EMPLOYMENT AND LABOR LAW

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I. INTRODUCTION

During the *Survey* period,[1] Michigan courts addressed a wide range of employment and labor law issues, from the impact of Michigan's Freedom to Work legislation,[2] to jurisdictional questions involving the

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1. The *Survey* period extended from June 1, 2017 to May 31, 2018, although several noteworthy decisions outside that time period are included in this Article.

2. Public Act 348 of 2012, 2012 Mich. Pub. Acts 1596 (codified in scattered sections at MICH. COMP. LAWS ANN. §§ 423.1–423.22 (West 2012)) (applying to employees in the private sector); Public Act 349 of 2012, 2012 Mich. Pub. Acts 1599 (codified in scattered sections at MICH. COMP. LAWS ANN. §§ 423.201–423.215 (West 2012)) (applying to public employees); *see* Saginaw Educ. Ass'n v. Eady-Miskiewicz, 319 Mich. App. 422, 902 N.W.2d 1 (2017), *leave to appeal denied*, 501 Mich. 1027, 908 N.W.2d 299 (2018) (mem.); Teamsters Local 214 v. Beutler, No. 330854, 2017 WL

Court of Claims [3] and whether claims under the Elliott-Larsen Civil Rights Act (ELCRA)[4] can be heard by state district courts.[5] Over strong dissenting statements, and with only three justices in each majority due to recusals, the Michigan Supreme Court declined to reverse decisions regarding the appropriate causation standard in ELCRA cases[6] and whether an employee's conversation with her private attorney can be a report to a public body for purposes of the Whistleblowers' Protection Act (WPA).[7] The Michigan Supreme Court decided questions concerning when a claim under the WPA arises,[8] and the Michigan Court of Appeals reviewed several challenges to decisions made by the Unemployment Insurance Agency.[9] The court of appeals also interpreted the Payment of Wages and Fringe Benefits Act,[10] and may have provided employers with new leverage in defending against discrimination claims by deciding that Michigan's Authentic Credentials in Education Act[11] is applicable to employees who engage in resume fraud.[12]

II. DISCRIMINATION CLAIMS

A. Questions of Jurisdiction

In *Reynolds v. Robert Hasbany MD PLLC*,[13] the Michigan Court of Appeals held that suits filed in Michigan courts under the Elliot-Larsen

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3441394 (Mich. Ct. App. Aug. 10, 2017), *leave to appeal denied*, 501 Mich. 1027, 908 N.W.2d 301 (2018) (mem.).

3. *See* Doe v. Department of Transportation, 324 Mich. App. 226, 919 N.W.2d 670 (2018), *leave to appeal denied*, 503 Mich. 876, 917 N.W.2d 637 (2018) (mem.).

4. MICH. COMP. LAWS ANN. §§ 37.2101–.2803 (West 2018).

5. *See* Reynolds v. Robert Hasbany MD PLLC, 323 Mich. App. 426, 917 N.W.2d 715 (2018).

6. *See generally* Hrapkiewicz v. Wayne State Univ. Bd. of Governors, 501 Mich. 1067, 910 N.W.2d 654 (2018) (mem.).

7. MICH. COMP. LAWS ANN. §§ 15.361–.369 (West 1980); *see* McNeill-Marks v. MidMichigan Med. Ctr.-Gratiot, 502 Mich. 851, 912 N.W.2d 181 (2018) (mem.), *reconsideration denied*, 503 Mich. 854, 915 N.W.2d 888 (2018) (mem.).

8. *See* Millar v. Constr. Code Auth., 501 Mich. 233, 912 N.W.2d 521 (2018).

9. *See* Brubaker v. Sodexo Mgmt., Inc., No. 337060, 2018 WL 2269961 (Mich. Ct. App. May 17, 2018); Haynes v. Collabera, Inc., No. 336372, 2018 WL 791569 (Mich. Ct. App. Feb. 8, 2018); Lawrence v. Mich. Unemployment Ins. Agency, 320 Mich. App. 422, 906 N.W.2d 482 (2017).

10. MICH. COMP. LAWS ANN. §§ 408.471–.490 (West 2018); *see* Ramos v. Intercare Cmty. Health Network, 323 Mich. App. 136, 916 N.W.2d 287 (2018), *leave to appeal denied*, 920 N.W.2d 141 (2018) (mem.).

11. MICH. COMP. LAWS ANN. §§ 390.1601–.1605 (West 2018).

12. *See* Estate of Buol v. Hayman Co., 323 Mich. App. 649, 918 N.W.2d 211 (2018).

13. Reynolds v. Robert Hasbany MD PLLC, 323 Mich. App. 426, 917 N.W.2d 715 (2018).

Civil Rights Act (ELCRA)[14] can only be brought in circuit court, regardless of the amount in controversy.[15]

In *Reynolds*, the plaintiff sued her former employer alleging an ELCRA violation of weight-based discrimination.[16] The ELCRA provides protection against employment decisions based on "religion, race, color, national origin, age, sex, height, weight, familial status, and marital status."[17] Unlike federal discrimination laws,[18] the ELCRA includes weight as a protected class, meaning that such claims can only be brought under state law, and most likely in state court. The issue in *Reynolds*, however, was which state court–circuit or district?[19]

Deborah Reynolds worked for Robert Hasbany, MD PLLC from 2010 to 2012.[20] During that time she lost 60 pounds.[21] However, when she returned to work for Dr. Hasbany in 2015, she had gained back most of that weight.[22] Reynolds claimed that Dr. Hasbany demanded that she lose the weight again, and that he made similar comments to other employees.[23] According to Reynolds, Hasbany regularly told female employees, "you gotta lose this weight," "I'm sick and tired of these fat/big/overweight people," "overweight people don't produce as much in the workplace," and "you guys need to take the weight off."[24] In addition to his comments, Dr. Hasbany allegedly required female employees to weigh themselves in the office and report the results to him.[25]

On August 12, 2016, Reynolds was told by the office manager that Dr. Hasbany wanted her to weigh herself and then meet with him in his office.[26] When Reynolds refused, she was told that she would be sent home and could not return to work without a doctor's note.[27] Reynolds then went to see Dr. Hasbany in his office and told him she was not going to weigh herself, to which the doctor replied, "[Y]ou either weigh

14. MICH. COMP. LAWS ANN. §§ 37.2101–.2803 (West 2018).
15. *Reynolds*, 323 Mich. App. at 428, 917 N.W.2d at 717.
16. *Id.*
17. MICH. COMP. LAWS ANN. § 37.2102(1) (West 2018).
18. *See generally EEO Laws*, NAT'L ARCHIVES, https://www.archives.gov/eeo/laws (last updated Aug. 15, 2016).
19. *Reynolds*, 323 Mich. App. at 431–32, 917 N.W.2d at 718–19.
20. *Id.* at 428, 917 N.W.2d at 717.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 429, 917 N.W.2d at 717.

in, or you get a doctor's note."[28] Reynolds tried to explain that she could not get a doctor's note because she did not have insurance, and that she was unsure about the reason for a doctor's note because she was not sick.[29] Dr. Hasbany insisted that she either weigh in or get a doctor's note.[30] At that point, Reynolds said, "[T]hen I take it you're firing me," left his office, and told her coworkers that "she guessed she was fired because she did not want to weigh herself."[31]

Reynolds then sued Hasbany for weight discrimination under the ELCRA, in state circuit court.[32] A month later, on October 25, 2016, Hasbany's lawyer sent an "unconditional return to work letter" stating:

> Please consider this e-mail a formal, unconditional offer to your client to return to work. She would be returning to her same position, same rate of pay, and same work hours. To accept this offer, you must notify me of your acceptance in writing (e-mail will do) by Tuesday, Nov. 1, 2016 by 5:00 p.m., and your client must return to work at 8:30 a.m. on Monday, November 7, 2016.[33]

On October 31, 2016, Reynolds rejected the offer, claiming that it was not a reasonable offer of reinstatement because returning to work "would require that she work closely with Dr. Hasbany and potentially again endure his discriminatory, harassing and abusive conduct."[34]

The defendants then moved for summary disposition under MCR 2.116(I)(4), arguing that Reynolds could recover no more than $5,280 because by rejecting the unconditional offer of reinstatement, she failed to mitigate her damages, which served to eliminate her right to front pay.[35] Therefore, defendants claimed, the amount in controversy fell below $25,000, the circuit court's jurisdictional minimum, and MCLA § 600.8301(1)[36] required that the claims be transferred to district court.[37] Reynolds responded that circuit courts have exclusive state court jurisdiction over civil rights claims, regardless of the amount in

28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 428, 917 N.W.2d at 717.
33. *Id.* at 429, 917 N.W.2d at 717.
34. *Id.* at 429–30, 917 N.W.2d at 717.
35. *Id.* at 430 n.1, 917 N.W.2d at 718 n.1.
36. "The district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00." MICH. COMP. LAWS ANN. § 600.8301(1) (West 2018).
37. *Reynolds*, 323 Mich. App. at 430, 917 N.W.2d at 717–18.

controversy.[38] The circuit court granted the defendants' motion, concluding that "[f]rom the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable jurisdictional limit of the Circuit Court. [Reynolds] has failed to establish damages to a legal certainty more than $25,000."[39] Reynolds appealed.[40]

The court of appeals began its analysis by citing the standard for subject-matter jurisdiction: "A court's subject-matter jurisdiction is determined only by reference to the allegations listed in the complaint. If it is apparent from the allegations that the matter alleged is within the class of cases with regard to which the court has the power to act, then subject-matter jurisdiction exists."[41] Reynolds' complaint alleged a violation of the ELCRA and that the amount in controversy exceeded $75,000.[42] Hasbany argued that the case was governed by MCLA § 600.8301(1), which states that "[t]he district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000."[43] However, the court noted that § 801(2) of ELCRA specifically allows for civil rights claims to be brought in circuit court.[44]

The appellate court assumed, for the sake of argument, that the amount in controversy did not exceed $25,000,[45] and then turned to an analysis of the seemingly conflicting statutes.[46] Initially, the court looked to the long-standing rule applied to statutory jurisdictional conflicts:

> Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception

38. *Id.* at 430, 917 N.W.2d at 718.

39. *Id.*

40. *Id.* at 428, 917 N.W.2d at 716.

41. *Id.* at 431, 917 N.W.2d at 718 (quotation marks and citation omitted) (quoting Trost v. Buckstop Lure Co., 249 Mich. App. 580, 586, 644 N.W.2d 54, 57 (2002)).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 434 n.6, 917 N.W.2d at 720 n.6. The court did note, however, that, under ELCRA, a plaintiff's damages were not limited to economic losses but also included non-economic damages such as emotional distress, which could take Reynolds' damages over the $25,000 limit. *Id.*

46. *Id.* at 431–32, 917 N.W.2d at 718–19.

> to the general act, as the Legislature is not to be presumed to have intended a conflict.[47]

As a result, the court had to determine whether § 600.8301(1) and section 801 of the ELCRA were general or specific in their respective grants of jurisdiction.[48] Fortunately, this issue had been decided previously in *Baxter v. Gates Rubber Co.*[49] There, the court held that § 600.8301(1) is a general jurisdiction statute, while section 801 of the ELCRA grants specific jurisdiction.[50] The *Baxter* court explained that, based on the importance of prohibiting discrimination and promoting civil rights, which "rise to the level of a clearly established public policy of this state," section 801 is more than a simple venue provision.[51] The public policy importance of civil rights claims outweighs the general amount in controversy restriction, which would otherwise limit claims with potential damages of less than $25,000[52] to district court.[53] Explaining further, the court wrote, "A plaintiff seeking vindication of these policies ... should have access to all of the procedural advantages and protections available only in the circuit court. Because [section] 801 is a specific grant of jurisdiction . . . we hold that it takes precedence over the more general jurisdictional provision of M.C.L. [section] 600.8301(1)."[54] Since *Baxter*, Michigan courts thus have viewed section 600.8301(1) as a general jurisdictional provision.[55]

The *Reynolds* court went on to explain that, while *Baxter* was not binding on the panel,[56] its reasoning was nonetheless persuasive.[57] As

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47. *Id.* at 432–33, 917 N.W.2d at 719 (quoting Driver v. Hanley, 207 Mich. App. 13, 17, 523 N.W.2d 815, 817 (1994) (quoting Baxter v. Gates Rubber Co., 171 Mich. App. 588, 590, 431 N.W.2d 81, 83 (1988))).

48. *See id.* at 433, 917 N.W.2d at 719.

49. 171 Mich. App. 588, 431 N.W.2d 81 (1988).

50. *Id.* at 591–592, 431 N.W.2d at 83.

51. *Id.* at 591, 431 N.W.2d at 83.

52. At the time of the *Baxter* decision, the jurisdictional minimum for cases brought in the circuit court was $10,000. However, it was raised to $25,000 in 1996 and, therefore, the increased minimum was in effect when *Reynolds* was decided. *See* Public Act 388 of 1996, 1996 Mich. Pub. Acts 1716, 1741 (codified at MICH. COMP. LAWS ANN. § 600.8301(1) (West 1996)).

53. *Baxter*, 171 Mich. App. at 591, 431 N.W.2d at 83.

54. *Id.* at 591–92, 431 N.W.2d at 83.

55. *See, e.g.*, Bruwer v. Oaks, 218 Mich. App. 392, 396, 554 N.W.2d 345, 347 (1996); Driver v. Hanley, 207 Mich. App. 13, 17–18, 523 N.W.2d, 815 817 (1994).

56. *Baxter* was decided in 1988. However, the court rule requiring "the Court of Appeals [to] follow the rule of law established by a prior published decision of the Court of Appeals" applied only to decisions "issued on or after November 1, 1990." *See* MCR 7.215(J)(1).

such, the court reaffirmed that section 801 of the ELCRA prevails over the general jurisdiction of MCLA section 600.8301 and held "that ELCRA provides for exclusive circuit court jurisdiction, regardless of the amount in controversy."[58] Accordingly, the court reversed the trial court's grant of summary disposition in favor of the defendants and remanded for further proceedings.[59]

The proper court for an ELCRA claim was also at issue in *Doe v. Department of Transportation*,[60] in which the Michigan Court of Appeals held that plaintiffs bringing actions against the State of Michigan under the ELCRA have the right to a jury, and so such suits can be brought in circuit court as well as the Michigan Court of Claims.[61]

Jane Doe filed suit against the Michigan Department of Transportation in Ingham County Circuit Court alleging sexual harassment in violation of the ELCRA and requested a jury trial.[62] Under the assumption that the Michigan Court of Claims had exclusive jurisdiction over all suits against state governmental entities, the Department of Transportation (DOT) removed the case to the court of claims.[63] Once there, the DOT filed a motion to dismiss because there is no right to a jury trial in the court of claims.[64] Doe filed an emergency motion to transfer her suit back to the circuit court,[65] citing MCLA § 600.6421(1), which allows for jury trials in claims against the State. [66] The DOT opposed the move, contending that MCLA § 600.6421(1) did

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57. Reynolds v. Robert Hasbany MD PLLC, 323 Mich. App. 426, 433, 917 N.W.2d 715, 719 (2018).

58. *Id.* at 433–34, 917 N.W.2d at 720.

59. *Id.* at 434, 917 N.W.2d at 720.

60. 324 Mich. App. 226, 919 N.W.2d 670 (2018), *leave to appeal denied*, 503 Mich. 876, 917 N.W.2d 637 (2018) (mem.).

61. *Id.* at 238–39, 919 N.W.2d at 677.

62. *Id.* at 228, 919 N.W.2d at 671.

63. *Id.*

64. *Id.*

65. *Id.* at 229, 919 N.W.2d at 671.

66. The statute provides:

> Nothing in this chapter eliminates or creates any right a party may have to a trial by jury, including any right that existed before November 12, 2013. Nothing in this chapter deprives the circuit, district, or probate court of jurisdiction to hear and determine a claim for which there is a right to a trial by jury as otherwise provided by law, including a claim against an individual employee of this state for which there is a right to a trial by jury as otherwise provided by law. Except as otherwise provided in this section, if a party has the right to a trial by jury and asserts that right as required by law, the claim may be heard and determined by a circuit, district, or probate court in the appropriate venue.

MICH. COMP. LAWS ANN. § 600.6421(1) (West 2018).

not apply because the ELCRA does not allow for jury trials in actions against the State.[67] The Michigan Court of Claims rejected the DOT's argument and found that, under Michigan law, plaintiffs in ELCRA suits are entitled to a jury even in actions against the State, and, therefore, the court of claims and circuit courts had concurrent jurisdiction.[68] The case was returned to the circuit court, and the DOT appealed.[69]

On appeal, the DOT persisted in its argument that under MCLA § 600.6419,[70] the Michigan Court of Claims had exclusive jurisdiction over Doe's claim.[71] According to the DOT, § 600.6421 does not establish the right to a jury trial where the State is the defendant.[72] The DOT argued, because Doe did not have a right to a jury, the court of claims had exclusive jurisdiction over her suit.[73]

The court disagreed, however, noting that the proper question was whether in passing the ELCRA, the legislature waived the state's immunity from jury trial.[74] Relying on the Michigan Supreme Court's decision in *Anzaldua v. Band*,[75] in which similar arguments had been made with respect to a jury right in actions against the State under the Whistleblowers' Protection Act (WPA), the *Doe* court rejected the DOT's arguments.[76] In *Anzaldua*, the court concluded that the WPA implicitly contained the right to a jury, which was sufficient to be a waiver by the State of immunity from suit or trial by jury.[77] The court also underscored the distinction between a government's immunity from liability, which can only be waived by express statutory enactment or

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67. *Doe*, 324 Mich. App. at 229, 919 N.W.2d at 671.

68. *Id.*

69. *Id.*

70. MCLA § 600.6419, amended in 2013, states:

> (1) Except as provided in sections 6421 and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive. . . Except as otherwise provided in this section, the court has the following power and jurisdiction: (a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

MICH. COMP. LAWS ANN. § 600.6419 (West 2018).

71. *Doe*, 324 Mich. App. at 226, 919 N.W.2d at 671.

72. *Id.* at 226, 919 N.W.2d at 672.

73. *Id.* at 230, 919 N.W.2d at 671–72 (2018).

74. *Id.* at 231, 919 N.W.2d at 672.

75. *Id.* at 231–32, 919 N.W.2d at 672–73; *see* Anzaldua v. Band, 457 Mich. 530, 578 N.W.2d 306 (1998).

76. *Doe*, 324 Mich. App. at 231–32, 919 N.W.2d at 672–73.

77. *Anzaldua*, 457 Mich. at 548–54, 578 N.W.2d at 314–16.

necessary inference, and immunity from suit, which can be waived simply by consent.[78] The *Anzaldua* court found that the State had waived immunity from suit under the WPA by including state entities in its definition of employers.[79]

The court in *Doe* reached a similar conclusion with respect to the ELCRA, determining that the State had agreed to be sued for violations of the ELCRA, which necessarily included agreement to be subject to jury trials.[80] The court observed that "[n]othing in the ELCRA indicates that the state is to be treated differently from any other employer, indicating that 'the Legislature chose to subject the state to suit in the circuit court.'"[81] As such, the circuit court had concurrent jurisdiction with the Michigan Court of Claims under § 600.6421(1), and the decision to transfer Doe's suit back to circuit court was correct.[82]

B. Questions of Sex

The ELCRA also was at issue at the administrative level during the *Survey* period. On May 21, 2018, the Michigan Civil Rights Commission issued Interpretive Statement 2018–1,[83] which permitted the Michigan Department of Civil Rights to process complaints of discrimination on account of gender identity and sexual orientation as complaints of sex discrimination.[84] The Commission based this on its finding that discrimination based upon gender identity and sexual orientation constitutes discrimination "because of sex," and is thus prohibited by the ELCRA.[85] Subsequently, at the request of several state legislators, then-Attorney General Bill Schuette issued a decision on July 20, 2018 concluding that the Commission had exceeded its authority to interpret

78. *Id.* at 552, 578 N.W.2d at 315–16.

79. *Id.* at 553, 578 N.W.2d at 316.

80. *Doe*, 324 Mich. App. at 235–39, 919 N.W.2d at 675–77 (2018).

81. *Id.* at 226, 919 N.W.2d 676 (quoting *Anzaldua*, 457 Mich. at 553, 578 N.W.2d at 316).

82. *Id.* at 226, 919 N.W.2d at 677.

83. Mich. Civil Rights Comm'n, Interpretive Statement 2018–1 (May 21, 2018), https://www.michigan.gov/documents/mdcr/MCRC_Interpretive_Statement_on_Sex_05212018_625067_7.pdf.

84. *Id.* at 1.

85. ELCRA at present prohibits discrimination on the basis of "religion, race, color, national origin, age, sex, height, weight, familial status, or marital status" in employment, housing, education, and access to public accommodations. MICH. COMP. LAWS. ANN. § 37.2102 (West 2018).

the ELCRA in publishing Interpretive Statement 2018–1.[86] In the Attorney General's view, the Interpretive Statement was invalid because it conflicted with "the original intent of the Legislature as expressed in the plain language of the Act and as interpreted by Michigan's courts."[87] Referring to the definition of the word "sex" from 1976, and more recent online definitions, the Attorney General concluded that the meaning of "sex" does not include the concepts of sexual orientation or gender identity.[88] The opinion also noted that Michigan courts have not interpreted the reference to "sex" in the ELCRA to include gender identity or sexual orientation.[89] In response to the opinion, the Director of the Michigan Department of Civil Rights reportedly said that the Michigan Civil Rights Commission will continue to include LGBTQ people as a group protected by the ELCRA.[90]

C. Questions of Proof

During the *Survey* period, in *Hrapkiewicz v. Wayne State University*,[91] the Michigan Supreme Court denied Wayne State University's (WSU) application for leave to appeal a $300,000 jury verdict in an age discrimination case.[92] The fact that a plurality of three judges decided the case made the decision noteworthy.[93] Two justices—Markman and Zahra—strongly dissented, and two did not participate in

86. Office of the Att'y Gen., 2018 Mich. Op. Att'y Gen. No. 7305, Opinion Letter on Validity of Interpretive Statement Interpreting Term "Sex" as Used in Elliot-Larsen Civil Rights Act (July 20, 2018), http://www.ag.state.mi.us/opinion/datafiles/2010s/op10384.htm.

87. *Id.* at 1.

88. *Id.* at 3.

89. *Id.* at 8. However, a number of federal courts interpreting Title VII, the federal analog to the ELCRA, have so concluded. *See, e.g.*, Zarda v. Altitude Express, 883 F.3d 100, 112 (2d Cir. 2018) (*en banc*); Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 351–52 (7th Cir. 2017) (*en banc*).

90. David Eggert, *Civil Rights Commission Rejects AG Opinion on LGBT Discrimination*, DET. FREE PRESS (July 23, 2018, 9:57 PM), https://www.freep.com/story/news/local/michigan/2018/07/23/civil-rights-commission-lgbt-complaints/824093002/. Over the years, bills banning discrimination based on sexual orientation and gender identity or expression have repeatedly been introduced in the Michigan Legislature but to date have not been enacted. *See, e.g.*, H.R. 4689, 99th Leg., Reg. Sess. (Mich. 2017); S. 424, 99th Leg., Reg. Sess. (Mich. 2017).

91. 501 Mich. 1067, 910 N.W.2d 654 (2018) (mem.).

92. *See* Hrapkiewicz v. Wayne State Univ. Bd. of Governors, No. 328215, 2017 WL 947604, at *1 (Mich. Ct. App. Mar. 9, 2017) (unpublished) (per curiam).

93. Hrapkiewicz, 501 Mich. at 1069, 910 N.W.2d at 655 (Markman, C.J., dissenting).

the decision.[94] The dissent urged the court to clarify the proper causation standard for cases brought under ELCRA.[95]

Karen Hrapkiewicz performed several roles at WSU's Division of Laboratory Animal Resources (DLAR).[96] For 30 years, she had been supervised by Dr. Merlin Ekstrom, until Dr. Ekstrom retired in 2010.[97] Dr. Lisa Brossia then became Hrapkiewicz's direct supervisor.[98] While Dr. Ekstrom had consistently rated Hrapkiewicz's work as excellent, his reviews also noted that Hrapkiewicz at times acted disrespectfully towards others and had interpersonal conflicts with other staff members.[99]

On February 1, 2011, several months into Brossia's tenure as Hrapkiewicz's supervisor, the university was closed due to bad weather.[100] Hrapkiewicz nonetheless permitted students to stay on campus to take an exam and told others who were not yet on campus that they could come in for the test.[101] The police had to be called to order Hrapkiewicz and the students to leave campus.[102]

Several weeks later, Brossia, Associate Vice-President Gloria Heppner, Brossia's supervisor, and Dr. Hillary Rattner, Heppner's supervisor, concluded that Hrapkiewicz should be discharged.[103] Rattner was 58, Heppner was approximately 70, and Brossia was 37.[104] Hrapkiewicz was 62.[105] While there were several stated reasons for the termination, the primary reason was the snow day incident, in which Hrapkiewicz placed students at risk.[106] Hrapkiewicz was discharged on February 28, 2011.[107] After she left, her duties were assumed by Susan Dibley (age 48), Brossia, and several others.[108] Hrapkiewicz later testified that, although she sought other employment, she was unable to find comparable work other than several part-time teaching positions.[109]

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94. *Id.* Justice Wilder was on the court of appeals panel that had decided the case, and so declined to participate, and Justice Bernstein was new to the bench and presumably was not involved in the court's decision-making process. *Id.*

95. *Id.* at 1067, 910 N.W.2d at 654.

96. *Hrapkiewicz*, 2017 WL 947604, at *1.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at *1–2

101. *Id.* at * 2.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at *1.

106. *Id.* at *2–3.

107. *Id.* at *3.

108. *Id.* at *2–3.

109. *Id.* at *3.

Hrapkiewicz sued, alleging age discrimination in violation of the ELCRA.[110] A prima facie case of age discrimination requires evidence that the plaintiff (1) was a member of the protected class; (2) suffered an adverse employment action; (3) was qualified for the position; and (4) was replaced by a younger person, or was discharged under circumstances giving rise to an inference of unlawful discrimination.[111] WSU sought summary disposition, arguing that Hrapkiewicz had failed to establish a prima facie claim because she had not been replaced by a younger person (and in fact was not replaced at all), and because she offered no other evidence that her age was a factor in the termination decision.[112] In response, Hrapkiewicz admitted that, while no one told her that her age was a factor in her discharge, Brossia did make comments that Hrapkiewicz thought were age-based, including saying that Hrapkiewicz did things "in a set manner" and was "old school."[113] The trial court denied WSU's motion, and the case went to trial.[114] The jury awarded Hrapkiewicz $300,000 in past economic damages (but no future economic or non-economic damages) and the trial court denied all post-trial motions and awarded $265,583.98 in attorney fees.[115] WSU appealed both awards.[116]

The court of appeals first considered whether the lower court had erred in denying WSU's motion for summary disposition, as well as its motions for directed verdict and JNOV.[117] In assessing whether Hrapkiewicz had established a prima facie age discrimination claim, the court disagreed with WSU's argument that Hrapkiewicz had not been replaced at all, let alone by someone younger.[118] The court found unpersuasive WSU's reliance on cases holding that an employee is not replaced for purposes of discrimination suits when that employee's duties are redistributed to other employees, observing that those cases involved reductions in force, which was not at issue in Hrapkiewicz's case.[119] The court then found that the reassignment of "the majority" of

110. *Id.*

111. *Id.* at *5; DeBrow v. Century 21 Great Lakes, 463 Mich. 534, 537 n.8, 620 N.W.2d 836 (2001) (quoting Lytle v. Malady, 458 Mich. 153, 172–73, 579 N.W.2d 906, 914 (1998)).

112. *Hrapkiewicz*, 2017 WL 947604, at *3.

113. *Id.*

114. *Id.* at *3–4.

115. *Id.* at *4.

116. *Id.*

117. *Id.*

118. *Id.* at *6. The appellate court did not address the allegedly age-based comments attributed to Brossia, either as direct or indirect evidence of discrimination.

119. *Id.* The court did not articulate, however, why this distinction made any difference. Moreover, while the Michigan case cited by WSU, Lytle v. Malady, 458

Hrapkiewicz's duties to an existing employee younger than Hrapkiewicz, sufficed as the final element of Hrapkiewicz's prima facie case.[120] The court next concluded, somewhat curiously, that Hrapkiewicz had produced sufficient evidence that the stated reasons for her termination were a pretext for age discrimination because WSU had offered a number of inconsistent reasons for her termination—although the decision-makers agreed the snow day incident was the primary reason.[121] As a result, the court of appeals found no error in the trial court's denial of summary disposition, the motion for directed verdict, or WSU's JNOV motion.[122]

Court of appeals Judge Deborah Servitto dissented, arguing that the majority's view of the prima facie elements of an age discrimination claim was so broad that nearly every plaintiff would be able to satisfy that burden.[123] Rather, according to the dissent, the court should have analyzed the case under *Hazle v. Ford Motor Co.*, where the Michigan Supreme Court wrote:

> Under *McDonnell Douglas,* a plaintiff must first offer a "prima facie case" of discrimination. Here, plaintiff was required to present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for

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Mich. 153, 579 N.W.2d 906 (1998), was a reduction in force ("RIF") case, the Michigan Supreme Court in *Lytle* did not limit its observation on this issue to RIF cases. Additionally, in Barnes v. GenCorp Inc., 896 F.2d 1457, 1465 (6th Cir. 1990), the federal decision relied upon by WSU and rejected by the *Hrapkiewicz* court, was also a RIF case, and subsequent Sixth Circuit decisions have applied the same analysis to non-RIF cases and found no prima facie case where the plaintiff's job duties are assumed by existing employees. *See, e.g.*, Blizzard v. Marion Tech. Coll., 698 F.3d 275, 283–84 (6th Cir. 2012); Grosjean v. First Energy Corp., 349 F.3d 332, 336 (6th Cir. 2003).

120. *Hrapkiewicz*, 2017 WL 947604 at *6.

121. *Id.* A close reading of the cases cited by the court in support of its conclusion reveals that, although they reflect the legal principle stated by the court, each case is distinguishable from *Hrapkiewicz*. In *Walker v. Johnson,* 798 F.3d 1085, 1092 (D.C. Cir. 2015), the court found that the plaintiff had not established pretext because there were only minor variations in her supervisor's descriptions of the incident leading to the termination. In *Foster v. Mountain Coal Co.*, 830 F.3d 1178, 1194 (10th Cir. 2016), there was no agreement among the decision-makers as to the basis for the discharge decision, unlike in Hrapkiewicz's case. In *Castro v. DeVry University, Inc.*, 786 F.3d 559, 577 (7th Cir. 2015), the court held that pretext is not shown by an employer's failure to address all of the reasons for a termination in every communication about the employer. And in *Seifert v. Unified Government. of Wyandotte Co.*, 779 F.3d 1141, 1158 (10th Cir. 2015), there again was actual contradictory testimony about why the plaintiff was fired.

122. *Hrapkiewicz*, 2017 WL 947604, at *7. The court also affirmed the attorney fee award, finding that the trial court had appropriately analyzed the fee request by modifying the hourly rate as needed and disallowing some of the billing entries. *Id.* at *9.

123. *See id.* at *9 (Servitto, J., dissenting).

> the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination.[124]

Judge Servitto continued in her dissent:

> The fourth element is essential to the analysis. The evidence required by the plaintiff in an age discrimination case to establish this element is more than just his or her birthdate and his or her replacement's birth date. Birthdates alone do not give rise to an inference of unlawful discrimination.[125]

Applying the *Hazle* standard to Hrapkiewicz's case, Judge Servitto concluded there was no evidence demonstrating that age was a motivating factor in the termination decision, because the reason for the discharge was not disputed, and because Hrapkiewicz provided no evidence that age was ever discussed by the decision-makers, or any other evidence from which it could be inferred that Wayne State was biased against older workers.[126] As such, the judge would have reversed the denial of Wayne State's motion for summary disposition and the denial of the directed verdict motion.[127]

Wayne State sought leave to appeal to the Michigan Supreme Court, which, as noted above, was denied by a minority of the justices on the court.[128] In his dissenting statement, Justice Markman argued that leave should have been granted to clarify the appropriate causation standard under the ELCRA, given the inconsistent standards previously announced by the Court.[129] As the Chief Justice observed, the *Hazle* Court held that "the ultimate factual inquiry made by the jury is whether consideration of a protected characteristic was a *motivating factor*, namely, whether it made a difference in the contested employment decision."[130] More recently, however, in *Hecht v. National Heritage Academies, Inc.*, the Michigan Supreme Court stated that the ELCRA, which prohibits employment actions taken "because of" a protected

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124. Hazle v. Ford Motor Co., 464 Mich. 456, 463, 628 N.W.2d 515, 521 (2000).

125. *Hrapkiewicz*, 2017 WL 947604, at *10 (Servitto, J., dissenting).

126. *Id.*

127. *Id.* at *11.

128. *See* Hrapkiewicz v. Wayne State Univ. Bd. of Governors, 501 Mich. 1067, 910 N.W.2d 654 (2018) (mem.).

129. *Id.* at 1069, 910 N.W.2d at 655 (Markman, C.J., dissenting).

130. *Id.* at 1067, 910 N.W.2d at 654 (quoting Hazle v. Ford Motor Co., 464 Mich. 456, 466, 628 N.W.2d 515, 522 (2001) (internal quotation marks omitted)).

characteristic,[131] requires "but for causation" or "causation in fact."[132] In light of recent U.S. Supreme Court decisions equating "because of" language with a "but for" causation standard,[133] Justice Markman urged his fellow justices to address whether the appropriate standard under ELCRA is "motivating factor" or the higher "but for standard."[134] He apparently was unable to persuade enough of his colleagues, however, and so resolution of this apparent conflict in Michigan case law will have to wait.

III. RETALIATION CLAIMS

A. What is a Public Body?

Michigan's Whistleblowers' Protection Act (WPA) provides that:

> An 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.[135]

Considerable WPA litigation has focused on whether the plaintiff engaged in activity protected under the Act, by reporting suspected wrongdoing to a "public body."[136] In 2016, in a decision that surprised many, the Michigan Court of Appeals concluded that speaking with one's private attorney about a suspected incident of wrongdoing at work

131. MICH. COMP. LAWS ANN. § 37.2102(1) (West 2018).

132. *Hrapkiewicz*, 501 Mich. at 1067–68, 910 N.W.2d at 654 (Markman, C.J., dissenting).

133. *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–77 (2009).

134. *Hrapkiewicz*, 501 Mich. at 1069, 910 N.W.2d at 655 (Markman, C.J., dissenting).

135. MICH. COMP. LAWS ANN. § 15.362 (West 2018).

136. *See generally* Patricia Nemeth & Deborah Brouwer, *Employment and Labor Law, 2008 Ann. Survey of Mich. Law*, 54 WAYNE L. REV. 167, 180–87 (2008).

constituted a report to a public body under the WPA.[137] During this *Survey* period, after hearing oral argument on Mid-Michigan's application for leave and requesting additional briefing, the Michigan Supreme Court denied leave, over a dissent from Justice Brian Zahra, joined by Chief Justice Steven Markman.[138] Justice Wilder did not participate in the decision because he was on the original court of appeals panel, and Justice Clements did not participate, having recently joined the Michigan Supreme Court.[139] Thus, as in *Hrapkiewicz*,[140] a plurality of three justices decided an important issue in Michigan employment law.

Tammy McNeill-Marks worked as a nurse at the MidMichigan Medical Center.[141] She adopted or had custody of three of her cousin's children, who all shared a grandmother who suffered from several psychiatric disorders.[142] In the eight years prior to the termination of McNeill-Marks' employment at MidMichigan, the children's grandmother harassed, stalked, and threatened to kill McNeill-Marks and her children.[143] As a result, McNeill-Marks obtained several personal protection orders against the grandmother.[144] Nonetheless, the grandmother regularly violated the PPOs by attempting to contact McNeill-Marks.[145]

On December 27, 2013, just before the expiration of the PPO then in effect, McNeill-Marks obtained a new, amended PPO on an ex parte basis that prohibited the grandmother from stalking McNeill-Marks.[146] The terms of the PPO provided that it was effective when signed and enforceable immediately.[147] Roughly two weeks later, before the amended PPO had been served, McNeill-Marks and the grandmother passed each other in the hallway at MidMichigan.[148] As McNeill-Marks walked out of an operating room, she encountered the grandmother being transported in a wheelchair.[149] Before she recognized who it was,

137. McNeill-Marks v. MidMichigan Med. Ctr.-Gratiot, 316 Mich. App. 1, 21, 891 N.W.2d 528, 538 (2016).

138. McNeill-Marks v. MidMichigan Med. Ctr.-Gratiot, 502 Mich. 851, 912 N.W.2d 181 (2018) (mem.).

139. *Id.* at 868, 912 N.W.2d at 195.

140. *See supra* Section I.C.

141. McNeill-Marks, 316 Mich. App. at 6, 891 N.W.2d at 530.

142. *Id.*

143. *Id.*, 891 N.W.2d at 530–31.

144. *Id.* at 6–7, 891 N.W.2d at 531.

145. *Id.* at 7, 891 N.W.2d at 531.

146. *Id.* at 7–8, 891 N.W.2d at 531.

147. *Id.* at 8, 891 N.W.2d *Id.* at 531.

148. *Id.*

149. *Id.*

McNeill greeted the patient, as she had been trained.[150] When the patient responded in what McNeill-Marks described as a "sing-songy" voice, as if she knew she was getting away with something–"Hello, Tammy," McNeill-Marks realized it was the grandmother.[151] Visibly shaken, McNeill-Marks retreated to an employee break room, and shortly afterwards, called her attorney.[152]

According to McNeill-Marks, she simply returned an earlier call from her attorney.[153] She mentioned to her attorney that the grandmother had "showed up today" at the hospital but did not tell him that the grandmother was a patient at MidMichigan.[154] She did tell the attorney not to serve the PPO on the grandmother at the hospital.[155] Still, the grandmother was served that evening in her hospital room–an event that apparently occurred because the attorney's secretary saw the grandmother at the hospital and told her boyfriend, the attorney's process server, who she had seen.[156] In response to being served with a PPO while in the hospital, the grandmother told MidMichigan that McNeill-Marks had revealed protected health information (that the grandmother was a patient at the hospital) in violation of Health Insurance Portability and Accountability Act (HIPAA) privacy regulations.[157] MidMichigan investigated, and McNeill-Marks admitted the conversation with her attorney.[158] Concluding that McNeill-Marks had violated, MidMichigan terminated her employment.[159] McNeill-Marks sued under the WPA, claiming that she was discharged for either reporting the grandmother's PPO violation to her attorney, or being about to report that violation to the court that issued the PPO.[160] MidMichigan moved for summary disposition, arguing that McNeill-Marks had not reported the grandmother's alleged violation to a public body, and also that she could not have reasonably suspected that the accidental encounter in the hospital violated the stalking provision of the PPO.[161] McNeill-Marks argued that her conversation with her attorney was a report to a public

150. *Id.*
151. *Id.* at 9, 891 N.W.2d at 532.
152. *Id.* at 9–10, 891 N.W.2d at 532.
153. McNeill-Marks v. MidMichigan Med. Ctr.-Gratiot, 502 Mich. 851, 912 N.W.2d 181, 183 (2018) (mem.).
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. McNeill-Marks v. MidMichigan Med. Ctr.-Gratiot, 316 Mich. App. 1, 11–12, 891 N.W.2d 528, 533 (2016).
159. *Id.* at 12, 891 N.W.2d at 534.
160. *Id.* at 13, 891 N.W.2d at 534.
161. *Id.*

body, because the attorney was an officer of the court, and hence a member of the judiciary.[162] The trial court found this argument unpersuasive and granted MidMichigan's motion.[163] McNeill appealed.[164]

The court of appeals first found that the grandmother's contact with McNeill-Marks had violated the PPO, because, even if coincidently passing McNeill-Marks in the hospital as she was being transported in a wheelchair by a staff member was not willful conduct, her statement, "Hello, Tammy" and the tone that she used, did violate the PPO.[165] Having established a violation of law, the open question for the appellate court was whether McNeill-Marks' call to her attorney was a report to a "public body."[166]

In resolving this issue, the court first turned to the WPA itself, which defines a "public body," in relevant part, as follows: *"(iv)* [a]ny other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body" and as *"(vi)* [t]he judiciary and any member or employee of the judiciary."[167]

Focusing first on section *(iv)*, the court looked to the attorney's licensure and good standing with the State Bar of Michigan (SBM), which is mandatory under state law, to conclude that he was a member of a "body which is created by state or local authority."[168] The court also relied upon Michigan's Revised Judicature Act, which identifies the SBM as a "public body corporate" for which the Supreme Court is empowered "to provide for the organization, government, and membership," "adopt rules and regulations," and set "the schedule of membership dues."[169] The court concluded that "under the plain language of the WPA, specifically MCL 15.361(d)*(iv)*, [the attorney] qualified as a member of a "public body" for WPA purposes. As a practicing attorney and member of the SBM, [the attorney] was a member of a body 'created by' state authority, which, through the regulation of our Supreme Court, is also 'primarily funded by or through' state authority."[170]

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162. *Id.* at 14, 891 N.W.2d at 534.

163. *Id.* at 14–15, 891 N.W.2d at 535.

164. *Id.* at 6, 891 N.W.2d at 530.

165. *Id.* at 20, 891 N.W.2d at 538.

166. *Id.* at 21, 891 N.W.2d at 538.

167. MICH COMP. LAWS ANN. § 15.361(d) (West 2018).

168. *McNeill-Marks*, 316 Mich. App. at 22–23, 891 N.W.2d at 539.

169. *Id.* at 23, 891 N.W.2d at 539 (citing MICH. COMP. LAWS ANN. §§ 600.901, 600.904 (West 2018)).

170. *Id.* Concluding that McNeill-Marks' attorney was a "public body" by virtue of his mandatory membership in the SBM, the court of appeals did not consider the alternative

MidMichigan sought leave to appeal the lower court's decision to the Michigan Supreme Court.[171] The Court scheduled oral argument on whether to grant the leave application, focused on whether a plaintiff's communication with her attorney was a report to a public body within the meaning of the WPA.[172] Following one argument, the Court ordered additional briefing on whether:

> 1) the plaintiff's communication must be to an individual with the authority to address the alleged violation of law; (2) the WPA requires that a plaintiff employee specifically intend to make a charge of a violation or suspected violation of law against another; and (3) privileged communications between a client and his or her attorney can constitute a report under the WPA.[173]

Almost a year later, the Court denied the application.[174] Justice Zahra, joined by Chief Justice Markman, issued a dissenting statement.[175] In that statement, Justice Zahra applied traditional principles of statutory interpretation, examining the text of the WPA and construing terms in accordance with the surrounding text and consistent with the statutory scheme.[176] The Justice thus concluded that protected activity under the statute required that a suspected violation or illegality be reported by someone to a public body, noting that the "Legislature's express designation of a 'public body' as the receiver of the reported illegality presumes that the governmental entity can address or cure the illegality through some governmental function."[177] Turning to the meaning of "report," which the WPA does not define, Justice Zahra applied another common tool of statutory interpretation–the dictionary–and determined that the definitions most consistent with the purpose of the statute were "to denounce to a person in authority" or "to make a charge of

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argument that the attorney was a "public body" because, as an officer of the court, he was a member of the judiciary.

171. *See* McNeill-Marks v. MidMichigan Med. Ctr.-Gratiot, 500 Mich. 931, 889 N.W.2d 248 (2017) (mem.).

172. *Id.*

173. McNeill-Marks v. MidMichigan Med. Ctr.-Gratiot, 500 Mich. 1031, 897 N.W.2d 176 (2017) (mem.).

174. McNeill-Marks v. MidMichigan Med. Ctr.-Gratiot, 502 Mich. 851, 912 N.W.2d 181 (2018), *reconsideration denied*, 503 Mich. 854, 915 N.W.2d 888 (2018) (mem.).

175. *Id.* at 851–68, 912 N.W.2d at 183–95 (Zahra, J., dissenting).

176. *Id.* at 855–56, 912 N.W.2d at 186–87 (Zahra, J., dissenting).

177. *Id.* at 858, 912 N.W.2d at 187 (Zahra, J., dissenting).

misconduct against."[178] According to the dissent, then, "the ordinary meaning of 'report' under the WPA requires that the whistleblower employee intend to denounce an illegality or make a charge of misconduct to a 'public body.'"[179]

Applying this analysis to McNeill-Marks' conversation with her private attorney made it clear, in Justice Zahra's view, that McNeill-Marks did not engage in activity protected by the WPA because she did not report a suspected illegality to an entity with the purpose of having that public body address the illegality.[180] That simple communications about an illegality with another does not automatically rise to the level of a "report" has been recognized previously by courts, in *Henry v. Detroit*[181] and *Hays v. Lutheran Social Services*.[182] In *Henry,* deposition testimony was found not to be protected by the WPA because the plaintiff "took no initiative to communicate the violation to a public body" and "was deposed in a private civil suit previously filed by a fellow officer."[183] Similarly, in *Hays*, a call to the police by a home healthcare worker to find out the criminal consequences of failing to disclose someone else's drug use was not a report under the WPA but simply a call to obtain information and seek advice.[184] These results support Justice Zahra's determination that a "report under the WPA requires that the whistleblower employee intend to denounce an illegality or make a charge of misconduct to a 'public body.'"[185]

Because the WPA permits a person acting on behalf of an employee to report an illegality, which also is protected activity, the dissent next considered whether McNeill-Marks' conversation with her attorney amounted to a privileged attorney-client communication.[186] If it was privileged, then the attorney's use of that information also failed as a protected "report" under the Act.[187] Relying on testimony from McNeill-

178. *Id.* at 859, 912 N.W.2d at 187 (Zahra, J., dissenting) (citing WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY: UNABRIDGED (1979); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1983)).

179. *McNeill-Marks*, 502 Mich. at 859, 912 N.W.2d at 187 (Zahra, J., dissenting).

180. *Id.* at 859, 912 N.W.2d at 188 (Zahra, J., dissenting).

181. 234 Mich. App. 405, 594 N.W.2d 107 (1999).

182. 300 Mich. App. 54, 832 N.W.2d 433 (2013). For a more detailed discussion of *Hays*, see Patricia Nemeth & Deborah Brouwer, *Employment & Labor Law, 2013 Ann. Survey of Mich. Law,* 59 WAYNE L. REV. 951, 963–65 (2014).

183. *McNeill-Marks*, 502 Mich. at 860, 912 N.W.2d at 189 (quoting Henry v. David, 234 Mich. App. 405, 411, 594 N.W.2d 107, 111 (1999)).

184. *Id.* at 860–61, 912 N.W.2d at 188–89 (citing Hays v. Lutheran Soc. Servs. of Mich., 300 Mich. App. 54, 59, 832 N.W.2d 433, 436 (2013)).

185. *Id.* at 859, 912 N.W.2d at 189.

186. *Id.* at 861–66, 912 N.W.2d at 190–95 (Zahra, J., dissenting).

187. *Id.* at 866, 912 N.W.2d at 192.

Marks, Justice Zahra concluded that while McNeill-Marks and her attorney obviously had an attorney-client relationship, McNeill-Marks did not intend for her attorney to act on the information regarding her encounter with the grandmother.[188] McNeill-Marks admitted that she told the attorney not to serve the grandmother.[189] Further, the attorney did not rely on the encounter in seeking to hold the grandmother in contempt for violating the PPO.[190] The dissent concluded:

> The facts clearly demonstrate that [McNeill-Marks] did not want [her attorney] to take any action upon the illegality. [McNeill-Marks'] phone call with [the attorney] was a privileged communication made under the attorney-client relationship; therefore, [the attorney] had no authority to disclose that communication without [McNeill-Marks'] consent. Thus, when communicating with her private attorney, [McNeill-Marks did not intend to denounce an illegality or make a charge of misconduct to a "public body." For these reasons, I conclude that [McNeill-Marks'] communication with her private attorney was not "reporting" under the WPA.[191]

Thus, Justice Zahra would have reversed the court of appeals' WPA decision.[192]

Presumably heartened by the dissenting statement, and the narrowness (3-2) of the decision, MidMichigan requested reconsideration of the denial of its application for leave.[193] The court again denied MidMichigan's request, and the status of attorneys in Michigan as "public bodies" under the WPA remains the law.[194]

B. When Does an Adverse Action Occur?

Under the WPA, an aggrieved person has 90 days from the alleged violation in which to bring suit.[195] In *Millar v. Construction Code Authority*, decided during the *Survey* period, the Michigan Supreme Court held that the ninety-day limitation period begins to run on the date

188. *Id.* at 866, 912 N.W.2d at 193.
189. *Id.*
190. *Id.* at 867, 912 N.W.2d at 193.
191. *Id.* at 866, 912 N.W.2d at 193.
192. *Id.* at 868, 912 N.W.2d at 195 (Zahra, J., dissenting).
193. McNeill-Marks v. MidMichigan Med. Ctr.-Gratiot, 503 Mich. 854, 915 N.W.2d 888 (2018) (mem.).
194. *Id.*
195. MICH. COMP. LAWS ANN. § 15.363 (West 2018).

of the actual adverse employment action, rather than the date on which the decision was made.[196]

Bruce Millar worked as a mechanical and plumbing inspector for the Construction Code Authority (CCA), which had contracts with Imlay City and Elba Township to provide licensed inspections within those municipalities.[197] On March 11 and March 20, 2014, the city and township both wrote to the CCA directing that Millar's inspection services within their districts be terminated.[198] On March 27, the CCA prepared a letter to Millar informing him that he would no longer be working in those districts, but Millar was not given the letter until March 31 when he arrived at work.[199]

Millar sued the CCA, Imlay City, and Elba Township for "violation of the WPA, wrongful termination in violation of public policy, and conspiracy to effectuate wrongful termination and violate the WPA."[200] Millar alleged that he was terminated because of and in retaliation for "fairly and honestly indicating his intentions to report and/or reporting violations of building codes, regulations, rules and statutes in accordance with his responsibilities" as an inspector.[201] Although Millar remained employed by the CCA, his termination from the City and Township accounts negatively affected his terms of employment because his workload directly determined his level of pay.[202]

The trial court granted summary disposition to the defendants on all three counts because, according to the court, the ninety-day limitation period under MCL § 15.363(1) began to run on March 27, the date on which the CCA drafted its letter.[203] Because Millar filed his claim 91 days later, his claim was untimely.[204] The court of appeals affirmed, finding that the alleged wrong occurred when the City and Township wrote their letters, or at the latest, when the CCA terminated Millar by drafting its letter to him.[205] Millar then sought leave to appeal to the Michigan Supreme Court, which ordered oral argument on the

196. 501 Mich. 233, 241, 912 N.W.2d 521, 526 (2018).
197. *Id.* at 236, 912 N.W.2d at 523.
198. *Id.*
199. *Id.*
200. *Id.* at 236–37, 912 N.W.2d at 523–24.
201. *Id.* at 236 n.4, 912 N.W.2d at 523 n.4.
202. *Id.* at 236 n.2, 912 N.W.2d at 523 n.2.
203. *Id.* at 237, 912 N.W.2d at 523–24.
204. *Id.* at 237, 912 N.W.2d at 523–24. The trial court dismissed Millar's public policy claim as preempted by the WPA. *Id.* Dismissal of the civil conspiracy claim followed dismissal of the other two claims, because civil conspiracy is not independently actionable. *Id.*
205. Millar v. Constr. Code Auth., No. 326544, 2016 WL 4162613, at *5 (Mich. Ct. App. Aug. 4, 2016).

application regarding the question of when Millar's WPA claim accrued.[206] On application, the court reversed in part, vacating the defendants' judgment.[207]

Questions of statutory interpretation are reviewed by the Michigan Supreme Court *de novo* without deference to the trial court.[208] The issue in *Millar* was which act triggered the WPA's ninety-day limitation period.[209] The WPA provides that: "A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act."[210] Therefore, the question for the court in *Millar* was what constituted "the occurrence of the alleged violation of this act" triggering the ninety-day limitations period.[211]

For guidance, the court looked to its previous decisions regarding the Elliott-Larsen Civil Rights Act (ELCRA) because that statute contains language similar to that of the WPA, linking the commencement of the limitations period to the occurrence of the actionable wrong.[212] In *Collins v. Comerica Bank*,[213] the Michigan Supreme Court held that ELCRA's limitations period began to run on the date of termination, and not on the last day the plaintiff actually worked.[214] In contrast, in *Magee v. DaimlerChrysler Corp.*[215] and *Joliet v. Pitoniak*,[216] the Court found that the pivotal date was the day of the last alleged discriminatory treatment, not the date of termination.[217] Neither *Magee* nor *Joliet* involved claims

206. Millar v. Constr. Code Auth., 500 Mich. 992, 894 N.W.2d 600 (2017) (mem.).

207. Millar v. Constr. Code Auth., 501 Mich. 233, 234–35, 912 N.W.2d 521, 522–23 (2018).

208. *Id.* at 237, 912 N.W.2d at 524 (citing Whitman v. City of Burton, 493 Mich. 303, 311, 831 N.W.2d 223, 228–29 (2013)).

209. *Millar*, 501 Mich. at 237, 912 N.W.2d at 524.

210. MICH. COMP. LAWS ANN. § 15.363(1) (West 2018).

211. *Millar*, 501 Mich. at 238, 912 N.W.2d at 524 (quoting MICH. COMP. LAWS ANN. § 15.363(1) (West 2018)).

212. *Id.* at 238 n.6, 912 N.W.2d at 524 n.6.

213. 468 Mich. 628, 644 N.W.2d 713 (2003). For a more detailed discussion of *Collins*, see Patricia Nemeth & Deborah Brouwer, *Employment & Labor Law, 2004 Ann. Survey of Mich. Law*, 51 WAYNE L. REV. 719, 727–728 (2007).

214. *Millar*, 501 Mich. at 238, 912 N.W.2d at 524 (citing Collins v. Comerica Bank, 468 Mich. 628, 644 N.W.2d 713 (2003)).

215. 472 Mich. 108, 693 N.W.2d 166 (2005). For a more detailed discussion of *Magee*, see Patricia Nemeth & Deborah Brouwer, *Employment & Labor Law, 2005 Ann. Survey of Mich. Law*, 52 WAYNE L. REV. 565, 580–582 (2006).

216. 475 Mich. 30, 715 N.W.2d 60 (2006). For a more detailed discussion of *Joliet*, see Patricia Nemeth & Deborah Brouwer, *Employment & Labor Law, 2006 Ann. Survey of Mich. Law*, 53 WAYNE L. REV. 223, 235–238 (2007).

217. *Millar*, 501 Mich. at 239, 912 N.W.2d at 524–25 (citing *Magee*, 472 Mich. 108, 693 N.W.2d 166; *Joliet*, 475 Mich. 30, 715 N.W.2d 60).

of discriminatory *discharge,* however.[218] In *Magee,* the plaintiff sued for harassment, while *Joliet* was a constructive discharge claim also alleging harassment.[219] The *Millar* court concluded that Millar's claim was more analogous to *Collins* than to *Magee* and *Joliet* because no discriminatory action had occurred prior to the date Millar was terminated.[220] On March 27, the date on which CCA wrote its letter, the defendants only "*intended* to curtail [Millar's] employment responsibilities."[221] No alleged discriminatory action occurred until March 31, when CCA informed Millar of the decision and his employment with Imlay City and Elba Township was effectively terminated.[222]

According to *Collins*, "a claim for discriminatory discharge cannot arise until a claimant has been discharged."[223] Therefore, Millar's WPA claim did not arise until March 31, the date of his termination from the municipalities.[224] The court held that although Millar was not discharged from his employment with CCA, the reduction of his employment responsibilities still required reliance on *Collins*.[225]

The court further explained that, under the WPA, the "employer must have done more than simply make a decision to discriminate against an employee. Instead, the employer must have taken an adverse employment action against the plaintiff. It is the employer's *action* to implement the decision that triggers the running of the limitations period; not the decision itself."[226] Therefore, it was CCA's act of informing Millar and preventing him from working for Imlay City and Elba Township on March 31 that gave rise to Millar's WPA claim, and not the drafting of the letter regarding that decision four days prior.[227]

As such, the court held that because "the occurrence of the alleged violation" of the WPA took place on March 31, Millar's WPA claim was timely filed within the ninety-day statutory limitation period.[228] The court therefore reversed the court of appeals' decision in part, vacated the

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218. *Id.* at 239, 912 N.W.2d at 525 (citing *Magee*, 472 Mich. 108, 693 N.W.2d 166; *Joliet*, 475 Mich. 30, 715 N.W.2d 60).

219. *Id.* at 239 n.7, 912 N.W.2d at 525 n.7 (citing *Magee*, 472 Mich. 108, 693 N.W.2d 166; *Joliet*, 475 Mich. 30, 715 N.W.2d 60).

220. *Id.* at 240, 912 N.W.2d at 525.

221. *Id.* at 239, 912 N.W.2d at 525 (emphasis in original).

222. *Id.*

223. *Id.* at 240, 912 N.W.2d at 525 (quoting Collins v. Comerica Bank, 468 Mich. 628, 633, 644 N.W.2d 713, 716 (2003)).

224. *Id.* at 239–40, 912 N.W.2d at 525.

225. *Id.* at 240, 912 N.W.2d at 525.

226. *Id.* at 240–41, 912 N.W.2d at 525–26 (emphasis in original).

227. *Id.* at 241, 912 N.W.2d at 526.

228. *Id.*

circuit court's order granting summary disposition to the defendants, and remanded to the circuit court for further proceedings.[229]

C. Who is an Employee?

In *Devine v. Bloomfield Township*, the Michigan Court of Appeals affirmed the dismissal of another WPA suit, holding that the plaintiff was not protected by the Act because he was not an employee entitled to protection and because he failed to allege a discriminatory or retaliatory employment action.[230]

Daniel Devine was first appointed as Bloomfield Township Treasurer in 1999, and was re-elected several times thereafter.[231] In May 2011, Devine and four members of the Bloomfield Township Board of Trustees signed an Administrator Employment Contract (the Contract) subjecting each to statutory rules and obligations along with the Township's rules of conduct and procedures.[232] Devine's Contract also stated that his compensation would remain the same as before, included a term through March 31, 2017, and entitled him to participate in various benefits as set forth in the Township Handbook.[233] The Contract further provided that Devine "shall serve in [his] current position subject to the will of the electorate expressed by a majority of voters in regularly scheduled elections, or unless recalled pursuant to lawful procedure governed by prevailing law or until [he leaves] the employment of the Township by resignation, retirement or death."[234]

After the Contract was executed by all Bloomfield Township elected officials, the Board's supervisor announced his retirement.[235] Devine and then-trustee Leo Savoie sought appointment to the vacant supervisor role.[236] The Board selected Savoie over Devine on July 25, 2011.[237]

Three years later, in August 2014, Devine filed a campaign finance complaint against Savoie with the Michigan Department of State, accusing Savoie of accepting a bribe.[238] Devine also informed the Michigan Secretary of State and the Township's Board of Trustees that

229. *Id.* at 242, 912 N.W.2d at 526. The court denied leave as to Millar's public policy claim, leaving the lower courts' dismissals of that claim intact. *Id.* at 235 n.1, 501 N.W.2d at 523 n.1.

230. No. 330947, 2017 WL 2348719, at *7 (Mich. Ct. App. May 30, 2017).

231. *Id.* at *1.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at *2.

236. *Id.*

237. *Id.*

238. *Id.*

the Township's decision to fund a sewer extension project violated a Township ordinance.[239] Then, in May 2015, Devine falsely reported to the Bloomfield Township police that Savoie had kidnapped his daughter.[240]

On July 31, 2015, the Township Board censured Devine for official misconduct, including: making a false statement regarding a bonus paid to a retiring director, falsely accusing Savoie of kidnapping, falsely accusing Savoie of violating campaign finance laws and of accepting a bribe, making questionable investment decisions, and "causing department heads and employees to feel uneasy and threatened in a potentially unsafe work environment."[241]

On September 10, 2015, Devine filed a WPA suit against Bloomfield Township and Savoie, claiming that the township was his employer and Savoie its agent.[242] His suit further alleged that he "had engaged in protected activities by reporting violations or suspected violations of law by [the] defendants," and that the Township Board retaliated against him by censuring him.[243] The defendants sought summary disposition, arguing that Devine was an elected official and therefore was not an employee protected by the WPA and that Devine failed to allege an adverse employment action protected by the WPA.[244] The trial court agreed that Devine was not an employee under the WPA because there was no contract for hire and it granted summary disposition.[245]

Devine appealed.[246] The issue before the court was whether Devine's contract was a contract of hire, and, as a result, whether he was entitled to WPA protections.[247] To be an employee under the WPA, one must "perform[] a service for wages or other remuneration under a contract of hire, written or oral, express or implied. Employee includes a person employed by the state or a political subdivision of the state except state classified civil service."[248]

Devine argued that he was an employee because his Contract used the word "employ" and variations of it throughout.[249] He also argued that provisions in the Contract subjecting him to the Township's Employee

239. *Id.*
240. *Id.*
241. *Id.* at *3.
242. *Id.* at *4.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. MICH. COMP. LAWS ANN. § 15.361(a) (West 2018).
249. *Devine*, 2017 WL 2348719, at *5.

Handbook and entitling him to payments under the Township's normal payroll policies and benefit packages established that he was an employee.[250] The court of appeals disagreed, noting that, as the trial court had concluded, Devine's Contract was not a contract of hire because the Township Board had no choice regarding Devine's role.[251] As such, the Contract "merely memorialized the status quo" regarding his position and salary.[252] The court was unpersuaded by Devine's two-part argument that because the Contract stated that he was employed to perform "such duties and responsibilities in accordance with the statutory obligations, *rules, policies, and oversight responsibilities* requisite to [his] position," Devine had in essence agreed to duties beyond his statutory obligations,[253] and was provided additional consideration for such performance through his entitlement to certain benefits.[254] In rejecting this argument, the court stated that even if some of Devine's duties did exceed his statutory obligations, "nothing in this contract reveals them as elements in a bargained-for exchange."[255] The court found it important that every elected official signed the same agreement and nothing in the Contract was specific to Devine, which undercut a finding of bargained-for consideration.[256]

Finally, the court noted that Devine's situation did not fit within the purpose of the WPA because the Township Board could not discharge Devine or decrease his compensation.[257] Significantly, the choice of treasurer belonged to the electorate, not the Board, and so Devine was not an employee who might be deterred from reporting violations of the law but for the protections of the WPA.[258] Instead, as an elected official, he could "garner political support by reporting a violation or suspected violation of the law."[259] Thus, the court declined to expand the definition of employee under the WPA to include public officials, concluding that the trial court had correctly granted summary disposition to the defendants.[260]

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250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* (emphasis in original).
254. *Id.*
255. *Id.* at *6.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* at *7. Because it was not necessary to do so, the court did not address whether the censure resolution constituted an adverse employment action under the WPA.

IV. OTHER EMPLOYMENT STATUTES

A. Public Employment Relations Act

On March 28, 2013, Michigan's controversial "Freedom-to-Work" laws became effective.[261] Generally, these laws prohibit union agreements (as well as other forms of coercion, threat, or restraint) that require public and private sector employees to financially contribute to a labor organization as a condition of employment.[262] The enactment of these laws resulted in significant litigation regarding the scope of their proscriptions.[263] During the *Survey* period, the court of appeals decided two such cases.[264]

In the first, *Saginaw Education Association v. Eady-Miskiewicz*, a consolidated appeal of twelve unfair labor practice charges, the court of appeals affirmed decisions by the Michigan Employment Relations Commission (MERC) declaring unlawful a union rule permitting members to resign membership only during a one-month window each year, holding that union members are entitled to end union affiliation at will.[265] In each of the consolidated cases, the Charging Party-employees were employed by public school districts in Michigan in bargaining unit positions, and were represented by a Michigan Education Association (MEA) local affiliate, including the Saginaw Education Association, the Standish-Sterling Educational Support Personnel Association, the Battle Creek Educational Secretaries Association, and the Grand Blanc Clerical Association.[266] Each of the Charging Parties entered into an identical Continuing Membership Application with the Associations, which provided that membership with the Association would continue unless the application was revoked in writing between August 1 and August 31 of any year.[267] The membership application also required the payment of

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261. 2012 Mich. Legis. Serv. 348 (West) (applying to employees employed in the private sector); 2012 Mich. Legis. Serv. 349 (West) (applying to public employees). These laws are often, if paradoxically, referred to as "Right to Work" laws. WWJ/AP, *Right-To-Work Law Takes Effect In Michigan*, CBS DET. (Mar. 28, 2013), https://detroit.cbslocal.com/2013/03/28/right-to-work-law-takes-effect-in-michigan/.

262. *See* 2012 Mich. Legis. Serv. 348 (West) (applying to employees employed in the private sector); 2012 Mich. Legis.Serv. 349 (West) (applying to public employees).

263. *See* Saginaw Educ. Ass'n v. Eady-Miskiewicz, 319 Mich. App. 422, 902 N.W.2d 1 (2017), *leave to appeal denied*, 501 Mich. 1027, 908 N.W.2d 299 (2018) (mem.); *see also* Teamsters Local 214 v. Beutler, No. 330854, 2017 WL 3441394 (Mich. Ct. App. Aug. 10, 2017), *leave to appeal denied*, 501 Mich. 1027, 908 N.W.2d 301 (2018) (mem.).

264. *Id.*

265. *Eady-Miskiewicz*, 319 Mich. App. at 459, 902 N.W.2d at 22.

266. *Id.* at 428, 902 N.W.2d at 5.

267. *Id.* at 430, 902 N.W.2d at 7.

union dues.[268] MEA bylaws similarly provided for continuing membership in the union unless membership was revoked in writing between August 1 and August 31.[269] The Charging Parties notified the Associations outside the August window period that they either wished to revoke their memberships in the union and their dues authorizations, or that they desired to revoke their dues authorizations.[270] In each case, the Associations rejected the revocations because they were not submitted during the August window period.[271]

The Charging Parties filed unfair labor practice charges with MERC claiming that the Associations' refusal to accept their membership and dues revocations violated Michigan's Freedom-to-Work laws, which provide employees the right to refrain from financially supporting a union and prohibit labor organizations from coercing or compelling an employee to become or remain a member of a labor organization.[272] The Charging Parties also argued that the Associations violated their duties of fair representation by restraining the Charging Parties from exercising their rights to refrain from joining or assisting a labor organization and by failing to adequately inform the Charging Parties of how to resign their membership and terminate their dues obligations.[273]

After a hearing on the merits, a MERC Administrative Law Judge (ALJ) found that the Associations' August window period violated the Public Employment Relations Act (PERA)[274] by limiting the Charging Parties' rights to terminate their union memberships, and that signing the continuing membership agreements did not waive their rights to resign membership.[275] The ALJ also concluded that the Associations did not violate their duties of fair representation by not actively informing members of their rights to resign during the August window period.[276]

Reviewing the ALJ's recommended decision, MERC held that the passage of the Freedom-to-Work laws required a departure from prior MERC decisions that held that "the MEA's [August] window period was reasonable and organizationally necessary."[277] According to MERC, as of the effective date of the Freedom-to-Work laws, the Charging Parties' membership obligations to the Associations ended when the Charging

268. *Id.*
269. *Id.* at 430–31, 902 N.W.2d at 7.
270. *Id.* at 432, 436–38, 902 N.W.2d at 8, 9–11.
271. *Id.* at 437–38, 902 N.W.2d at 9–11.
272. MICH. COMP. LAWS ANN. §§ 423.209(2)(a), .210(2)(a) (West 2018).
273. *Eady-Miskiewicz*, 319 Mich. App. at 432, 902 N.W.2d at 8.
274. MICH. COMP. LAWS ANN. §§ 423.201–.217 (West 2018).
275. Saginaw Educ. Assoc., 29 MPER ¶ 21 (2015).
276. *Id.*
277. *Eady-Miskiewicz*, 319 Mich. App. at 433 n.1, 902 N.W.2d at 8 n.1.

Parties provided the Associations with resignation notices.[278] MERC further held that the Associations violated their duties of fair representation by refusing to allow the Charging Parties to resign their memberships, but that the Associations did not violate their duties of fair representation by failing to provide more information about how the passage of the Freedom-to-Work legislation affected their members' resignation opportunities.[279]

The Associations and Charging Parties cross-appealed MERC's decision to the Michigan Court of Appeals.[280] On such appeals, issues of jurisdiction and statutory interpretation are reviewed *de novo*.[281] Nevertheless, as the court of appeals noted, administrative agency interpretations of a statute should be given "respectful consideration, but not deference."[282] The court also took note of the principle that MERC's findings of fact are "conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole."[283] "MERC's legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law."[284]

The Associations advanced six arguments on appeal.[285] First, the Associations argued that MERC lacked jurisdiction to decide the charges because the August window period was an internal union rule that had "no direct relationship to conditions of employment."[286] MERC's decision[287] addressed its 2004 opinion in *West Branch-Rose City Education Association*,[288] in which a schoolteacher filed an unfair labor practice charge alleging that a MEA local affiliate violated its duty of fair representation by refusing to accept his attempted membership resignation outside the window period to become an agency fee payer.[289] In *West Branch*, MERC held that it had jurisdiction because "the collection of agency fees from nonmembers cannot be characterized as purely an internal union matter, since it can only be accomplished

278. *Id.* at 435, 902 N.W.2d at 9.
279. *Id.*
280. *Id.* at 427–28, 902 N.W.2d at 5.
281. *Id.* at 440, 902 N.W.2d at 12.
282. *Id.*
283. *Id.* at 443, 902 N.W.2d at 13 (quoting Grandville Mun. Exec. Ass'n v. City of Grandville, 453 Mich. 428, 436, 553 N.W.2d 917 (1996)).
284. *Id.* (quoting Grandville Mun. Exec. Ass'n v. City of Grandville, 453 Mich. 428, 436, 553 N.W.2d 917 (1996)).
285. *Id.* at 441–56, 902 N.W.2d at 12–20.
286. *Id.* at 441, 902 N.W.2d at 12–13.
287. Saginaw Educ. Ass'n, 29 MPER ¶ 21, 2015 WL 6390582 (2015).
288. 17 MPER ¶ 25, 2004 WL 6012388 (2004).
289. *Id.*

pursuant to a negotiated contract provision, and there is a potential impact on employment should the nonmember refuse to pay."[290] The Associations' collective bargaining agreements did not contain union security clauses and, therefore, the Associations argued, MERC did not have jurisdiction because there was no potential impact on the Charging Parties' employment.[291] As a result, the charges involved purely internal union governance matters over which MERC does not have jurisdiction.[292]

The Associations also emphasized that MCL § 423.210(3)(b) prohibits requiring a person to become or remain a member of a labor organization only "as a condition of obtaining or continuing public employment."[293] The Associations argued that the charges did not address a condition of employment, but instead focused on independent contractual obligations owed by the Charging Parties to the Associations.[294] Because the Associations' collective bargaining agreements no longer contained union security clauses, it was argued, the Charging Parties' refusal to pay dues did not implicate their employment.[295] The court disagreed.[296] Noting that MCL § 423.210(2) prohibits any restraint or coercion on the Charging Parties' right to refrain from joining or assisting a labor organization, the court found that MERC did have jurisdiction over the charges, holding that "restricting the opportunity to resign from a union to one month out of the year effectively forces continued affiliation for however long it happens to take in a given situation until that time of the year arrives."[297]

Second, the Associations argued that MERC's finding of a duty of fair representation violation was in error because the Freedom-to-Work laws provide a labor organization with the right to "prescribe its own rules with respect to the acquisition or retention of membership."[298] Following the United States Supreme Court decision in *Pattern Makers' League of North America v. National Labor Relations Board*, which

290. *Id.*

291. *Eady-Miskiewicz*, 319 Mich. App. at 434, 902 N.W.2d at 9.

292. *See, e.g.*, Mich. Educ. Ass'n, 18 MPER ¶ 64, 2005 WL 6710379 (2005) (noting that, generally, MERC has no jurisdiction over the internal affair of labor organizations in the absence of a direct impact on the employment relationship or the denial of rights under Section 9 of PERA, MCL § 423.209).

293. *Eady-Miskiewicz*, 319 Mich. App. at 442–43, 902 N.W.2d at 13 (quoting MICH. COMP. LAWS ANN. § 423.210(3)(b) (West 2018)).

294. *Id.*

295. *Id.* at 431, 902 N.W.2d at 7.

296. *Id.* at 446-47, 902 N.W.2d at 15–16.

297. *Id.* at 441–42, 902 N.W.2d at 11–12.

298. *Id.* at 443–44, 902 N.W.2d at 13–14 (quoting MICH. COMP. LAWS ANN. § 423.210 (2)(a)).

considered similar language in the National Labor Relations Act, MERC found that the provision cited by the Associations referred to rules providing for the expulsion of members from the union.[299] Applying the substantial-and-material-error standard to MERC's conclusions of law, the Court of Appeals agreed with MERC that by "limiting resignation opportunities to one month of each year, respondents were stepping beyond establishing membership policy and governance as allowed under § 10(2)(a) and into the substantial forcing of continued union affiliation or support in violation of MCL 423.209(2)(a)."[300]

Third, the Associations argued that the Charging Parties had waived their right to resign membership at any time by voluntarily entering into membership agreements that restricted the right to resign to the August window period.[301] Affirming MERC's decision, the appellate court agreed that the right to discontinue financially supporting a union may be waived, but that such waivers of a statutory right must be "clear, explicit, and unmistakable."[302] The court cited with approval the United States Court of Appeals for the Second Circuit decision in *Communications Workers of America CIO v. NLRB*, for the proposition that "a member of a voluntary association is free to resign at will, subject of course to any financial obligations due and owing the association."[303] The provisions in the Associations' constitution and bylaws limiting the right to resign "did not define 'membership' as the obligation to pay dues or fees, or otherwise specify that restrictions set forth on disassociation opportunities were limited to" financial-core membership (as distinguished from a "formal personal affiliation" with the union).[304] For this reason, "and because the restrictions on resignation opportunities . . . merely reflected general union policy," the court concluded that the membership agreements did not rise to the "clear, explicit, and unmistakable" level required for waiver of a statutory right.[305] Additionally, the court noted that the membership agreements had been signed before the effective date of the Freedom-to-Work laws.[306]As a result, the Court of Appeals agreed with MERC that the Charging Parties

299. *Id.* at 444, 902 N.W.2d at 14 (citing Pattern Makers' League of N. Am. v. Nat'l Labor Relations Bd., 473 U.S. 95, 108–09 (1985)) (quoting 29 U.S.C.A. § 158(b)(1)(A) (West 2018)).

300. *Id.* at 447, 902 N.W.2d at 15.

301. *Id.* at 447–48, 902 N.W.2d at 16.

302. *Id.* at 449-50, 902 N.W.2d at 16.

303. *Id.* at 449, 902 N.W.2d at 17 (quoting Comm. Workers of Am., CIO v. NLRB, 215 F.2d 835, 838 (2d Cir. 1954)).

304. *Id.* at 449-50, 902 N.W.2d at 17.

305. *Id.* at 450, 902 N.W.2d at 17.

306. *Id.*

had not clearly, explicitly, and unmistakably waived their rights to discontinue financial support of the Associations.[307]

Fourth, the Associations argued that MERC violated the Association's expressive associational rights guaranteed by the United States and Michigan Constitutions.[308] In support, the Associations contended that MERC's decision would permit individuals to elect union leadership and "take advantage of the member-only benefits," and then immediately resign, "creating an entirely new class of free-rider."[309] The appellate court dismissed this argument, but suggested that the Associations' membership agreements could be made enforceable with the addition of a clear and unmistakable waiver, writing:

> If respondents raise a legitimate concern over members' accepting a union benefit on one day then ending union support the next, and if locking members into fixed periods of obligation to provide financial support were the only way to avoid such imbalances between benefits received and contributions provided, respondents' remedy would be to offer membership agreements that clearly and unmistakably set forth waivers of the right to discontinue financial support before a specified date . . . .[310]

Fifth, the Associations argued that MERC's interpretation of the Freedom-to-Work laws unconstitutionally impaired the obligations of the Associations' membership contracts with their members.[311] The court disagreed, noting that the Associations' argument was "foiled by the unsuitability of characterizing union membership agreements as contracts."[312] The Court of Appeals again looked to the United States Supreme Court's decision in *Pattern Makers*.[313] There, the Supreme Court held that a union rule restricting the right of members to resign during a strike and imposing fines against those attempting to do so violated the policy of voluntary unionism inherent in the National Labor Relations Act.[314] In so doing, the Supreme Court recognized that

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307. *Id.*
308. *Id.*
309. *Id.* at 451, 902 N.W.2d at 17–18.
310. *Id.* at 451–52, 902 N.W.2d at 18.
311. *Id.* at 452, 902 N.W.2d at 18.
312. *Id.*
313. *Id.* at 448, 902 N.W.2d at 16 (citing Pattern Makers' League of N. Am. v. Nat'l Labor Relations Bd., 473 U.S. 95 (1985)).
314. Pattern Makers' League of N. Am. v. Nat'l Labor Relations Bd., 473 U.S. 95, 107 (1985).

"[m]embership in a union contemplates a continuing relationship with changing obligations" akin to "relationships created by marriage, the purchase of a stock certificate, or the hiring of a servant" and is "far removed from the main channel of contract law."[315] Citing *Pattern Makers*, the *Eady-Miskiewicz* Court agreed with MERC that "the relationship between union and union member is not strictly contractual in nature . . . " and the membership agreements lacked a clear and unmistakable waiver "of the right to discontinue financial support."[316] The court further ruled that "establishing a broad right to refrain from union affiliation is reasonably related to the legislatively identified public need for *voluntary* unionism."[317]

Finally, the Battle Creek Educational Secretaries Association (BCESA) and MEA argued that the charges filed by its member were untimely, and that MERC inappropriately applied the continuing-wrongs doctrine to find that it had jurisdiction.[318] Unfair labor practice (ULP) charges must be filed "within six months of the act engendering the charge."[319] The Battle Creek Charging Party attempted to resign her membership with the BCESA in April 2013.[320] Later that month, the BCESA informed her that her attempted resignation was untimely.[321] Then, in September 2013, the Charging Party emailed the BCESA stating that she had indeed resigned her membership in April.[322] On October 9, 2013, the BCESA again informed her that her resignation was untimely.[323] The Charging Party then filed her ULP charge on March 18, 2014.[324] The BCESA and MEA argued that its first rejection of her resignation in April 2013 was the alleged unlawful act that triggered the limitations period.[325] Because Michigan no longer recognizes the continuing-wrongs doctrine, the BCESA and MEA argued that the charge was untimely.[326] The Court of Appeals concluded that it would

315. *Id.* at 113 n.26 (citing Clyde W. Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1055–56 (1951)).

316. *Eady-Miskiewicz*, 319 Mich. App. at 453, 902 N.W.2d at 19.

317. *Id.* (emphasis in original).

318. *Id.* at 454–55, 902 N.W.2d at 19.

319. *Id.* at 454, 902 N.W.2d at 19 (citing MICH. COMP. LAWS ANN. § 423.216(a) (West 2018)).

320. *Id.* at 454, 902 N.W.2d at 19.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 454–55, 902 N.W.2d at 19.

325. *Id.* at 455, 902 N.W.2d at 19.

326. *Id.*, 902 N.W.2d at 19-20 (citing Garg v. Macomb Cty. Mental Health Servs., 472 Mich. 263, 290, 696 N.W.2d 646, 662 (2005) (holding that "the 'continuing violations'

have been inappropriate to apply the continuing-wrongs doctrine, but agreed with MERC that the October 2013 communication from the BCESA constituted a separate, independent violation.[327] The court found that after the BCESA rejected the Charging Party's April 2013 resignation as untimely, the Charging Party communicated in her September 2013 email that she believed the April 2013 resignation would have become effective the following August.[328] The BCESA's subsequent October 2013 refusal to honor her resignation on any terms, therefore, constituted a substantially new controversy, which resulted in a timely ULP charge.[329]

On cross-appeal, the Charging Parties argued that MERC erred in finding that the Associations did not violate the duty of fair representation "by failing to provide sufficient information to their members on applicable resignation procedures."[330] The Court of Appeals agreed with MERC that the Freedom-to-Work laws do not require unions to disseminate information about resignation procedures because the Associations provided "enough avenues . . . available for their members to discover pertinent resignation procedures."[331] The court and MERC both concluded that the membership agreements, bylaws, and constitution all provided information about the August window period.[332] Further, information about the August window period was provided to all of the Charging Parties after they attempted to resign, and to any member who requested the information.[333] Accordingly, the court agreed with MERC that:

> [T]he Legislature recognized that the duty of fair representation did not include a duty to take active responsibility for disseminating information about the new options for disassociation from union activities under 2012 PA 349 [the Freedom-to-Work law applicable to public sector employees] by assigning that responsibility to the Department of Licensing and Regulatory Affairs.[334]

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doctrine . . . has no continued place in the jurisprudence of this state"), *amended on other grounds*, 473 Mich. 1205, 699 N.W.2d 697 (2005).

327. *Id.*, 902 N.W.2d 1, 20 (2017).

328. *Id.* at 456, 902 N.W.2d at 20.

329. *Id.*

330. *Id.*

331. *Id.* at 457–58, 902 N.W.2d at 21.

332. *Id.*

333. *Id.* at 458, 902 N.W.2d at 21 (2017).

334. *Id.* at 457, 902 N.W.2d at 21.

Several months after the *Eady-Miskiewicz* ruling was issued, a different court of appeals panel defined the limits of its holding in *Teamsters Local 214 v. Beutler*.[335] Pauline Beutler was a bus driver for the Livingston Educational Service Agency and a member of Teamsters Local 214.[336] Upon joining Local 214, Beutler signed an application for membership and a wage assignment for her dues payment.[337] Unlike the membership application in *Eady-Miskiewicz*, Local 214's assignment provided that it was "voluntary and . . . not conditioned on . . . present or future membership in the Union."[338] The assignment automatically renewed for successive yearly periods and provided that it could only be revoked on written notice of "at least sixty (60) days, but not more than seventy-five (75), days before [the] . . . renewal date."[339]

In September 2013, Beutler sent a letter to Local 214's president purportedly resigning her membership in the union and revoking her dues obligation.[340] Local 214 rejected Beutler's attempted revocation, stating that the assignment was a separate, independent contract that superseded the Freedom-to-Work law, and that her agreement did not permit her to cancel her financial commitment at that time.[341] Beutler subsequently filed an unfair labor practice charge with MERC, alleging that Local 214 violated the Freedom-to-Work law by failing to honor the revocation of her dues obligation.[342]

After an evidentiary hearing, the ALJ ruled that, in the absence of a union security clause, Beutler's dues obligation to Local 214 did not implicate her terms and conditions of employment and, thus, MERC did not have jurisdiction over the charge.[343] Nevertheless, the ALJ found that no credible evidence had been presented establishing that Local 214 had prevented Beutler from resigning her union membership.[344] Relying on three NLRB decisions explaining the difference between dues checkoff authorizations as voluntary, contractual wage assignments, and compulsory union membership,[345] "the ALJ concluded that [Local 214]

335. No. 330854, 2017 WL 3441394 (Mich. Ct. App. Aug. 10, 2017), *leave to appeal denied*, 501 Mich. 1027, 908 N.W.2d 301 (2018) (mem.).

336. *Id.* at *1.

337. *Id.* at *2.

338. *Id.*

339. *Id.*

340. *Id.* at *3.

341. *Id.*

342. *Id.* at *1.

343. Teamsters Local 214, 29 MPER ¶ 46, 2015 WL 10141529 (2015).

344. *Id.*

345. *Id.* (citing Int'l Bhd. of Elec. Workers, Local 2088 (Lockheed Inc.), 302 NLRB 322 (1991); Steelworkers Local 4671, 302 NLRB 367 (1991); Smith's Food & Drug

did not violate PERA by refusing to permit Beutler to revoke" her wage assignment outside of the period permitted by the assignment, while at the same time permitting her to resign her membership in the union.[346]

Based on the holding of *Eady-Miskiewicz*, which found that union membership could violate PERA, MERC overruled the ALJ's finding that MERC did not have jurisdiction to consider Beutler's charge.[347] MERC did adopt the ALJ's conclusion that Beutler's letter was sufficient to effectuate her resignation from Local 214, but found that it did not terminate her obligation to continue paying dues.[348] Distinguishing the contract in Beutler's case from those in *Eady-Miskiewicz*, MERC found that Beutler's obligation to pay dues "was not necessarily tied to her membership in the Union," in contrast with *Eady-Miskiewicz,* where the dues obligations were "the *quid pro quo* of membership in the union."[349] Beutler appealed MERC's decision to the court of appeals.[350]

The issue presented to the appellate court was "whether the MERC correctly identified the contract between the instant parties as differing from those at issue in *Saginaw Ed. Ass'n* in actually satisfying the requirements for a clear, explicit, and unmistakable waiver of the statutory right to discontinue union support at will."[351] The court held that the dues deduction agreement renewed after Beutler failed to terminate the agreement during the applicable timeframe, essentially creating a new and distinct contract.[352] Accordingly, the court was bound by "basic contract principles" to conclude that:

> MERC correctly recognized in this instance that the membership agreement at issue – having specified an 'assignment' that is 'irrevocable for the term of the applicable contract' and would 'automatically renew itself for successive yearly or applicable contract periods' but for submission of revocation in the manner set forth – clearly, explicitly, and unmistakably set forth an

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Ctrs., 358 NLRB 704 (2012), *rev'd sub nom.* Stewart v. NLRB, 851 F.3d 21 (D.C. Cir. 2017)).

346. *Id.*

347. *Id.* (noting that MERC found that "amended PERA provisions" granted it jurisdiction "over matters in which an employee organization unlawfully restrains a public employee from refraining from participation in certain statutorily protected activities").

348. Teamsters Local 214 v. Beutler, No. 330854, 2017 WL 3441394, at *1 (Mich. Ct. App. Aug. 10, 2017), *leave to appeal denied*, 501 Mich. 1027, 908 N.W.2d 301 (2018) (mem.).

349. *Id.* (emphasis added).

350. *Id.*

351. *Id.* at *2.

352. *Id.* at *3.

> obligation to pay union dues for a specified period, regardless of charging party's membership status, and thus constituted a binding waiver of her right to discontinue her financial support of the union at will.[353]

An unfair labor practice also was at issue in *Ionia County Intermediate Education Association v. Ionia County Intermediate School District*, in which the Michigan Court of Appeals affirmed a MERC decision finding that the Association erred in demanding arbitration of a grievance challenging a written reprimand issued to teacher Renee Eis.[354] Eis was a probationary teacher in Ionia, and on March 31, 2015, received a written reprimand from her principal "for failing to prohibit male and female students from undressing in a locker room at the same time."[355] The Association grieved the discipline, arguing that Eis should have received only a verbal warning and that the District had violated the parties' collective bargaining agreement and Eis's due process rights under the Fifth and Fourteenth Amendments of the U.S. Constitution.[356] The District denied the grievance, "informed the Association that teacher discipline was a prohibited subject of bargaining under PERA," and responded that it had not violated Eis's due process rights "because she was an at-will probationary employee" and the discipline was fair.[357] In response, the Association demanded arbitration on the due process issue, contending that Eis had not been given the opportunity to respond to the charges and had not been informed of the investigation.[358] The District answered that the Association's arbitration demand was nothing more than an attack on the District's disciplinary procedures and was, thus, a prohibited subject of bargaining.[359] The Arbitrator held the case in abeyance when the District filed a charge with MERC claiming that the Association violated its duty to bargain in good faith.[360]

Concurrent with its unfair labor practice charge, the District filed a motion for summary disposition with MERC, arguing that, by processing its grievance to arbitration, the Association had committed an unfair labor practice.[361] The Association responded that, because PERA

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353. *Id.*

354. No. 334573, 2018 WL 1020299, at *1 (Mich. Ct. App. Feb. 22, 2018), *leave to appeal denied*, 503 Mich. 860, 917 N.W.2d 625 (2018) (mem.).

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.* at *1.

360. *Id.*

361. *Id.* at *2.

prohibited the District from adopting an arbitrary or capricious disciplinary policy, its due process challenge to Eis's discipline did not concern a prohibited subject of bargaining.[362] The Asssociation's argument did not persuade the ALJ, who wrote that "the Legislature intended to remove all topics related to teacher discipline, including disciplinary procedures and disciplinary due process, from the realm of collective bargaining" and that it was an unfair labor practice for the Association to process its grievance to arbitration.[363] MERC adopted the ALJ's decision, and the Association appealed to the court of appeals.[364]

Based on the use of the disjunctive "or" in the list of prohibited subjects of bargaining, the appellate court held that PERA prohibited bargaining on three distinct subjects relating to teacher discipline: "(1) decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, (2) decisions concerning the discharge or discipline of an individual employee, and (3) the impact of those decisions on an individual employee or the bargaining unit."[365] As result, the court found that "[t]he Legislature has made clear its intention that issues of individual teacher discharge or discipline 'are within the sole authority of the public school employer to decide.'"[366] In so holding, the court rejected the Association's argument that it could challenge individual disciplinary actions that are arbitrary or capricious because PERA prohibits a district from adopting a disciplinary policy that is arbitrary or capricious.[367] The court instead concluded that the statute's prohibition on arbitrary and capricious disciplinary policies applied "to the school's adoption, implementation, or maintenance of *policies* – not to disciplinary decisions made with regard to individual teachers."[368]

The Association also argued that the parties had incorporated due process principles into their collective bargaining agreement, and by prohibiting the Association from processing due process violations to arbitration, MERC had violated the parties' CBA.[369] The court found this unpersuasive, ruling that "[b]ecause a decision concerning the discipline of an individual teacher is a prohibited subject of bargaining, the

362. *Id.*
363. *Id.*
364. *Id.* at *3.
365. *Id.* at *4.
366. *Id.* (quoting MICH. COMP. LAWS ANN. § 423.215(4) (West 2018)).
367. *Id.*
368. *Id.* at *5.
369. *Id.*

grievance process does not apply to a claim challenging the disciplinary procedure related to that decision."[370]

B. Teachers' Tenure Act/Revised School Code

In *Southfield Education Association v. Board of Education of Southfield Public Schools*,[371] the Southfield Education Association (the Association) and teacher Velma Smith filed suit against Southfield Public Schools (SPS) alleging that SPS violated §§ 1248[372] and 1249[373] of the Revised School Code, the Teachers' Tenure Act (TTA), and Smith's due process rights by failing to recall Smith from layoff to a teaching position for which Smith was certified and qualified.[374] The Association and Smith also sought a writ of mandamus ordering SPS to reinstate Smith to a teaching position.[375]

During the 2012–2013 and 2013–2014 school years, Smith taught an online remedial education course at SPS's alternative education high school and received a "highly effective" rating both years.[376] Following the 2013–2014 school year, SPS eliminated Smith's position and laid her off.[377] Prior to the 2014–2015 school year, SPS posted a part-time technology position at one of its K-8 schools.[378] Smith had held that position during the 2010–2011 school year, but had not received an "effectiveness" rating under SPS's newly adopted teacher evaluation system.[379] As a result, SPS believed it had no obligation to offer the position to Smith and hired an external candidate.[380] When that teacher resigned after one year, SPS again hired an external candidate.[381]

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370. *Id.*

371. 320 Mich. App. 353, 909 N.W.2d 1 (2017).

372. MCLA § 380.1248 obligates school boards to base its personnel decisions on teacher effectiveness with the primary goal of retaining effective teachers following a staffing or program reduction. MICH. COMP. LAWS ANN. § 380.1248 (West 2018).

373. MCLA § 380.1249 obligates schools to evaluate its teachers annually under a performance evaluation system that assesses teacher effectiveness and rates teachers as: highly effective, effective, minimally effective, or ineffective. MICH. COMP. LAWS ANN. § 380.1249 (West 2018).

374. *Southfield Educ. Ass'n*, 320 Mich. App. at 358, 909 N.W.2d at 6.

375. *Id.*

376. *Id.* at 357, 909 N.W.2d at 5.

377. *Id.*

378. *Id.*

379. *Id.* at 357–58, 909 N.W.2d at 5. The teacher evaluation system was mandated by the 2011 amendment of § 1249 of the Revised School Code. *See* MICH. COMP. LAWS ANN. § 380.1249 (West 2018).

380. *Id.* at 358, 909 N.W.2d at 5.

381. *Id.* at 358, 909 N.W.2d at 5–6.

The trial court dismissed the claims alleging violations of § 1249 of the Revised School Code, the Teachers' Tenure Act, and Smith's due process rights, as well as the mandamus action, for failure to state a claim upon which relief could be granted.[382] In so doing, the trial court adopted SPS's arguments that, since 2011, there has been no right of recall for tenured teachers under Michigan law; that there is no private right of action under § 1249, and that Smith had failed to exhaust her administrative remedies under the Teachers' Tenure Act by failing to file a claim with the State Tenure Commission.[383] The trial court subsequently granted summary disposition to SPS on the § 1248 claim, ruling that the Legislature's elimination of recall rights for tenured teachers barred the plaintiffs' claims as a matter of law and that, even if those recall rights had not been eliminated, Smith did not receive an "effective" or better rating when she worked in the technology position during the 2010–2011 school year.[384] The Association and Smith appealed the dismissal of their claims.[385]

In the Court of Appeals, the plaintiffs argued that § 1248 required SPS, following a staffing reduction, to retain effective teachers.[386] While the court agreed with the plaintiffs' reading of § 1248, it affirmed summary disposition because Smith's effectiveness in that position had not been evaluated.[387] The court stated that "[a] school district must consider the relative effectiveness ratings of candidates for open teaching positions, whether as part of a recall *or a new hire* after a staffing or program reduction," but "[n]othing in the language of § 1248 suggests that a teacher's effectiveness evaluation for teaching one subject requires that teacher's recall or rehire to teach a different subject."[388]

The *Southfield Educ. Ass'n* Court also affirmed the trial court's dismissal of the plaintiffs' Section 1249 claim, reaffirming its decision in *Summer v. Southfield Board of Education*, which found no private right of action under § 1249.[389] Although *Summer* left open the possibility that a teacher could challenge a school district's failure to comply with the requirements of § 1249 as part of a § 1248 claim, the court in the SPS case concluded that the plaintiffs' § 1248 claim properly alleged a

382. *Id.* at 359, 909 N.W.2d at 6.
383. *Id.*
384. *Id.* at 360, 909 N.W.2d at 7.
385. *Id.* at 357, 909 N.W.2d at 5.
386. *Id.* at 364-65, 909 N.W.2d at 9.
387. *Id.* at 368, 909 N.W.2d at 11.
388. *Id.*
389. *Id.* at 372, 909 N.W.2d at 13 (citing Summer v. Southfield Bd. of Educ., 310 Mich. App. 660, 676, 874 N.W.2d 150, 160 (2015)).

violation of § 1249, and that the plaintiffs therefore were not entitled to a separate claim under § 1249.[390]

The Court of Appeals also upheld the dismissal of the plaintiffs' TTA and due process claims.[391] The plaintiffs had argued that SPS's failure to recall Smith to the technology position deprived her of her right to continuous employment under the Tenure Act and her vested property right in continuous employment without due process of law.[392] The court determined that, because the plaintiffs' claims raised questions under Section 1248 and 1249 of the Revised School Code, as opposed to the TTA, the State Tenure Commission did not have jurisdiction over those claims.[393] The court rejected the plaintiffs' attempt to characterize SPS's failure to recall her as a discharge or demotion, writing:

> [a] layoff because of a necessary reduction in personnel is not a discharge or demotion. ... Therefore, no process is due a tenured teacher who is laid off unless the reduction is workforce is not bona fide. Plaintiffs have not alleged or argued that the elimination of Smith's position was not bona fide, nor do they suggest that the layoff was a subterfuge to avoid the protections of the TTA. Therefore, plaintiffs have failed to state a claim for due process violations in this case.[394]

C. Michigan Employment Security Act

During the *Survey* period, the Michigan Court of Appeals reversed three different trial court decisions regarding unemployment benefits, on a range of issues.[395]

In the first case, *Lawrence v. Michigan Unemployment Insurance Agency*,[396] a $158 dispute progressed from the Michigan Unemployment Insurance Agency (UIA), to the Michigan Compensation Appellate Commission (MCAC), to the Oakland County Circuit Court, and eventually to the court of appeals.[397] Suzanne Lawrence worked as a seasonal employee at the Bloomfield Hills Country Club (BHCC) and was laid off each winter.[398] BHCC required Lawrence to use her vacation

390. *Id.* (citing *Summer*, 310 Mich. App. at 679, 874 N.W.2d at 163).
391. *Id.* at 374, 909 N.W.2d at 14.
392. *Id.*
393. *Id.*
394. *Id.* at 376–77, 909 N.W.2d at 15.
395. *See infra* Part III.C.
396. 320 Mich. App. 422, 906 N.W.2d 482 (2017).
397. *Id.* at 425–30, 906 N.W.2d 484–87.
398. *Id.* at 425, 906 N.W.2d at 484.

time during winter layoffs, and, as a result, she received $820 in vacation pay for one week in January 2013 and again in the first week in February 2013, even though her last day of work prior to layoff was January 4, 2013.[399] Lawrence applied for unemployment benefits, was deemed eligible, and received her first unemployment check on February 20, 2013 for the previous two weeks.[400]

Two years later, the UIA mailed Lawrence a Notice of Determination stating that she had been ineligible for unemployment benefits for the weeks ending January 26 and February 3, 2013, and directing her to repay $158 for payments received during that time.[401] Lawrence disputed the determination, noting the lapse in time and also referencing her employer's records, which stated that she had received vacation pay from January 6, 2013 through February 2, 2013 and that the UIA paid her for the two weeks immediately preceding February 20, 2013.[402] The UIA issued a redetermination restating its previous findings, which Lawrence again disputed.[403]

Lawrence participated in a telephone hearing (without UIA participation) before an Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System (MAHS).[404] During the hearing, Lawrence agreed that she had been ineligible for benefits during the weeks for which she received vacation pay, but maintained that she did not receive any unemployment payments before February 20, 2013, and so had nothing to repay.[405] The ALJ affirmed the UIA's redetermination.[406] The ALJ acknowledged Lawrence's testimony and found that she was ineligible for benefits during the weeks that she received vacation pay.[407] Notably, the ALJ did not address the question of whether Lawrence received unemployment benefits for the weeks in which she also received vacation pay[408]—a finding that presumably would have resolved the question of whether Lawrence was required to repay those benefits.

Lawrence appealed to the MCAC, explaining in her letter that the ALJ had failed to address the actual issue: whether she had received

399. *Id.*
400. *Id.* at 425–26, 906 N.W.2d at 484.
401. *Id.* at 426, 906 N.W.2d at 484.
402. *Id.*, 906 N.W.2d at 484–85.
403. *Id.* at 426, 906 N.W.2d at 485.
404. *Id.* at 427, 906 N.W.2d at 485.
405. *Id.*
406. *Id.* at 428, 906 N.W.2d at 486.
407. *Id.* at 428–29, 906 N.W.2d at 485–86.
408. *Id.* at 429, 906 N.W.2d at 486.

unemployment benefits and vacation pay for the same period.[409] Despite this clear statement of the issue, the MCAC affirmed the ALJ's decision without hearing, concluding that "the ALJ's findings of fact accurately reflect[ed] the evidence introduced" and that the law was properly applied to those facts.[410]

Lawrence appealed the MCAC's decision to the Oakland County Circuit Court, which affirmed the MCAC's decision (again without a hearing).[411] The Oakland County Circuit Court did acknowledge Lawrence's insistence that the issue was not about eligibility, but whether she had received payment during the contested period.[412] Nonetheless, it still concluded that the ALJ and MCAC decisions were correct.[413] The circuit court based its decision on the fact that Lawrence "had the burden of proof to establish that she was eligible for unemployment benefits at the time that the agency paid her," that she failed to provide documentation showing that she did not receive the payments, and that the ALJ made a finding of fact that such payments were made.[414]

Lawrence moved next to the Michigan Court of Appeals, which "reviews a lower court's review of an administrative decision to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clear-error standard of review."[415] "A finding is clearly erroneous where, after reviewing the record, [the court of appeals] is left with the definite and firm conviction that a mistake has been made."[416] The record includes "'all documents, files, pleadings, testimony, and opinions and orders of the tribunal, agency, or officer."[417] "Great deference is accorded to the circuit court's review of the [administrative] agency's factual findings; however, substantially less deference, if any, is accorded to the circuit court's determinations on matters of law."[418]

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409. *Id.*
410. *Id.*
411. *Id.*
412. *Id.* at 429–30, 906 N.W.2d at 486.
413. *Id.* at 430, 906 N.W.2d at 486.
414. *Id.*
415. *Id.* at 431, 906 N.W.2d at 487 (citing Braska v. Challenge Mfg. Co., 307 Mich. App. 340, 351–352, 861 N.W.2d 289, 296 (2014)).
416. *Id.* at 431–32, 906 N.W.2d at 487 (quoting Vanzandt v. State Emps. Ret. Sys., 266 Mich. App. 579, 585, 701 N.W.2d 214, 218 (2005)).
417. *Id.* at 434–35, 906 N.W.2d at 489.
418. *Id.* at 432, 906 N.W.2d at 487 (quoting Mericka v. Dep't of Cmty. Health, 283 Mich. App. 29, 36, 770 N.W.2d 24, 28 (2009)).

Considering the entire record, the Court of Appeals expressed puzzlement at the lower court's affirmance of the MCAC, instead concluding that the decisions reached at every stage below were legally unsound, and also that "the circuit court clearly erred when it determined that the MCAC's decision was supported by competent, material, and substantial evidence."[419]

The appellate court's decision was grounded in its agreement with Lawrence that the issue was not one of eligibility for benefits–an issue that Lawrence did not dispute with respect to the period when she received vacation pay.[420] The actual issue was whether Lawrence received benefits during that period, and the Court of Appeals concluded that the circuit court's limited findings regarding payments to Lawrence were "unsupported by the record."[421] As such, the circuit court did not "establish by competent, material, and substantial evidence that Lawrence received payments during the weeks of her conceded ineligibility."[422] First, the circuit court had erroneously stated that the ALJ had considered the UIA's determination and redetermination letters, which showed that Lawrence had received payments during the contested period.[423] In fact, the ALJ did not have those letters, and moreover, the letters were not evidence that payments were actually issued.[424] Furthermore, "the burden was not on Lawrence to prove that she did not receive" those payments, but on the agency–the party claiming that the payments were made–to prove that it had issued payments.[425] Finally, the appellate court found clear error in the circuit court's decision that the ALJ believed that the documentation in the record established that payments were received because the ALJ never reached that issue, but only addressed the eligibility issue.[426] The Court of Appeals therefore reversed the order of the circuit court, and remanded the case to that court with instructions to enter an order reversing the MCAC's decision.[427]

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419. *Id.* at 437, 906 N.W.2d at 490.

420. *Id.* at 436, 906 N.W.2d at 489–90.

421. *Id.* at 437–38, 906 N.W.2d at 490.

422. *Id.* at 438, 906 N.W.2d at 490.

423. *Id.*

424. *Id.* at 438–39, 906 N.W.2d at 490–91.

425. *Id.* at 439–40, 906 N.W.2d at 491.

426. *Id.* at 440, 906 N.W.2d at 492.

427. *Id.* at 444, 906 N.W.2d at 493. The appellate court also ruled on the question of the appropriate record on appeal—whether it is simply the record before the ALJ, or the entire record as certified by the MCAC, which includes (as required by MCR 7.210(A)(2)) "all documents, files, pleadings, testimony, and opinions and orders" of the tribunal and agency. The court concluded that the appellate record includes every document below, even those not before the ALJ. *Id.* at.434–35, 906 N.W.2d at 488–89.

Seasonal employment was also considered in another Court of Appeals decision issued during the *Survey* period. In *Brubaker v. Sodexo Management, Inc.*, the court considered the impact of work search requirements.[428] Sylvia Brubaker was a cook at Adrian College, working 40 hours per week during the school year and 10 to 15 hours per week during summer break.[429] The summer hours were mandatory but inconsistent from week-to-week, with schedules posted just one week in advance.[430] In 2015, Brubaker received a letter from her employer stating that she would be laid off during the summer but that she had to remain available to report to work if scheduled, and she also had to attend an employee meeting in mid-July.[431] Due to her reduced hours, Brubaker filed for unemployment benefits during the summer, as she had done in the past, and she returned to full time work at the end of July.[432]

In September, the UIA wrote to Brubaker, challenging her eligibility for benefits based on her apparent failure to provide to the agency work search forms verifying that she had actively searched for work during the period of under employment.[433] Brubaker acknowledged failing to submit such forms but claimed that she had never been told of such requirement.[434] As a result, the UIA issued a notice of determination that Brubaker was ineligible for benefits during several periods of time.[435] Brubaker protested, reiterating that she did not know she needed to submit such forms, and also that the requirement "was waived because either her layoff was short term with a definite return to work date of less than 15 days from her first day of scheduled unemployment, or her layoff was a temporary one of less than 45 days."[436] The UIA issued redetermination notices that affirmed the prior determinations "on the ground that there had been new or additional evidence submitted to warrant reversal."[437]

Brubaker appealed and requested an ALJ hearing.[438] At the hearing, Brubaker testified that she had sought, but could not find, other employment during her layoff due to her employer's on-call

428. Brubaker v. Sodexo Mgmt., Inc., No. 337060, 2018 WL 2269961, at *1 (Mich. Ct. App. May 17, 2018).
429. *Id.*
430. *Id.*
431. *Id.*
432. *Id.*
433. *Id.*
434. *Id.*
435. *Id.* at *2.
436. *Id.*
437. *Id.*
438. *Id.*

requirements.[439] The ALJ reversed the UIA redetermination, reasoning that Brubaker had not been required to submit work search forms in the past, and that Brubaker had provided credible testimony that she "made reasonable efforts to seek work during her periods of underemployment."[440] The UIA then appealed to the MCAC, which reversed the ALJ decision because it found that Brubaker had "failed to comply with the seeking work requirement of § 28(6) of the MES Act."[441] One commissioner dissented, noting that the "employer did not make the claimant's schedule available to her far enough in advance that she could provide another employer with meaningful notice of a scheduling conflict."[442]

Brubaker, in turn, appealed the MCAC decision to the Lenawee County Circuit Court, arguing again that she qualified for a waiver of the work search requirement because she was subject to a short-term layoff with a defined return-to-work date, and "because work was made available to her within 45 days after her layoff."[443] She also argued that, because she was required to check her schedule and appear at work if requested, she was still "attached to the labor market," meaning she did not have to continue an active job search.[444] In opposition, the UIA argued that, while the work search requirements in MCLA § 421.28 "mandated that an individual both seek work and report the details of that work search in order to be eligible for unemployment benefits," Brubaker did not identify the employers she contacted, did not state when she contacted them, and did not submit proof of such contacts.[445] "The UIA also argued that none of the provisions for waiving the work search requirements applied" because Brubaker's layoff lasted longer than the fifteen-day and forty-five-day periods, and there was no evidence from the employer that her layoff would be shorter than forty-five days.[446] The circuit court reversed the MCAC, holding that Brubaker was underemployed and the work search requirement was waived.[447] The UIA sought leave to appeal to the court of appeals, which was granted.[448]

439. *Id.*
440. *Id.* at *3.
441. *Id.*
442. *Id.*
443. *Id.*
444. *Id.*
445. *Id.* at *4.
446. *Id.* at *4.
447. *Id.*
448. *Id.*

On appeal, the court strictly applied MCLA § 421.28(6),[449] which requires that claimants "be actively engaged in seeking work" and "conduct a systematic and sustained search for work in each week the individual is claiming benefits."[450] The section also requires that a claimant report her monthly job search results on the agency's on-line reporting system by filing a written report of such efforts, by mail or facsimile, or by appearing in person at an agency office to report this information.[451] After rejecting Brubaker's ignorance of the law excuse, the court concluded that "based on the record evidence in this case, it is clear to a reasoning mind that claimant failed to report any work search that she may have conducted."[452] It continued: "[t]he MCAC's conclusion in this regard was therefore not contrary to law and was also supported by competent, material, and substantial evidence. Accordingly, the circuit court was not permitted to reverse the MCAC's decision regarding claimant's failure to comply with MCLA section 421.28(6) and her resulting ineligibility for benefits."[453]

The Court of Appeals next addressed the circuit court's conclusion that Brubaker qualified for a waiver of the job search reporting requirements.[454] Arguing in favor of a waiver, Brubaker relied on Mich. Admin. Code R. 421.216(1) and (3), which provide that claimants need not report job search efforts where the lay off in question is either "short-term" (15 days or less) or "temporary" (fewer than 45 days).[455] The court focused on the language of the regulation, which states that waivers of the work search reporting requirement are made by the agency and found no record evidence that Brubaker "ever obtained such a waiver from the UIA."[456] The circuit court's decision that Brubaker was entitled to a waiver was not the circuit court's decision to make, and so that court's reversal of the MCAC's decision exceeded its authority.[457] The MCAC's decision thus did comport with the law "and was supported by competent, material, and substantial evidence," and the circuit court erred in concluding otherwise.[458] As such, the Court of Appeals reversed

449. As the Michigan Court of Appeals noted, this section of the statute was amended effective March 21, 2018. The amendments were only stylistic, however, and did not impact the court's analysis or decision. *Id.* at n.3.

450. *Id.* at *6.

451. *Id.* (citing MICH. COMP. LAWS ANN. § 421.28(6)(a)–(c) (West 2018)).

452. *Id.* at *7 (citing Lawrence v. Mich. Unemployment Ins. Agency, 320 Mich. App. 422, 431, 906 N.W.2d 482 (2017)).

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.* at *8.

457. *Id.* at *9.

458. *Id.* at *8.

the Lenawee County Circuit Court and remanded the case for entry of an order affirming the MCAC's decision.[459]

During the *Survey* period, the Michigan Court of Appeals reversed yet another circuit court decision involving unemployment benefits, this time regarding whether the claimant was ineligible for benefits under the "voluntary quit" provision of Michigan's Employment Security Act.[460] In *Haynes v. Collabera, Inc.*, claimant Jim Haynes, a computer programmer for an IBM subcontractor, resigned but still applied for unemployment benefits, arguing that his resignation was for good cause.[461] Haynes' employer, a staffing company, had a contract with the State of Michigan through IBM, and hired Haynes to perform services under that contract in January 2014.[462] Haynes received a pay increase after about six months.[463] In October 2014, an IBM representative told Haynes that the State was pleased with his work, and that IBM would be extending Haynes' contract and might also increase his pay rate.[464] In December 2014 and again in January 2015, Haynes asked IBM and his employer about the possible rate increase.[465] An IBM representative confirmed in January that Haynes' contract would be extended through December 2015, but that it was unclear how quickly the pay increase would be initiated.[466] However, "as far as [the representative was] aware, that [was] in the works as well."[467] A month later, Haynes tendered a letter of resignation, stating "I feel as though it is in my best interest to resign."[468] The parties tried to resolve the issue prior to Haynes' last day but were not successful.[469]

After leaving his employment, Haynes filed a claim for unemployment benefits, which the UIA denied under the voluntary quit provision.[470] Under that provision, an individual is disqualified from receiving benefits if he or she "left work voluntarily without good cause attributable to the employer or employing unit."[471] When Haynes requested a redetermination, the UIA affirmed its prior decision because

459. *Id.* at *9.
460. MICH. COMP. LAWS ANN. § 421.29(1) (West 2013); *see also* Haynes v. Collabera, Inc, No. 336372, 2018 WL 791569 (Mich. Ct. App. Feb. 8, 2018).
461. *Haynes*, 2018 WL 791569, at *2.
462. *Id.* at *1.
463. *Id.*
464. *Id.*
465. *Id.*
466. *Id.*
467. *Id.*
468. *Id.* at *2.
469. *Id.*
470. *Id.* at *1.
471. MICH. COMP. LAWS ANN. § 421.29(1) (West 2018).

it found no new evidence warranting a reversal.[472] Haynes then requested an ALJ hearing.[473] There, the human resources administrator for Haynes' employer testified that he was not aware of any oral offers of a rate increase made to Haynes, that such an offer could not be made to Haynes without a new purchase order from the client, and that such a purchase order had not been completed until after Haynes had submitted his resignation (but prior to Haynes' last day).[474] Haynes testified that he was not advised of the new contract or its terms "before his last day of employment."[475] The ALJ reversed the UIA's decision, finding that Haynes "had good cause to quit his job" because he was denied a raise for which he had bargained.[476] The UIA appealed to the MCAC, which reversed because it did not consider the reference to a possible raise to be a promise, but rather a mere possibility being discussed by Haynes and his managers.[477] The MCAC concluded that, given these facts, "a reasonable employee would not have quit," and so Haynes did not show good cause attributable to the employer for his decision to leave.[478]

Haynes appealed to the circuit court, which reversed the MCAC.[479] That court opined that the employer's failure to give Haynes a promised raise was good cause for a resignation.[480] The UIA appealed to the Court of Appeals.[481]

On appeal, the UIA contended "that the circuit court erred" because the MCAC's decision "was in accordance with the law and supported by substantial evidence."[482] The Court of Appeals agreed.[483] Section 29 of the Michigan Employment Security Act disqualifies individuals from unemployment benefits if they voluntarily leave work "without good cause attributable to the employer."[484] Courts interpreting that provision have found that good cause exists "where an employer's actions would cause a reasonable, average, and otherwise qualified worker to give up his or her employment."[485] The appellate court determined that that the

472. *Haynes*, 2018 WL 791569, at *2.
473. *Id.*
474. *Id.*
475. *Id.*
476. *Id.*
477. *Id.*
478. *Id.* at *3.
479. *Id.*
480. *Id.*
481. *Id.*
482. *Id.*
483. *Id.*
484. MICH. COMP. LAWS ANN. § 421.29(1) (West 2018).
485. *Haynes*, 2018 WL 791569, at *4 (citing McArthur v. Borman's, Inc., 200 Mich. App. 686, 693, 505 N.W.2d 32, 37 (1993)).

circuit court "misapplied the substantial evidence test" when it reweighed evidence that was already before the MCAC and set aside the MCAC's findings.[486] According to the court of aappeals, it was not the circuit court's job to resolve conflicting evidence, and it also was not appropriate to set aside the MCAC's findings, given that alternative findings also could have been supported by substantial evidence on the record.[487] Because it was undisputed that Haynes left voluntarily, the issue was whether there was good cause for his resignation attributable to his employer.[488] The Court of Appeals rejected Haynes' attempt to analogize his case to *Degi v. Varano Glass Co.,* in which good cause had been found.[489] In *Degi,* the claimant had actually been promised a raise, whereas the MCAC concluded that Haynes was not.[490] Also, there were several additional inequities in *Degi* that were not present in *Haynes,* including that the *Degi* claimant set up a new department for his employer, attempted to secure new clients for it, and shared his talents with other employees, all in reliance on the promise of a raise from the employer.[491]

As a result, the Court of Appeals agreed with the MCAC's determination that Haynes had failed to establish good cause and the case was remanded to the circuit court to enter an order affirming the MCAC's decision.[492]

D. Payment of Wages and Fringe Benefits Act

In *Ramos v. Intercare Community Health Network,* the Michigan Court of Appeals disagreed with an earlier interpretation of the anti-discrimination provision of Michigan's Payment of Wages and Fringe Benefits Act (PWFBA), ultimately determining that the PWFBA does cover employees exercising a right on their own behalf although binding precedent held otherwise.[493]

Intercare Community Health Network (ICHN) terminated Joel Ramos from his job on June 26, 2015 because, according to ICHN, he

486. *Id.* at *4.
487. *Id.*
488. *Id.* at *5.
489. *Id.* at *5 (citing Degi v. Varano Glass Co., 158 Mich. App. 695, 405 N.W.2d 129 (1987).
490. *Id.*
491. *Id.* (citing *Degi,* 158 Mich. App. at 699, 405 N.W.2d at 131).
492. *Id.* at *6.
493. 323 Mich. App. 135, 916 N.W.2d 287 (2018), *leave to appeal denied,* 920 N.W.2d 141 (2018) (mem.); *see also* MICH. COMP. LAWS ANN. §§ 408.471–.490 (West 2018); Cockels v. Int'l Business Expositions, Inc., 159 Mich. App. 30, 406 N.W.2d 465 (1987).

falsified his time sheets.[494] Ramos then filed an administrative complaint with the Wage and Hour Program (WHP) of Michigan's Department of Licensing and Regulatory Affairs (LARA), maintaining that "he had a right to be paid his wages under MCL[A] § 408.472."[495] Ramos claimed that he had properly filled out his time sheet and that by doing so, he had exercised a right to receive payment of wages under the PWFBA.[496] Ramos asserted that he could not be terminated for properly filling out his time sheet under MCLA § 408.483(1) and sought reinstatement with back pay under the remedy provision of MCLA § 408.483(2).[497]

MCLA § 408.483(1) bars an employer from discharging or discriminating against an employee who participates in certain activities, stating:

> An employer shall not discharge an employee or discriminate against an employee because the employee filed a complaint, instituted or caused to be instituted a proceeding under or regulated by this act, testified or is about to testify in a proceeding, or because of the exercise by the employee on behalf of an employee or others of a right afforded by this act.[498]

The WHP ruled against Ramos, concluding that he had not been discharged for engaging in any of the protected activities listed in the statute.[499] The WHP apparently relied on the Court of Appeals decision in *Reo v. Lane Bryant,* which held that § 408.483(1) only protects employees when acting on behalf of another employee or person.[500] The court in *Reo* had specifically concluded that filling out one's own time sheet does not constitute a protected activity under the PWFBA.[501] According to *Reo*, § 408.483(1) only safeguards employees who "act on behalf of *another* employee or other person. Simply exercising a right on one's own behalf would not bring an employee within the purview of [MCL 408.483]."[502] In light of this precedent, the WHP dismissed Ramos's complaint.[503] Ramos then petitioned for judicial review, but the

494. *Ramos*, 323 Mich. App. at 138, 916 N.W.2d at 288.
495. *Id.*
496. *Id.*
497. *Id.*
498. MICH. COMP. LAWS ANN. § 408.483(1) (West 2018).
499. *Ramos*, 323 Mich. App. at 139, 916 N.W.2d at 289 (2018).
500. *Id.* (citing Reo v. Lane Bryant, Inc., 211 Mich. App. 364, 536 N.W.2d 556 (1995)).
501. *Id.*; *Reo*, 211 Mich. App. at 367, 536 N.W.2d at 558.
502. *Reo*, 211 Mich. App. at 367, 536 N.W.2d at 558.
503. *Ramos*, 323 Mich. App. at 137–38, 916 N.W.2d at 288.

circuit court affirmed the WHP decision.[504] Ramos then appealed to the Michigan Court of Appeals.[505]

Rulings from the circuit court on appeal from an administrative decision are analyzed under a clearly erroneous standard of review to determine whether the lower court applied the correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings.[506] A finding is clearly erroneous when the court "is left with the definite and firm conviction that a mistake has been made."[507]

In *Ramos*, the Court of Appeals affirmed the circuit court because it was bound to do so by *Reo*, but stated firmly that, if not bound by precedent, it would have ruled otherwise.[508] The court first observed that the plain meaning of MCLA § 408.483(1) does not reflect an intent to only cover acts on behalf of another because the word "another" does not even appear in the statute.[509] The court explained that "[t]he statute's words are the most reliable indicator of the Legislature's intent and should be interpreted based on their ordinary meaning and the context within which they are used in the statute."[510] As such, courts cannot substitute words in a statute or "mistakenly assume that the Legislature mistakenly used one word or phrase instead of another."[511] Under the plain meaning rule, statutes are to be interpreted using the ordinary meaning of the language of the statute.[512] "When a statute does not define a word, we presume the Legislature intended the word to have its plain and ordinary meaning, which we may discern by consulting a dictionary."[513] Thus, the *Ramos* court looked to the dictionary definition of the article "a," because the language of the statute specifically reads, "on behalf of *an* employee."[514] The court then differentiated the

504. *Id.* at 138, 916 N.W.2d at 288.

505. *Id.*

506. *Id.* at 139 n.2, 916 N.W.2d at 289 n.2 (citing Buckley v. Prof. Plaza Clinic Corp., 281 Mich. App. 224, 231, 761 N.W.2d 284, 289 (2008)).

507. *Ramos*, 323 Mich. App. at 139 n.2, 916 N.W.2d at 289 n.2 (quoting Logan v. Manpower of Lansing, Inc., 304 Mich. App. 550, 555, 847 N.W.2d 679, 681 (2014)).

508. *Id.* at 140, 916 N.W.2d at 289.

509. *Id.*

510. *Id.* at 140–41, 916 N.W.2d at 289 (quoting Burleson v. Dep't of Envtl. Quality, 292 Mich. App. 544, 557–58, 808 N.W.2d 792, 800 (2011) (Gleicher, J., dissenting) (quotation marks and citation omitted)).

511. *Id.* at 141, 916 N.W.2d at 289–90 (quoting *Burleson*, 292 Mich. App. at 558, 808 N.W.2d at 800).

512. *See* MICH. COMP. LAWS ANN. § 8.3a (West 2018).

513. *Ramos*, 323 Mich. App. at 141, 916 N.W.2d at 290 (quoting Denton v. Dep't of Treasury, 317 Mich. App. 303, 312, 894 N.W.2d 694, 698 (2016)).

514. *Id.* at 141 n.4, 916 N.W. at 290 n.4 ("MCL 408.483(1) refers to 'an employee.' (Emphasis added). However, when 'an' is used as an indefinite article, Merriam

definition of "a" from that of "another" to support its conclusion that the substitution of "another" by *Reo* was not proper under the plain meaning of the statute.[515] In the view of the *Ramos* court, then, the statute can cover acts taken by an employee on his own behalf.

Further, the court noted that *Reo* stands alone in its holding.[516] A court of appeals panel had initially addressed the question in *Cockels v. Int'l Business Expositions, Inc.*, holding that MCLA section 408.483(1) applied to an employee who exercised a right on her own behalf.[517] Although *Cockels* was decided before the November 1, 1990 deadline of MCR 7.215(J)(1),[518] and therefore was not binding on the *Reo* court, the *Reo* opinion rejected *Cockels* with no analysis, stating only that "[w]e believe [the *Cockels* Court's] interpretation to be incorrect."[519]

Bound by *Reo*, the *Ramos* court affirmed the decision below, but asked that, under MCR 7.215(J)(2), a conflict panel evaluate the reasoning and conclusions set forth by *Reo*.[520] However, the request for a conflict panel was declined by an order of the entire court on February 21, 2018.[521]

In his partial dissent, Judge Joel P. Hoekstra agreed with the majority's overall conclusion to affirm based on *Reo*, but disagreed with the view that *Reo* was incorrectly decided.[522] In Judge Hoekstra's view, the phrase "on the behalf of" in MCLA § 408.483(1) signaled "an agency or representative relationship" with another, based on the dictionary definitions of "behalf" and "on behalf of."[523] According to Judge Hoekstra, the inclusion of the phrase "on behalf of" meant that an

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Webster's Collegiate Dictionary (11th ed.) refers to the definition of 'a' for the usage of 'an.'").

515. *Id.* at 141, 916 N.W.2d at 290.

516. *Id.*

517. *Ramos*, 323 Mich. App. at 141, 916 N.W.2d at 290 (citing Cockels v. Int'l Bus. Expositions, Inc., 159 Mich. App. 30, 34–35, 406 N.W.2d 465, 467 (1987)).

518. MCR 7.215(J)(1) states:

> A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

519. *Ramos*, 323 Mich. App. at 142, 916 N.W.2d at 290 (quoting Reo v. Lane Bryant, Inc., 211 Mich. App. 364, 367 n.3, 536 N.W.2d 556, 558 n.3 (1995)).

520. *Ramos*, 323 Mich. App. at 142, 916 N.W.2d at 290.

521. Ramos v. Intercare Cmty. Health Network, 2018 Mich. App. LEXIS 357 (Mich. Ct. App. Feb. 21, 2018). Subsequently, the Michigan Supreme Court denied leave to appeal, stating the Court was "not persuaded that the question presented should be reviewed by this Court." Ramos v. Intercare Cmty. Health Network, 920 N.W.2d (Mich. 2018) (mem.).

522. *Ramos*, 323 Mich. App. at 142, 916 N.W.2d at 290 (Hoekstra, J., dissenting).

523. *Id.* at 144, 916 N.W.2d at 291.

employee could only exercise a right on behalf of *another*, and so the *Reo* court's addition of the word "another" was in line with the plain meaning of the statute.[524] Furthermore, the dissent stated that *Cockels* was not binding because it was decided in 1987, and the *Reo* court therefore was not obliged to follow it.[525] "I note that Reo was decided in 1995 and that it has constituted the rule of law on this issue for more than 20 years, during which the Legislature has not seen fit to address this Court's interpretation of MCL 408.483(1)."[526] Thus, the dissent would have simply affirmed the circuit court's decision, and not called for a conflict panel.[527]

E. Authentic Credentials in Education Act

In 2005, the Michigan Legislature adopted the Authentic Credentials in Education Act (ACEA)[528] to "prohibit the issuance or manufacture of false academic credentials."[529] In 2018, in *Estate of Buol v. Hayman Co.*, the Michigan Court of Appeals considered whether that Act's provisions applied to an employee's resume fraud.[530] The court found that it did, but also expressed concerns as to whether the defendant had (or would be able) to establish that, within the limitations period, it had suffered damages due to the resume fraud.[531]

Cheryl Ann Buol was hired by the Hayman Company in 1991 after submitting an application in which she claimed to have earned a bachelor's degree from the University of Wisconsin, which was not true.[532] She eventually became the company's chief operating officer, and after 23 years of employment she left the company in 2014.[533] When she sued for discrimination under ELCRA, Hayman filed a counterclaim under the ACEA.[534] Summary disposition was granted in favor of Hayman on Buol's ELCRA claim and also on the company's ACEA

524. *Id.*
525. *Id.* at 145, 916 N.W.2d at 292.
526. *Id.*
527. *Id.*
528. MICH. COMP. LAWS ANN. §§ 390.1601-.1605 (West 2018).
529. 2005 Mich. Pub. Acts 100 (West) (codified in MICH. COMP. LAWS ANN. §§ 390.1601–.1605 (West 2018).
530. 323 Mich. App. 649, 918 N.W.2d 211 (2018).
531. *Id.* at 662–63, 918 N.W.2d at 219.
532. *Id.* at 652, 918 N.W.2d at 214.
533. *Id.*
534. *Id.*

claim.[535] Judgment was entered for Hayman for $100,000, the statutory minimum under the ACEA, and Buol appealed.[536]

Buol's primary argument in the appellate court was that the ACEA was directed not at individuals but at so-called "diploma mills" that issued false academic credentials.[537] Buol argued further that she had not knowingly used a "false academic credential," as prohibited under MCLA § 390.1604(1), because she did not submit any document, false or otherwise, issued by a qualified institution to Hayman.[538] While agreeing that Buol had not violated MCLA § 390.1604(1), the appellate court rejected her claim nonetheless, noting that the plain language of § 390.1604(2) states that "an individual who does not have an academic credential shall not knowingly use or claim to have that academic credential to obtain employment or a promotion or higher compensation in employment . . . "[539] According to the court, this "plain unambiguous language" indicated that the Legislature intended to address claims by an individual that she possessed an academic credential that she did not in fact have—classic resume fraud.[540]

The court of appeals was more receptive to Buol's argument with respect to Hayman's entitlement to statutory damages, however.[541] Hayman argued that such an award was consistent with the ACEA because the company was damaged by using Buol's biography and credentials in its promotional materials, and also by giving Buol salary increases.[542] The court noted, however, that Hayman had not "identified any action by [Buol]—after 1991—by which she 'knowingly use[d] or claim[ed] to have [a non-existent] academic credential to obtain a promotion or higher compensation," as required under the act.[543] Further, in ordering statutory damages, the trial court had not explored how Buol's 1991 resume fraud caused actual harm to Hayman.[544] As a result,

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535. *Id.* at 653, 918 N.W.2d at 214.

536. *Id.*

537. *Id.*

538. *Id.* at 654, 918 N.W.2d at 215.

539. *Id.* at 655, 918 N.W.2d at 215 (quoting MICH. COMP. LAWS ANN. § 390.1604(2) (West 2018)).

540. *Estate of Buol*, 323 Mich. App. at 655, 918 N.W.2d at 215. The court also found wanting Buol's argument that applying the ACEA to resume fraud would violate the Title-Object Clause of the Michigan Constitution, because there is no reference to "resume fraud" in the act's title. *Id.* at 656–60, 918 N.W.2d at 216–18. The court found that the ACEA's title was not "so diverse from its body as to raise a constitutional infirmity." *Id.*

541. *Id.* at 661, 918 N.W.2d at 218.

542. *Id.* at 660, 918 N.W.2d at 218.

543. *Id.* at 661, 918 N.W.2d at 218.

544. *Id.* at 663, 918 N.W.2d at 219.

the court concluded that "in light of the lack of any specific findings by the trial court, or any explanation of its reasoning in granted defendant damages under MCL[A §] 390.1605, that remand is required . . . on the issue of whether defendant was 'a person damaged by a violation' of the act."[545]

V. CONCLUSION

While the Michigan Supreme Court did leave several open issues on the table, Michigan courts did provide resolution with respect to numerous statutory interpretation questions during the *Survey* period. While some of those answers might be less than satisfactory, it may now be up to the Legislature to provide additional clarity–a request expressly made by Justice Zahra in *McNeill-Marks,*[546] in his "Statement to the Legislature" contained within his dissent in that case. With respect to the WPA, Justice Zahra wrote "I strongly encourage the Legislature to reexamine this inartfully drafted statute, particularly the 'public body' definition."[547] After listing examples of possible "public bodies," such as employees of the judiciary, Justice Zahra concluded:

> I question whether the Legislature considered the vast implications of including in the exceedingly broad definition of 'public body' all agents, boards, commissions, councils, and employees of the legislative and executive branches of government. If this is not what the Legislature intended, it would be well served to consider amending the definition of 'public body' under the WPA.[548]

Perhaps by the next *Survey,* we will know whether the Legislature heard this plea.

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545. *Id.* While the court of appeals retained jurisdiction, it appears that the matter was subsequently settled in the trial court.

546. 502 Mich. 851, 912 N.W.2d 181 (2018), *reconsideration denied*, 503 Mich. 854, 915 N.W.2d 888 (2018) (mem.).

547. *Id.* at 867, 912 N.W.2d at 195 (Zahra, J., dissenting).

548. *Id.* at 865–68, 912 N.W.2d at 194-95.