to be dispositive, the trial judge wrote, "'[R]easonable minds could not differ regarding whether [plaintiff's] call to the U.S. attorney was one of the reasons for his discharge. The evidence regarding his inevitable termination is overwhelming. But, more importantly, documentary

66. *Fuhr*, 2013 WL 1629301, at *1.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at *2.
71. *Id.*
72. *Fuhr,* 2013 WL 1629301, at *2.
73. *Id.*
74. *Id.*
75. *Id.* at *2-3.
76. *Id.*
77. *See id.* at * 3.

evidence and his own Complaint blatantly contradict his testimony that his "protected activity" was the reason for his termination.'"[78]

The court of appeals, in a 2-1 decision, disagreed.[79] The majority saw Fuhr's deposition testimony as direct evidence of discrimination, precluding summary disposition (despite noting that they were "not unsympathetic to the dissent's concerns about plaintiff's credibility").[80] The majority further concluded that the statement ascribed to the hospital's vice president was admissible as a statement against interest, and the fact that it was contradicted by other evidence from the plaintiff did not render it inadmissible.[81]

In dissent, Judge Joel Hoekstra left no doubt as to his views of the matter, writing, "I conclude that plaintiff's self-serving deposition testimony is blatantly contradicted by the record so that no reasonable jury could believe it."[82] In support of his conclusion, Judge Hoekstra pointed to the U.S. Supreme Court's decision in *Scott v. Harris*, in which the Court wrote, "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary disposition."[83]

The Michigan Supreme Court was similarly unimpressed by Fuhr's offer of "direct evidence." In response to Trinity Health's application for leave to appeal, the court reversed the court of appeals decision "for the reasons stated in the Court of Appeals dissenting opinion" and reinstated the order granting summary disposition to the defendants.[84]

2. Protected Activity

Without direct evidence, a WPA plaintiff must offer prima facie evidence of retaliation, beginning with evidence that he engaged in activity protected by the Act.[85] Such protected activity occurs when the employee: (1) reports a violation or a suspected violation of the law to a public body, (2) is about to report a violation or a suspected violation of

78. *Fuhr*, 2013 WL 1629301, at *3 (alteration in original).
79. *See generally id.*
80. *Id.* at *4-5.
81. *Id.*
82. *Id.* at *6.
83. *Id.* (quoting Scott v. Harris, 550 U.S. 372, 380 (2007)).
84. Fuhr v. Trinity Health Corp., 495 Mich. 869; 837 N.W.2d 275 (2013).
85. *See* Ernsting v. Ave Maria Coll., 274 Mich. App. 506, 510-11; 736 N.W.2d 574 (2007) (quoting Roulston v. Tendercare (Mich), Inc., 239 Mich. App. 270, 279; 608 N.W.2d 525 (2000)).

the law to a public body, or (3) is asked "by a public body to participate in an investigation."[86]

Whether actionable protected activity has occurred is frequently at the core of WPA litigation, and this *Survey* period was no exception. In *Whitman v. City of Burton,*[87] the Michigan Supreme Court rejected the argument that an employee who acts primarily for his own personal interests, rather than out of the public good, is not protected by the WPA.[88]

The contention at issue in *Whitman* had its origins in the legislative history of the WPA and several early cases interpreting it. In one of the earliest of those cases, *Shallal v. Catholic Social Services of Wayne County*,[89] the Michigan Supreme Court observed that, in enacting the WPA, the Michigan legislature sought to "alleviate the inability to combat corruption or criminally irresponsible behavior in the conduct of government or large businesses."[90] Next, in *Dolan v. Continental Airlines/Continental Express*,[91] the Michigan Supreme Court wrote that the WPA arose "largely in response to the accidental PBB-contamination of livestock feed" and that "the act encourages employees to assist in law enforcement . . . with an eye toward promoting public health and safety. The underlying purpose of the act is protection of the public."[92] Without the WPA, according to the court in *Dolan,* "the public would remain unaware of large-scale and potentially dangerous abuses."[93]

During the previous *Survey* period, in *Whitman v. City of Burton*,[94] the Michigan Court of Appeals applied these principles to reverse denial of a JNOV motion in which the plaintiff claimed that his employer's decision not to reappoint him as police chief violated the WPA.[95] The gravamen of the court of appeals' decision was that Whitman's repeated complaints to the City concerning the mayor's refusal to pay him for "unused sick and vacation time," which Whitman claimed violated an ordinance, occurred in furtherance of the plaintiff's personal financial

86. *Id.* at 510.

87. Whitman v. City of Burton, 493 Mich. 303; 831 N.W.2d 223 (2013).

88. *Id.* at 305-06.

89. Shallal v. Catholic Soc. Servs., 455 Mich. 604; 566 N.W.2d 571 (1997).

90. *Id.* at 612 (citing Dudewicz v. Norris-Schmid, Inc., 443 Mich. 58; 503 N.W.2d 645 (1993)).

91. Dolan v. Cont'l Airlines/Cont'l Express, 454 Mich. 373; 563 N.W.2d 23 (1997).

92. *Id.* at 378 (citing H. Legis. Analysis, H.B. 5088, 5089 (Mich. 1981)).

93. *Id.* at 379.

94. Whitman v. City of Burton, 293 Mich. App. 220; 810 N.W.2d 71 (2011), *rev'd,* 493 Mich. 303; 831 N.W.2d 223 (2013). For a more detailed discussion of the decision of the court of appeals, see Patricia Nemeth & Deborah Brouwer, *Employment and Labor Law, 2012 Ann. Survey of Mich. Law*, 58 WAYNE L. REV. 675, 695-98 (2012).

95. *See Whitman*, 293 Mich. App. at 222.

interests and not any true public interest.[96] Relying on *Dolan*[97] and *Shallal*,[98] the court of appeals wrote, "To 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."[99] Moreover, the court wrote,

> 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.[100]

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

> 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."[101]

Because the plaintiff's primary motivation was his own financial well-being, his claim was not actionable under the WPA.[102]

Not unexpectedly, the Michigan Supreme Court disagreed.[103] In a unanimous decision,[104] the court held that "nothing in the statutory language of the WPA addresses the employee's motivation for engaging in protected conduct, nor does any language in the act mandate that the

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96. *Id.* at 224-29.

97. *Dolan,* 454 Mich. at 373.

98. Shallal v Catholic Soc. Servs., 455 Mich. 604; 566 N.W.2d 571 (1997).

99. *Whitman*, 293 Mich. App. at 229-30 (quoting *Shallal*, 455 Mich. at 612).

100. *Id.* at 230 (quoting *Shallal*, 455 Mich. at 621-22).

101. *Id.* at 230-31 (quoting Wolcott v. Champion Int'l Corp., 691 F. Supp. 1052, 1063 (W.D. Mich. 1987) (internal quotation marks omitted)).

102. *Id.* at 231.

103. Whitman v. City of Burton, 493 Mich. 303, 306; 831 N.W.2d 223 (2013).

104. Two of the seven justices did not participate in the decision, presumably because they had not been on the bench at the time the case was argued. Thus, the unanimous decision was 5-0. *Id.* at 321.

employee's *primary* motivation be a desire to inform the public of matters of public concern."[105] The court noted that the purpose of the WPA was to remove "barriers that may interfere with employee efforts to report . . . violations or suspected violations, thus establishing a cause of action for an employee who has suffered an adverse employment action for reporting or being about to report a violation or suspected violation of the law."[106] After reviewing the specific language of MCL section 15.362,[107] the court concluded that the statute "does not address an employee's 'primary motivation,'" nor does it "suggest or imply that *any* motivation must be proved as a prerequisite for bringing a claim."[108] Further, according to the court, "the WPA does not suggest or imply, let alone mandate, that an employee's protected conduct must be motivated by 'a desire to inform the public on matters of public concern.'"[109] The court concluded that, in the absence of statutory language imposing such a requirement, it would not judicially impose one.[110]

Given its conclusion that the WPA itself did not require altruistic conduct by a plaintiff seeking the protection of the Act, the Court was forced to disavow elements of its decision in *Shallal v. Catholic Social Services*,[111] which the lower court had relied upon in concluding that the protected activity prong of a prima facie WPA claim demanded that Whitman establish that he had acted primarily for the public good, rather than out of self-interest.[112] The supreme court achieved this by concluding that *Shallal* had never adopted such a position in the first place.[113] In *Shallal,* while meeting with her supervisor regarding her failure to adequately report an instance of possible child abuse, Shallal became angry and threatened to report the supervisor's alleged alcohol use and misuse of agency funds to the Michigan Department of Social Services.[114] The court of appeals eventually dismissed Shallal's WPA suit, concluding that Shallal had not engaged in protected activity because her threat was not a genuine "about to report" claim but was made just to save her job.[115] The Michigan Supreme Court disagreed as

105. *Id.* at 306.
106. *Id.* at 312.
107. Whistleblowers' Protection Act, MICH. COMP. LAWS ANN. § 15.362 (West 2013).
108. *Whitman,* 493 Mich. at 313.
109. *Id.* (quoting Shallal v. Catholic Soc. Servs., 455 Mich. 604, 621; 566 N.W.2d 571 (1997)).
110. *Id.* at 313.
111. *Shallal*, 455 Mich. at 610.
112. *Whitman,* 493 Mich. at 314.
113. *Id.* at 319.
114. *Id.* at 314-15 (citing *Shallal*, 455 Mich. at 607-08).
115. *Id.* at 315 (citing S*hallal*, 455 Mich. at 608-09).

to this finding, but it still affirmed dismissal of Shallal's claim because she was unable to establish a causal connection between her threat and her subsequent discharge.[116] Accordingly, the supreme court in *Whitman v. Burton* concluded that *Shallal* had not held "that an employee's motivation is a factor in determining whether the employee was engaged in protected activity."[117]

Returning to the facts of the dispute before it, the supreme court noted that, because of the lower court's conclusion that Whitman had not engaged in protected activity, it never addressed whether Whitman had offered evidence of a causal connection between his report of an ordinance violation and his subsequent termination sufficient to establish a prima facie violation of the WPA.[118] The supreme court thus remanded the case to the court of appeals for consideration of that issue.[119]

Protected activity also was an issue in *Hays v. Lutheran Social Services of Michigan*,[120] in which the court of appeals held that a home healthcare worker who called a local narcotics enforcement agency to report the marijuana use of one of her patients did not engage in activity protected by the WPA.[121]

Hays, who worked for a private social services agency providing in-home healthcare, was told and later observed that one of her clients was smoking marijuana.[122] She decided to call 911 regarding this client, and during that call asked to be connected to the Bay Area Narcotics Enforcement Team (BAYANET).[123] When a representative from that agency came on the phone, Hays asked about the consequences of someone knowing about another's drug use and not reporting it.[124] At the end of the conversation, she was asked if she wished to take any action.[125] She said no.[126]

Sometime thereafter, Hays's employer received a complaint regarding Hays's call to BAYANET.[127] When asked about the situation by her supervisor, Hays admitted making the call.[128] As a result, she was

116. *Id.* (citing *Shallal*, 455 Mich. at 621).
117. *Id.* at 319.
118. *Whitman*, 493 Mich. at 320.
119. *Id.* at 321.
120. Hays v. Lutheran Soc. Serv., 300 Mich. App. 54; 832 N.W.2d 433 (2013), *appeal denied*, 494 Mich. 869; 832 N.W.2d 242 (2013).
121. *Id.* at 60.
122. *Id.* at 57.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Hays*, 300 Mich. App. at 57.
127. *Id.*
128. *Id.*

discharged for violations of the confidentiality agreement she signed as a condition of her employment in which she had promised not to reveal information about her employer's clients.[129]

Hays sued, claiming that she had been fired in violation of the WPA because she had reported a suspected violation of the law and because she had been "about to report" a violation.[130] On the defendant's motion, the trial court dismissed Hays's "about to report" claim but allowed the remainder of her suit to go to trial, during which a jury found for Hays.[131] The defendant appealed and Hays cross-appealed.[132]

The court of appeals reversed the judgment in favor of the plaintiff, Hays.[133] Relying on a dictionary definition of the word "report" as meaning "'a detailed account of an event, situation, etc. [usually] based on observation or inquiry,'" the court concluded that Hays's call to BAYANET asking about what might happen to her if she did not report drug use did not fall within this definition.[134] Hays provided no information during the call that would have helped BAYANET investigate any "violation of the law"; she did not identify the client, the drugs the client allegedly used, where the client lived, or even her own name.[135] Based on these facts, the court viewed Hays's call not as a report but a call seeking information and advice.[136] As such, the court of appeals found that the trial court erred in failing to grant the defendant's motion for summary disposition as to this claim.[137]

On Hays's cross-appeal, the court of appeals concluded that Hays's "about to report" claim had been properly dismissed on motion because Hays had not carried her burden of proving her intent to report by clear and convincing evidence.[138] The court did not find that the evidence offered by Hays—that she had discussed the client's drug use with her supervisor and that she called BAYANET to ask about her potential exposure—established that she actually intended to report a violation.[139] That Hays told the BAYANET officer that she did not wish to take any

129. *Id.* at 57-58.
130. *Id.* at 58-62.
131. *Id.* at 58.
132. *Hays,* 300 Mich. App. at 56
133. *Id.* at 64.
134. *Id.* at 59-60 (alteration in original) (quoting RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2005)).
135. *Id.* at 60.
136. *Id.*
137. *Id.* at 62.
138. *Hays*, 300 Mich. App. at 63 (citing Chandler v. Dowell Schlumberger, Inc., 456 Mich. 395, 400; 572 N.W.2d 210 (1998)).
139. *Id.* at 63.

action was especially persuasive to the court of appeals regarding whether Hays truly intended to report anything.[140]

The court observed that Hays's "about to report" claim also was deficient because her employer had no objective knowledge that Hays was about to report the client's behavior to a public agency and could not have discharged her in retaliation for that reason.[141] As such, Hays's claims were without merit, and the judgment in her favor was reversed.[142]

3. *Adverse Employment Action*

The WPA states that "[a]n employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment" because the employee engages in activity protected under the Act.[143] Michigan courts have further expanded on this element of a prima facie WPA claim, noting that an adverse employment action is "an employment decision that is materially adverse in that it is more than a mere inconvenience or an alteration of job responsibilities."[144]

During the *Survey* period, a divided Michigan Court of Appeals panel concluded that the decision not to offer a new employment contract to an employee after the end date of a previous contract was an adverse employment action for purposes of the WPA. That case, *Wurtz v. Beecher Metropolitan District*,[145] was appealed to the Michigan Supreme Court.

Richard Wurtz, an attorney, was hired in 2000 as the administrator of the Beecher Metropolitan Water District, which provides water and sewage services to residents and businesses near Flint, Michigan.[146] The District is overseen by five elected board members.[147]

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140. *Id.*

141. *Id.* at 64 (citing Roulston v. Tendercare (Mich.), Inc., 239 Mich. App. 270, 279; 608 N.W.2d 525 (2000)).

142. *Id.* at 64.

143. MICH. COMP. LAWS ANN. § 15.352 (West 2013).

144. Brown v. Mayor of Detroit, 271 Mich. App. 692, 706; 723 N.W.2d 464 (2006) (quoting Heckmann v. Detroit Chief of Police, 267 Mich. App. 480, 492; 705 N.W.2d 689 (2005)).

145. Wurtz v. Beecher Metro. Dist., 298 Mich. App. 75; 825 N.W.2d 651 (2012), *rev'd*, 495 Mich. 242 (2014).

146. *Id.* at 77-78.

147. *Id.* at 77.

Wurtz's contract was for ten years, from February 1, 2000 to February 1, 2010, and contained no renewal clause.[148] During his tenure at the District, Wurtz typically worked from 8:00 a.m. to 12:00 noon and then worked for the remainder of each day at his private law practice.[149] In 2008, he was paid $79,322 plus benefits by the District.[150]

It was undisputed that Wurtz worked the full term of his contract and received all of the salary and benefits to which he was entitled under that agreement.[151] During 2008-2009, however, Wurtz raised concerns about various actions taken by some of the District's board members.[152] In May 2008, he wrote to the Genesee County Sheriff, the Genesee County Prosecutor, and the Mt. Morris Police Chief, claiming that three board members had violated Michigan's Open Meetings Act by meeting privately with their attorney and also by meeting with their attorney and union representatives for a negotiating session.[153] The prosecutor responded that he did not believe that the allegations warranted a criminal investigation.[154] In May 2009, Wurtz wrote a memorandum to the board protesting the cost of board members' attendance at an industry conference in San Diego.[155] In August 2009, after the board members attended the conference, Wurtz raised concerns about possible illegal reimbursements to board members for the conference with the Genesee County Sheriff, and a criminal investigation ensued.[156] During this same period, in January 2009, Wurtz proposed a new contract with the District, in which he would reduce his salary and benefits in return for an extension of his contract to August 1, 2012.[157] That offer was rejected by the board in March 2009 and again in November 2009.[158]

Wurtz's contract thus ended on January 31, 2010.[159] Wurtz filed suit on January 19, 2010, claiming that the District's refusal to renew his contract occurred in violation of the WPA because he had reported

148. *Id.* at 92. The factual summary contained in this article draws on factual recitations from both the majority and dissenting opinions.

149. *Id.*

150. *Id.*

151. *Wurtz*, 298 Mich. App. at 92.

152. *Id.* at 78-79.

153. *Id.*

154. *Id.*

155. *Id.* at 79-80.

156. *Id.* at 80-82. Eventually, criminal charges were brought against all of the board members stemming from their conference expenses. Those charges were dismissed prior to trial as to one board member; the other board members were found not guilty at trial.

157. *Wurtz*, 298 Mich. App. at 79.

158. *Id.* at 79-81.

159. *Id.* at 81.

possible wrongdoing by board members to the police.[160] The District moved for summary disposition, arguing that Wurtz had not experienced an adverse employment action.[161] The trial court granted the motion.[162] Wurtz appealed.[163]

In a 2-1 decision, the court of appeals reversed.[164] Recognizing that no Michigan case had ever addressed the question of whether contract non-renewal was an adverse employment action under the WPA, or even under the ELCRA, the court turned to federal court decisions issued in Title VII suits.[165] According to the court, numerous federal circuit courts of appeal have held that failure to renew a contract is an adverse employment action, just as failure to hire is one.[166] Ultimately, the court in *Wurtz* found these decisions persuasive, writing that "[w]ere we to hold that nonrenewal of a contract cannot, under any circumstances, qualify as an adverse employment action under the WPA because a contractual employee has no expectation of further employment past the expiration of his or her contract, we would carve an arbitrary distinction between contractual and at-will employees (who have no expectation of further employment from day to day)."[167]

The court thus concluded that the trial court had erred in granting summary disposition to the defendant and also erred in not permitting further discovery as requested by Wurtz.[168] The case was remanded to the trial court for a determination as to what motivated the District's decision not to renew Wurtz's contract.[169]

Judge Kirsten Frank Kelly, dissenting, found the majority's analysis of the issue wanting in several respects. First, looking at the exact language of the WPA, Judge Kelly concluded that the Act itself requires an employment relationship because it states, "An employer shall not discharge, threaten, or otherwise discriminate against an *employee* regarding the *employee*'s compensation, terms, conditions, location or

160. *Id.*

161. *Id.* at 82.

162. *Id.* at 82-83.

163. *Wurtz*, 298 Mich. App. at 83.

164. *Id.* at 77.

165. *See id.* at 85-86. The court noted that in *Barrett v. Kirtland Community College,* the court of appeals accepted without analysis that the non-renewal of a contract could be an adverse employment action in an ELCRA claim, because the plaintiff was nonetheless unable to establish causation. *Id.* at 85 n.13 (citing *Barrett*, 243 Mich. App. 306; 628 N.W.2d 63 (2001)).

166. *Id.* at 86-87.

167. *Id.* at 88.

168. *Id.* at 84-90. The trial court held that, as a matter of law, non-renewal could not be an adverse employment action, so additional discovery was not necessary. *Id.* at 89-90.

169. *Wurtz*, 298 Mich. App. at 90.

privileges of employment."[170] Further, an employee is specifically defined by the WPA as "a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied."[171] In Judge Kelly's view, the WPA's protections do not apply to pre-employment negotiations or a refusal to hire but only to current employees.[172] Wurtz's claimed adverse employment action (that he did not receive a new contract) did not occur until after his prior contract had ended by its own terms and not through any adverse action, at which time Wurtz was no longer an employee but a candidate seeking employment.[173] Unlike the ELCRA, which expressly covers pre-employment wrongs, the WPA does not.[174] Wurtz therefore failed to establish the adverse employment action element of his prima facie case, and, according to the dissent, the trial court properly dismissed his claim on that basis.[175]

The District applied for, and was granted, leave to appeal to the Michigan Supreme Court.[176] In its order, that court asked the parties to address whether Wurtz had suffered an adverse employment action when the District "declined to renew or extend his employment contract," perhaps implying that even if non-renewal is not an adverse action, the District's decision not to extend Wurtz's contract when he requested it (while Wurtz was still employed) might have been.[177] That the court may view this dispute as involving more than a single question of law is suggested by its request that the parties also address whether additional discovery could have produced evidence of a genuine issue of material fact in light of the trial court's grant of the District's motion prior to the completion of discovery.[178]

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170. *Id.* at 95 (quoting MICH. COMP. LAWS ANN. § 15.362).

171. *Id.* at 96 (quoting MICH. COMP. LAWS ANN. § 15.361(a)).

172. *Id.*

173. *See id.* at 96-97.

174. *Id.* at 101. The ELCRA protects "[t]he opportunity to obtain employment . . . without discrimination." MICH. COMP. LAWS ANN. § 37.2102(1) (West 2013).

175. *Wurtz,* 298 Mich. App. at 104. The dissent also observed that both Wurtz and the majority improperly characterized his alleged adverse employment action as a "failure to renew," even though Wurtz's contract contained no renewal provision, and the District was not obligated to renew his contract. *Id.* at 100. A more appropriate view of Wurtz's claim, in Judge Kelly's view, was a failure to hire claim—an action not covered by the WPA. *Id.* at 96.

176. Wurtz v. Beecher Metro. Dist., 494 Mich. 862; 831 N.W.2d 235 (2013).

177. *Id.*

178. *Id.*

4. Causation and Pretext

In its recent decision in *Debano-Griffin v. Lake County*,[179] the Michigan Supreme Court confirmed that claims brought under the WPA involving circumstantial rather than direct evidence are appropriate for the *McDonnell Douglas* burden-shifting analysis.[180] In addition, the court shed light on the evidence necessary to establish the fourth prong of that analysis, the causal connection between the protected activity and the adverse employment action.[181]

In 1998, Cheryl Debano-Griffin began working for Lake County as the director of its 911 department.[182] The County's ambulance service was funded by a specific millage approved by the voters; two ambulances a day were provided by Life EMS under a contract with the County.[183] In 2002, Debano-Griffin informed the County board of commissioners of her belief that Life EMS was using one of those ambulances to transport residents of other counties in breach of its contract with Lake County.[184] Two years later, in 2004, Debano-Griffin again brought complaints to the board, protesting the transfer of funds from the ambulance millage account to a mapping project.[185] The board of commissioners agreed to return the funds to the ambulance account.[186]

Around the same time that it agreed to restore funds to the ambulance account, the board of commissioners decided to eliminate Debano-Griffin's position by merging it with another position.[187] The stated reason for the decision was a need to balance the County's budget in light of fiscal problems, even though the 911 director's position was fully funded at that time.[188]

As a result of her termination, Debano-Griffin filed suit under the WPA in January 2005, claiming that her position had been eliminated because of her complaints to the board about the Life EMS breach of contract and its transfer of funds from the ambulance account.[189] At trial, following denial of the County's motion for summary disposition, the

179. 493 Mich. 167; 828 N.W.2d 634 (2013).
180. *Id.* at 171 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).
181. *Id.* at 175–76.
182. *See id.* at 172.
183. *Id.* at 173.
184. *Id.*
185. *Debano-Griffin*, 493 Mich. at 172-73.
186. *Id.* at 173.
187. *Id.*
188. *Id.*
189. *Id.*

jury found for Debano-Griffin.[190] That verdict was overturned by the court of appeals, however, which held that Debano-Griffin had not engaged in protected activity because she had only a subjective belief that the board's activities violated the law and because she could not identify the specific rules or laws that the board had violated in moving funds from one account to another.[191]

In lieu of granting Debano-Griffin's application for leave to appeal, the Michigan Supreme Court reversed, holding that reporting a suspected violation of the law is protected activity under the WPA and that the transfer of funds complained of by Debano-Griffin could violate Michigan law, meaning that Debano-Griffin in fact had reported a suspected violation of actual law.[192] The case was remanded for consideration of other issues raised by the County in its summary disposition motion, which the court of appeals had not reached.[193]

On remand, the court of appeals again reversed the trial court's denial of summary disposition, this time holding that Debano-Griffin had failed to establish any connection between her complaints to the board of commissioners and her termination other than temporal proximity.[194] Debano-Griffin again sought leave, and the supreme court again reversed.[195]

Focusing solely on the issue of causation, the court clarified that the applicable framework for assessing a WPA claim at the summary disposition stage was the *McDonnell Douglas* burden-shifting paradigm.[196] Under this approach, if a plaintiff offers sufficient evidence of a prima facie claim, the defendant may come forward with a legitimate, non-retaliatory reason for the action taken against the

190. *Id.* at 173-74. Even though Debano-Griffin reported alleged violations of the law internally to her employer rather than externally to an outside public body, her actions nonetheless met the WPA's requirement that a plaintiff report a violation to a political subdivision of the state because Lake County is such a political subdivision. *See* Brown v. Mayor of Detroit, 478 Mich. 589, 591; 734 N.W.2d 514 (2007).

191. Debano-Griffin v. Lake Cnty., 2009 WL 3321510, at *4 (Mich. Ct. App. Oct. 15, 2009), *rev'd*, 486 Mich. 938; 782 N.W.2d 502 (2010).

192. *Debano-Griffin,* 486 Mich. at 938. The court also stated that, in light of its decision, it was "unnecessary to address whether the reporting of a suspected violation of *suspected* law constitutes protected activity." *Id.* at 938.

193. *Id.*

194. Debano-Griffin v. Lake Cnty., No. 282921, 2011 WL 3760907 (Mich. Ct. App. Aug. 25, 2011), *rev'd*, 493 Mich. 167; 828 N.W.2d 634 (2013).

195. *Debano-Griffin*, 493 Mich. at 171-72.

196. *Id.* at 175-76 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

plaintiff.[197] The plaintiff then has the opportunity to establish that the proffered reason was a pretext for retaliation.[198]

Applying this approach, the court found that the lower appellate court mistakenly concluded that Debano-Griffin had not satisfied the causation element of her prima facie case.[199] The court of appeals had viewed Debano-Griffin's claim as resting solely on the timing of the board of commissioners' elimination of her position following her complaints about the transfer of funds from the ambulance account.[200] In the supreme court's view, however, Debano-Griffin did not rely solely on temporal proximity but presented other evidence linking her termination to her protected activity: that, "during a 12-day period" in which she raised multiple concerns with the board's actions, her position "went from fully funded to non-existent," allowing the inference that the board members intended to fund Debano-Griffin's position until she began complaining about their decisions.[201] Further, the entity that was the target of Debano-Griffin's complaints—the board of commissioners—also was the entity that decided to eliminate her position, which strengthened the causal connection because, according to the court,

> it is reasonable to infer that the more knowledge the employer has of the plaintiff's protected activity, the greater the possibility of an impermissible motivation. Similarly, it is reasonable to conclude that the more an employer is affected by the plaintiff's whistleblowing activity, the stronger the causal link becomes between the protected activity and the employer's adverse employment action.[202]

The court continued,

> [T]hat the board remedied its prior and potentially unlawful action lends support to plaintiff's position that defendants, because of plaintiff's complaints, were forced to do something that they would not have otherwise done and, thus, a reasonable

197. *Id.* at 176.
198. *Id.*
199. *Id.* at 177.
200. Debano-Griffin v. Lake Cnty., No 282921, 2011 WL 3760907, at *1 (Mich. Ct. App. Aug. 25, 2011), *rev'd*, 493 Mich. 167; 828 N.W.2d 634 (2013).
201. *Debano-Griffin*, 493 Mich. at 177.
202. *Id.* at 178.

> inference may be drawn that the board was motivated to eliminate plaintiff's position *because of* her complaints.[203]

Having concluded that Debano-Griffin established a rebuttable presumption that the board of commissioners retaliated against her because of her complaints, the court turned to the evidence offered by Debano-Griffin to rebut the County's stated reason for its decision, its financial crisis.[204] The County argued that Debano-Griffin could not refute its budget-based reason because doing so would "call into question" the County's business judgment and would also unconstitutionally violate the separation of powers because the judiciary would be reviewing the decisions of a legislative body.[205] The supreme court found neither of these contentions to be persuasive.[206]

Under the business judgment defense, a "plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent."[207] This argument was inapplicable in Debano-Griffin's case, in the supreme court's view, because she did not argue that the decision to eliminate her position was an unsound business decision or that the crisis could have been better addressed through other measures.[208] Instead, Debano-Griffin contended that the claimed budgetary crisis was not the true reason for the board's decision.[209] That argument was supported by evidence calling into doubt the existence of a financial emergency, which the court found sufficient to allow a jury to conclude that monetary problems were not the motivating factor in the decision to discharge Debano-Griffin.[210]

The court also gave short shrift to the County's separation of powers argument, observing that the WPA had expressly waived legislative immunity by extending its protection to public employees.[211] Further, the separation of powers doctrine applies only to lawful or legitimate acts by the legislative body in question and not to those taken in violation of the

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203. *Id.*
204. *Id.* at 179.
205. *Id.*
206. *See id.*
207. *Debano-Griffin*, 493 Mich. at 180 (quoting Hazle v. Ford Motor Co., 464 Mich. 456, 476; 628 N.W.2d 515 (2001)).
208. *See id.* at 180.
209. *Id.*
210. *Id.* at 180-81.
211. *Id.* at 183 (citing Anzaldua v. Band, 457 Mich. 530; 578 N.W.2d 306 (1998)).

law.[212] The court therefore held that "the question whether the board *lawfully* exercised its authority when it eliminated plaintiff's position is subject to judicial review. To hold otherwise would essentially allow defendants an impenetrable defense because plaintiff lacked direct evidence of retaliation and would render futile the burden-shifting framework of *McDonnell Douglas*."[213] Because Debano-Griffin offered enough evidence to establish a prima facie case of retaliation under the WPA as well as evidence rebutting the County's claimed reason for her discharge, the trial court correctly denied the County's motion for summary judgment.[214] The court of appeals decision was reversed, and the jury verdict for Debano-Griffin was reinstated, ending her lengthy odyssey through Michigan's appellate system.[215]

III. DISCRIMINATION

A. Sexual Harassment

The question of when workplace incivility rises to the level of actionable harassment under state and federal civil rights laws has been confounding courts for decades, and the recent advent of bullying claims has only further muddied those waters. During this *Survey* period, however, the Sixth Circuit Court of Appeals again reinforced the concept that, as the U.S. Supreme Court first observed in *Oncale v. Sundowner Offshore Services, Inc.*,[216] Title VII is not "a general civility code for the American workplace." Thus, in *Wasek v. Arrow Energy Services*,[217] the court of appeals upheld the dismissal of an employee's same sex harassment and bullying claims because the plaintiff offered no evidence other than his speculation that his tormentor was homosexual.[218]

Harold Wasek was a derrick hand, working on oil rig towers for Arrow Energy Services.[219] Based in Michigan, he was assigned to a four-man crew in Pennsylvania, working alongside Paul Ottobre.[220] As the court observed, Ottobre quickly discovered that he could provoke Wasek with crude stories of his sexual exploits, sexual comments (such as telling Wasek that he had a "pretty mouth"), and by poking Wasek in the

212. *Id.* at 184 (citing Detroit v. Hosmer, 79 Mich. 384, 387; 44 N.W. 622 (1890)).
213. *Debano-Griffin*, 493 Mich. at 185.
214. *Id.* at 185-86.
215. *Id.* at 186.
216. 523 U.S. 75, 80 (1998).
217. 682 F.3d 463 (6th Cir. 2012).
218. *Id.* at 468.
219. *Id.* at 465.
220. *Id.*

buttocks and touching him in a sexual manner.[221] Each time, Wasek responded angrily, swearing at Ottobre and telling him to stop.[222] Eventually, in September 2008, Wasek grew so angry at Ottobre's actions that he shoved him and threatened to beat him up.[223] Wasek also complained to his direct supervisor, who laughed and told Wasek not to complain to headquarters.[224]

Matters came to a head on September 11, 2008, when Wasek asked Ottobre for the keys to the company truck so that he could get something to eat. Ottobre refused.[225] Wasek called Dick Smillie, the director of operations in Michigan, to complain about this incident and told Smillie about the sexual harassment.[226] Smillie told Wasek that he should just "kick [Ottobre's] ass" but also said that he would call Ottobre, which he did.[227] At Smillie's direction, Wasek went back to Ottobre's room for the keys, but Ottobre had left, taking the truck with him.[228] Wasek again called Smillie, who told him to call the director of operations in Pennsylvania, Bill Strong.[229] Wasek called Strong and described all of the harassment he had experienced from Ottobre.[230] Strong told him to stop whining and just duke it out with Ottobre.[231] Frustrated by these events, Wasek abruptly returned to Michigan, leaving a note that he had gone home.[232]

When Arrow's human resources department called Wasek to find out why he had abandoned his job, Wasek said that he was not quitting but that he could no longer work with Ottobre.[233] Wasek also met with the company's regional supervisor and relayed to him all that had been happening.[234] The regional supervisor told Wasek that he was not being fired but that he could no longer work in Pennsylvania because that crew was angry that Wasek had left them "high and dry."[235] He also told Wasek that what he had experienced was simply life in the oil fields, and

221. *Id.* at 465-66.
222. *Id.* at 466.
223. *Wasek,* 682 F.3d at 466.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Wasek*, 682 F.3d at 466.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.* at 467.
235. *Wasek*, 682 F.3d at 467.

if he could not handle it, he should find other work.[236] Still, the company promised to find Wasek a new assignment, which it did, beginning October 21, 2008.[237] Wasek did not report to that job, however, because he had accepted a position with another company on October 12.[238]

Wasek subsequently sued Arrow Energy, claiming that he had been subjected to a hostile work environment because of his gender in violation of both Title VII and the ELCRA.[239] He also claimed that he was discharged in retaliation for complaining about harassment.[240] On the company's motion, the district court dismissed all of Wasek's claims.[241] Wasek appealed.[242]

The Sixth Circuit affirmed.[243] In so doing, the court first considered Wasek's same-sex harassment claim, noting that sexual harassment can be actionable whether it involves members of the same or different genders.[244] Regardless of which gender is involved, the focus is whether the alleged victim has suffered an adverse action or a hostile environment *because of* his or her gender.[245] In same-sex harassment cases, an inference that harassment occurred because of the plaintiff's gender can arise from the following: "(1) 'credible evidence that the harasser was homosexual,' (2) evidence that 'make[s] it clear that the harasser is motivated by general hostility to the presence of [the same-sex] in the workplace,' or (3) 'comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.'"[246]

The Sixth Circuit noted that there was no evidence that Ottobre was generally hostile to men in the workplace and also no evidence that he treated men differently than women because there were no women at the worksite.[247] Wasek thus could only succeed on his same-sex harassment claim by offering evidence that Ottobre's treatment of him was the result of Ottobre's homosexuality.[248] Wasek had no evidence establishing Ottobre's sexual orientation, however, beyond his speculation that

236. *Id.* at 466.
237. *Id.* at 467.
238. *Id.*
239. *Id.* at 466-67.
240. *Id.* at 467.
241. *Wasek*, 682 F.3d at 467.
242. *Id.*
243. *Id.* at 472.
244. *Id.* at 467 (citing Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998)).
245. *Id.* at 467 (citing Harris v. Forklift Sys. Inc., 510 U.S. 17, 25 (1993)).
246. *Id.* at 467-68 (quoting *Oncale*, 523 U.S. at 80-81).
247. *Wasek*, 682 F.3d at 468.
248. *Id.* at 468.

Ottobre was "a little strange, possibly bisexual."[249] Because "a single speculative statement in a deposition cannot be the first link in the 'chain of inference' that *Oncale* recognizes may follow from the harasser's non-heterosexuality," the court of appeals concluded that Wasek's Title VII claim had been properly dismissed.[250]

The court reached the same conclusion as to Wasek's harassment claim under the ELCRA, relying on the Michigan Court of Appeals' decision in *Robinson v. Ford Motor Co.*[251] In *Robinson,* the male plaintiff sued under the ELCRA for sexual harassment based on egregious conduct he suffered at the hands of a male co-worker.[252] Relying on *Oncale,* the court of appeals remanded the case to the trial court to determine whether the plaintiff had established that the harasser was homosexual, acted out of hostility towards men in the workplace, or harassed only men.[253] On the basis of *Robinson*, the Sixth Circuit concluded that Wasek's ELCRA claim should be analyzed in the same manner as his Title VII claim, resulting in dismissal of the ELCRA claim also.[254]

Wasek's retaliation claim presented a thornier issue for the court of appeals. Under both Title VII and the ELCRA, a prima facie case of retaliation requires evidence (1) that the plaintiff engaged in activity protected under the statute, (2) that the employer was aware of that protected activity, (3) that "[the employer] took adverse employment action against" the plaintiff, and (4) that "there was a causal connection between the [plaintiff's] protected activity and the adverse employment action."[255] While it was undisputed that Wasek reported Ottobre's conduct to Arrow Energy, Title VII and the ELCRA only protect an employee from retaliation for opposing conduct prohibited by those statutes.[256] Because Ottobre's conduct was not actionable under either statute, the question was whether Wasek's complaints could still form the basis for a retaliation claim. The court determined that Wasek was able to establish the protected activity element of his claim because he had a "reasonable and good faith belief" that the harassment he reported did violate Title VII.[257]

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249. *Id.*
250. *Id.*
251. Robinson v. Ford Motor Co., 277 Mich. App. 146; 744 N.W.2d 363 (2007).
252. *Id.* at 148-50.
253. *Id.* at 157-58.
254. *Wasek*, 682 F.3d at 468.
255. *Id.* at 468-69, 472 (citing Morris v. Oldham Cnty. Fiscal Court, 201 F.3d 784, 792 (6th Cir. 2000)).
256. *See id.* at 469, 472.
257. *Id.* at 469-70.

The court next concluded, readily, that Arrow Energy was aware of Wasek's protected activity.[258] The court also found that Wasek's ban from working in Pennsylvania constituted an adverse employment action sufficient to support his prima facie case, although the court did not believe that Arrow's two-week delay in finding a new position for Wasek rose to that level.[259]

Ultimately, however, Wasek's claim foundered on causation—the required connection between his complaints about Ottobre and Arrow's decision not to let Wasek return to Pennsylvania.[260] The court concluded that, based on the evidence, Arrow Energy's banning of Wasek from Pennsylvania occurred because Wasek had walked off the job, leaving his team "high and dry" and unable to work.[261] The court was unpersuaded by the only evidence offered by Wasek in support of causation—that the Pennsylvania ban occurred close in time to Wasek's complaints about Ottobre.[262] The court therefore affirmed dismissal of Wasek's retaliation claims as well as his harassment claims.[263]

As distasteful as Ottobre's conduct towards Wasek may have been, this decision is another reminder that not all bad behavior is illegal under civil rights laws. As the court concluded, "The conduct of jerks, bullies, and persecutors is simply not actionable under Title VII unless they are acting because of the victim's gender."[264]

B. Disability Discrimination

In *Kroll v. White Lake Ambulance Authority*,[265] the Sixth Circuit Court of Appeals addressed an issue of first impression in the Sixth Circuit about the meaning of "medical examination" under 42 U.S.C. § 12112(d)(4)(A) of the Americans with Disabilities Act (ADA).[266] Under that provision, employers cannot "require a medical examination" or "make inquiries of an employee as to whether such employee is an individual with a disability . . . unless such examination or inquiry is shown to be job-related and consistent with business necessity."[267] At issue in *Kroll* was whether the employer's request that an employee

258. *Id.* at 470.
259. *Id.*
260. *Wasek*, 682 F.3d at 471-72.
261. *Id.* at 471.
262. *Id.* at 471-72.
263. *Id.* at 472.
264. *Id.* at 467.
265. Kroll v. White Lake Ambulance Auth., 691 F.3d 809 (6th Cir. 2012).
266. *Id.* at 810 (citing Americans with Disabilities Act, 42 U.S.C. § 12112(d)(4)(A)).
267. 42 U.S.C.A. § 12112(d)(4)(A) (West 2013).

undergo psychological counseling was a medical examination for purposes of § 12112(d)(4)(A).[268] That provision applies not only to persons applying for a job but also persons already hired.[269]

Emily Kroll was a long-time emergency medical technician (EMT) for White Lake Ambulance Authority (WLAA), and she was generally considered good at her position and a good employee by her direct supervisor, Brian Binns.[270] After Kroll allegedly became romantically involved with a co-worker, however, Binns and Office Manager Jean Dresen began receiving complaints about Kroll's conduct and well-being.[271] As a result, according to Kroll, Dresen requested that Kroll receive psychological counseling and also asked Kroll to authorize the release of her counseling records so that WLAA could monitor her attendance at those counseling sessions.[272] Shortly thereafter, Binns was told by one of Kroll's co-workers that Kroll had screamed at a male acquaintance while driving a vehicle carrying a patient in emergency status (with lights and sirens on).[273] Binns told Kroll that in order to continue her employment with WLAA, she had to get some counseling because WLAA was concerned about her ability to safely perform her job.[274] Kroll responded that she would not seek counseling, left the meeting, and never returned to work at WLAA.[275]

Kroll then sued WLAA under the ADA, claiming that WLAA's demand that she attend counseling violated 42 U.S.C. § 12112(d)(4).[276] WLAA moved for summary judgment, which was granted.[277] The district court concluded that "counseling alone does not constitute a medical examination under the ADA," and, therefore, "WLAA's requirement that Kroll attend counseling as a condition of continued employment was not governed by 42 U.S.C. § 12112(d)(4)."[278] Kroll appealed.[279]

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268. *Kroll*, 691 F.3d at 814.

269. *See* 42 U.S.C.A. § 12112.

270. *Kroll*, 691 F.3d at 810-11.

271. *Id.* at 811.

272. *Id.*

273. *Id.* at 811-12.

274. *Id.* at 812. Whether Binns used the term "psychological" in describing the counseling that he asked Kroll to attend was a disputed fact. Binns did testify that it would be fair to describe his request to Kroll as a request for her to see a psychologist to discuss issues related to her mental health. *Id.*

275. *Kroll,* 691 F.3d at 812.

276. *Id.* at 812-13. Kroll also asserted retaliation and sex discrimination claims. *Id.* Kroll did not oppose WLAA's summary judgment motion as to her sex discrimination claim and also did not present arguments in opposition to summary judgment on her retaliation claim. *Id.*

277. *Id.*

278. *Id.*

The Sixth Circuit Court of Appeals first addressed, briefly, a standing issue raised by WLAA for the first time on appeal.[280] WLAA argued that because Kroll never actually underwent any counseling, she could not demonstrate an injury as required for standing to sue.[281] In order to have standing, a plaintiff must plead a "concrete, particularized, and imminent injury in fact caused by the defendant that a favorable judicial outcome would likely remedy."[282] According to the court, whether a violation of 42 U.S.C. § 12112(d) in and of itself creates a cognizable harm for standing purposes did not have to be answered because it was sufficient that Kroll alleged an injury—the loss of her job—"proximately caused by the violation of 42 U.S.C. § 12112(d)."[283] The court thus had the capacity to remedy the harm, so the jurisdictional standing requirement was met.[284]

The court then turned to the primary question on appeal—whether the counseling that WLAA directed Kroll to attend was a "medical examination" under § 12112(d)(4)(A).[285] This provision of the ADA prohibits employers from requiring a medical examination unless the examination or inquiry is job-related and consistent with business necessity.[286] Accordingly, employees can only be ordered to obtain a medical examination in certain circumstances.[287]

The court noted that the ADA offers scant "insight into the intended meaning or scope of the term 'medical examination' under § 12112(d)(4)," and it turned to the EEOC's Enforcement Guidance as an interpretive aid.[288] Under the EEOC's Enforcement Guidance, a "medical examination" is a "procedure or test that seeks information about an individual's physical or mental impairments or health."[289] The Guidance includes a seven-factor test to determine whether a test or procedure is a medical examination:

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279. *Kroll*, 691 F.3d at 812-13.

280. *Id.* at 813-14.

281. *Id.* at 813.

282. *Id.* (citing Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs, 641 F.3d 197, 206 (6th Cir. 2011)).

283. *Id.* at 814.

284. *Id.*

285. *Kroll*, 691 F.3d at 814-20.

286. *Id.* at 815 (citing EEOC v. Prevo's Family Mkt., Inc., 135 F.3d 1089, 1094 (6th Cir. 1998)).

287. *See id.*

288. THE U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES & MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (2000), *available at* http://www.eeoc.gov/policy/docs/guidance–inquiries.html [hereinafter EEOC NOTICE].

289. *Kroll*, 691 F.3d at 816 (citing EEOC NOTICE, *supra* note 288, at 5-6).

1) Whether the test is administered by a health care professional;

2) Whether the test is interpreted by a health care professional;

3) Whether the test is designed to reveal an impairment or physical or mental health;

4) Whether the test is invasive;

5) Whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task;

6) Whether the test normally is given in a medical setting; and,

7) Whether medical equipment is used.[290]

In applying these factors, the court initially noted that according to the guidance document, a single factor may be sufficient to determine that a test or procedure is a medical examination.[291] Further, in deciding whether a test is a medical examination, one must consider the likelihood that the test or procedure would "elicit information about a disability, providing a basis for discriminatory treatment."[292] The court also emphasized that the "examples provided by the EEOC suggest that an employer's intent is not dispositive" of the issue.[293] Thus, an employer's intentions, even if neutral with regard to disability, do not prevent a test or procedure from being considered a medical examination under § 12112(d)(4)(A).[294]

The court of appeals also reviewed the Seventh Circuit's decision in *Karraker v. Rent-A-Center, Inc.*,[295] as the most analogous authority on the issue.[296] In *Karraker*, the Seventh Circuit held that an evaluation administered to employees seeking a promotion, which included a personality inventory, was a medical examination under the ADA.[297] The personality inventory in *Karraker* was designed, at least in part, "to reveal mental illness and has the effect of hurting the employment

290. *Id.* (citing EEOC NOTICE, *supra* note 288, at 5-6).
291. *Id.*
292. *Id.*
293. *Id.* at 816.
294. *Id.*
295. Karraker v. Rent-A-Center, Inc., 411 F.3d 831 (7th Cir. 2005).
296. *Kroll*, 691 F.3d at 817.
297. *Id.* (citing *Karraker*, 411 F.3d at 837).

prospects of one with a mental disability."[298] The *Kroll* court observed that the Seventh Circuit had reached this decision despite the fact that "the employer claimed to be administering the MMPI solely for the purpose of measuring personality traits, that the test was not being scored by a psychologist, and that the employer was only using a 'vocational scoring protocol.'"[299]

Within this interpretive and precedential framework, the court of appeals analyzed Kroll's claims. Several key facts were integral to the court's analysis, including that Kroll had been instructed to attend some form of counseling (although the exact type was disputed) and that Kroll alleged that WLAA required her to "receive psychological counseling" and "to see a mental health counselor as a condition to keeping her employment."[300] Because the matter involved appeal of a motion to dismiss, the court was required to construe all facts in favor of Kroll, so it assumed that WLAA had required that Kroll receive "psychological counseling."[301]

The court then reviewed medical and lay definitions of the phrase "psychological counseling."[302] Because no clear or precise meaning was apparent from these differing definitions, the court applied the evidence presented by Kroll under the seven factor test outlined in the EEOC's Enforcement Guidance.[303]According to the court, factors one and two—"administration and interpretation by a health care professional"—both weighed in favor of a finding that the psychological counseling that Kroll was required to attend could be a medical examination under the ADA.[304] Specifically, Kroll alleged that WLAA told her to attend counseling administered by a psychologist, and regardless of the role of the psychologist (test-oriented, diagnostic, facilitative, etc.), that psychologist, at minimum, would have engaged in some interpretation of information received from or about Kroll.[305] Accordingly, the court concluded that a reasonable jury could find the required psychological counseling constituted a medical examination for purposes of § 12112(d)(4)(A).[306]

The court next examined factor three—"whether 'the psychological counseling' was designed to reveal a mental-health impairment"—which

298. *Id.* at 817.
299. *Id.* at 817-18 (quoting *Karraker*, 411 F.3d at 836-37).
300. *Id.* at 818.
301. *Id.* at 818-19.
302. *Kroll*, 691 F.3d at 818-19.
303. *Id.* at 819.
304. *Id.*
305. *Id.*
306. *Id.*

it concluded was the most critical factor.[307] Common definitions of psychological counseling suggested that, at least sometimes, such counseling is used for diagnosis and treatment of mental illnesses.[308] In fact, WLAA admitted that it instructed Kroll to attend counseling in order to discuss her mental health.[309] Thus, a reasonable jury could conclude that WLAA intended for Kroll to attend counseling in order to explore possible mental health impairment and to receive corresponding treatment.[310] The court stated that such an "uncovering of mental-health defects at an employer's direction is the precise harm that § 12112(d)(4)(A) is designed to prevent absent a demonstrated job-related business necessity."[311]

The court of appeals determined, however, that the absence of information needed to evaluate the remaining factors made it difficult to decide the weight to be given to those factors.[312] The court, therefore, declined to comment on these factors, which, ultimately, were not dispositive to its analysis.[313]

Based solely on factors one, two, and three, then, the Sixth Circuit held that summary judgment in favor of WLAA had been improper.[314] The court noted, however, that WLAA might still be entitled to summary judgment on the question of whether the counseling at issue was "'job related' and consistent with 'business necessity'"; however, because the district court did not address those questions, they were not addressed on appeal.[315] The court therefore remanded the matter to the district court for further proceedings consistent with its opinion.[316]

A brief dissent was penned by Judge Jeffrey Sutton, focusing on the specific language of § 12112(d)(4)(A), which stated that "[a] covered entity shall not *require a medical examination*."[317] Judge Sutton observed that WLAA had not compelled Kroll to take a medical examination.[318] Instead, "it compelled her to obtain psychological counseling," which she could "obtain on her own terms and with any counselor she

307. *Id.*
308. *See Kroll*, 691 F.3d at 819.
309. *Id.*
310. *Id.* at 819.
311. *Id.*
312. *Id.* at 819-20.
313. *Id.* at 820.
314. *Kroll*, 691 F.3d at 820.
315. *Id.*
316. *Id.*
317. *Id.* (Sutton, J., dissenting).
318. *Id.*

wished."[319] Further, WLAA "had no interest in the outcome of the counseling," in any diagnosis, in the type of counseling received, or in "anything at all save verification that she obtained some form of counseling if she was going to continue providing EMT services for the ambulance company."[320] The dissent also noted that, even under the EEOC guidelines, not all psychological tests are medical examinations.[321] Because "Kroll had the right to meet the counseling requirement on her own terms, some of which could have resulted in a medical examination and others of which would not," WLAA did not necessarily require Kroll to obtain a medical examination.[322]

IV. EMPLOYMENT AND OTHER STATUTES

A. Public Employment Relations Act

In *Bailey v. Callaghan*,[323] the Sixth Circuit Court of Appeals considered whether the U.S. Constitution requires Michigan public schools to collect membership dues for unions representing public school employees.[324] The issue was triggered by the enactment of Public Act 53 of 2012,[325] which modified Michigan's Public Employment Relations Act (PERA).[326] PERA grants state employees in Michigan the right to organize and be represented by a labor organization of their choice.[327] One of the statute's requirements is that public employers must bargain with their employees' designated representatives regarding the terms and conditions of employment.[328]

Public Act 53 of 2012 amended PERA so that "[a] public school employer's use of public school resources to assist a labor organization in collecting dues or service fees from wages of public school employees is a prohibited contribution to the administration of a labor organization."[329] At issue in *Bailey* was whether Public Act 53's

319. *Kroll*, 691 F.3d at 820.
320. *Id.*
321. *Id.* at 820-21.
322. *Id.* at 821.
323. Bailey v. Callaghan, 715 F.3d 956 (6th Cir. 2013).
324. *Id.* at 957.
325. The decision by the district court provides a background discussion on the legislative history of Public Act 53 of 2012, which is codified at MICH. COMP. LAWS ANN. § 423.210 (West 2013). *See* Bailey v. Callaghan, 873 F. Supp. 2d 879, 881-82 (E.D. Mich. 2012), *rev'd*, 715 F.3d 956 (6th Cir. 2013).
326. MICH. COMP. LAWS ANN §§ 423.201-.217 (West 2013).
327. MICH. COMP. LAWS ANN. § 423.209(1)(a).
328. MICH. COMP. LAWS ANN. § 423.215(1).
329. 2012 Mich. Pub. Act 53.

amendment to PERA violated the federal constitutional rights of public school employees.[330] The provision was challenged by individual public school employees and several unions, which argued that the ban violated the First and Fourteenth Amendments.[331] The federal district court granted a preliminary injunction preventing the defendants[332] or their agents from enforcing Public Act 53 pending the resolution of the matter on its merits. The defendants appealed.[333]

The Sixth Circuit Court of Appeals examined the case under the framework for determining the appropriateness of a preliminary injunction. The factors considered by the court were

> (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction.[334]

The court initially determined that the likelihood of success factor would be determinative because the court necessarily would have to resolve the merits of the plaintiffs' constitutional claims.[335]

The court first addressed the merits of the plaintiffs' First Amendment claim.[336] The plaintiffs argued that

> unions engage in speech (among many other activities); they need membership dues to engage in speech; if the public schools do not collect the unions' membership dues for them, the unions will have a hard time collecting the dues themselves; and thus Public Act 53 violates the unions' right to free speech.[337]

According to the court, however, this premise had already been explicitly rejected by the U.S. Supreme Court in *Ysursa v. Pocatello*

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330. Bailey v. Callaghan, 715 F.3d 956, 957 (6th Cir. 2013).

331. *Id.* at 958.

332. *Id.* Members of the Michigan Employment Relations Commission, the state agency charged with enforcing the provisions of PERA, were named as defendants.

333. *Id.* at 958.

334. *Id.* (citing Hunter v. Hamilton Cnty. Bd. of Elections, 635 F.3d 219, 233 (6th Cir. 2011)).

335. *See id.* at 958.

336. *Bailey*, 715 F.3d at 958-60.

337. *Id.* at 958.

Education Association.[338] In *Ysursa*, the Supreme Court upheld a provision in Idaho's Right to Work Act permitting public employees to authorize payroll deductions only for general union dues and not for union political activities.[339] Quoting *Ysursa*, the Sixth Circuit stated that "[t]he First Amendment prohibits government from 'abridging the freedom of speech': it does not confer an [*affirmative right*] to use government payroll mechanisms for the purpose of obtaining funds for expression."[340] The court further emphasized that Public Act 53 did not actually restrict union speech at all; the unions remained free to speak on whatever issue they wished.[341] Further, "nothing in the First Amendment prevents a State from determining that its political subdivisions may not provide payroll deductions for union activities."[342] Because payroll deductions were the only acts that Public Act 53 precluded, the court considered *Ysursa* to be determinative of the matter."[343]

The Sixth Circuit nonetheless considered the plaintiffs' challenge to *Ysursa*.[344] First, the plaintiffs argued that the Supreme Court's decision in *Cornelius v. NAAC*[345] supported their claim that the school payroll deduction process was a "non-public forum" for purposes of the First Amendment.[346] Secondly, the plaintiffs argued that Public Act 53 was "viewpoint discriminatory in a way that the statute in *Ysursa* was not."[347]

Cornelius involved the exclusion of certain groups from the federal government's Combined Federal Campaign.[348] Through the Campaign, nonprofit groups sought donations from federal employees.[349] Further, the non-profits were permitted to disseminate thirty-word written statements presenting their cause to employees, who then could donate to the group by a lump-sum payment or payroll deduction.[350] The Supreme Court held that the Campaign was a nonpublic forum.[351]

The *Bailey* plaintiffs argued that, under *Cornelius*, a school's payroll deduction procedure is a non-public forum from which the unions could

338. *Id.* (citing Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 355 (2009)).
339. *Ysursa*, 555 U.S. at 353.
340. *Bailey,* 715 F.3d at 958 (quoting *Ysursa*, 555 U.S. at 355).
341. *Id.*
342. *Id.* (quoting *Ysursa*, 555 U.S. at 355).
343. *See id.* at 958-59 (stating that "[s]eldom is precedent more binding than *Ysursa* is in this case").
344. *Id.*
345. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985).
346. *See Bailey*, 715 F.3d at 958-59.
347. *Id.* at 959.
348. *Id.*
349. *Id.*
350. *Id.*
351. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 789 (1985).

not be excluded.[352] The *Bailey* court disagreed, stating that a forum, whether "real or virtual," requires "some form of communicative activity."[353] The administrative process in which sums are deducted from an employee's paycheck involves no communication at all and so is not a forum.[354] In *Cornelius*, no one claimed that the payroll deduction process itself was speech; at issue instead was whether the thirty-word solicitations were speech, and according to the Supreme Court, if the thirty-word solicitations were not speech, "we need go no further."[355] The Sixth Circuit echoed this in *Bailey*: "*Ysursa* makes clear that payroll deductions are not speech, so we need go no further with the argument here."[356]

The *Bailey* plaintiffs also argued that Public Act 53 was viewpoint discriminatory.[357] They contrasted Public Act 53, which was applicable only to public school unions, to the statute in *Ysursa*, which applied to all unions.[358] The Sixth Circuit rejected this contention on multiple grounds.[359] The court first stated that, even assuming that viewpoint discrimination is problematic with respect to the process of payroll deductions, the text of the Act did not facially discriminate based upon viewpoint.[360] For example, the Act did not allow or deny a particular union access to the payroll deduction process based upon the policy position of the union.[361] Because the Act is silent as to speech of any kind, it is facially neutral.[362]

The court then addressed the argument that Public Act 53 denied access to the payroll deduction process only to certain unions, thereby acting as a proxy for viewpoint discrimination.[363] The court again pointed to the language of Public Act 53, reiterating that the Act did not explicitly deny payroll access to any particular union.[364] What the Act actually did, according to the court, was bar "public school employers from using their resources to collect membership dues on behalf of any

352. *Bailey*, 715 F.3d at 958-59.
353. *Id.* at 959 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)).
354. *Id.*
355. *Id.* (quoting *Cornelius*, 473 U.S. at 797).
356. *Id.* at 959.
357. *Id.*
358. *Bailey*, 715 F.3d at 959.
359. *Id.*
360. *Id.*
361. *Id.*
362. *Id.* at 959.
363. *Id.* at 959-60.
364. *Bailey*, 715 F.3d at 959.

union."[365] Therefore, "the particular union to which an employee belongs . . . is irrelevant to whether a public employer can collect the employee's membership dues."[366] Accordingly, under Public Act 53, it did not matter who the speaker was; what mattered was the employer.[367]

According to the court, the only argument left for the plaintiffs was the contention that the court should look past the Act's facial neutrality to conclude that the Act's real purpose was to "suppress speech by teachers' unions."[368] However, the court stated that such a review was foreclosed by the Supreme Court, which has stated that "it is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[369] The court therefore declined to "peer past" the text of Public Act 53 "to infer some invidious legislative intent."[370]

Lastly, the court addressed the plaintiffs' Fourth Amendment equal protection argument, which it analyzed under a rational basis review because it involved neither a fundamental right nor a suspect class.[371] Such review is highly deferential so that "'any conceivable legitimate governmental interest will [be considered constitutional]; and even then it is constitutionally irrelevant whether the conceivable interest actually underlay the enactment of the challenged provision.'"[372] The court noted that a rational basis review signals that the issue likely should be resolved by the legislature rather than by the courts.[373] However, the court briefly considered whether there was a legitimate interest in support of the classification and found there was: "the Legislature could have concluded that it is more important for the public schools to conserve their limited resources for their core mission than it is for other state and local employers."[374] Accordingly, the court held that the plaintiffs' equal protection claim failed.[375]

Because their First and Fourteenth Amendment claims were each without merit, the plaintiffs had no likelihood of success.[376] The

365. *Id.*
366. *Id.*
367. *Id.* at 959-60.
368. *Id.* at 960.
369. *Id.* (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968)).
370. *Bailey*, 715 F.3d at 960 (citing Wis. Educ. Ass'n Council v. Walker, 705 F.3d 640, 649-50 (7th Cir. 2013)).
371. *Id.*
372. *Id.* (emphasis omitted) (quoting Fednav, Ltd. v. Chester, 547 F.3d 607, 624-625 (6th Cir. 2008)).
373. *See id.* at 960.
374. *Id.*
375. *Id.*
376. *Bailey*, 715 F.3d at 960.

injunction issued by the district court was reversed, and the case was remanded for further proceedings consistent with the court's decision.[377]

In dissent, Judge Jane Stranch strongly disagreed with the majority opinion, stating that it "mischaracterize[d] the First Amendment interests at stake, glosse[d] over key distinctions the Supreme Court requires us to observe, and avert[ed] its gaze from Act 53's blatant viewpoint discrimination."[378] Judge Stranch framed the issue as whether "the government may burden expression it disagrees with by *selectively* restricting access to public resources that facilitate that expression."[379]

The dissent initially examined the Supreme Court's *Ysursa* decision.[380] In contrast to the majority, the dissent did not find *Ysursa* controlling based on two critical factors.[381] First, Judge Stranch asserted that the statute at issue in *Ysursa* applied to "all deductions for political activities, not just to a disfavored few."[382] Secondly, the dissent argued that there was no suggestion that the statute at issue in *Ysursa* "impermissibly discriminate[d] on the basis of viewpoint.[383] While agreeing that, under *Ysursa*, the Constitution "does not require a state to facilitate *all* union speech by providing universal payroll deductions, or decline to do so for all," Judge Stranch found that *Ysursa* did not address what happens when the statute at issue fails to act evenhandedly.[384] Thus, the majority should have considered "whether Michigan's choice to *exclude just one subset of unions* from the speech-facilitating mechanism of payroll deduction violates the First Amendment."[385] In the dissent's view, because the First Amendment issues in *Bailey* were distinct from those in *Ysursa*, the court was required to scrutinize the allegations of political viewpoint discrimination.[386]

Judge Stranch then examined the question of viewpoint neutrality, criticizing the majority's view that Public Act 53 was "facially neutral."[387] The dissent opined that "facial neutrality of a speech regulation does not resolve its legitimacy."[388] Instead, it is the court's "duty to ferret out hidden viewpoint bias" or, at the minimum, to assess

377. *Id.* at 960-61.
378. *Id.* at 961.
379. *Id.* at 961.
380. *Id.* at 962-65 (citing Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009)).
381. *Id.*
382. *Bailey*, 715 F.3d at 962.
383. *Id.*
384. *Id.* at 963.
385. *Id.*
386. *Id.* at 964.
387. *Id.* at 964-65.
388. *Bailey*, 715 F.3d at 965.

the legislature's justifications for the Act's selective ban.[389] Judge Stranch examined the neutral justifications for Public Act 53 offered by the defendants, including cost savings, promoting union accountability, and providing a "check on union power."[390] She found each of these to be unpersuasive, such that Public Act 53 was, in fact, meant to "muzzle" the specific viewpoint of school unions and the positions they advocate.[391] Public Act 53, therefore, was an impermissible restriction on the plaintiffs' speech.[392] As such, the plaintiffs' First Amendment claims were likely to succeed, and so the dissent would have affirmed the district court's preliminary injunction.[393]

PERA also was in play in *AFSCME Local 25 v. Wayne County,* in which the Michigan Court of Appeals, in a 2-1 decision, sided with Wayne County and its chief executive officer (CEO) in upholding the County's unilateral implementation of a twenty percent wage decrease and benefit concessions for its employees.[394] On behalf of those employees, AFSCME Council 25 had argued that the concessions violated Wayne County ordinances requiring that any action fixing compensation rates for County employees be approved by the Wayne County Commission.[395] Because, following a bargaining impasse, the CEO had implemented a last best offer fixing compensation rates without commission approval, in Council 25's view, that offer was unlawful. The trial court agreed and granted partial summary disposition to Council 25.[396]

In response, the defendants moved for reconsideration or, alternatively, for a stay pending appeal.[397] The defendants argued that they were immune from suit under the Governmental Tort Liability Act

389. *Id.* at 966.

390. *Id.* at 966-69.

391. *See id.*

392. *Id.* at 969.

393. *Id.*

394. AFSCME Local 25 v. Wayne Cnty, 297 Mich. App. 489; 824 N.W.2d 271 (2012), *appeal dismissed*, 493 Mich. 899; 822 N.W.2d 788 (2012).

395. *See id.* at 493. The original plaintiffs were four unions that were parties to a collective bargaining agreement with the county. When the parties could not reach a successor agreement, the unions sued. Council 25 then was permitted to intervene. Eventually, all of the plaintiffs except for Council 25 were dismissed because the trial court determined that their claims first had to be raised with the Michigan Employment Relations Commission. This left Council 25 to argue that imposition of a last best offer violated county ordinances. *Id.* at 492-93.

396. *Id.* at 492-93.

397. *Id.* at 493.

(GTLA).[398] The trial court denied the defendants' motion.[399] But because immunity was at issue, the defendants could appeal by right and did so.[400]

The key question before the court of appeals was whether the County, through its CEO, could implement a last best offer that included wage and benefit concessions for county employees without first obtaining approval from the Wayne County Commission. To answer that question, the court not only had to consider Michigan's Public Employment Relations Act (PERA),[401] but it also had to interpret language from the Wayne County Charter and the Wayne County Code of Ordinances.[402]

The court of appeals began by reviewing bargaining obligations of public employers and employees under PERA.[403] That statute's primary purpose is to "resolve labor-management strife through collective bargaining."[404] Under PERA, once a collective bargaining agreement (CBA) expires, public employers must bargain collectively, in good faith, with respect to mandatory subjects of bargaining (generally wages, hours, and other terms and conditions of employment).[405] If negotiations are unsuccessful, the parties reach an impasse.[406] Prior to impasse, "neither party may take unilateral action with respect to a mandatory subject of bargaining."[407] Once impasse has been reached, and if the parties have negotiated in good faith, their statutory duty under PERA has been met, and a public employer may unilaterally implement its last best offer.[408]

According to the court of appeals, "intrinsic to the duty to collectively bargain in good faith is the authority to unilaterally implement a [last best offer] when negotiations have reached an

398. *Id.* at 493-94. The GTLA is codified at MICH. COMP. LAWS ANN. §§ 691.1401-.1419 (West 2013).

399. *AFSCME Local 25*, 297 Mich. App. at 494.

400. *Id.*

401. MICH. COMP. LAWS. ANN. §§ 423.201-.217 (West 2013).

402. CODE OF ORDINANCES, WAYNE COUNTY (2013), *available at* http://www.minucicode.com.

403. *See AFSCME Local 25*, 297 Mich. App. at 494.

404. *Id.* (citing Detroit Fire Fighters Ass'n, IAFF Local 344 v. City of Detroit, 482 Mich. 18; 753 N.W.2d 579 (2008)).

405. *Id.*

406. *Id.* at 495.

407. *Id.* (citing Jackson Cmty. Coll. Classified & Technical Ass'n, Mich. Educ. Support Pers. Ass'n v. Jackson Cmty. Coll., 187 Mich. App. 708, 712; 468 N.W.2d 61 (1991)).

408. *Id.* at 495.

impasse."[409] Although the parties in the case did not dispute that impasse had been reached, Council 25 did dispute whether the County had the authority to implement its last best offer without commission approval to the extent that the offer affected wages and benefits of county employees.[410] The court concluded that this argument contravened the concept that the authority to implement a last best offer upon impasse is part of the negotiation process.[411] The court emphasized that the last best offer is a bargaining tactic integral to the collective bargaining process and, as such, is a continuation of the collective bargaining process.[412] Because section 4.323(b) of the Wayne County Charter authorizes the county's labor relations division to "act for the County under the direction of the CEO in the negotiation and administration of collective bargaining contracts," the court concluded that "commission approval was not required before the [last best offer] was implemented."[413]

The court of appeals next addressed the argument that certain Wayne County ordinances required the CEO to seek commission approval prior to implementing a wage offer.[414] Ordinance 90-847, section 3(a) states, "Subject to county commission approval hereinafter provided, each county agency shall formulate and promulgate rules to prescribe the organization, procedures and methods by which it serves the public or regulates any public or private activity, process, facility, operation or agency."[415]

Ordinance 90-847, section 3 sets forth specific requirements that must be met before an agency adopts a rule, including detailed notice, processing, and commission approval.[416] However, Ordinance 90-847, section 6 exempts certain rules from these procedural requirements,

409. *AFSCME Local 25*, 297 Mich. App. at 496.

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.* at 497 (citing WAYNE COUNTY, MICH., CHARTER §4.323).

414. *See id.* at 497-99.

415. *AFSCME Local 25*, 297 Mich. App. at 497 (citing WAYNE COUNTY, MICH., CODE OF ORDINANCES, Ordinance 90–847, § 3(a) (1991)). The court also looked to Ordinance 90-847, § 2, which defines a rule as

> a directive, statement, standard, policy, regulation, proclamation, ruling, determination, order, instruction or interpretation, which is of general effect and future application, which applies, implements or makes more specific those express laws enforced, implemented or administered by an officer or agency, or which prescribes the organization, procedure or practice of that office or agency, including the amendment, suspension or rescission thereof.

Id. at 498 (quoting WAYNE COUNTY, MICH., CODE OF ORDINANCES, Ordinance 90–847, § 2) (internal quotation marks omitted).

416. *Id.* at 498-99 (citing WAYNE COUNTY, MICH., CODE OF ORDINANCES, Ordinance 90–847, § 3).

including commission approval.[417] Specifically exempted are rules addressing "[a] determination, decision, order or opinion in a case," "[a] declaratory ruling or opinion as applied to a fixed and stated set of facts," and "[a]n individual decision by an agency to exercise or not to exercise a legal power, although private rights and interests are affected by that decision."[418] As noted by the court, these exemptions themselves are subject to limitations of Ordinance 90-847, section 7, which states,

> A memorandum, directive, order or determination *which governs the internal management, organization or procedures of an agency*, but which also addresses or substantially impacts upon the following matters, shall not be valid and of effect unless in full compliance with the commission approval requirements of this chapter:
>
> > (1) Fix the rate of compensation for county officers and employees, including fringe benefits, per diem rates and lump sum payments in lieu of reimbursed expenses, where these rates are not otherwise fixed by contract or law.[419]

Council 25 relied primarily upon the limitations of Ordinance 90-847, section 7 in arguing that commission approval was required prior to implementing the last best offer because that offer affected county employees' rates of compensation and benefits.[420]The court of appeals disagreed, stating that the plain language of section 7 only "pertains to the internal management, organization or procedures of an agency."[421] The court further opined that, based on Ordinance 90-847, it was apparent that it applied to agency rulemaking and was "wholly inapplicable to collective bargaining and negotiations," which are duties relegated to the labor relations division by section 4.323 of the Wayne County Charter.[422] Thus, the trial court had erred by relying on the ordinance in granting partial summary judgment for Council 25.[423]

The court also concluded the commission was empowered by statute to approve county employee salaries after a successor agreement is reached.[424] Therefore, once negotiations progressed beyond imposition of

417. *Id.* at 499-500.
418. *Id.*
419. *Id.* (emphasis added).
420. *AFSCME Local 25*, 297 Mich. App. at 499-500.
421. *Id.*
422. *Id.*
423. *Id.* at 501-02.
424. *Id.* at 501.

the last best offer, the commission could ratify any salary changes prior to the agreement taking effect.[425] Likely influencing the court's decision was the fact that this ratification process, and not the procedure outlined in Ordinance 90-847, was the process used when the parties eventually reached a successor contract.[426]

Lastly, the court explained that accepting Council 25's interpretation would "require the legislative branch, the commission, to intrude into the negotiation process, exclusively granted to the executive, rather than to perform its overseeing function in ratifying or rejecting the CBA upon its submission."[427] Accordingly, the court of appeals reversed and remanded the dispute for entry of summary disposition in favor of the defendants.[428]

A spirited dissent penned by Judge Michael J. Kelley disagreed with the majority's opinion on multiple fronts.[429] Specifically, the dissent concluded that the provisions of PERA could not be read to include codification of the last best offer negotiation tactic and that PERA also could not be read to limit a local government's authority to regulate its negotiator's use of this tactic.[430] Therefore, the county CEO could not use the last best offer tactic if "it would result in lower benefits for the employees without first obtaining approval from . . . the Wayne County Commission."[431]

Although Judge Kelley agreed with the majority that the use of the last best offer was a permissible negotiation tactic under PERA, he did not agree that the statutory duty to bargain in good faith intrinsically included the use of this tactic, as stated by the majority.[432] He contended that the majority had misinterpreted the use of the last best offer gambit as a requirement under PERA for "local governments to give unfettered authority to their representatives to use whatever tactics the representative might wish to use, as long as those tactics are consistent with good-faith bargaining."[433] In contrast, the dissent viewed PERA as

425. *Id.*
426. *AFSCME Local 25*, 297 Mich. App. at 501.
427. *Id.*
428. *Id.* at 502.
429. *Id.* at 502-12 (M.J. Kelly, J., dissenting). The dissenting opinion referred to the ordinances by their codification in the Wayne County Code of Ordinances rather than by the numbers assigned at their adoption. Thus, the chief ordinance at issue in the case, referred to by the majority as 90-847, was referred to in the dissent as §§ 5-1 through 5-6 of the Wayne County Code. *Id.* at 502 n.1.
430. *Id.* at 502.
431. *AFSCME Local 25*, 297 Mich. App. at 502.
432. *Id.* at 503-04.
433. *Id.* at 504.

limited in its application, stating that it should not be read to "deprive local governments of the ability to specify whether, when, or how specific bargaining tactics may be used."[434] Under this view, PERA does not prevent a local government from either directly or indirectly limiting its own negotiator's use of a bargaining tactic.[435]

Judge Kelley disagreed with the majority's interpretation of the Wayne County Charter and ordinances as well.[436] While the labor relations division, under the direction of the CEO, had the responsibility to negotiate and administer collective bargaining agreements, the CEO's power to direct the labor relations division was not unlimited.[437] The Wayne County Charter provides that the CEO may "'[s]upervise, coordinate, direct, and control all county facilities, operations, and functions *except as otherwise provided by law or this Charter*[.]'"[438] Therefore, opined the dissent, the CEO's authority to direct the labor relations division does not include the authority to direct that division to violate Wayne County ordinances or its charter.[439] Accordingly, the relevant question was whether Wayne County's ordinances required the CEO to obtain approval prior to implementing a last best offer.[440]

Unsurprisingly, Judge Kelley found that it did not.[441] He disagreed with the majority's interpretation of Ordinance 90-847, which states that a "memorandum, directive, order or determination which governs the internal management, organization or procedures of an agency but which also addresses or substantially impacts upon [certain] matters, shall not be valid and of effect unless it complies with the commission approval requirements" of the Wayne County Code.[442] The majority found that this section applied only to agency rulemaking and was thus inapplicable to collective bargaining and negotiations.[443] The dissent, in contrast, found the phrase "but which also addresses or substantially impacts upon [certain] matters" to require commission approval for additional matters specified in the ordinance, including any "order or determination that fixes the rate of compensation for county officers and employees,

434. *Id.*
435. *Id.*
436. *Id.* at 505-10.
437. *AFSCME Local 25*, 297 Mich. App. at 506.
438. *Id.* (alterations in original) (quoting WAYNE COUNTY, MICH., CHARTER § 4.112(a)(1)).
439. *Id.* at 506.
440. *Id.*
441. *Id.* at 506–07.
442. *Id.* at 508.
443. *AFSCME Local 25*, 297 Mich. App. at 508.

including fringe benefits."[444] As stated by the dissent, "This ordinance represents a clear policy choice by the local legislature: the Wayne County Commission determined that it is in the best interests of the county to maintain the status quo on the pay and benefits for county employees unless the change is directly approved by the Commission."[445]

The dissent argued alternatively that fixing the rate of compensation and benefits for government employees implicates internal management of an agency.[446] Thus, the CEO's use of the last best offer tactic is a "directive or order" governing the internal management of the agency because it fixes the rate of compensation and benefits for county employees, although on a temporary basis.[447] Therefore, Ordinance 90-847 required commission approval prior to the imposition of a last best offer.[448]

B. Michigan Employment Security Act

In *Sheppard v. Meijer Great Lakes Limited*, the Michigan Court of Appeals determined that an employee terminated for taking a leave of absence without employer permission was nonetheless eligible for unemployment benefits.[449]

The decision was notable for its review and interpretation of the statutory criteria for determining whether an employee has left a job voluntarily under the Michigan Employment Security Act (MESA).[450] The MESA provides wage loss benefits to persons unemployed through no fault of their own.[451] These benefits are not available, however, for a claimant whose separation from employment is his or her own fault.[452] A claimant thus may be disqualified from benefits under a variety of circumstances, including where the claimant "'[l]eft work voluntarily without good cause attributable to the employer[.]' Courts construe these exceptions narrowly."[453]

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444. *Id.*
445. *Id.* at 508.
446. *Id.* at 509.
447. *Id.*
448. *Id.*
449. Sheppard v. Meijer Great Lakes Ltd., No. 300681, 2012 WL 6633993 (Mich. Ct. App. Dec. 20, 2012).
450. *Id.* at *3.
451. *See* MICH. COMP. LAWS ANN. §§ 421.1-421.75 (West 2013).
452. *Sheppard*, 2012 WL 6633993, at *2.
453. *Id.* (alterations in original) (quoting MICH. COMP. LAWS ANN. 421.29(1)(a)).

Sheppard was employed as a part-time clerk for Meijer and also as a full-time receptionist for another unrelated employer.[454] In February 2009, Sheppard was terminated from her full-time receptionist position due to the employer's financial difficulties.[455] Shortly thereafter, Sheppard requested a two-month leave of absence from Meijer, and her last day of work was February 8, 2009.[456]

Sheppard's supervisor at Meijer subsequently testified that he explained to Sheppard that she would need formal written approval from the store director for her leave of absence.[457] The supervisor further testified that he assumed that Sheppard requested, and received, formal approval.[458] In contrast, Sheppard testified that she believed that her supervisor had received the required approval.[459] Thus, Sheppard left her employment at Meijer on February 8, 2009, believing that she had been approved for a voluntary leave.[460] Because Sheppard's employment file did not contain a written approval for a voluntary leave of absence, the store director concluded that Sheppard's leave had not been properly authorized and terminated her employment on March 29, 2009.[461]

Sheppard sought and began receiving unemployment benefits in April 2009.[462] Meijer protested this decision and requested a redetermination, claiming that Sheppard had voluntarily resigned.[463] The Michigan Unemployment Insurance Agency (UIA), the agency that enforces and administers the MESA, determined that Sheppard was not qualified for unemployment benefits due to misconduct under MCL section 421.29(1)(b) because she had been "suspended or discharged for misconduct connected with the individual's work."[464] Sheppard appealed her claim to a UIA hearing referee, who, after an evidentiary hearing, concluded that Sheppard "did not receive approval from [Meijer] for her 2 month vacation.[465] As a result, [Sheppard] was discharged by [Meijer]."[466] The hearing referee therefore found that Sheppard was not qualified for unemployment benefits on the basis of misconduct.[467]

454. *Id.* at *1.
455. *Id.*
456. *Id.*
457. *Id.*
458. *Sheppard*, 2012 WL 6633993, at *1.
459. *Id.*
460. *Id.*
461. *Id.*
462. *Id.*
463. *Id.*
464. *Sheppard*, 2012 WL 6633993, at *1.
465. *Id.*
466. *Id.*
467. *Id.*

Sheppard appealed to the UIA board of review, which affirmed the decision based on the voluntary leaving provision of the MESA, MCL section 421.29(1)(a), rather than the misconduct provision.[468] The board stated that Sheppard had "abandoned her employment when she left work without first securing proper approval for a leave of absence."[469] Thus, the board modified the hearing referee's determination of misconduct and held that Sheppard was disqualified from benefits under MCL section 421.29(1)(a).[470]

Sheppard appealed the board's decision to the circuit court, which affirmed the board of review's denial of benefits.[471] Sheppard next sought leave to appeal to the court of appeals but was denied.[472] However, the supreme court remanded to the court of appeals for a determination on leave granted.[473]

Because the case involved an agency decision, the court of appeals had to determine "whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings."[474] Additionally, the applicable standard of review limited the court's authority to "determining whether the agency's action was authorized by law and whether the agency's findings of fact [were] 'supported by competent, material, and substantial evidence on the whole record.'"[475]

Utilizing this standard, the court first addressed voluntary termination under MCL section 421.29(1)(a).[476] Under the statute, "when determining whether an employee has voluntarily left work, the threshold question is whether the claimant 'voluntarily quit . . . or was discharged.'"[477] The appellate court emphasized that a voluntary departure is an intentional act.[478] As prior decisions have held, when an employee requests a leave of absence, and the employer subsequently terminates the employee, the employee has not voluntarily quit.[479] "This

468. *Id.*
469. *Id.*
470. *Sheppard*, 2012 WL 6633993, at *1.
471. *Id.*
472. Sheppard v. Meijer Great Lakes Ltd., 490 Mich. 1004; 807 N.W.2d 708 (2012).
473. *Sheppard*, 2012 WL 663993, at *1-2.
474. *Id.* (citing Boyd v. Civil Serv. Comm'n, 220 Mich. App. 226, 234; 559 N.W.2d 342 (1996)).
475. *Id.*
476. *Id.* at *2. *See also* MICH. COMP. LAWS ANN. § 421.29(1)(a) (West 2013).
477. *Sheppard*, 2012 WL 6633993, at *3.
478. *Id.* (citing McArthur v. Borman's, Inc., 200 Mich. App. 686, 690; 505 N.W.2d. 32 (1993)).
479. *Id.* (citing Ackerberg v. Grant Cmty. Hosp., 138 Mich. App. 295, 300; 360 N.W.2d. 599 (1984)).

court has specifically decline[d] to create a doctrine of constructive voluntary leaving where, as here, the claimant was in fact discharged and the employer failed to sustain the discharge as one for misconduct connected with work."[480] Applying this analysis to the facts before it, the *Sheppard* court found that both the circuit court and the board of review had improperly applied the law in holding that Sheppard had voluntarily quit.[481] According to the court of appeals, Meijer in fact had terminated Sheppard's employment.[482] Because Sheppard was discharged, her departure was not voluntary.[483]

The court also addressed Meijer's argument that the outcome of the case was controlled by the Michigan Supreme Court case of *Jenkins v. Appeal Board of Michigan Employment Security Commission*.[484] The court noted, however, that in *Jenkins*, the plaintiff had been disqualified due to "misconduct connected with work" because he left work half a day early after his request to do so was denied by his foreman.[485] The court also observed that the Michigan Supreme Court later relied on *Jenkins* in holding that it is inappropriate to apply the voluntary leaving provision of the MESA in cases where an employee is absent from work.[486] Rather, in such cases, the misconduct provision of the statute should be applied.[487]

The court of appeals also concluded that the board of review had not properly analyzed whether Sheppard abandoned her employment under MCL section 421.29(1)(a), given that its opinion was missing essential statutory language.[488] The voluntary leaving provision provides specific language defining when an individual who fails to report to work has voluntarily left that work:

> An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to

480. *Id.* at *2-3.
481. *Id.*
482. *Id.*
483. *Sheppard*, 2012 WL 6633993, at *2-3.
484. *Id.* (citing Jenkins v. Appeal Bd. of Mich. Emp. Sec. Comm'n, 364 Mich. 379, 382; 110 N.W.2d 899, 900 (1961)).
485. *Id.* at *3.
486. *Id.* (citing Wickey v. Appeal Bd. of Mich. Emp't Sec. Comm'n, 369 Mich. 487, 503-04; 120 N.W.2d 181 (1963)).
487. *Id.*
488. *Id.*

> have voluntarily left work without good cause attributable to the employer.[489]

Thus, the circuit court had erred in concluding that the board of review had applied the correct legal principles.[490]

Finally, the appellate court rejected Meijer's assertion that Sheppard's benefits should be denied under the misconduct provision.[491] The court held that Meijer had not exhausted its administrative remedies under the misconduct provision because the board of review had determined that this provision did not apply.[492] Because Meijer failed to appeal that decision to the circuit court, the court of appeals had no authority to review the board's determination on that issue.[493] The court thus vacated the decisions of the circuit court and the board of review and remanded for reinstatement of Sheppard's unemployment benefits.[494]

C. Michigan Medical Marihuana Act

In *Casias v. Wal-Mart Stores, Inc.*, the Sixth Circuit Court of Appeals affirmed a Michigan federal district court decision holding that the Michigan Medical Marihuana Act (MMMA) does not regulate private employment.[495] Passed in 2008, the MMMA regulates and protects the medical use of marijuana.[496] At issue in *Casias*, however, was whether it applies to employment actions by private employers regarding employee marijuana use.[497]

Joseph Casias was employed at a Wal-Mart store in Battle Creek, Michigan.[498] Casias was a long-term survivor of sinus cancer and also had been diagnosed with an inoperable brain tumor at age seventeen.[499] During Casias's employment at Wal-Mart, he endured chronic and persistent head and neck pain requiring pain medication.[500] Despite

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489. *Sheppard*, 2012 WL 6633993, at *3 (citing MICH. COMP. LAWS ANN. § 421.29(1)(a)).

490. *Id.* at *4.

491. *Id.*

492. *Id.*

493. *Id.*

494. *Id.*

495. Casias v. Wal-Mart Stores Inc., 695 F.3d 428 (6th Cir. 2012).

496. MICH. COMP. LAWS ANN. §§ 333.26421-.26430 (West 2013). While the statute itself uses the spelling "marihuana," the more common spelling ("marijuana") will be used in this article.

497. *Casias*, 695 F.3d at 431.

498. *Id.*

499. *Id.*

500. *Id.*

taking prescription medication, Casias experienced ongoing pain as well as side effects from the medication.[501] After the MMMA was passed in 2008, Casias's physician recommended marijuana to address his ongoing symptoms.[502] Casias was issued a registry card by the Michigan Department of Community Health and began using medical marijuana for pain management in 2009.[503] Casias consistently maintained that he only used marijuana in accordance with the MMMA, never used it at work, and never came to work under the influence of the drug.[504] Casias claimed that he used other prescription medications during working hours.[505]

Later that same year, Casias injured his knee while at work; in accordance with the company's standard drug use policy, Wal-Mart required that Casias take a drug test.[506] The test was administered at a local hospital.[507] Prior to the test, Casias informed the testing staff that he was a qualifying patient under the MMMA and provided his registry card.[508] Subsequently, Wal-Mart notified Casias that he had tested positive for marijuana.[509] Casias immediately met with his shift manager to explain the positive results and showed his registry card to the shift manager.[510] Casias explained that he never smoked marijuana while at work nor came to work under the influence.[511] Additionally, Casias explained that the positive drug test was the result of ingesting marijuana days before his work injury.[512] The shift manager took a photocopy of the registry card.[513] A week after this meeting, Wal-Mart's corporate office directed the store manager, Troy Estill, to discharge Casias for failing the drug test, as required under the company's drug use policy.[514]

Casias sued Wal-Mart and Estill in state court, alleging wrongful discharge and violation of the MMMA.[515] Casias argued that, under the MMMA, a business cannot discipline a medical marijuana card holder

501. *Id.*
502. *Id.*
503. *Casias*, 695 F.3d at 431.
504. *Id.*
505. *Id.*
506. *Id.* at 432.
507. *Id.*
508. *Id.*
509. *Casias*, 695 F.3d at 432.
510. *Id.*
511. *Id.*
512. *Id.*
513. *Id.*
514. *Id.*
515. *Casias*, 695 F.3d at 432.

who is a qualifying patient for medical marijuana use.[516] The defendants removed the case to federal court on the basis of diversity jurisdiction and then moved to dismiss the action for failure to state a claim.[517] Casias moved to remand, arguing that defendant Estill was a Michigan citizen and properly joined, thus destroying diversity.[518] Casias also opposed the defendants' motion to dismiss.[519]

The district court denied Casias's motion to remand, holding that Estill had been fraudulently joined.[520] The district court also granted the defendants' motion to dismiss, concluding that Casias had no actionable claim for wrongful termination because the MMMA does not regulate private employers. Casias appealed to the Sixth Circuit Court of Appeals.[521]

The court of appeals identified two issues for review: (a) whether "Estill was fraudulently joined" and (b) whether the Michigan legislature intended the MMMA to "regulate private employment."[522]

The court of appeals' review of Casias's motion to remand required analysis of whether Casias had a claim against Estill.[523] Under the federal doctrine of fraudulent joinder, when a non-diverse party is joined as a defendant in the absence of a federal question, remand can be avoided only by a demonstration that the non-diverse party was fraudulently joined.[524] The party seeking remand must show that there is "a colorable basis for predicting that a plaintiff may recover against [a defendant]."[525] A defendant is fraudulently joined if "it is clear that there can be no recovery under the law of the state on the cause alleged or on the facts in view of the law."[526]

Casias argued that the district court had improperly asserted diversity jurisdiction because Estill, a Michigan citizen like Casias, was a proper defendant in the case.[527] Casias contended that Estill had participated in his wrongful discharge and was personally liable under Michigan law.[528] The defendants countered that Casias had failed to establish a colorable

516. *Id.*
517. *Id.*
518. *Id.*
519. *Id.*
520. *Id.*
521. *Casias*, 695 F.3d at 432.
522. *Id.*
523. *Id.*
524. *Id.* (citing Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C., 176 F.3d 904 (6th Cir. 1999)).
525. *Id.* at 433 (citing Coyne v. Am. Tobacco Co., 183 F.3d 488 (6th Cir. 1999)).
526. *Id.* (citing Alexander v. Elec. Data Sys. Corp., 13 F.3d 940, 949 (6th Cir. 1994)).
527. *Casias*, 695 F.3d at 433.
528. *Id.*

claim because Estill had no involvement in the decision to terminate Casias's employment but only implemented the decision made by others.[529] Further, the defendants argued that under Michigan law, corporate agents cannot be liable in a wrongful discharge action.[530] The court of appeals agreed.[531]

In explaining its decision, the appellate court first examined the undisputed facts on which the lower court relied in reaching its decision that personal liability did not attach to Estill:

> Wal-Mart's corporate office in Arkansas, not Mr. Estill, made the decision to terminate Mr. Casias. In fact, Wal-Mart employed a specific drug screening department at its corporate headquarters for precisely this type of situation. Neither Mr. Estill nor any other individual store manager had the authority or the discretion to vary from the decisions made by Wal-Mart's Drug Screening department in Arkansas.[532]

The court of appeals agreed with the district court's observation that the record was "void of any evidence" supporting the conclusion that Estill intended to cause, or did cause, any adverse action against Casias.[533] Accordingly, the court declined to adopt Casias's position, which would in essence "make any individual who participates in the 'communication' of a corporate decision a proper defendant in a cause of action."[534]

With the jurisdictional issue resolved, the court of appeals then addressed the merits of the defendants' motion to dismiss.[535] Casias had

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529. *Id.*

530. *Id.*

531. *Id.*

532. *Id.* (quoting Casias v. Wal-Mart Stores, Inc., 764 F. Supp. 2d 914, 916 (W.D. Mich. 2011)) (internal quotation marks omitted).

533. *Casias*, 695 F.3d at 433.

534. *Id.* The court of appeals recognized that its decision was "in some tension" with Michigan tort law. The court stated that, as "there is an absence of guidance from Michigan courts on the issue of a corporate employee's personal liability and the required level of individual participation necessary to establish a common-law wrongful termination action," it would consider Estill's liability for wrongful termination in the context of other laws. The court noted that Michigan courts recognize some limitations on the personal liability of corporate actors under other Michigan laws and that Estill's actions fell squarely within those limitations. Because Estill was not a participant in the decision to terminate Casias' employment, however, his "mere acquiescence to the command from Wal-Mart's corporate office to communicate the discharge did not render him subject to personal liability." *Id.* at 434.

535. *Id.* at 434-35.

argued in the district court that the MMMA protects patients against disciplinary actions in private employment when using marijuana in accordance with Michigan law.[536] In support of this proposition, Casias offered both a plain language and a public policy interpretation.[537]

Casias's argument focused on the following provision of the MMMA:

> A *qualifying patient* who has been issued and possesses a registry identification card *shall not be subject to* arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or *disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act*…[538]

Thus, at issue was the word "business" and whether it modified only the phrase "licensing board or bureau" or was a stand-alone reference to a private business.[539] If the term was read separately from "licensing board or bureau," the MMMA seemingly applied to private employers.[540]

The Sixth Circuit began by stating that, "under Michigan law, courts interpreting statutes must review the entire law itself in order to arrive at the legislative intent and provide an harmonious whole. If the intent is evident from this comprehensive review of the statute, [then the] inquiry ends and [the court] employ[s] the plain intent."[541] When "the language used is clear and the meaning of the words chosen is ambiguous, a common-sense reading of the provision will suffice, and no interpretation is necessary."[542] Lastly, it stated that "[o]nly if the statute is of doubtful meaning or ambiguous, is the door … open to a judicial determination of the legislative intent."[543]

The court of appeals then looked to the district court's conclusion that the statute "'does not regulate private employment; [r]ather the Act provides a potential defense to criminal prosecution or other adverse

536. *Id.* at 434-35.

537. *Id.*

538. *Casias*, 695 F.3d at 435 (emphasis added) (quoting MICH. COMP. LAWS ANN. § 333.26424(a)).

539. *Id.* at 435.

540. *Id.*

541. *Id.* (citing Grand Traverse Cnty. v. State, 450 Mich. 457; 538 N.W.2d 1, 4 (1995)).

542. *Id.* (citing People v. Lee, 447 Mich. 552; 526 N.W.2d 882 (1994)).

543. *Id.* (quoting *Lee*, 447 Mich. at 557) (internal quotation marks omitted).

action by *the state*.'"[544] The district court had placed particular emphasis on the fact that the MMMA contained no language repealing or otherwise modifying or limiting the general rule of at-will employment.[545] The appellate court agreed, holding that the MMMA does not impose restrictions upon private employers such as Wal-Mart.[546] In doing so, the court looked at the placement of the term "business" in the statute, observing that the interpretation proposed by Casias would be "entirely inconsistent with state law precedent which requires [the court] to 'interpret the words in their context and with a view to their place in the overall statutory scheme.'"[547] The court further noted that under a plain reading of the MMMA, the term "business" is not a stand-alone term but instead qualifies the type of "licensing board or bureau."[548] In this context, and taking into account the natural placement of the words and phrases in relation to each other, the court found it evident that the use of the term "business" only referred to a business licensing board or bureau.[549]

The Sixth Circuit also addressed Casias's broader argument that the plain language of the MMMA regulates private employment relationships and, in doing so, restricts the ability of a private employer to discipline an employee for drug use when the employee's use of marijuana is authorized by the state.[550] In rejecting this, the court emphasized that the statute never expressly referred to employment, nor is private employment implied in its "discussion of occupational or professional licensing boards."[551] Further, other courts addressing state medical marijuana statutes have held that such laws do not regulate private employment actions.[552] Therefore, the Sixth Circuit concluded that Casias's interpretation of the MMMA was not only unpersuasive on its face but also in direct conflict with other states that have passed similar legislation.[553]

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544. *Casias*, 695 F.3d at 435 (alteration in original) (quoting Casias v. Wal-Mart Stores, Inc., 764 F. Supp. 2d 914 (W.D. Mich. 2011)).

545. *Id.*

546. *Id.*

547. *Id.* at 436 (citing Manuel v. Gill, 481 Mich. 637, 648–649; 753 N.W.2d 48 (2008)).

548. *Id.* at 436.

549. *Id.* "The statute is simply asserting that a qualifying patient is not to be penalized or disciplined by a business or occupational or professional licensing board or bureau for his medical use of marijuana." *Id.* (internal quotation marks omitted).

550. *Casias*, 695 F.3d at 436.

551. *Id.*

552. *Id.* (citing Johnson v. Columbia Falls Aluminum Co., 350 Mont. 562, 2009 WL 965308, at *2 (Mont. 2009)).

553. *Id.*

Finally, the court rejected Casias's public policy interpretation.[554] In a brief discussion, the court stated that such an interpretation "could potentially prohibit any Michigan business from issuing any disciplinary action against a qualifying patient who uses marijuana in accordance with the Act,"[555] and it concluded that, if the legislature had intended such a substantial change to Michigan law (i.e., the creation of a completely new category of protected employees), it would have expressly set forth this "far-reaching revision" in the statute.[556]

The dissenting opinion by Circuit Judge Karen Nelson Moore disagreed with the majority's initial conclusion that the district court had diversity jurisdiction.[557] Judge Moore argued that, contrary to the majority's conclusion, it was far from clear that Estill did not participate in the alleged wrongful termination of Casias.[558] Although Judge Moore agreed that Michigan courts have not addressed the issue of a corporate employee's personal liability in the context of common-law wrongful discharge claims, she observed that the court was "not free to predict how a state court would rule on an unsettled issue of state law."[559] Because Michigan law is unclear on whether a non-diverse defendant would be liable, in Judge Moore's view, the "federal court [had] no subject-matter jurisdiction and must remand the case" to state court.[560]

V. EMPLOYMENT CONTRACTS

Michigan law generally permits parties to shorten the applicable limitations period by contract if the provision is clear and unambiguous.[561] Standard provisions contained in employment applications, employee handbooks, and employee contracts have been held to be valid agreements to shorten limitations periods for bringing employment-related lawsuits.[562]

554. *Id.* at 436-37.
555. *Id.* at 437.
556. *Casias*, 695 F.3d at 437.
557. *Id.*
558. *Id.* at 438.
559. *Id.*
560. *Id.*
561. *See* Rory v. Cont'l Ins. Co., 473 Mich. 457; 703 N.W.2d 23 (2005); Clark v. DaimlerChrysler Corp., 268 Mich. App. 138; 706 N.W.2d 471 (2005).
562. *See, e.g.*, *Clark*, 268 Mich. App. 138 (six-month limitation period in employment application precluded lawsuit); Schoonmaker v. Spartan Graphics Leasing, No. 1:07-cv-1245, LLC, 2009 WL 1475492 (W.D. Mich. May 26, 2009) (one-year limitations period in employee handbook precluded lawsuit).

In *Hoogland v. Kubatzke,*[563] the scope of such a provision was before the Michigan Court of Appeals, which examined the provision's language to determine if it applied to all claims arising from the plaintiff's employment, regardless of the identity of the named defendant.[564] Frances Hoogland had been hired by Delta College in January 2004, initially as a part-time employee in the facilities management department and then, in September 2005, as an office assistant in the human resources department.[565]

In May 2006, Hoogland applied for a new position at the college.[566] The college's policy was to require any current employee seeking a new position within the college to complete a new application.[567] The employment applications that Hoogland submitted and signed during her employment contained the following disclaimer just above the signature line:

> I agree that any action or suit against Delta College arising out of my employment or termination of employment, including, but not limited to, claims arising under State or Federal civil rights statutes, must be brought within 180 days of the event giving rise to the claims or be forever barred. I waive any limitation periods to the contrary.
>
> READ CAREFULLY BEFORE SIGNING
>
> I agree that any claim or lawsuit relating to my service with Delta College or any of its divisions must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary.[568]

Delta College did hire Hoogland for the new job she sought, an "office professional equity/human resources" position, and in June 2007,

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563. Hoogland v. Kubatzke, No. 307459, 2013 WL 331580 (Mich. Ct. App. Jan. 29, 2013).

564. *Id.* The underlying facts of this case are more fully set forth in an earlier suit filed by the plaintiff under her maiden name in the Eastern District of Michigan. *See* Boensch v. Delta College, No. 10120, 2011 WL 1233301 (E.D. Mich. Mar. 30, 2011). This article thus relies on and cites to the *Boensch* decision for background facts relevant to the Michigan Court of Appeals decision discussed in this article.

565. *Boensch*, 2011 WL 1233301, at *1-2.

566. *Id.* at *2.

567. *Id.*

568. *Id.*

Hoogland signed a one-year employment contract.[569] In July 2008, Hoogland signed another one-year employment contract, extending her employment through June 2009.[570]

In May or June 2008, Hoogland received a threatening email while at work from a woman she had dated.[571] Hoogland shared the email with a Delta College public safety officer, who started an investigation.[572] The officer submitted a complaint to the Bay County Prosecutor and requested a stalking warrant for the woman's arrest.[573] However, the officer's supervisor later requested that the warrant be withdrawn because he did not believe the officer had conducted a sufficiently thorough investigation.[574] The warrant was withdrawn.[575]

A supervisor from the college's public safety office took over the investigation and interviewed Hoogland about her complaint.[576] Hoogland alleged that, during the interview, the supervisor expressed bias toward women and was unprofessional.[577] Hoogland filed a complaint against the public safety supervisor with the college's human resources department.[578] On July 22, 2008, Delta College informed Hoogland that it had investigated her complaint against the officer but did not believe that his actions constituted harassment.[579]

In the meantime, the Bay County Prosecutor sought a warrant for Hoogland's arrest for an alleged violation of Michigan's anti-cyberstalking law.[580] On July 14, 2008, Hoogland was arrested while at work.[581] This prompted Delta College to investigate Hoogland's computer use, and on August 5, 2008, Hoogland was suspended with pay for excessive personal use of the college's computers.[582] On September 12, 2008, Hoogland was reassigned to a temporary position in the financial aid department based on the college's loss of confidence in her regarding access to confidential information.[583]

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569. *Id.*
570. *Id.*
571. *Boensch*, 2011 WL 1233301, at *3.
572. *Id.*
573. *Id.*
574. *Id.*
575. *Id.*
576. *Id.*
577. *Boensch*, 2011 WL 1233301, at *3.
578. *Id.* at *4.
579. *Id.*
580. *Id.*
581. *Id.*
582. *Id.*
583. *Boensch*, 2011 WL 1233301, at *4.

On September 19, 2008, Hoogland grieved her suspension, her transfer, and the results of the harassment investigation.[584] In October 2008, the grievance was rejected by the president of the college.[585]

On May 28, 2009, the cyberstalking charges against Hoogland were dismissed because the anti-cyberstalking statute was unconstitutionally vague.[586] Several days later, in June 2009, Delta College notified Hoogland that it would not renew her employment contract.[587]

On January 12, 2010, Hoogland filed a four-count federal lawsuit against Delta College in the Eastern District of Michigan, alleging violations of her Fourteenth Amendment rights to equal protection and due process, breach of employment contract, and violation of the Michigan Elliott-Larsen Civil Rights Act.[588]

The college moved for summary judgment, arguing that Hoogland's claims were barred by the six-month statute of limitations contained in her employment application.[589] The last alleged adverse employment action experienced by Hoogland occurred on June 30, 2009, the day her contract expired and was not renewed.[590] Because Hoogland's suit was not filed until January 12, 2010, the federal district court held that her claims were untimely.[591]

Several months after her federal suit was dismissed, Hoogland filed a retaliation case under the Elliott-Larsen Civil Rights Act in Bay County Circuit Court.[592] This time, however, the suit named as defendants several managers and executives of Delta College, who Hoogland alleged had constructively discharged her by retaliating against her for filing discrimination and harassment complaints.[593]

The defendants filed a motion for summary disposition in lieu of answering the complaint, arguing again that Hoogland's claim was time-barred and also barred by res judicata and collateral estoppel.[594] The state

584. *Id.*
585. *Id.*
586. *Id.* at *5.
587. *Id.*
588. *Id.* at *1.
589. *Boensch*, 2011 WL 1233301, at *1. Delta College also argued that it was immune under the Eleventh Amendment. The district court disagreed, finding that Delta College was a "political subdivision" and not an "arm" of the state. *Id.* at *6-10. Nonetheless, the case was dismissed as untimely based on the six-month statute of limitations provision. *Id.*
590. *Id.* at *10.
591. *Id.* at *12.
592. Hoogland v. Kubatzke, No. 307459, 2013 WL 331580, at *1 (Mich. Ct. App. Jan. 29, 2013).
593. *Id.*
594. *Id.*

circuit court judge agreed, holding that the shortened limitations period barred Hoogland's claims against the individual defendants.[595] The court reasoned that the contractual limitation language applied to any action arising out of Hoogland's employment, regardless of who was named as a defendant.[596]

Hoogland appealed.[597] The Michigan Court of Appeals examined the contractual statute of limitations provision in the employment application to determine whether it applied to actions filed against individual managers and executives.[598] In doing so, the court of appeals strictly read the contractual language.[599] The court first concluded that the limitations provision clearly applied to Delta College: "I agree that any action or suit against Delta College arising out of my employment or termination of employment . . . must be brought within 180 days . . . ."[600]

Hoogland's employment application contained a second limitations provision, however, stating that "any claim or lawsuit relating to my service with Delta College or any of its divisions must be filed no more than six (6) months after the date of the [adverse] employment action."[601]

The court first questioned whether the defendants even had standing to assert the statute of limitations defense, given that they were not parties to the employment contract.[602] The court also considered whether the contractual language contained a promise for the benefit of third parties because the individual defendants were not specifically named in the limitations provision.[603] Under Michigan law,

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promise.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had

595. *Id.*
596. *Id.* The res judicata and collateral estoppel arguments raised by the defendants were deemed moot and not considered by the court. *Id.*
597. *Hoogland,* 2013 WL 331580, at *1.
598. *Id.*
599. *Id.*
600. *Id.*
601. *Id.* at *2.
602. *Id.*
603. *Hoogland,* 2013 WL 331580, at *2.

> undertaken to give or to do or refrain from doing something directly to or for said person.[604]

The *Hoogland* court looked to *Shay v. Aldrich*[605] and *White v. Taylor Distributing Co.*[606] for guidance on when a third party may assert contractual defenses.[607] In *Shay*, the Michigan Supreme Court generally held that if the language at issue broadly releases "all other persons" from liability, a nonparty to a contract can qualify as a third-party beneficiary.[608] In *White*, the defendant contended that the language stating, "IT IS expressly agreed that this Release also refers to any and all (past, present and future) claims/benefits arising or that may arise from the March 15, 2004 accident" applied to *any* potential defendant and not just the specific categories of individuals listed elsewhere in the release.[609] The *White* court rejected that argument, holding that there was a difference between who was being released and what was being released.[610] As such, the broad release of all claims clarified only the absolute immunity to which the defined class of individuals was entitled—it did not expand the class of individuals protected under the release.[611]

Applying *Shay* and *White*, the court in *Hoogland* concluded that the clear and unambiguous language in the employment application referred only to Delta College.[612] No other class of persons was defined or listed in the limitations provision.[613] Furthermore, consistent with *White*, the language referring to "any claim or lawsuit" in the second paragraph of the limitations provision only clarified the scope of protection available to the defined class, i.e., Delta College.[614] As in *White*, the appellate court believed that the lower court had confused "who" was protected by

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604. MICH. COMP. LAWS ANN. § 600.1405(1) (West 2013).

605. Shay v. Aldrich, 487 Mich. 648; 790 N.W.2d 629 (2010).

606. White v. Taylor Distrib. Co., 289 Mich. App. 731; 798 N.W.2d 354 (2010).

607. Both *Shay* and *White* addressed the scope of a contractual release of liability rather than the scope of a contractual statute of limitations period. However, as the court of appeals observed, the principles are the same when analyzing either provision. *Hoogland,* 2013 WL 331580, at *2 n.2.

608. *Shay*, 487 Mich. at 665.

609. *White*, 289 Mich. App. at 736.

610. *Id.*

611. *Id.*

612. *Hoogland,* 2013 WL 331580, at *2.

613. *Id.*

614. *Id.*

the contractual language with "what" was protected.[615] Therefore, the case was remanded to the trial court for further proceedings.[616]

Based on the court's interpretation of the contract language and case law, it may well be that if Delta College had included specific classes of individuals in its limitations language or had clearly defined who "Delta College" was, the managers and executives would have been protected by the shortened limitations period.[617] The provision at issue was not so specific, and so it was unenforceable as to those individual defendants.[618]

VI. FAMILY AND MEDICAL LEAVE ACT

Under the Family and Medical Leave Act of 1993 (FMLA),[619] an employee is eligible for leave only if the employee has worked for an employer for a minimum of twelve months and worked at least 1,250 hours during the twelve months preceding the leave request.[620] The employee must also work at a location at which the company employs fifty or more employees within seventy-five miles.[621] In calculating whether an employer employs at least fifty workers at a worksite, only actual employees are considered.[622]

During the 2011-2012 *Survey* period, the Eastern District of Michigan examined whether volunteer firefighters were employees for purposes of FMLA eligibility in *Mendel v. City of Gibraltar*.[623] Applying traditional tests used in deciding "whether the totality of circumstances suggests an employer-employee relationship,"[624] and focusing particularly on an "examination of control and

615. *Id.* The court of appeals also rejected the defendants' argument that the lawsuit was barred by res judicata and collateral estoppel, reasoning that the federal court did not decide the claims of discrimination against the individuals, only the statute of limitations issue with respect to Delta College. The court also observed that the defendants named in the state court action were not mandatory parties to the first federal court action. *Id.* at *3-4.

616. *Id.* at *4.

617. *Hoogland,* 2013 WL 331580, at *4.

618. *Id.*

619. 29 U.S.C.A. §§ 2601-2654 (West 2013).

620. *Id.* § 2611(2)(A)(i)-(ii).

621. *Id.*

622. *Id.* § 2612(1) (West 2009).

623. Mendel v. City of Gibraltar, 842 F. Supp. 2d 1035 (E.D. Mich. 2012) (citing 29 U.S.C. §§ 2601-2654). For a more detailed discussion of this decision, see Nemeth & Brouwer, *supra* note 94, at 719-722.

624. *Mendel*, 842 F. Supp. 2d at 1040-41. 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." *Id.*

compensation,"[625] the district court concluded that the volunteer firefighters in question were not employees, because the City exerted no control over them.[626] According to the district court, it was significant that the firefighters were not required to respond to fire calls, were not subject to disciplinary actions when they did not respond to a call, and were not required to work a set schedule or staff the fire station during off hours.[627] The lower court also determined 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.[628]

During this *Survey* period, however, the Sixth Circuit Court of Appeals reversed the district court in *Mendel,* holding that the volunteer firefighters were city employees and should be included in the calculation of the number of employees needed to render the plaintiff an eligible employee under the FMLA.[629]

Paul Mendel was a dispatcher for the City of Gibraltar Police Department.[630] The City had forty-one regular employees.[631] It also relied on volunteer firefighters but did not consider them employees.[632] Those volunteers were paid $15 per hour for responding to calls and maintaining equipment.[633] They did not receive health insurance, vacation or sick time, social security benefits, or premium pay.[634] The firefighters were required to attend mandatory trainings and take tests on their own time without compensation.[635] The firefighters were not required, however, to respond to calls, nor did they work scheduled shifts or staff a fire station.[636] The firefighters did receive a Form-1099 MISC from the City.[637]

The City terminated Mendel from his dispatch position after he did not report to work for five scheduled shifts.[638] According to the City, Mendel failed to provide sufficient medical documentation explaining his

625. *Id.*
626. *Id.*
627. *Id.* at 1042.
628. *Id.* at 1043.
629. Mendel v. City of Gibraltar, 727 F.3d 565, 570 (6th Cir. 2013).
630. *Mendel*, 842 F. Supp. 2d at 1035.
631. *Id.* at 1036.
632. *Id.*
633. *Id.*
634. *Id.* at 1037.
635. *Id.*
636. *Mendel*, 842 F. Supp. 2d at 1037.
637. *Mendel,* 727 F.3d at 567.
645. *Mendel*, 842 F. Supp. 2d at 1036.

absences.[639] 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.[640]

The City sought to dismiss Mendel's claim, arguing that he was not an eligible employee under the FMLA because the City employed fewer than fifty workers within seventy-five miles of Mendel's worksite.[641] The district court granted the City's motion and dismissed Mendel's suit.[642]

Mendel appealed, and the court of appeals reversed.[643] The issue as identified by the appellate court was "whether reputedly 'volunteer' firefighters fall within the scope of the FMLA's definition of an employee."[644] In reaching its decision, the court first reviewed the definition of "employee" under the Fair Labor Standards Act (FLSA) because the FMLA incorporates that definition by reference.[645] The FLSA defines "employee" as "any individual employed by an employer"[646] and defines "employ" as "to suffer or permit to work."[647] Finding these definitions to be of limited assistance, the court turned to U.S. Supreme Court decisions stating that, under the FLSA, common law categories of employees and employment relationships are not determinative.[648] More instructive, according to the Supreme Court, is the economic reality test,[649] which, on a case-by-case basis, views the entire business relationship to assess whether an employment relationship exists.[650] Based on the fact that the City did suffer or permit the firefighters to work and paid them "substantial wages" for that work,

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639. *Id.*

640. *Id.*

641. *Id.* at 1036 (citing 29 U.S.C. §§ 2601-2654).

642. *Id.* at 1043-44.

643. *Mendel,* 727 F.3d at 567.

644. *Id.* at 569.

645. *Id.* (citing 29 U.S.C. § 2611(3)).

646. 29 U.S.C.A. § 203(e)(1) (West 2006).

647. *Id.* § 203(g).

648. *Mendel,* 727 F.3d at 569 (quoting Walling v. Portland Terminal Co., 330 U.S. 148, 150-51 (1947)).

649. The economic reality test looks at a variety of factors, including

> 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."]

Donovan v. Brandel, 736 F.2d 1114, 1117-20, 1117 n.5 (6th Cir. 1984).

650. *Mendel,* 727 F.3d at 569-70 (citing Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 301 (1985), and *Donovan,* 736 F.2d at 1116).

the court of appeals determined that they were indeed employees under the FLSA's broad definition—subject to an analysis of the applicability of a 1986 amendment to the FLSA exempting volunteers performing work for a public agency.[651]

That amendment excludes from the FLSA's definition of employee 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'" and is not otherwise employed by the agency to perform those same types of services.[652] Critical to the court was whether the firefighters received compensation or merely a "nominal fee."[653] Also critical to the court's analysis were U.S. Department of Labor regulations defining a volunteer as one performing hours of service "'without promise, expectation or receipt of compensation for services rendered'"[654] and stating that "volunteers may be paid expenses, reasonable benefits, a nominal fee or any combination thereof, for their service without losing their status as volunteers."[655] The regulation continues: "'Whether the furnishing of expenses, benefits, or fees would result in individuals' losing their status as volunteers under the FLSA can only be determined by examining the total amount of payments made . . . in the context of the economic realities of the particular situation.'"[656]

Applying these regulations, the court held that the hourly wage paid to the firefighters was not nominal but instead was compensation, at least in part because the monies were paid on an hourly basis and not merely per call.[657] Further, the hourly rate paid was similar to the rates paid in neighboring communities to full-time employees working as firefighters.[658] According to the Sixth Circuit, the Gibraltar firefighters were paid a regular hourly wage for whatever time they chose to work and thus worked "in contemplation of compensation," removing them from the definition of volunteers under the regulations.[659]

As such, the firefighters were included as city employees for purposes of the FMLA, and Mendel was therefore an eligible employee under that Act.[660] In reaching that result, the court recognized that the

651. *Id.* at 570.
652. *Id.* (quoting 29 U.S.C. § 203(e)(4)(A)(i)–(ii)).
653. *Id.* at 570.
654. *Id.* (quoting 29 C.F.R. § 553.101(a)).
655. *Id.* (quoting 29 C.F.R. § 553.106(a)).
656. *Mendel*, 727 F.2d at 570-71 (quoting 29 C.F.R. § 553.106(f)).
657. *Id.* at 571.
658. *Id.*
659. *Id.*
660. *Id.* at 572.

FLSA's definitions of "employee" and "volunteer" were not the same as those terms' popular usage, resulting in a decision that the court itself described as "counterintuitive" but nonetheless based on the applicable law and facts.[661]

In dissent, Judge Raymond Kethledge stated that, in his view, the firefighters were not employees that the City "suffered" or "permitted" to work because the City exercised virtually no control over the firefighter's actions.[662] Further, Judge Kethledge disagreed with the majority's conclusion that the $15 per hour paid to the firefighters was substantial because it was only paid for time fighting fires and not for training time and also because of the importance of the service provided.[663]

A. Certification of Leave

The FMLA entitles eligible employees who work for covered employers to take unpaid, job-protected leave for specified family and medical reasons.[664] Under the FMLA regulations issued by the U.S. Department of Labor to enforce the Act, within five days of receiving a leave request, an employer has the right to request and obtain complete and sufficient medical certification to support an absence due to an employee's alleged serious health condition.[665] The employee then must provide the requested certification within fifteen calendar days, unless it is not practicable to do so despite the employee's diligent, good faith efforts.[666] An employee who could but does not provide the necessary certification may lose her right to take FMLA leave and risk possible termination.[667]

The Sixth Circuit Court of Appeals addressed the consequences of an employee's failure to provide timely certification in *Kinds v. Ohio Bell Telephone Co.*, the first of several FMLA decisions involving Ohio Bell decided during the *Survey* period.[668] The court concluded that an employer can request medical certification even after the requisite five-business-days period if the employer suspects that the reason for an employee's leave may not be appropriate.[669]

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661. *Id.*
662. *Mendel,* 727 F.3d at 573.
663. *Id.* at 571.
664. *See generally* 29 U.S.C.A. §§ 2601-2654 (West 2013).
665. 29 C.F.R. §§ 825.300-.313 (2013).
666. 29 C.F.R. § 825.305(b) (2013).
667. 29 C.F.R. § 825.305(c) (2013).
668. Kinds v. Ohio Bell Tel. Co., 724 F.3d 648 (6th Cir. 2013).
669. *Id.* at 653-54.

On October 13, 2009, Debra Kinds requested FMLA leave from her employer to deal with a mentally and physically abusive relationship with her live-in boyfriend.[670] The leave was granted, and Kinds did not work again until December 15, 2009, when she returned part-time.[671] A week after Kinds went on leave, Ohio Bell initiated a claim for short-term disability benefits on Kinds' behalf with its insurance administrator, Sedgwick Claims Management Services.[672] Also around this time, the FMLA management company used by Ohio Bell informed Kinds that the FMLA would only apply if the request for short-term disability was denied, and so medical certification was not needed at that time.[673]

On November 24, 2009, Sedgwick approved Kinds' short-term disability benefits for the period of November 10, 2009 through December 14, 2009.[674] Benefits were denied for the period of October 20, 2009 through November 9, 2009 because Kinds was not disabled during that period based on her medical records.[675] When Kinds returned to full-time work on December 29, 2009, she was asked to submit FMLA medical certification by January 13, 2010 addressing the October 20 through November 9 period for which she had been denied short-term disability benefits.[676] Kinds did not provide the required medical certification in a timely manner.[677] Ohio Bell then discharged Kinds on March 30, 2010 because, without the medical certification, Kinds' absences from October 20 to November 9, 2009 were unexcused, placing Kinds in violation of the company's attendance policy.[678]

Kinds filed suit, alleging that Ohio Bell had interfered with her FMLA rights by failing to timely request the medical certification.[679] The district court granted Ohio Bell's motion for summary judgment and dismissed the case.[680] Kinds appealed.[681]

The Sixth Circuit affirmed based on Kinds' failure to timely submit medical justification for her requested FMLA leave.[682] The court rejected Kinds' argument that Ohio Bell did not comply with the applicable

670. *Id.* at 650.
671. *Id.*
672. *Id.*
673. *Id.*
674. *Kinds*, 724 F.3d at 650.
675. *Id.*
676. *Id.* at 651.
677. *Id.*
678. *Id.*
679. *Id.* at 652.
680. *Kinds*, 724 F.3d at 651-52.
681. *Id.* at 649.
682. *Id.* at 654.

FMLA regulation governing the timing of medical certification requests, which states,

> In most cases, the employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.[683]

Kinds contended that this regulation requires an employer to request medical certification within five business days after receiving notice of the need for leave or else forever forfeit the right to request a certification.[684] Kinds further argued that the exception to the regulation allowing a later request for certification "if the employer later has reason to question the appropriateness of the leave" is limited to those instances when the employee is suspected of fraud.[685] The court rejected this argument, however, because nothing in the regulation refers to employee fraud as the only acceptable reason to request certification.[686] Further, Ohio Bell did have "reason to question the appropriateness of [Kinds'] leave after Sedgwick denied short-term disability benefits for the full period requested by Kinds."[687] Under the circumstances, it was appropriate for Ohio Bell to wait until the disability insurance administrator denied benefits before requesting additional medical certification.[688] Thus, Ohio Bell's December 29, 2009 request was timely and triggered Kinds' obligation to provide the requested certification.[689]

The FMLA also allows employers to request recertification of an employee's medical condition if the employee's medical condition changes.[690] The question then becomes how frequently an employer can request recertification. The Sixth Circuit answered this question in *Smith v. City of Niles*,[691] concluding that an employer can request recertification

683. *Id.* at 652-53 (citing 29 C.F.R. § 825.305(b) (2013)).
684. *Id.* at 653.
685. *Id.* (citing 29 C.F.R. § 825.305(b)).
686. *Kinds*, 724 F.3d at 653.
687. *Id.* at 654.
688. *Id.*
689. *Id.* 653-54.
690. 29 C.F.R. § 825.308(c)(2) (2013).
691. Smith v. City of Niles, 505 F. App'x 482 (6th Cir. 2012).

as often as warranted when there is a change in the employee's medical condition.[692]

Leddrew Smith worked as an engineering assistant in the utilities department of the City of Niles.[693] Smith suffered a back injury in a 2001 car accident that partially disabled him.[694] Following the accident, Smith was unable to "bend, lift more than thirty pounds or walk more than thirty minutes."[695] Smith's doctor told the City that Smith would have one- to two-day intermittent episodes of incapacity for three to four years, for which he required intermittent FMLA leave.[696] Intermittent leave (blocks of time less than the full amount of FMLA leave entitlement) is available under the Act when medically necessary or when the leave is due to a qualifying exigency.[697]

Beginning in 2002 and continuing until 2009, the City asked Smith to provide six separate medical certifications.[698] After Smith's job was eliminated in 2010, he sued, alleging, among other things, that the City had engaged in "certification harassment" in violation of the FMLA by demanding six separate medical recertifications over a period of several years.[699]

The Sixth Circuit affirmed the district court's grant of summary disposition to the City, agreeing that the City's recertification efforts were justified based on the changed circumstances surrounding Smith's need for intermittent leave.[700] The court explained that, while an employer may demand "'a recertification of a medical condition every six months in connection with an absence by the employee,'" an employer may also demand recertification within a shorter time, even as few as thirty days, if "'[c]ircumstances described by the previous certification have changed significantly,'" including an "'increased duration of absence.'"[701]

In Smith's case, according to the court, two events justified the City's request for new certification: when Smith took six days of leave

692. *Id.* at 484-85.
693. *Id.* at 483.
694. *Id.*
695. *Id.*
696. *Id.*
697. 29 U.S.C.A. § 2612(b) (West 2013).
698. *Smith,* 505 F. App'x at 484. In 2010, the City decided to close its records department, which consisted of Smith and another employee. Both jobs were eliminated at the same time. *Id.* at 483.
699. *Id.* at 484-85.
700. *Id.*
701. *Id.* at 484 (alteration in original) (quoting 29 C.F.R. § 825.308(b), and 29 C.F.R. § 825.308(c)(2)).

instead of the two days the doctor had estimated in the earlier certification and again when Smith sought a change in his working conditions to accommodate a new physical limitation of "no repetitive bending or twisting at the waist."[702] According to the court, a request for recertification was warranted because Smith's new limitations were not included on his previous certification—"the epitome of a reasonable recertification request."[703]

The court also observed that "an FMLA certification does not provide a no-questions-asked pass for employees to take time off whenever and for however long they wish,"[704] and it concluded by stating, "[Smith] is right about one thing: An unreasonable demand for recertification may interfere with FMLA rights. He is wrong about another: The city's requests all fit comfortably within the regulatory boundaries."[705] While Smith's claim was unsuccessful, the court seemed to leave the door open for another plaintiff, with different facts, to argue that unreasonable certification requests violate the Act.[706]

B. Fraudulent FMLA Use and the Honest Belief Defense

Under the Act, employers are prohibited from interfering with an employee's FMLA rights and from retaliating against employees who invoke their rights under the Act.[707] FMLA regulations acknowledge, however, that employees have no greater rights than they would have without taking FMLA leave.[708] Further, employers are allowed to rely on their "honest belief" when making employment decisions regarding FMLA-related absences.[709] The "honest belief" rule applies when "the employer honestly believes, based on particularized facts, that an employee lied and misused her FMLA leave and disciplines/terminates such employee based on such belief."[710] During the *Survey* period, numerous district and appellate courts in the Sixth Circuit examined these issues in the context of FMLA fraud by employees. These cases

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702. *Id.* at 484-85.
703. *Smith,* 505 F. App'x at 485.
704. *Id.* at 484-85.
705. *Id.* at 484.
706. *See id.* at 588.
707. 29 U.S.C.A. § 2615(a)(1)-(2) (West 1993).
708. 29 C.F.R. § 825.216(a) (2013).
709. Lineberry v. Richards, No. 11-13752, 2013 WL 4386989 (E.D. Mich. Feb. 5, 2013) (citing Smith v. Chrysler Corp., 155 F.3d 799 (6th Cir. 1998), and Donald v. Sybra, Inc., 667 F.3d 757 (6th Cir. 2012)).
710. *Id.* at *6.

resulted in several employer-friendly decisions reinforcing the "honest belief" rule as a valid defense for employers defending FMLA claims.

In *Jaszczyszyn v. Advantage Health Physician Network*,[711] the court upheld the employer's termination of an employee observed engaging in activities inconsistent with her FMLA leave.[712] Sara Jaszczyszyn was a customer service representative for Advantage Health Physician Network (Advantage).[713] In July 2009, Jaszczyszyn began experiencing pain in her lower back stemming from a car accident that occurred ten years before.[714] About a month later, Jaszczyszyn's doctor concluded she was "completely incapacitated" from work from August 31 through September 7, 2009.[715] Because Jaszczyszyn did not have enough paid time off to cover her absences, Advantage recommended that Jaszczyszyn apply for FMLA leave and provided her with the necessary paperwork, including a FMLA medical certification form for her doctor to complete.[716]

On September 8, 2009, Jaszczyszyn returned to work as planned.[717] The next day, her doctor submitted a FMLA Certification of Health Care Provider form to Advantage, indicating that Jaszczyszyn was having about four flare-ups per month, lasting anywhere from a few hours to days, and that she would be unable to perform all of her job duties during these episodes.[718] Advantage approved the request for intermittent FMLA leave.[719] Jaszczyszyn, however, appeared to have "treated the leave as continuous, open-ended, and effective immediately . . . [and] never return[ed] . . . to work after September 9th."[720] Advantage had to repeatedly remind Jaszczyszyn to contact her supervisor each day when she was unable to work and to turn in the required paperwork.[721] Advantage began to treat Jaszczyszyn's absences as approved intermittent FMLA leave.[722]

On September 22, 2009, Jaszczyszyn finally provided Advantage with a note from her doctor certifying a "projected length of disability"

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711. Jaszczyszyn v. Advantage Health Physician Network, 504 Fed. App'x 440 (6th Cir. 2012).
712. *Id.* at 450.
713. *Id.* at 441-42.
714. *Id.* at 442.
715. *Id.*
716. *Id.*
717. *Jaszczyszyn*, 504 Fed. App'x at 443.
718. *Id.*
719. *Id.*
720. *Id.*
721. *Id.*
722. *Id.*

from September 10 through October 5, 2009.[723] On September 30, 2009, the doctor provided another note extending Jaszczyszyn's incapacity from October 5 through October 26, 2009.[724]

Three days after her doctor completed the second work release form rendering her completely incapacitated until October 26, 2009, Jaszczyszyn attended a local Polish heritage festival for eight hours.[725] Afterwards, she posted pictures on Facebook showing her at the festival. During that same weekend, Jaszczyszyn left voicemail messages for her supervisor, stating that she was in pain and could not come to work the following Monday, October 5, 2009.[726]

Jaszczyszyn's supervisor and several of her co-workers, all of who were Jaszczyszyn's "friends" on Facebook, saw the pictures of Jaszczyszyn at the festival. Jaszczyszyn's co-workers felt "betrayed and duped" by seeing Jaszczyszyn out partying while they were covering for her at work.[727]

In response, Advantage began a formal investigation, including a meeting with Jaszczyszyn to discuss her leave.[728] During the meeting, Advantage raised Jaszczyszyn's communication issues, her requests for additional leave, her job requirements, and the injuries that she claimed had prevented her from fulfilling those requirements, and Advantage confirmed that Jaszczyszyn knew that the company took fraud seriously.[729] Advantage also discussed the pictures of Jaszczyszyn at the festival, which it believed were inconsistent with statements she had made in support of her FMLA leave requests.[730] Because Jaszczyszyn was unable to provide a reasonable explanation of the discrepancy between her request for leave and her activity in the pictures, Advantage terminated her employment at the end of the meeting.[731]

Jaszczyszyn sued Advantage, claiming that she was discharged in retaliation for taking FMLA leave or in interference with her right to take FMLA leave.[732] The district court granted summary judgment to Advantage, accepting its arguments that there was no evidence of

723. *Jaszczyszyn*, 504 Fed. App'x at 444.
724. *Id.*
725. *Id.*
726. *Id.*
727. *Id.*
728. *Id.*
729. *Jaszczyszyn*, 504 Fed. App'x at 445.
730. *Id.*
731. *Id.*
732. *Id.* at 446.

retaliatory motive and that it had an "honest suspicion" that Jaszczyszyn was abusing her leave.[733]

The Sixth Circuit affirmed.[734] With respect to Jaszczyszyn's FMLA interference claim, relying on *Donald v. Sybra, Inc.,*[735] the court held that the *McDonnell Douglas* burden-shifting analysis applied to FMLA interference claims when the employer offers a legitimate reason for the termination unrelated to the FMLA leave.[736] In addition, as in *Donald*, the court declined to expressly apply the "honest belief" rule to FMLA interference claims.[737] Instead, the court relied on a later published opinion, *Seeger v. Cincinnati Bell Telephone Co.*[738] In *Seeger*, the Sixth Circuit found that the district court properly confined its analysis to an FMLA retaliation theory, despite Seeger's attempt to claim both interference and retaliation claims, because Seeger received all of the FMLA leave to which he was entitled.[739]

Likewise, Jaszczyszyn argued that the basis for her interference claim was Advantage's failure to reinstate her.[740] However, Jaszczyszyn never requested reinstatement after her first leave and instead submitted a second request for leave.[741] As such, the court held that because Advantage granted Jaszczyszyn all the leave to which she was entitled and paid for all of her time off prior to her termination, Advantage did not interfere with Jaszczyszyn's FMLA rights.[742] Therefore, the court did not need to consider the "honest belief" rule.[743]

In addressing Jaszczyszyn's retaliation claim, the court held that she had failed to establish a causal connection between her FMLA leave and her termination.[744] The court did address the "honest belief" rule here, finding that Advantage had an "honest belief" that Jaszczyszyn had engaged in fraud.[745] Its decision to terminate Jaszczyszyn following its investigation because of her dishonesty, therefore, was a non-retaliatory basis for Jaszczyszyn's discharge.[746] The court noted further that

733. *Id.*
734. *Id.* at 450.
735. Donald v. Sybra, Inc., 667 F.3d 757 (6th Cir. 2012)
736. McDonnell Douglas Corp., v. Green, 411 U.S. 792, 802 (1973).
737. *Jaszczyszyn*, 504 F. App'x at 446-48.
738. Seeger v. Cincinnati Bell Tel. Co., LLC, 681 F.3d 274 (6th Cir. 2012).
739. *Id.* at 283.
740. *Jaszczyszyn*, 504 F. App'x at 449.
741. *Id.*
742. *Id.*
743. *Id* at 450.
744. *Id.* at 449–50.
745. *Id.*
746. *Jaszczyszyn*, 504 F. App'x at 450.

Jaszczyszyn did not refute her employer's honest belief that attending a Polish festival was inconsistent with her claim of complete disability.[747]

A similar result was reached in *Hall v. Ohio Bell Telephone Co.*,[748] in which the Sixth Circuit held that the employer did not violate the FMLA by investigating an employee's suspicious use of FMLA leave.[749]

Stella Hall worked as a customer service representative for Ohio Bell from 2001 through 2010.[750] In August 2007, following a "breakdown" on the sales floor during work, Hall was diagnosed with anxiety disorder by a licensed clinical social worker who certified that Hall needed 80 hours of FMLA leave each month.[751] Ohio Bell approved the request, and Hall began taking intermittent FMLA leave on September 8, 2007.[752]

About a month into Hall's leave, an article appeared in a local newspaper describing how Hall had written and self-published two novels.[753] In the article, Hall was quoted as saying that publishing a book "'takes hard work, perseverance, and determination. . . . How far will you go? Meaning, are you ready to give up your Saturday or Friday or take time off work to make your dream come true?'"[754] Based on this article and the timing of Hall's leave requests, Ohio Bell suspected that Hall might be abusing her FMLA leave; however, no investigation was formally initiated.[755]

In 2008 and 2009, Hall used all of her FMLA leave (12 weeks, or 480 hours) by mid-year.[756] She maintained regular attendance during the remainder of each year.[757] In January 2010, Hall reported absent due to FMLA every Monday that she was scheduled to work.[758] This pattern of absences again raised Ohio Bell's suspicions and resulted in another request for investigation into those absences.[759]

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747. *Id.*

748. Hall v. Ohio Bell Tel. Co., 529 F. App'x 434 (6th Cir. 2013).

749. *Id.* at 443-44.

750. *Id.* at 435.

751. *Id.*

752. *Id.*

753. *Id.*

754. *Hall*, 529 F. App'x at 435.

755. *Id.* at 436-37. Hall also took overlapping disability leave, and therefore, pursuant to procedure, Ohio Bell's Asset Protection Department directed Hall's manager to forward the request for investigation to the disability case manager for review. The request for investigation was never forwarded, however, so no further action was taken. *Id.*

756. *Id.* at 436

757. *Id.* In March 2009, Ohio Bell's Asset Protection Department conducted an investigation into Hall's FMLA leave but terminated the investigation in August 2009 after finding no evidence of abuse. *Id.*

758. *Hall*, 529 F. App'x at 436.

759. *Id.* The second investigation into Hall's FMLA was also inconclusive. *Id.*

In August 2010, Hall's step-grandchild passed away.[760] Hall informed Ohio Bell that her "grandchild" had died and requested bereavement leave.[761] Hall's collective bargaining agreement allowed employees to take such leave for the death of a biological grandchild.[762] Hall was approved for leave.[763] During the leave, however, she came to work to pick up her paycheck and provided confusing text messages to her supervisor regarding the details of the funeral service—behavior her supervisor found odd.[764] Ohio Bell again suspected that Hall might be committing fraud and initiated yet another investigation.[765] During the investigation, Hall admitted that the deceased child's mother was not her biological daughter.[766] Ohio Bell subsequently terminated Hall's employment for fraud.[767] Hall filed suit, alleging that her termination occurred in retaliation for her FMLA activity.[768] The district court granted summary judgment in favor of Ohio Bell, and Hall appealed.[769]

On appeal, the Sixth Circuit emphasized Ohio Bell's honest belief that Hall had engaged in fraudulent conduct and therefore upheld dismissal of Hall's FMLA retaliation claim.[770] More specifically, the court rejected Hall's claim that Ohio Bell's reason for termination was pretext for FMLA retaliation.[771] The court held that Ohio Bell had articulated particularized facts, along with contemporaneous records, in support of its investigations into Hall's several years of intermittent FMLA leave.[772] The court also noted that Ohio Bell did not target Hall for investigation merely because she took FMLA leave, but because it had evidence that Hall might have abused FMLA leave—the interview regarding her book publication and her pattern of FMLA absences.[773]

In two other FMLA fraud cases decided during the *Survey* period, *Lineberry v. Richards*[774] and *Durden v. Ohio Bell Telephone Co.*,[775]

760. *Id.* at 437.
761. *Id.*
762. *Id.* at 437-38.
763. *Hall*, 529 F. App'x at 438.
764. *Id.* at 438.
765. *Id.*
766. *Id.* at 438-39.
767. *Id.* at 439.
768. *Id.* at 435.
769. *Hall*, 529 F. App'x at 436.
770. *Id.* at 443-44.
771. *Id.* at 440-41.
772. *Id.*
773. *Id.*
774. Lineberry v. Richards, No. 11-13752, 2013 WL 4386989 (E.D. Mich. Feb. 5, 2013).

federal courts in Michigan and Ohio found for employers based on employee misuse and abuse of FMLA.

In *Lineberry*, Judge Zatkoff of the Eastern District of Michigan granted a motion for summary judgment in favor of Detroit Medical Center (DMC) in a case arising from the FMLA claims of an employee discharged for dishonesty and misuse of FMLA leave after posting pictures of her vacation on Facebook while on medical leave.[776] Carol Lineberry, a nurse at the DMC, was injured at work in January 2011 while moving stretchers. Lineberry's doctor, a DMC employee, concluded that Lineberry should not return to work, and DMC approved FMLA leave for her from January 27, 2011 through April 27, 2011.[777]

While on leave, Lineberry took a prepaid, planned vacation to Mexico and, like Jaszczyszyn, posted pictures of her trip on Facebook.[778] Lineberry's co-workers, who also were her Facebook "friends," saw the pictures of Lineberry riding in a motorboat and lying on her side while holding up two bottles of beer.[779] Lineberry also posted pictures in which she was shown holding her grandchildren, taking trips to Home Depot, "watching" her grandchildren, and taking online classes.[780]

Lineberry's co-workers reported the Facebook postings to Lineberry's supervisor.[781] When the supervisor commented to Lineberry about her vacation activities in an email, Lineberry responded that she had used a wheelchair at the airports during her travel.[782] Lineberry's supervisor alerted DMC's Loss Time Management Department of her suspicions that Lineberry was misusing her leave.[783] When Lineberry returned to work on April 19, 2011, DMC interviewed her.[784] Lineberry admitted that she had lied in her email to her supervisor about using a wheelchair while on vacation.[785] DMC fired Lineberry for dishonesty and for falsifying or omitting information related to her FMLA leave, a violation of company policy.[786] Lineberry sued, alleging that DMC had

775. Durden v. Ohio Bell Tel. Co., No. 12-734, 2013 WL 1352620 (N.D. Ohio Apr. 2, 2013).
776. *See generally Lineberry*, 2013 WL 4386989.
777. *Id.* at *1.
778. *Id.*
779. *Id.*
780. *Id.*
781. *Id.*
782. *Lineberry*, 2013 WL 4386989, at *1-2.
783. *Id.* at *2.
784. *Id.*
785. *Id.*
786. *Id.* at *3.

interfered with her FMLA rights and retaliated against her for taking FMLA leave.[787]

In dismissing Lineberry's claims, the district court noted that the FMLA does not afford an employee greater rights than if she had not taken FMLA leave, and therefore concluded that, based on Lineberry's undisputed dishonesty, DMC had the right to terminate Lineberry regardless of her FMLA activity.[788] The court further held that DMC was entitled to summary judgment under the "honest belief" rule. The court found that Lineberry's activities, including her Facebook postings and her lies about using a wheelchair, established the "particularized facts" that supported DMC's decision to terminate her employment.[789]

In *Durden*, the final Ohio Bell case discussed in this FMLA *Survey*, Judge Gaughan of the Northern District of Ohio emphasized the importance of thoroughly investigating potential employee FMLA fraud.[790] Jacqueline Durden was a customer service representative in Ohio Bell's customer call center.[791] Throughout her employment with Ohio Bell, Durden used intermittent FMLA leave based on a medical certification allowing her to be absent for migraine headaches two to three days per month.[792]

Unknown to Ohio Bell, Durden's wedding was scheduled for the evening of July 14, 2011. On that day, Durden called in and requested a vacation day. When she was told that she had no available vacation time, Durden said she would take an FMLA day instead.[793] Soon after Durden's July 14 FMLA leave, Ohio Bell requested a recertification because Durden had been absent on intermittent leave more frequently than indicated in her original certification.[794] Ohio Bell wanted to verify that Durden was incapacitated from working on the days she had previously taken off, including July 14, 2011.[795] Durden submitted the requested recertification, and Ohio Bell approved her request for FMLA leave for July 14, 2011.[796]

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787. *Id.* DMC filed a counter-complaint seeking to recover the amount of short-term disability benefits it paid to Lineberry during her leave but agreed to dismiss this claim when summary judgment was granted in order to bring an end to the litigation. *Id.* at *7.

788. *Lineberry*, 2013 WL 4386989, at *4-5.

789. *Id.* at *6-7.

790. *See generally* Durden v. Ohio Bell Tel. Co., No. 12-734, 2013 WL 1352620 (N.D. Ohio Apr. 2, 2013).

791. *Id.* at *1.

792. *Id.* at *2.

793. *Id.*

794. *Id.*

795. *Id.*

796. *Durden*, 2013 WL 1352620, at *2.

Several weeks later, Durden gave Ohio Bell a copy of her marriage license to update her records with her married name.[797] Noticing that the date on Durden's license was the same day for which she had been approved for FMLA leave, Ohio Bell began an investigation, which confirmed that Durden had obtained a marriage license on July 14, 2011 and was married that evening.[798] The investigation also revealed that Durden had asked a co-worker several months earlier to officiate her wedding and that Durden had only requested FMLA leave after being denied vacation.[799] Ohio Bell thus concluded that Durden's absence on July 14, 2011 had been pre-planned and that Durden was not incapacitated from work that day.[800] Durden was discharged.[801]

In rejecting Durden's FMLA claims, the district court concluded that Ohio Bell had readily established that it terminated Durden based on its honest belief that she fraudulently used FMLA leave because she admitted to calling off sick and using FMLA leave on a day on which she was well enough to obtain a marriage license and get married.[802] In addition, Durden requested FMLA leave only after her request for a vacation day was denied.[803] This was enough to show that Ohio Bell had an honest belief that Durden abused her FMLA leave.[804]

Finally, in *Adams v. Auto Rail Logistics, Inc.*, the Sixth Circuit expanded upon its position that taking FMLA leave does not protect an employee from being terminated for other reasons.[805] In *Adams*, the court confirmed that the "same decision" defense remained viable in the Sixth Circuit.[806] Under that defense, an employer can avoid liability with evidence that it would have terminated an employee regardless of the employee's use of FMLA leave.[807]

John Adams was employed by Auto Rail Logistics, Inc. as a rail supervisor.[808] On December 26, 2007, Adams missed work in order to

797. *Id.*
798. *Id.* at *2-3.
799. *Id.*
800. *Id.* at *3.
801. *Id.*
802. *Durden*, 2013 WL 1352620, at *8. Durden also alleged discrimination based on her race and religion under Ohio law, hostile work environment based on religious and FMLA discrimination, and wrongful discharge in violation of Ohio public policy. All of these claims were dismissed on Ohio Bell's motion for summary judgment. *Id.* at *3, *14.
803. *Id.* at *8.
804. *Id.*
805. Adams v. Auto Rail Logistics, Inc., 504 F. App'x 453 (6th Cir. 2012).
806. *Id.* at 457.
807. *Id.* (citing Edgar v. JAC Prods., Inc., 443 F.3d 501 (6th Cir. 2006), and Arban v. W. Publ'g Corp., 345 F.3d 390 (6th Cir. 2003)).
808. *Id.* at 454.

care for his ill daughter.[809] Adams later admitted that he did not need to care for his daughter after December 26, 2007, but he still did not return to work because, according to Adams, Auto Rail's human resources manager told him not to come back until he submitted medical certification supporting his daughter's condition.[810]

Adams did provide that medical certification on January 8, 2008 and was discharged in response.[811] Adams sued, alleging that under the FMLA, he had fifteen days to provide Auto Rail with the requested medical certification but was fired before those fifteen days had elapsed.[812] A jury found that Auto Rail was not liable, because it proved that it would have terminated Adams because of his misuse of FMLA leave, even without considering his December 26 absence.[813]

On appeal, the Sixth Circuit relied on previous decisions holding that "an employer may lawfully dismiss an employee and prevent that employee from exercising rights under the FMLA if the employer would have dismissed the employee regardless of the employee's taking of FMLA leave,"[814] and concluded that the district court's "same decision" jury instruction was proper.[815]

The court further held that an employer that discharges an employee for fraudulent use of leave is not required to prove fraud under state law.[816] It need only demonstrate an honest belief that the employee misused the FMLA such that it would have discharged the employee despite taking legitimate FMLA leave.[817]

C. Sovereign Immunity

During the *Survey* period, in *Diaz v. Michigan Department of Corrections*, the Sixth Circuit again addressed Eleventh Amendment sovereign immunity as to FMLA claims.[818] In 2012, the U.S. Supreme Court held, in *Coleman v. Court of Appeals of Maryland,*[819] that sovereign immunity barred suit against a state for money damages under

809. *Id.*
810. *Id.* at 454-55.
811. *Adams,* 504 F. App'x at 455.
812. *Id.*
813. *Id.*
814. *Id.* at 457 (citing Edgar v. JAC Prods., Inc., 443 F.3d 501, 508 (6th Cir. 2006), and Arban v. W. Publ'g Corp., 345 F.3d 390, 401 (6th Cir. 2003)).
815. *Id* at 457-58.
816. *Id.*
817. *Adams,* 504 F. App'x at 457-58.
818. Diaz v. Mich. Dep't of Corr., 703 F.3d 956 (6th Cir. 2013).
819. Coleman v. Court of Appeals of Md., 132 S. Ct. 1327 (2012).

the self-care provision of the FMLA.[820] When reaching that decision, the Supreme Court cited the Sixth Circuit decision of *Touvell v. Ohio Department of Mental Retardation & Developmental Disabilities*,[821] which held that while a state employee may recover monetary damages for her employer's failure to comply with the family-care provisions of the FMLA[822] under *Nevada Department of Human Resources v. Hibbs,*[823] that right did not extend to suits arising under the self-care provision of the FMLA.[824] The Supreme Court distinguished the FMLA's family-care provision from its self-care provisions by noting that the FMLA's family leave policies were grounded in concerns about the gender discrimination inherent in many pre-FMLA family leave policies.[825] The same concerns did not exist for the FMLA's self-care provision.[826]

In *Diaz,* the issue was whether an equitable FMLA claim, such as one for reinstatement, was also barred by a state's sovereign immunity.[827] Ricardo Diaz and Connie Boden sued their employers, the Michigan Department of Corrections and Michigan Department of Human Services, under 42 U.S.C. § 1983, alleging that they had been retaliated against for exercising their FMLA rights to self-care leave.[828] The district court dismissed all claims.[829]

The Sixth Circuit Court of Appeals affirmed dismissal of the claims for monetary damages because the plaintiffs could not obtain such damages against state officials under the self-care provision of the FMLA.[830] The court noted that the plaintiffs could not circumvent sovereign immunity by bringing § 1983 suits rather than FMLA claims.[831] However, the court also held that the district court had erred in dismissing Diaz's reinstatement claim because the right to equitable

820. The portion of the FMLA that entitles employees to take up to twelve weeks of unpaid leave for "the employee's own serious health condition that makes the employee unable to perform the functions" of his employment is frequently referred to as the "self-care" provision under the FMLA. 29 U.S.C.A. § 2617(a)(1) (West 2013).

821. Touvell v. Ohio Dep't of Mental Retardation & Developmental Disabilities, 422 F.3d 392 (6th Cir. 2005).

822. The portion of the FMLA that entitles employees to take up to twelve weeks of unpaid leave per year to care for a "spouse, or a son, daughter, or parent" with a serious health condition is commonly referred to as the "family-care" provision of the FMLA. 29 U.S.C.A. § 2617(a)(1) (West 2013).

823. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

824. *Touvell*, 422 F.3d at 400.

825. *Hibbs*, 538 U.S. at 721-22.

826. *See generally* Coleman v. Court of Appeals of Md., 132 S. Ct. 1327 (2012).

827. Diaz v. Mich. Dep't of Corr., 703 F.3d 956, 964-65 (6th Cir. 2013).

828. *Id.* at 958-60.

829. *Id.* at 958.

830. *Id.* at 962.

831. *Id.*

relief for an FMLA violation by a public employer has not been deemed unconstitutional.[832] The court observed that the holdings in *Touvell* and *Coleman* were narrow and applied to claims for monetary damages under the self-care provision of the FMLA, not to equitable claims.[833] The court remanded the case for the district court to determine whether Diaz had sufficiently alleged an ongoing violation in order to maintain his equitable claim.[834]

D. FMLA Retaliation

In an unpublished decision, the Sixth Circuit Court of Appeals adopted for FMLA retaliation cases the standard endorsed by the U.S. Supreme Court for Title VII claims in *Burlington Northern v. White.*[835]

In *Burlington,* the Supreme Court held that to establish the adverse employment action element of a prima facie case of retaliation, "[a] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[836] The Supreme Court emphasized that this was an objective standard, based on the view of a reasonable person in the plaintiff's position and not on the subjective desires or views of the plaintiff, in order to "screen out trivial conduct."[837]

Whether this same standard applied to FMLA cases was an open question until *Crawford v. JP Morgan Chase & Co.*[838] Paula Crawford worked as a project manager for Chase Bank in Columbus, Ohio.[839] While working for Chase, Crawford also worked for Safe Auto Insurance Company.[840] In March 2005, Crawford was held hostage at gunpoint by a Safe Auto co-worker.[841] In January 2007, Crawford requested FMLA leave from Chase for anxiety and depression associated with the Safe Auto incident.[842] Chase granted Crawford's FMLA leave request, and Crawford was off work until March 2007.[843]

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832. *Id.* at 964-65.
833. *Diaz*, 703 F.3d at 964-65.
834. *Id.* at 966.
835. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006).
836. *Id.*
837. *Id.* at 69-70.
838. Crawford v. JP Morgan Chase & Co., 531 F. App'x 622 (6th Cir. 2013).
839. *Id.* at 623.
840. *Id.*
841. *Id.*
842. *Id.*
843. *Id.* at 625.

When Crawford returned to work in March 2007, she was assigned to a different supervisor.[844] Crawford then took another FMLA leave from December 2007 through February 2008.[845] A month later, in March 2008, Chase informed Crawford that her position had changed from Project Manager I to Qualify Analyst II and that the project manager position was moving to Phoenix.[846] Crawford thus was assigned to a different position in Columbus, but her "salary, grade level, work hours, work location, and bonus potential did not change."[847]

Crawford sued, alleging that upon her return from an approved FMLA leave, she was not returned to the same position she had previously held and that the change occurred in retaliation for the FMLA leave.[848] The district court dismissed Crawford's claims on Chase's motion for summary judgment.[849] Crawford appealed.[850]

Applying *Burlington,* the court of appeals noted that while Crawford's compensation remained the same, her new position involved more clerical duties, did not require the same expertise, and required her to report to someone who previously had been her peer.[851] Based on these facts, the court concluded that the change in job responsibilities and transfer to a lesser position could be viewed by a jury as an adverse employment action.[852]

In his dissent, Circuit Judge Eric Clay disagreed, noting that the majority had been "too quick to accept Plaintiff's assertion[s]" regarding the alleged changes in her position.[853] Even if those assertions were taken at face value, according to Judge Clay, the changes were "the kinds of *de minimus*, intangible, or unmeasurable parts of a job that specifically do not give rise to a claim under the FMLA."[854] Judge Clay also rejected Crawford's retaliation claim because she was transferred to an equivalent position and had always been granted the FMLA leave she requested, eliminating the requisite causal connection.[855]

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844. *Crawford*, 531 F. App'x at 623.
845. *Id.* at 624.
846. *Id.*
847. *Id.*
848. *Id.* at 625.
849. *Id.*
850. *Crawford*, 531 F. App'x at 625.
851. *Id.* at 628.
852. *Id.*
853. *Id.* at 631 (Clay, J. dissenting).
854. *Id.* (citing Donahoo v. Master Data Ctr., 282 F. Supp. 2d 540, 552 (E.D. Mich. 2003)).
855. *Id.* at 632.

VII. CONCLUSION

Despite its several forays into whistleblower disputes during this *Survey* period, the Michigan Supreme Court is not quite finished. Still pending before the court is whether federal labor laws preempt a WPA claim brought against a union that discharged several of its business agents, allegedly because the agents had reported illegal activities by the union.[856] In light of the proliferation of whistleblower and other retaliation claims, that case is unlikely to be the supreme court's last word on the WPA. It is not unreasonable to expect continued litigation over the parameters of protected activities and causation.

Still winding through the state and federal judicial systems are challenges to Michigan's 2012 right to work legislation, such as the suit filed by unions representing state employees, which argues that only the Civil Service Commission has the authority to regulate terms of employment for classified civil service workers.[857] After losing at the court of appeals, the unions sought and were granted leave to appeal to the Michigan Supreme Court.[858] Pending in federal court is a challenge to the law as preempted by the National Labor Relations Act filed by the AFL-CIO.[859] Decisions on these cases should consume a substantial portion of next year's *Survey*.

In the meantime, these are the takeaways from this *Survey* period: disgruntled employees can maintain WPA suits based on whistleblowing designed only to benefit the employee; an employee cannot testify at deposition to events contradicted by other record evidence and expect that testimony to be accepted as direct evidence of discrimination; even volunteers can be employees; employers are still struggling to comply with the FMLA and ADA; and employees on FMLA leave just need to stop posting their vacation photos on Facebook.

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856. *See generally* Henry v. Laborers Local 1191, Nos. 302373, 302710, 2012 WL 2579683 (Mich. Ct. App. July 3, 2012), *appeal granted,* 493 Mich. 934; 825 N.W.2d 578 (2013).

857. *See generally* UAW v. Green, 302 Mich. App. 246; 839 N.W.2d 1 (2013).

858. UAW v. Green, 495 Mich. 921; 843 N.W.2d 742 (2014).

859. That case is *Michigan State AFL-CIO v. Callaghan,* Case No. 13-10557, assigned to Judge Stephen Murphy of the Eastern District of Michigan.