EMPLOYMENT AND LABOR LAW

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I. INTRODUCTION

During the *Survey* period,[1] the Michigan Supreme Court held that the Whistleblower's Protection Act protects those employees who report suspected violations to their own public body employer;[2] that there is no private cause of action under the law restricting the right of municipalities to impose residency restrictions;[3] that words alone are insufficient to place an employer on notice of an employee's criminal sexual propensities, in order to impose negligent retention liability on the employer;[4] and that employment agreements stating that the employee can be terminated with or without cause are at-will employment agreements, even if the agreement also contains severance payment provisions.[5] Court of appeals decisions established the appropriate burden of proof for an employee's disqualification for unemployment benefits due to a refusal to accept suitable work;[6] that a plaintiff suing under the Bullard-Plawecki Right to Know Act can only receive those damages directly attributable to the employer's violation;[7] that the Veterans' Preference Act provides hiring preferences only to those veterans with qualifications comparable to those of other applicants;[8] and that non-solicitation agreements are valid even when it is the employer that ends the employment relationship by closing a local office.[9]

The variety and breadth of these decisions was unusual, as the courts addressed issues involving employment contracts, employment statutes, employment torts, and employment discrimination—an entire panoply of issues of interest to employers and employees hoping for clarification as to their respective rights and remedies. To be sure, areas of disagreement remain, including what constitutes direct evidence of discrimination and

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1. The *Survey* period covers, generally, May 31, 2006 to June 1, 2007. To the extent that significant decisions, particularly those from the Michigan Supreme Court, were issued just beyond that period, they have been included in this article.

2. *See generally* Brown v. Mayor of Detroit, 478 Mich. 589, 734 N.W.2d 514 (2007).

3. *See generally* Lash v. City of Traverse City, 479 Mich. 180, 735 N.W.2d 628 (2007).

4. *See* Brown v. Brown, 478 Mich. 545, 552, 739 N.W.2d 313, 316 (2007).

5. *See generally* Pandy v. Bd. of Water and Light, 480 Mich. 899, 739 N.W.2d 86 (2007).

6. *See generally* Eyre v. Saginaw Corr. Facility, 274 Mich. App. 382, 733 N.W.2d 437 (2007).

7. *See generally* McManamon v. Charter Twp. of Redford, 273 Mich. App. 131, 730 N.W.2d 757 (2006).

8. *See generally* Carter v. Ann Arbor City Attorney, 271 Mich. App. 425, 722 N.W.2d 243 (2006), *leave to appeal denied*, 480 Mich. 975, 741 N.W.2d 519 (2007).

9. *See generally* Rooyakker & Sitz, P.L.L.C. v. Plante & Moran, P.L.L.C., 276 Mich. App. 146, 742 N.W.2d 409 (2007).

which federal entities are "law enforcement agencies" under the Whistleblower's Protection Act. Presumably, however, resolution of those issues will be the topic of next year's *Survey*.

II. PLEADING AND PROVING EMPLOYMENT DISCRIMINATION CLAIMS

A. Evidence of Discrimination

Under Michigan's Elliott-Larsen Civil Rights Act (ELCRA),[10] an employer is prohibited from basing employment decisions on the religion, race, color, national origin, age, sex, height, weight, or marital status of its applicants or employees.[11] Proof of illegal discriminatory treatment can be established by direct evidence, or by indirect or circumstantial evidence.[12] Direct evidence is evidence that "if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions."[13] In addition, direct evidence must provide proof that the discrimination was causally connected to the adverse employment decision.[14] If the plaintiff produces adequate direct evidence, the case should be submitted to the fact finder for a determination as to whether the plaintiff's claims are true.[15] Summary disposition thus is not appropriate in such cases, because, in essence, direct evidence is an admission of bias or discriminatory intent, leaving the jury to determine only whether the admission actually occurred, and, if so, whether that bias caused the adverse employment action.

In most instances, the employment discrimination plaintiff offers only indirect evidence to support his or her claim. Such cases then are analyzed according to the framework first established by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*,[16] which since has been adopted by Michigan courts.[17]

The *McDonnell Douglas* test allows "a plaintiff to present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful discrimination."[18] To establish this rebuttable prima facie case of

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

11. *See generally id.*

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

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

14. *See id.* at 133, 666 N.W.2d at 193.

15. Harrison v. Olde Fin. Corp., 225 Mich. App. 601, 613, 572 N.W.2d 679, 684 (1997).

16. 411 U.S. 792 (1973).

17. *See Sniecinski*, 469 Mich. at 133-34, 666 N.W.2d at 193-94.

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

discrimination, the plaintiff must come forth with evidence that (1) she is a member of a class protected by the ELCRA, (2) she suffered an adverse employment action, and (3) that the circumstances resulting in the adverse employment action give rise to an inference of unlawful discrimination.[19] In a failure to hire claim, such an inference could arise from evidence that the person hired was outside the plaintiff's protected classification.[20] In a termination case, such an inference could arise from evidence that an employee similarly situated to the plaintiff (but not in the protected class) was not terminated for the same or similar conduct.[21] Once the plaintiff presents the appropriate prima facie case, the employer then has the opportunity to offer a legitimate, non-discriminatory reason for the adverse employment action.[22] To avoid summary disposition, the plaintiff then must establish that the proffered reason was merely a pretext for discrimination.[23]

Because reliance on direct evidence provides a surer path to the jury, discrimination plaintiffs often push the court to accept their evidence as direct evidence. The precise nature of "direct evidence" seems to confound parties to employment litigation as well as courts. Again during this *Survey* period, Michigan appellate courts reached divergent conclusions as to what constitutes direct evidence of discrimination. In most cases, the evidence proffered by the plaintiff as direct evidence consisted of statements made by management level employees of the defendant employer.

Courts therefore have developed a five-part test to analyze whether such statements are admissible evidence of discrimination, or merely "stray remarks."[24] Under this test, courts are to ask:

> (1) Were the disputed remarks made by the decisionmaker or by an agent of the employer uninvolved in the challenged decision?
>
> (2) Were the disputed remarks isolated or part of a pattern of biased comments?
>
> (3) Were the disputed remarks made close in time or remote from the challenged decision?

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19. *Id.*

20. *Hazle*, 464 Mich. at 471-72, 625 N.W.2d at 525.

21. *See generally* Town v. Michigan Bell Tel. Co., 455 Mich. 688, 700, 568 N.W. 2d 64, 70 (1997).

22. *See Sniecinski*, 469 Mich. at 134, 666 N.W.2d at 194.

23. *See id.*

24. *See generally* Krohn v. Sedgwick James of Michigan, Inc., 244 Mich. App. 289, 624 N.W.2d 212 (2001); *see also Sniecinksi*, 469 Mich. at 136 n.8, 666 N.W.2d at 194 n.8.

(4) Were the disputed remarks ambiguous or clearly reflective of discriminatory bias?[25]

Depending on the balance of those factors, a statement may be admitted in support of a claim of discrimination, or may be excluded under Michigan Rule of Evidence ("MRE") 402 or 403.[26]

This test was applied by one panel of the Michigan Court of Appeals in *Sobieski v. Takata Seat Belts*,[27] which concluded that three age-based remarks ascribed to the plaintiff-employee's supervisor were not direct evidence of discrimination.[28] The alleged statements were that "[I] just can't work with older guys;" "These guys just won't work and we've got to get more young people in here;" and "The younger ones feel better or normal."[29] Applying the five-part "stray remarks" test, the court noted that the statements were not made in reference to any particular employee nor in reference to any adverse employment action taken against the plaintiff; were made months before that adverse employment action; and were ambiguous, vague and isolated.[30]

In *Goodman v. Genesee County*,[31] a reverse discrimination case decided on the same day as *Sobieski*, a different panel of the court appeals did not specifically apply the "stray remarks test." That panel concluded that the following email sent to the plaintiff from his African-American supervisor *was* direct evidence of discrimination: "[B]eing white and so autonomous in your position for so many years, I bet you think the board will listen to you tomorrow. You'll find out different, they listen to me now. You people seem to think you can get away with anything but things have changed around here now."[32] In reversing the trial court's grant of summary disposition on the plaintiff's reverse race discrimination claim, the court of appeals stated that the statement was direct evidence of discrimination because the email referred to the plaintiff's race, an upcoming board vote on whether to eliminate the plaintiff's position, and the supervisor's intent to influence that vote. The

25. *Krohn*, 244 Mich. App. at 292, 624 N.W.2d at 214.

26. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the supreme court. Evidence which is not relevant is not admissible." MICH. R. EVID. 402. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." MICH. R. EVID. 403.

27. No. 268366, 2006 WL 2270382 (Mich. Ct. App. Aug. 8, 2006), *leave to appeal denied*, 477 Mich. 985, 725 N.W.2d 459 (2007).

28. *Id.* at *3.

29. *Id.* at *1.

30. *Id.* at *3.

31. No. 266955, 2006 WL 2270411 (Mich. App. Aug. 8, 2006).

32. *Id.* at *2.

court held that this was evidence that, if believed, required the conclusion that discrimination had occurred.[33]

Although the court in *Goodman* did not expressly apply the *Krohn* "stray remark" analysis, the court's analysis did touch upon most of the *Krohn* factors. The email, through its own content, revealed that it was sent close in time to the adverse employment action ("I bet you think the board will listen to you tomorrow") and that it occurred in relation to an adverse employment action. The question of whether the author of the email (the plaintiff's supervisor) was the decision-maker as to the elimination of the plaintiff's position received greater attention from the court, which ultimately concluded that there was sufficient evidence that the supervisor "provided primary input into the board's decision" to eliminate the plaintiff's position.[34] Finally, the court's conclusion that the substance of the email, if believed, "requires the conclusion that discrimination occurred" addressed the *Krohn* inquiry into whether the remark was "clearly reflective of discriminatory bias." In essence, that final *Krohn* factor is a reformulation of the traditional definition of direct evidence, as evidence that, without inference, requires the conclusion that discrimination played a role in the employment decision at issue.

In *Roberts v. Trinity Health-Michigan*,[35] yet another panel of the court of appeals held that age-based comments were not direct evidence of discrimination, because the comments were not close in time to the termination decision, and did not "by themselves require the conclusion that unlawful discrimination was at least a motivating factor."[36] In that age discrimination case, the plaintiff alleged that he was told by his supervisor that she expected more of him because of his age, and that she questioned how the plaintiff could keep up with the demands of a hospital residency schedule, given that she was younger than the plaintiff but could not do that herself.[37] The court did not employ the "stray remark" analysis adopted by the court in *Krohn*.

The Michigan Supreme Court had an opportunity to provide direction to litigants regarding direct evidence in *Ramanathan v. Wayne State Univ. Bd. of Governors*.[38] During the *Survey* period, the supreme court ordered oral argument on the employer's application for leave to appeal, directing the parties to submit supplemental briefs on a number of issues of particular interest to the employment bar, such as direct evidence and stray remarks.[39] On March 7, 2008, however, in lieu of

33. *Id.*
34. *Id.* at *3-4.
35. No. 258912, 2006 WL 3372955 (Mich. Ct. App. Nov. 21, 2006).
36. *Id.* at *4.
37. *Id.*
38. 480 Mich. 1090, 745 N.W.2d 115 (2008).
39. Ramanathan v. Wayne State Univ. Bd. of Governors, 478 Mich. 910, 733 N.W.2d 21 (2007). The court's order stated, in part:

granting leave to appeal, the court reversed in part and remanded in part.[40] The court concluded that the plaintiff's timely claims of national origin discrimination were without evidentiary support, leaving only his retaliation claim for trial.[41]

Chathapuram Ramanathan, an Asian Indian, sued the Wayne State Board of Governors in 1998, claiming that he had been denied tenure in 1995 because of his national origin and race, and subjected to a hostile work environment.[42] As evidence of discrimination, he pointed to two statements allegedly made in 1993 by Leon Chestang, the chair of the plaintiff's department.[43] In one such statement, Chestang allegedly said that the sitar was "an obscure instrument."[44] In another statement, Chestang allegedly made a comment about a sacrificial lamb, stating that he would not want to be "curried."[45] Ramanathan's suit was dismissed by the trial court in part because it was untimely, because the alleged racial harassment had occurred more than three years before suit was filed.[46] The court of appeals reversed, however, holding that, under the continuing violations doctrine, the plaintiff's claims were timely.[47]

The dispute returned to the trial court, where the defendants again moved for summary disposition, arguing that the Michigan Supreme Court had since abrogated the continuing violations doctrine in *Garg v. Macomb County Cmty Mental Health Servs.*[48] The trial court initially granted the defendants' motion, but then, on the plaintiff's motion for reconsideration, reinstated the case.[49] The defendants sought leave to appeal, which was granted.

The court of appeals agreed with the defendants that only Ramanathan's tenure claim survived *Garg*, because only that claim

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> At oral argument, the parties shall address: (1) whether there is any direct evidence, apart from the comments about a sitar and curried lamb, to indicate that the defendant Leon Chestang had a discriminatory animus toward the plaintiff; (2) whether the sitar and curried lamb comments by the defendant were more than mere stray remarks; (3) whether defendant Chestang's comments and actions are subject to the same-actor inference; (4) whether there is any evidence that the provost of defendant university had any knowledge of, or relied in any manner on, any discriminatory animus by defendant Chestang; and (5) whether there is any evidence that the provost harbored any national origin or racial animus toward the plaintiff.

Id. at *21-22.

40. *Ramanathan,* 478 Mich. 910, 745 N.W.2d 115 (2008).

41. *Id.*

42. Ramanathan v. Bd. of Governors of Wayne State Univ., No. 227726, 2002 WL 551097 (Mich. Ct. App. April 12, 2002).

43. *Id.* at *1.

44. *Id.*

45. *Id.*

46. *Id.* at *2.

47. *Id.* at *8-9.

48. 472 Mich. 263, 696 N.W.2d 646 (2005), *amended* 473 Mich. 1205, 699 N.W.2d 697 (2005).

49. *Ramanathan,* 2007 WL 28416, at *1.

accrued in the three years prior to the lawsuit.[50] The court of appeals refused, however, to direct the trial court to enter summary disposition as to Ramanathan's untimely claims, because the plaintiff had "concede[d] on appeal" that those claims are untimely.[51] The court of appeals also rejected the defendants' argument that even Ramanathan's tenure claim should be dismissed, because the evidence of discrimination alleged in support of that claim—Chestang's 1993 statements—were untimely under *Garg*.[52] The court said that "we find no basis in *Garg* for a blanket exclusion of evidence in this case solely because the event at issue occurred outside the limitations period."[53]

In *Garg,* the Supreme Court seemingly held that evidence of untimely acts could not be considered in support of a discrimination claim, holding that "we conclude that, once evidence of acts that occurred outside the statute of limitations period is removed from consideration, there was insufficient evidence" to support Garg's suit.[54] The court originally included a footnote stating that evidence of untimely acts should never be admitted, but on rehearing, the court deleted that footnote.[55]

The *Ramanathan* court noted the confusion resulting from the deletion of footnote 14, stating:

> Despite the language in *Garg,* referencing limitations on the admissibility of evidence in that case, we cannot read the amended opinion so broadly as to exclude per se all background evidence of alleged discriminatory or retaliatory acts occurring outside the limitations period. Absent clear guidance in this regard from the Supreme Court, we conclude that this evidence

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50. *Id.*

51. *Id.*

52. *Id.* at *2.

53. *Id.*

54. *Garg*, 472 Mich. at 266, 696 N.W. 2d at 650.

55. The text of the original footnote 14 can be found in the May 11, 2005 slip opinion initially issued by the Supreme Court, *available at* http://courtofappeals.mijud.net/documents/opinions/final/sct/20050511_s121361_103_garg1nov04-op.pdf (last visited Mar. 30, 2008). The footnote stated, in part:

> Notwithstanding our overruling of Sumner, the dissent, unlike the majority, would still allow acts falling outside the period of limitations to be admissible 'as background evidence in support of a timely claim' . . . quoting [Nat'l Rail Passenger Corp. v.] Morgan, 536 U.S. 101 (2002) . . . . The dissent would enable a plaintiff to claim that an adverse employment action occurring outside the limitations period constituted evidence that the employer is committing current violations. Such an understanding would essentially resurrect the 'continuing violations' doctrine of Sumner through the back door. It would bar an employee from directly recovering for untimely acts of discrimination but allow the employee to indirectly recover for the same acts.

Garg v. Macomb County Cmty. Mental Health Servs., No. 121361 Slip Opinion (Mich. May 5, 2005).

> is subject to the rules of evidence and other applicable governing law, and its admissibility is within the discretion of the trial court.[56]

The reliance on evidence of untimely acts in discrimination cases as so-called "background" evidence has been much discussed in the appellate courts (and among employment attorneys as well). Plaintiffs' counsel introduce such evidence in the hope that it will shore up other evidence as to the defendant-employer's discriminatory intent. Defense counsel argue that the prejudicial impact of such evidence, which is unlikely to be cured by a jury instruction, should render the evidence inadmissible. Court decisions have come out on either side of the issue.[57] The Michigan Supreme Court's order in *Ramanathan* sidestepped the issue, remanding the case for trial solely on the plaintiff's retaliation claim, without direction on the evidentiary issues.[58]

The Supreme Court in *Ramanathan* also shed little light on issues of direct evidence and stray remarks. The court of appeals in *Ramanathan* had concluded that Chestang's "sitar" and "curried lamb" remarks were direct evidence of discrimination, but conducted no analysis as to whether the comments were stray remarks under *Krohn*.[59] It is difficult to see such remarks as evidence "requir[ing] the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions."[60] While the Supreme Court's March 2008 order offered no detailed guidance as to this issue, a majority of the court held that the plaintiff had not presented "a genuine issue of material fact to sustain his claim of racial or national origin discrimination in violation of the Civil Rights Act."[61] Since the only evidence of discrimination offered by the plaintiff in support of these claims were Chestang's alleged "sitar" and "curried lamb" remarks, it appears that the supreme court did not view them as direct evidence of discrimination. A more thorough elucidation of Michigan law on these evidentiary issues apparently will have to wait for another day.

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56. *Ramanathan*, 2007 WL 28416 at *3.

57. *See, e.g.*, Allen v. DaimlerChrysler Corp., No. 265427, 2006 WL 626239 (Mich. Ct. App. Mar. 14, 2006); Hill v. PBG Michigan, L.L.C., No. 268692, 2006 WL 2872581 (Mich. Ct. App. Oct. 10, 2006); Shepherd v. General Motors, No. 260171, 2005 WL 1750626 (Mich. Ct. App. July 26, 2005); Conti v. Am. Axle & Mfg, No. 05-72335, 2006 WL 3500632 (E.D. Mich. Dec. 4, 2006); *Ramanathan*, 2007 WL 28416.

58. In *Ramanathan*, dissenting Justice Markman chastised the majority for failing to address the question of whether evidence of events occurring outside the limitation period may be admitted at trial, stating that the "practical effect of the majority's order will be . . . to case doubt upon the integrity of a growing number of discrimination trials by failing to clarify under *Garg* the proper scope of admissible evidence in such trials." *Ramanathan*, 480 Mich. 1090, 745 N.W.2d at 121 (. arkman, J., dissenting).

59. *Ramanathan*, 2002 WL 551097 at *5.

60. *Hazle*, 464 Mich. at 462, 628 N.W.2d at 521.

61 480 Mich. 1090, 745 N.W.2d at 116.

B. Affirmative Defenses - Res Judicata

While it is not unheard of for disgruntled employees to file serial lawsuits against their former employers, not all are as persistent as the plaintiff in *Young v. Twp of Green Oak,*[62] in which the Sixth Circuit Court of Appeals considered the res judicata impact of those serial filings.

Larry Young was employed as a police officer by Green Oak Township, on active duty from 1978 until 1992. From 1992 until 2003, he remained on the Township's records as an employee, receiving workers' compensation benefits for much of that period.[63] Eventually, in 2003, he was terminated because he was unable to perform his essential duties with or without accommodation.[64]

During these same years, Young filed a number of lawsuits against the Township. In July 1995, he sued in state court, claiming violations of ELCRA and the Michigan Handicapper's Civil Rights Act (MHCRA)[65] for the Township's failure to promote him and for retaliatory discharge. The trial court dismissed all but Young's retaliation claim, which then was settled. The settlement agreement permitted Young to appeal the trial court's dismissal of his MHCRA claim to the Michigan Court of Appeals.[66] He did so, and that court affirmed.[67]

Young filed a second state court lawsuit in June 1998, claiming breach of contract, failure to accommodate under the ELCRA and the MHCRA, disability discrimination, intentional infliction of emotional distress, harassment, and conspiracy to deprive him of his civil rights. All claims were dismissed by the trial court.[68]

In 1999, Young filed his third suit, this time in federal court, alleging a hostile work environment as well as violation of 42 U.S.C. § 1983.[69] That suit was dismissed with prejudice pursuant to a settlement agreement.[70]

Young's fourth lawsuit - the case under consideration by the Sixth Circuit - was filed in 2002, although Young did not serve the complaint upon the Township until 2003.[71] Young asserted claims under the Americans with Disabilities Act (ADA),[72] Michigan's Persons with

62. 471 F.3d 674 (6th Cir. 2007).

63. *Id.* at 676.

64. *Id.* at 677.

65. MICH. COMP. LAWS ANN. §§ 37.1103-.1214 (West 2008). This Act is now known as the Persons with Disabilities Civil Rights Act (PWDCRA).

66. *Young*, 471 F.3d at 677.

67. Young v. Green Oak Twp., No. 198019, 1998 WL 1992898 (Mich. Ct. App. Mar. 13, 1998).

68. *Young*, 471 F.3d at 678.

69. 42 U.S.C. § 1983 (1996).

70. *Young*, 471 F.3d at 678.

71. *Id.*

72. 42 U.S.C. §§ 12112-12117 (West 2006).

Disabilities Civil Rights Act (PWDCRA),[73] employment discrimination, retaliatory discharge under 42 U.S.C. § 1983, violation of the Whistleblower's Protection Act (WPA),[74] and loss of due process rights.[75] Defendant Green Oak Township sought summary judgment on the basis of res judicata, which the district court granted.[76] Young appealed.

In reviewing the district court's conclusion that Young's claims were barred by res judicata, the Sixth Circuit first determined that the res judicata effect of a state court judgment is governed by the federal Full Faith and Credit Act.[77] Further, in assessing such a state court judgment, federal courts are to rely upon state law regarding res judicata.[78] The *Young* court therefore looked to the Michigan Supreme Court decision in *Adair v. Michigan*, which held that under Michigan law, the res judicata doctrine bars a second, subsequent action when "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first."[79] If the three elements are established, "then *res judicata* serves to bar 'every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.'"[80]

Applying these factors, the Sixth Circuit in *Young* determined that a final decision on the merits had been reached in Young's 1995 and 1998 state court suits, which each involved the same parties now before the Sixth Circuit. The first two elements of the res judicata analysis thus were met.[81]

Turning to whether Young raised or could have raised all of his current claims in his 1995 or 1998 lawsuits, the Sixth Circuit held that, but for allegations that his 2002 termination did not comport with the due process requirements of section 1983 and Michigan's Veterans'

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73. MICH. COMP. LAWS ANN. §§ 37.1103-.1214 (West 2001).

74. MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 2004 & Supp. 2007).

75. *Young*, 471 F.3d at 678.

76. *Id.*

77. 28 U.S.C. § 1738 (2007). That Act states in part that:

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States . . . . Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

78. *Young*, 471 F.3d at 680 (citing Smith, Hinchman & Grylls Assoc., Inc. v. Tassic, 990 F.2d 256, 257 (6th Cir. 1993)).

79. 470 Mich. 105, 121, 680 N.W.2d 386, 396 (2004), *rev'd on other grounds*, 474 Mich. 1073, 712 N.W.2d 702 (2006).

80. *Young*, 471 F.3d at 680, (quoting *Adair*, 470 Mich. at 121, 680 N.W.2d at 396).

81. *Id.* at 680-81.

Preference Act,[82] all of Young's claims had accrued by the time those suits were filed, and so were barred.[83]

The lesson of *Young* is clear—plaintiffs who fail to raise all of their employment-related claims in a single lawsuit risk dismissal of subsequent suits, even those alleging violations of different laws. That Young asserted violations of state discrimination laws in his state court suit, and violations of substantially similar federal discrimination laws in his federal court suit did not dissuade the federal court from concluding that those claims were sufficiently similar so as to prevent relitigation under the res judicata doctrine.

C. Individual Liability

The ELCRA defines "employer" as "a person who has 1 or more employees, and includes an agent of that person."[84] In 2005, in *Elezovic v. Ford Motor Co.*,[85] the Michigan Supreme Court ruled that an "agent" who sexually harasses an employee in the workplace can be held individually liable under the ELCRA, as an "employer."[86] In light of this ruling, the supreme court remanded the case to the trial court, without determining whether the supervisor alleged to have harassed Elezovic, Daniel Bennett, qualified as an "agent."[87] The case was returned to the trial court, which granted summary disposition to Bennett, concluding that Bennett was not acting as Ford Motor Co.'s agent when he allegedly harassed Elezovic.[88] Elezovic appealed, and during the *Survey* period, the court of appeals reversed, holding that Bennett indeed was Ford's agent.[89]

Initially, the court of appeals reviewed the supreme court's analysis of the issue in *Elezovic*, stating:

> The clear result of the Supreme Court's conclusion is that if the purported harasser is an agent of the employing entity, the

82. MICH. COMP. LAWS ANN. §§ 35.401-.404 (West 2008). Section 35.402 states in part that: "No veteran . . . shall be removed . . . except for . . . incompetency; and such veteran shall not be removed . . . except after a full hearing before . . . the township board . . . ." MICH. COMP. LAWS ANN. § 35.402 (West 2008).

83. *Young*, 471 F.3d at 681-83. While the Sixth Circuit concluded that the district court had erred in holding that *all* of Young's claims were barred by res judicata, the appellate court determined that the non-barred claims were nevertheless properly dismissed, because Young "was afforded all of the process that he was due." *Id.* at 683. For a more detailed discussion of this issue, see *infra* notes 249-271 and accompanying text.

84. MICH. COMP. LAWS ANN. § 37.2201 (West 2001).

85. 472 Mich. 408, 697 N.W. 2d 851 (2005).

86. *Id.* at 420, 697 N.W.2d at 858.

87. *Id.* at 431, 607 N.W.2d at 864.

88. Elezovic v. Bennett, 274 Mich. App. 1, 3, 731 N.W.2d 452, 455 (2007).

89. *Id.* at 15, 731 N.W.2d at 461.

> harasser is treated as if he *is* the employer for purposes of the [ELCRA]. In other words, the harasser may be held directly and individually liable if he engaged in discriminatory behavior in violation of the [ELCRA] while acting in his capacity as the victim's employer.[90]

Based on this, the court of appeals determined that a *respondeat superior* analysis was unnecessary, because direct, not vicarious liability was at issue.[91]

The court then turned to the question of when a person is considered an agent. Instead of consulting the Restatement of Agency,[92] the court of appeals relied on dictionary definitions of what constitutes an "agent."[93] The court eventually concluded that "persons to whom an employing entity delegates supervisory power and authority to act on its behalf are 'agents,' as distinguished from coemployees, subordinates, or coworkers who do not have supervisory powers . . . ."[94] The court further held, however, that "it is not necessary for a plaintiff to establish that a defendant was 'functioning as an agent' when he committed the specific charged acts of sexual harassment," because, "[a]lmost invariably, the harasser is never acting within the scope of his agency when he breaks the law by sexually harassing a subordinate."[95] To hold otherwise, according to the court, would essentially erase individual liability under the ELCRA.[96]

Thus, "[t]he issue is whether the harasser was an agent, one vested with supervisory power and authority, at the time the harassing acts were being perpetuated against the victim; if so, the harasser is considered an employer for purposes of the [ELCRA]."[97]

As opposed to traditional agency principles, under which many employees are viewed as "agents," the definition of "agent" announced by the court of appeals in *Elezovic* is limited only to supervisors. Under the court's analysis, coworkers accused of discriminatory conduct are not

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90. *Id.* at 9-10, 731 N.W.2d at 458.

91. *Id.* at 10, 731 N.W.2d at 458.

92. The Restatement of Agency defines agency as follows:

> Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

93. *Elezovic*, 274 Mich. App. at 10, 731 N.W.2d at 458.

94. *Id.*

95. *Id.* at 11, 731 N.W.2d at 459.

96. *Id.* at 12-13, 731 N.W.2d at 459-60.

97. *Id.* at 11, 731 N.W.2d at 459.

subject to individual liability, because coworkers do not have the same influence and power over their victim's employment as do supervisors.[98]

In a dissenting opinion, Judge Talbot strongly criticized the majority's rejection of traditional, common law agency principles, under which Bennett could not have been held liable, because his alleged sexual harassment of Elezovic did not occur within the scope of any authority, express or implied, extended to Bennett by his employer, Ford.[99]

It is not yet clear whether a majority of the Michigan Supreme Court will agree with Judge Talbot or the court of appeals' majority. The supreme court denied Bennett's application for leave to appeal because it was "not persuaded that the questions presented should be reviewed" prior to remand to the trial court.[100]

III. RETALIATION

Under Michigan's Whistleblower's Protection Act (WPA),[101] an employer may not "discharge, threaten, or otherwise discriminate against an employee . . . because 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 . . . to a public body . . . ."[102] During this *Survey* period, the focus was on the words "a public body," as courts confronted the question "Which public body?"

A. Can The Employer Be The Public Body?

In *Brown v. Mayor of Detroit,*[103] a decision surprising only in its unanimity and its brevity (which likely was directly related to its unanimity), the Michigan Supreme Court held that "the WPA does not require that an employee of a public body report violations or suspected violations to an outside agency or higher authority to receive the protections of the WPA."[104] The court also determined that "there is no requirement that an employee who reports violations or suspected violations receives the protections of the WPA only if the reporting is outside the employee's job duties."[105]

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98. *Id.* at 12, 731 N.W.2d at 459. Of course, the discriminatory acts of coworkers can still subject an employer to liability, under the *respondeat superior* doctrine.

99. *Elezovic,* 274 Mich. App. at 22-23, 731 N.W.2d at 465 (Talbot, J., dissenting).

100. Elezovic v. Bennett, 480 Mich. 1001, 742 N.W.2d 349 (2007).

101. MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 2004 & Supp. 2007).

102. MICH. COMP. LAWS ANN. § 15.362 (West 2004 & Supp. 2007).

103. 478 Mich. 589, 734 N.W.2d 514 (2007).

104. *Id.* at 591, 734 N.W.2d at 515.

105. *Id.*

The case arose when two City of Detroit police officers suffered adverse employment actions for their investigation into allegations of illegal conduct and wrongdoing by the Mayor of Detroit and members of the mayor's security force.[106] The officers, Brown and Nelthrope, filed suit against the City and the mayor, alleging slander as well as violations of the WPA.[107] The defendants' motion for summary disposition of the WPA claims was denied, and the defendants appealed.[108]

The court of appeals affirmed in part and reversed in part.[109] The court first considered whether the plaintiffs had engaged in protected activity under the WPA, because they had reported suspected wrongdoing only to their superior, the Chief of Police, and not to an outside "public body."[110] In its analysis, the court reviewed prior decisions in *Dickson v. Oakland University,*[111] *Dudewicz v. Norris-Schmid, Inc.*,[112] and *Heckmann v. Detroit Chief of Police.*[113] In *Dickson v. Oakland University*, the court of appeals held that a police officer's report of wrongdoing of students was not covered under the WPA, because the officer had reported student misconduct as opposed to that of his employer, and because reporting on student wrongdoing was, in essence, the plaintiff's job.[114]

In *Dudewicz,* the Michigan Supreme Court addressed the question of whether the WPA applies when an employee reports wrongdoing by a fellow employee, rather than that of his employer.[115] The court held that the WPA did protect this type of whistle blowing, but also criticized language in *Dickson* suggesting that the WPA only covered reports of employer wrongdoing.[116] The court in *Dudewicz* concluded, however, that the *Dickson* court had reached the correct result, because Dickson had reported the student misconduct only to his employer and not to a public body.[117]

This observation in *Dudewicz* led subsequent courts to believe that the supreme court might believe that reports to an employer that also is a public body are not protected under the WPA.[118] This was an issue in *Heckmann,* where the plaintiff had reported suspected wrongdoing by his employer, the fiscal operations section of the Detroit Police Department,

106. *Id.* at 591, 734 N.W.2d at 516.
107. *Id.* at 592, 734 N.W.2d at 516.
108. *Id.*
109. Brown v. Mayor of Detroit, 271 Mich. App. 692, 723 N.W.2d 464 (2006).
110. *Id.* at 711-12, 723 N.W.2d at 475-76.
111. 171 Mich. App. 68, 429 N.W.2d 640 (1988).
112. 443 Mich. 68, 503 N.W.2d 645 (1993).
113. 267 Mich. App. 480, 705 N.W.2d 689 (2005).
114. *Dickson,* at 69-71, 429 N.W.2d at 641-42.
115. *Dudewicz,* 443 Mich. at 74-76, 503 N.W.2d at 647-48.
116. *Id.* at 77, 503 N.W.2d at 649.
117. *Id.* at 77 n.4, 503 N.W.2d at 649 n.4.
118. *See, e.g.*, *Heckmann*, 267 Mich. App. 480, 705 N.W.2d 689.

to the chief of police and to the Mayor of Detroit.[119] In deciding whether Heckmann had reported to a public body, the court of appeals wrote that:

> We discern in the plain language of the WPA no exception for reporting a violation or a suspected violation of a law to a public body when the whistleblower is also an employee of a public body. We also discern no ambiguity permitting judicial construction. Nevertheless, we feel constrained by our Supreme Court's partial approval in *Dudewicz* of the analysis in *Dickson.*[120]

The *Heckmann* court sidestepped the problem, however, by concluding that Heckmann's report to the mayor in fact was a report to a "higher authority," consistent with *Dickson-Dudewicz.*[121]

Like the court of appeals in *Heckmann,* the *Brown* court expressed discomfort with the *Dickson-Dudewicz* decisions.[122] It too side-stepped the issue, however, by noting that there was evidence that plaintiff Brown had reported suspected wrongdoing to the Mayor (a "higher authority" and perhaps even a different "public body" than Brown's employer, the police department) and that Nelthrope had reported wrongdoing to the FBI.[123] The court of appeals therefore affirmed the trial court's denial of the defendants' motion for summary disposition on this issue.[124]

The supreme court dispelled all of this confusion, holding in *Brown* that the language of the WPA is unambiguous and does not require that the public body to whom an employee reports be an outside agency or a higher authority.[125] The court also expressly disavowed what it referred to as dictum in *Dudewicz* that suggested an opposite result.[126] The court thus concluded that Brown came within the protection of the WPA when he reported his suspicions to the chief of police, and that Nelthrope did so when he reported his allegations to the police department's Professional Accountability Bureau.[127]

The court in *Brown* completed its perusal of the WPA by stating that the Act's protection was not limited "to employees who report violations or suspected violations only if this reporting is outside the employee's job duties."[128] The defendants had argued that the plaintiffs were not

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119. *Id.* at 482-83, 705 N.W.2d at 692.
120. *Id.* at 494-95, 705 N.W.2d at 698.
121. *Id.*
122. *Brown,* 271 Mich. App. at 715-16, 723 N.W.2d at 477-78.
123. *Id.* at 715-16, 723 N.W.2d at 478.
124. *Id.*
125. *Brown,* 478 Mich. at 594, 734 N.W.2d at 517.
126. *Id.* at 595 n.2, 734 N.W.2d at 517 n.2.
127. *Id.* at 595, 734 N.W.2d at 517.
128. *Id.* at 596, 734 N.W.2d at 518.

entitled to protection of the WPA because their job duties included reporting on the alleged wrongdoing about which they complained.[129] Relying strictly on the language of the WPA, with scant discussion of the implications of its decision, the court rejected this argument.[130] While it cannot be denied that the WPA contains no such limiting language, it seems that judicial consideration of the purpose of the Act would have been appropriate. If the WPA automatically insulates from discipline an employee whose job requires him to report problems—say, a safety inspector—then the WPA has turned that employee into a just cause employee.[131]

B. Can A Federal Agency Be A Public Body?

Several other cases decided during the *Survey* period confronted the definition of "public body" from a different angle than the court in *Brown*. In both *Lewandowski v. Nuclear Management, L.L.C.* [132] and *Ernsting v. Ave Maria College*, [133] the court of appeals was asked to decide whether a federal agency is a "public body" under the WPA. Each panel answered that question differently.

The WPA precludes an employer from retaliating against an employee for reporting a violation or a suspected violation of either state or federal law to a public body.[134] The WPA defines "public body" as including the following:

> (i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.
>
> (ii) An agency, board, commission, council, member, or employee of the legislative branch of state government.
>
> (iii) A county, city, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, or any member or employee thereof.

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129. *See id.*

130. *Id.*

131. This was the conclusion reached by the Sixth Circuit in *Sassé v. U.S. Dep't of Labor*, 409 F.3d 773 (6th Cir. 2005) and by the U.S. Supreme Court in *Garcetti v. Ceballos*, 547 U.S. 410, (2006), which both held that an employee whose job requires him to report wrongdoing is not, without more, protected from disciplinary actions by whistle blowing laws.

132. 272 Mich. App. 120, 724 N.W.2d 718 (2006).

133. 274 Mich. App. 506, 736 N.W.2d 574 (2007), *leave to appeal denied*, 480 Mich. 985, 742 N.W.2d 112 (2007).

134. MICH. COMP. LAWS ANN. § 15.362 (West 2004 & Supp. 2007).

> (iv) Any 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.
>
> (v) A law enforcement agency or any member or employee of a law enforcement agency.
>
> (vi) The judiciary and any member or employee of the judiciary.[135]

The issue thus is whether a given entity is a "public body" under one of these definitions.

In *Lewandowski v. Nuclear Management*, the plaintiff was the manager of Consumers Energy Company's Palisades Nuclear Power Plant from 1981 to 2004.[136] In 2003, he observed what he considered to be a safety violation at the plant. According to Lewandowski, he was told not to file a report about the incident, but nevertheless reported it directly to the Nuclear Regulatory Commission (NRC).[137]

More than a year later, Lewandowski was terminated for failing to provide adequate medical documentation to support his absence from work.[138] In turn, he sued his employer,, alleging violation of the WPA, among other claims.[139] The trial court dismissed Lewandowski's WPA claims because the NRC is not a "public body" under that Act, and Lewandowski appealed.[140]

The court of appeals firsts observed that the NRC could not be deemed a public body under subsections (i) through (iv) of the WPA, because each of those subsections requires that the entity be a unit of state government.[141] Subsection (vi) is applicable only to the judiciary, clearly excluding the NRC.[142] Thus, the only subsection under which the NRC could possibly qualify as a public body is subsection (v), which includes law enforcement agencies within its definition of public bodies.[143] The court of appeals determined, however, that the NRC was *not* a law enforcement agency because, the NRC is an "independent regulatory agency," which, under federal law, is not considered to be a law enforcement agency.[144]

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135. MICH. COMP. LAWS ANN. § 15.361(d) (West 2004 & Supp. 2007).
136. *Lewandowski*, 272 Mich. App. at 121-22, 724 N.W.2d at 720.
137. *Id.*
138. *Id.*
139. *Id.* at 122, 724 N.W.2d at 720.
140. *Id.*
141. *Id.* at 125, 724 N.W.2d at 721-22.
142. *See* MICH. COMP. LAWS ANN. § 15.361(d)(vi) (West 2004 & Supp. 2007).
143. *Lewandowski*, 272 Mich. App at 124-25, 724 N.W.2d at 721-22.
144. *Id.* at 126, 724 N.W.2d at 722.

In contrast, in *Ernsting v. Ave Maria College*, the court of appeals decided that the U.S. Department of Education (DOE) *was* a law enforcement agency under the WPA, and so reversed the trial court's grant of summary disposition to the employer.[145]

Katherine Ernsting was the Special Assistant to the President of Ave Maria College until July 2004, when her employment was terminated.[146] Ernsting sued the college, alleging that she had been wrongfully discharged in violation of the WPA.[147] She claimed that the true reason for her termination was her report to and participation in a U.S. Department of Education investigation of the college's administration of its federally-funded financial aid programs.[148]

In response to Ava Maria's motion for summary disposition, the trial court dismissed Ernsting's suit, concluding that the DOE was not a law enforcement agency and thus not a public body under the Act.[149] Ernsting appealed, and, in a 2-1 decision, the court of appeals reversed.

In reaching its decision, the majority of the court first observed that "law enforcement agency" is not defined by the WPA. The court thus resorted to *Black's Law Dictionary,* which defined "law enforcement" as "the detection and punishment of violations of the law. . . not limited to enforcement of criminal laws."[150] The court declined to consult the legislative history of the Act, because the language of the Act was "unambiguous."[151]

The court did, however, consult federal statutes concerning the DOE, determining that under those laws, the DOE is a department within the executive branch, tasked with the job of ensuring that "education issues receive proper treatment at the federal level."[152] Looking further, the court learned that the U.S. Congress had established in each governmental agency an Office of Inspector General (OIG), responsible for conducting and supervising audits as well as civil and criminal investigations.[153] Given the statutory powers of the Office of Inspector

145. *Ernsting*, 274 Mich. App. at 507, 736 N.W.2d at 577.

146. *Id.*

147. *Id.*

148. *Id.* at 507-08, 736 N.W.2d at 577.

149. *Id.* at 508, 736 N.W.2d at 577-78.

150. *Id.* at 512, 736 N.W.2d at 580 (citing BLACK'S LAW DICTIONARY (8th ed. 2004)). The court's reliance on a dictionary in construing statutory language is not surprising, given the frequency with which the current Michigan Supreme Court consults such sources. In this case, however, the disagreement between the appellate court and the trial court appeared to focus on the specific dictionary consulted. As the majority decision observed, the trial court "apparently quoted" from *Webster's Dictionary,* while the appellate court selected *Black's Law Dictionary. Id.* at 508 n.1, 736 N.W.2d at 578 n.1.

151. *Ernsting,* 274 Mich. App. at 514, 736 N.W.2d at 581. It is surprising how fiercely parties can disagree about the meaning of "unambiguous" language, at times resulting in inconsistent appellate decisions.

152. *Id.* at 515, 736 N.W.2d at 581-82.

153. *Id.* at 515-16, 736 N.W.2d at 582 (citing the Inspector General Act of 1978, 5 U.S.C. app. 3 §§ 1-12 (2002)).

General, the majority concluded that the DOE fell within the definition of "law enforcement agency" in the WPA.[154]

The court did not entirely ignore the apparent conflict presented by the earlier *Lewandowski* decision, but determined that it was distinguishable because the NRC is an independent regulatory agency, not an executive department like the DOE.[155] The majority did not mention the fact that, under the Inspector General Act, the NRC contains, like the DOE, its own Office of Inspector General.[156]

In dissent, Judge Zahra disagreed with the majority's conclusion that the DOE is a law enforcement agency because it has been granted "some limited law enforcement powers through the OIG."[157] Judge Zahra noted that the WPA used the phrase "law enforcement agency," not the phrase "agency with law enforcement powers." He concluded, therefore, that the phrase "law enforcement agency" refers to "an agency that has as its primary purpose the enforcement of the general criminal laws of the jurisdiction. The DOE is not such an agency."[158] Judge Zahra's position did not prevail, however, either in the court of appeals or in the supreme court. That court denied the college's application for leave to appeal.[159]

IV. PUBLIC SECTOR EMPLOYMENT

A. Governmental Immunity

Under Michigan's Governmental Tort Liability Act (GTLA),[160] public officials are immune from liability for acts of negligence.[161] Specifically, the statute provides that "[a] judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority."[162] Whether this statute serves to insulate a school superintendant from a wrongful discharge suit was resolved by the Michigan Supreme Court in *Baker v. Couchman.*[163]

Plaintiff Jason Baker was a deputy sheriff employed by Livingston County when he was assigned to Pinckney Community Schools as the school resource officer (SRO).[164] Defendant Michael Couchman was the

154. *Id.* at 517, 736 N.W.2d at 582.
155. *Id.* at 518-19, 736 N.W.2d at 583.
156. *See* 5 U.S.C. app. 3 § 8(b) (2002).
157. *Ernsting,* at 520, 736 N.W.2d at 584 (Zahra, J., dissenting).
158. *Id.*
159. Ernsting v. Ave Maria Coll., 480 Mich. 985, 742 N.W.2d 112 (2007).
160. MICH. COMP. LAWS ANN. §§ 691.1401-.1419 (West Supp. 2007).
161. *See generally id.*
162. MICH. COMP. LAWS ANN. § 691.1407(5) (West Supp. 2007).
163. 477 Mich. 1097, 729 N.W.2d 520 (2007).
164. Baker v. Couchman, 271 Mich. App.174, 177, 721 N.W.2d 25, 253 (2006).

superintendant of the Pinckney Community Schools.[165] While Baker and Couchman worked successfully together for a period of time, their relationship ultimately deteriorated, resulting in Baker's removal from his SRO position and reassignment to road patrol duties.[166] Baker then sued Pinckney Community Schools and Couchman alleging that he was terminated in violation of the Whistleblower's Protection Act (WPA),[167] and that Couchman had tortiously interfered with his employment relationship with the school district.[168]

The trial court dismissed Baker's WPA claim, concluding that Baker was not an employee of the defendant school district. The court refused to dismiss Baker's tortious interference claim, though, holding that Couchman was not entitled to immunity under the GTLA.[169] Couchman appealed as of right pursuant to MCR 7.202(6)(a)(v) and MCR 7.203(A)(1).[170]

In a 2-1 decision, the court of appeals affirmed, holding that Superintendent Couchman was not acting within the scope of his authority with regards to Baker, and so was not immune from tort liability.[171] The majority held that, while "it was within the scope of defendant's executive authority to closely supervise plaintiff's activities as SRO" and to "express concerns to plaintiff's superiors, to the school board and to the public, it was not within Couchman's authority to interfere with Baker's investigations of alleged criminal activity at the school.[172] In fact, the court wrote, "once the administration opens the schoolhouse doors to assistance from law enforcement personnel, it concedes some of its authority to that autonomous agency . . . and loses its authority to direct or interfere with law enforcement personnel's function . . . ."[173]

In a strong dissenting opinion, Judge O'Connell demurred from the majority's holding, arguing that a review of the record showed that Superintendent Couchman was acting well within the scope of his authority in dealing with the plaintiff, and thus was entitled to absolute immunity under the GTLA.[174] Further, he noted that, given the

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165. *Id.*

166. *Id.*

167. MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 2004 & Supp. 2007).

168. *Baker*, 271 Mich. App. at 177, 721 N.W.2d at 253.

169. *Id.* at 178, 721 N.W.2d at 253-54.

170. MCR 7.202(6)(a)(v) and MCR 7.203(A)(1), read together, provide that an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee is a final order entitled to an appeal by right to the court of appeals, rather than an appeal by leave. *See* MICH. CT. R. 7.202(6)(A)(V); MICH. CT. R. 7.203(A)(1).

171. *Baker*, 271 Mich. App. at 178, 721 N.W.2d at 254.

172. *Id.* at 182-83, 721 N.W.2d at 256.

173. *Id.* at 183-84, 721 N.W.2d at 256.

174. *Id.* at 192, 721 N.W.2d at 261 (O'Connell, J., concurring in part and dissenting in part).

majority's concession that the plaintiff had a "dual employment role" with the sheriff's department and the school system, the plaintiff's tortious interference claim failed on its face, because such a claim requires the intervention of a third party.[175]

According to Judge O'Connell, the investigations of alleged criminal activity undertaken by Baker while he was the SRO actually involved relatively mundane episodes, such as stolen gym shorts and careless driving in the school parking lot, which Baker turned into major incidents.[176] Judge O'Connell wrote that "plaintiff repeatedly pursued minor school incidents with vigor, often seeking to arrest, write citations or launch lengthy investigations rather than defer to the school's administration for routines admonition and correction."[177] Judge O'Connell continued: "[T]he evidence demonstrates that defendant did not interfere at all with plaintiff's most serious and damaging investigations, but instead took reasonable preemptive measures only when an investigation inappropriately intensified or veered into areas under defendant's direct authority."[178]

Judge O'Connell concluded that, even if Couchman had interfered with Baker's investigations, doing so was well within Couchman's authority.[179]

A superintendent's role includes any act taken as chief administrator and disciplinarian in the school district, even in school districts that engage monitoring police officers for additional manpower, surveillance and protection. Superintendents are the highest-level executives of school districts, so they are entitled to absolute immunity for actions they take pursuant to that authority.[180]

Finally, according to O'Connell,

> This case sets an abominable precedent because it blurs the previously unmistakable lines marking the boundaries of a superintendent's personal liability. Now superintendents must second-guess how their administrative decisions may peripherally cause damage to subordinates and third parties. I disagree with any decision that requires superintendents to protect themselves by placing the concerns of others over the interests of the children in their charge.[181]

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175. *Id.* at 194 n.3, 721 N.W.2d at 262 n.3.

176. *Baker*, 271 Mich. App. at 194-95, 721 N.W.2d at 262 (O'Connell, J., concurring in part and dissenting in part).

177. *Id.* at 194-95, 721 N.W.2d at 262-63.

178. *Id.* at 196, 721 N.W.2d at 263.

179. *Id.* at 194, 721 N.W.2d at 262.

180. *Id.* at 197, 721 N.W.2d at 263-64.

181. *Id.* at 206, 721 N.W.2d at 268.

The supreme court completely and unanimously agreed.[182] In a per curiam order, entered after oral argument on Couchman's application for leave to appeal, the court reversed the judgment of the court of appeals "for the reasons stated in Court of Appeals Judge O'Connell's partial dissent."[183] In a concurring statement, Chief Justice Taylor (joined by Justices Young and Kelly) noted specifically that, as superintendent, Couchman was entitled to absolute immunity.[184] Justice Markman concurred with the decision to reverse the court of appeals, but on a different basis—that the plaintiff had failed to state a claim of tortious interference, because the defendant was not a third party to the plaintiff's relationship with the school district.[185]

B. Residency Requirements

Governmental immunity also played a role in the Michigan Supreme Court's decision in *Lash v. City of Traverse City*,[186] in which the court was called upon to interpret legislation enacted in 1999 that limited the scope of residency requirements imposed by local governmental units on its public employees.[187] That law prohibits public employers from requiring that its employees reside within a specific geographic area as a condition of employment.[188] Under the ACAT, "public employer" is defined as "a county, township, village, city, authority, school district, or other political subdivision of this state."[189] The law targeted the residency requirements often imposed upon municipal workers, particularly police and fire fighters. It contains an exception, however, that permits a public employer to demand that its employees reside twenty miles or more from the "nearest boundary of the public employer."[190] In *Lash,* the court concluded that, under the doctrine of

182. *Baker*, 477 Mich. at 1097, 729 N.W.2d at 520.
183. *Id.*
184. *Id.* at 1098, 719 N.W.2d at 520.
185. *Id.* at 1097, 729 N.W.2d at 521.
186. 479 Mich. 180, 735 N.W.2d 628.
187. MICH. COMP. LAWS ANN. §§ 15.601-.603 (West 2004).
188. MCL section 15.602(a) provides that:

> Except as provided in subsection (2), a public employer shall not require, by collective bargaining agreement or otherwise, that a person reside within a specified geographic area or within a specified distance or travel time from his or her place of employment as a condition of employment or promotion by the public employer.

MICH. COMP. LAWS ANN. §§ 15.602(a) (West 2004).
189. MICH. COMP. LAWS ANN. § 15.601(a) (West 2004).
190. MCL section 15.602(2) states that:

> Subsection (1) does not prohibit a public employer from requiring, by collective bargaining agreement or otherwise, that a person reside within a specified distance from the nearest boundary of the public employer. However, the specified distance shall be 20 miles or another specified distance greater than 20 miles.

governmental immunity, no private right of action to recover money damages can be implied from the Act.[191] The court also held that the twenty mile exception contained in the Act contemplated straight line, or air miles.[192] In so doing, the supreme court reversed a split decision of the court of appeals.

Joseph Lash, a police officer in Flint, Michigan, applied for a similar position in Traverse City.[193] The posted requirements for the position stated that the successful candidate had to reside "within a fifteen mile radius, or twenty road miles, from the nearest City limits."[194] After receiving a conditional offer of employment, Lash bought property on which to build a home, which, by Lash's measure, was within twenty miles of the city limits of Traverse City.[195] The City, however, determined that Lash's home was twenty-three road miles from the nearest city limit and therefore rescinded its offer.[196]

Lash sued, seeking money damages for the City's alleged "unlawful failure to hire," claiming that the residency requirement, as applied to him, violated the law.[197] The defendant's motion for summary disposition was granted by the trial court, which found that a private cause of action existed under the Act, but that Lash had failed to comply with the requirement that he live within twenty road miles of the city limits.[198]

Lash appealed, and, in a split decision, the court of appeals affirmed in part and reversed in part.[199] Two members of the panel concluded that a private cause of action for money damages was implicit in the Act, because the Act otherwise contained no enforcement mechanism.[200] One judge disagreed, concluding that Lash could only enforce the Act through a declaratory action, and not through a claim for monetary relief.[201] A different configuration of panel members concluded, however, that the twenty mile exception had to be measured in straight line (or air) miles, while Judge Neff believed that road miles were the proper measure.[202] Thus, summary disposition was reversed, and the

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MICH. COMP. LAWS ANN. § 15.602(2) (West 2004).

191. 479 Mich. at 194, 735 N.W.2d at 637.

192. *Id.* at 191, 735 N.W.2d at 635.

193. *Id.* at 183-84, 735 N.W.2d at 631.

194. *Id.*

195. *Id.* at 184, 735 N.W.2d at 631.

196. *Id.* at 184-85, 735 N.W.2d at 632.

197. *Lash*, 479 Mich. at 185, 735 N.W.2d at 632.

198. *Id.*

199. Lash v. Traverse City, 271 Mich. App. 207, 209, 720 N.W.2d 760, 761 (2006).

200. *Id.* at 226, 720 N.W.2d at 770.

201. *Id.* at 221-22, 720 N.W.2d at 767-68.

202. *Id.* at 209-10, 720 N.W.2d at 761.

matter was remanded to the trial court for further proceedings.[203] The supreme court granted the City's application for leave to appeal.[204]

The first issue addressed by the court—the method of measurement under the statute—was resolved unanimously.[205] While the Act permits a municipality to impose a residency requirement, the municipality only can require its employees to live twenty miles or more from the nearest boundary of the city.[206] The statute does not define the method of measuring that distance, however. Traverse City argued that the absence of a specific measuring method rendered the statute ambiguous, because "20 miles" can be measured in radial or road miles.[207] The court disagreed, noting that "mile" is a very precise term, measuring 5,280 feet.[208] According to the court, "[n]othing in the ordinary definition of the word indicates that this distance is to be measured along available routes of public travel. . . . [Because insertion] of the word 'road' before 'miles' in the statute subverts the plain language of the statute, defendant's preferred interpretation fails."[209] Thus, the Court held that "where a public employer requires an employee to reside 20 miles from the employer's nearest boundary as permitted by MCL section 15.602(2), this distance is properly measured in a straight line between the employee's place of residence and the nearest boundary of the public employer."[210]

The unanimity expressed by the Court on this initial issue did not hold, though, once the Court turned to the question of whether a private cause of action for money damages was allowed under the statute. Chief Justice Young, joined by Justices Taylor, Corrigan and Markman, observed that no implied private cause of action for money damages against a public employer existed, absent express authorization by the legislature.[211] Justices Cavanagh and Weaver would have affirmed the court of appeals on this issue, importing a private cause of action into the statute, because otherwise no real mechanism existed to enforce violations of the statute.[212] Justice Kelly opined that a private cause of

203. *Id.* at 221-22, 720 N.W.2d at 767.

204. Lash v. City of Traverse City, 477 Mich. 920, 722 N.W.2d 884 (2006).

205. *Lash*, 479 Mich. at 191, 735 N.W.2d at 635. Even that unanimity was ephemeral, however. In her partial dissent, Justice Kelly observed that, while she agreed that the proper method of measurement under the statute was straight line miles rather than road miles, even that holding was *dicta,* because previous decisions of the Court dictated the conclusion that Lash's claim was barred by governmental immunity. *Id.* at 198, 735 N.W.2d at 639.

206. *Id.*

207. *Id.* at 188, 735 N.W.2d at 634.

208. *Id.* at 189, 735 N.W.2d at 634.

209. *Id.*

210. *Id.* at 191, 735 N.W.2d at 635.

211. *Lash*, 479 Mich. at 195, 735 N.W.2d at 637.

212. *Id.* at 198, 735 N.W.2d at 639 (Cavanagh, J., concurring in part and dissenting in part) (Weaver, J., concurring).

action *should* be inferred, but could not be under "this Court's unfortunate decision in *Mack v. Detroit.*"[213]

In the majority opinion, Justice Young first stated that, under the Court's prior decisions, a private cause of action of for money damages can never be implied against a governmental entity, under the doctrine of governmental immunity, without express legislative authorization.[214] Justice Young then observed that the residency statute contained no such express authorization permitting such a claim.[215] Justice Young further noted that nothing in Michigan's Governmental Tort Liability Act (GTLA),[216] which sets forth various exceptions to governmental immunity, allowed municipalities to be sued for monetary damages for violation of the residency act.[217]

Justice Young also rejected Lash's argument that, without a private cause of action for money damages, the statute was unenforceable, stating that an aggrieved party could seek injunctive relief under MCR 3.310[218] or declaratory relief under MCR 2.605(A)(1). [219] Thus, the majority affirmed the court of appeals' decision that, under the statute, the 20-mile limitation is to be measured in straight line miles, but reversed its holding that a private cause of action could be inferred by the act.[220]

C. Veteran's Preference Act

During the *Survey* period, the court of appeals twice was called upon to interpret Michigan's Veterans' Preference Act (VPA).[221] In *Carter v. Ann Arbor City Attorney*,[222] the court concluded not only that a public employer may consider a veteran's qualifications in declining to hire the veteran, but that a public employer that hires a veteran without

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213. *Lash*, 479 Mich. at 198, 735 N.W.2d at 639 (Kelly, J., concurring in part and dissenting in part) (citing Mack v. City of Detroit, 467 Mich. 186, 649 N.W.2d 47 (2002)). Interestingly, the issue of governmental immunity was not raised by the City at either the trial court or in the court of appeals, and in fact played no role in this case until the supreme court itself raised the issue. *Id.* at 201, 735 N.W.2d at 641.

214. *Id.* at 194, 735 N.W.2d at 637 (citing *Mack*, 467 Mich. at 196, 649 N.W.2d at 53).

215. *Id.*

216. MICH. COMP. LAWS ANN. §§ 691.1401-.1419 (West 2000 & Supp. 2007).

217. *Lash*, 479 Mich. at 195-96, 735 N.W.2d at 637-38.

218. *Id.* at 196, 735 N.W.2d at 638. MCR 3.310 sets forth the procedure under which injunctions may be requested from the courts. *See* MICH. CT. R. 3.310.

219. *Id.* at 196, 735 N.W.2d at 638. MCR 2.605(A)(1) states that: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MICH. CT. R. 2.605(A)(1).

220. *Id.* at 197, 735 N.W.2d at 639.

221. MICH. COMP. LAWS ANN. §§ 35.401-.404 (West 2001).

222. 271 Mich. App. 425, 722 N.W.2d 243 (2006), *leave to appeal denied*, 480 Mich. 975, 741 N.W.2d 519 (2007).

considering whether the veteran is actually qualified for the position may be acting in derogation of its duties to the public.[223]

James Carter, a Vietnam War veteran, applied for but did not receive a position as an Assistant City Attorney for the City of Ann Arbor.[224] The initial posting for the position was general, citing minimum qualifications of two years of experience as an attorney in a wide variety of areas, with experience in municipal law preferred.[225] Carter applied, and in response received a letter from the City Attorney stating that he intended to take several months to reviewing all resumes and determine the specific needs of the office.[226] After this review, the City Attorney decided that the office needed two attorneys: a labor law attorney and a zoning law attorney.[227] Carter's resume did not reflect significant experience in either area, and he was not hired.[228] In response, Carter filed a mandamus action against the City Attorney, claiming that the City was obligated to hire him because he met the minimum qualifications for the position.[229] The trial court dismissed Carter's claim on the City's motion for summary disposition, and Carter appealed. [230]

The appellate court first examined the language of the VPA, observing that an "honorably discharged veteran . . . shall be preferred for employment" by public employers if the veteran has been a resident of Michigan for two years, a resident of the county in which the position is located for one year, and possesses "other requisite qualifications."[231] The court's analysis thus focused on two questions: what does it mean to be "preferred" and what are "other requisite qualifications."

Noting that the statute failed to define "preferred," "requisite" or "qualifications," the court turned to *Random House Webster's College*

223. *Id.* at 433-34, 722 N.W.2d at 249-50.
224. *Id.* at 436, 722 N.W.2d at 251.
225. *Id.* at 435, 722 N.W.2d at 250-51.
226. *Id.* at 436, 722 N.W.2d at 251.
227. *Id.*
228. *Carter*, 271 Mich. App. at 436-37, 722 N.W.2d at 251.
229. *Id.* at 426, 722 N.W.2d at 246.
230. *Id.*
231. *Id.* at 428, 722 N.W.2d at 246-47 (quoting MICH. COMP. LAWS ANN. § 35.401 (West 2001)). MCL section 35.401 states that:

> In every public department and upon the public works of the state and of every county and municipal corporation thereof honorably discharged veteran as defined by Act No. 190 of the Public Acts of 1965, as amended, being sections 35.61 and 35.62 of the Michigan Compiled Laws, shall be preferred for appointment and employment. Age, loss of limb, or other physical impairment which does not, in fact, incapacitate, shall not be deemed to disqualify them. When it shall become necessary to fill by appointment a vacancy occurring in an elective office, the appointment shall be deemed to be within this act. The applicant shall be of good moral character and shall have been a resident of the state for at least 2 years and of the county in which the office or position is located for at least one year, and possess other requisite qualifications, after credit allowed by the provisions of any civil service laws.

MICH. COMP. LAWS ANN. § 35.401 (West 2001).

Dictionary and *Black's Law Dictionary*.[232] As a result of its survey of these reference materials, the court concluded that, under the plain, ordinary meanings of the words in the VPA, the City Attorney was required to "hold plaintiff above, or give plaintiff priority over, other nonveteran applicants if he possessed the qualities or accomplishments that were required or necessary to fulfill the role of an assistant city attorney."[233]

Carter contended, however, that an amendment to the VPA, which formerly had required that the veteran possess "other requisite qualifications which shall be at least equal to those of other applicants" changed the law so that a veteran did not have to establish his qualifications relative to other applicants.[234] In 1939, the legislature removed the phrase "which shall be at least equal to those of other applicants" from the VPA.[235] While the court agreed with Carter that, after this amendment, a veteran no longer was required to prove that his qualifications were equal to or better than non-veteran applicants, the court also noted that "this does not mean that the Legislature intended for the VPA to provide an absolute preference, regardless of qualifications."[236]

To support its interpretation, the court looked to a 1908 decision of the Michigan Supreme Court in *Patterson v. Boron*.[237] In *Patterson,* the plaintiff was "an honorably discharged Union soldier, having served in the late Rebellion . . . and a regular practicing attorney."[238] Patterson sought an appointment to the position of city attorney in St. Johns, but the mayor rejected his application.[239] Patterson sued for mandamus under the VPA, but was denied.[240] The supreme court affirmed, holding that the mayor had the authority to appoint a city attorney, and therefore had the authority to determine whether an applicant was qualified for that position.[241] The Court wrote: "This right to appoint imposed upon respondent the duty of determining that his appointee possessed the requisite qualifications for the office. He would have been faithless to that duty had he appointed an applicant whom he deemed disqualified."[242] Based upon this, the court of appeals in *Carter* stated, "[i]n *Patterson,* then, our Supreme Court clearly held that to be entitled

232. *Id.* at 429, 722 N.W.2d at 247.
233. *Id.* at 429, 722 N.W.2d at 247.
234. *Carter*, 271 Mich. App. at 429, 722 N.W.2d at 247.
235. *Id.* at 430, 722 N.W.2d at 247-48.
236. *Id.* at 430, 722 N.W.2d at 248.
237. 153 Mich. 313, 116 N.W. 1083 (1908).
238. *Id.*
239. *Id.* at 314, 116 N.W.2d at 1083.
240. *Id.* at 314-15, 116 N.W.2d at 1084. According to the *Carter* court, the VPA of 1908 was substantially similar to the version in effect now. *Carter*, 271 Mich. App. at 430 n.2, 722 N.W.2d at 248 n.2.
241. *Id.*
242. *Patterson*, 153 Mich. at 314, 116 N.W. at 1084.

to the veterans' preference, a veteran must possess the requisite qualifications for the position as determined by the hiring authority."[243]

Having consulted dictionaries as well as supreme court precedent, the court next sought support from the case law of other states with similar veterans' preference laws, to shore up its ultimate conclusion that "although the veteran's qualifications need not be equal to the qualifications of a non-veteran to trigger the preference, his or her qualifications must at least be comparable."[244] Based on decisions from Pennsylvania and Washington state, and echoing the Michigan Supreme Court in *Patterson,* the court in *Carter* stated that: "Public employers should not be required to hire veterans who meet the bare minimum job qualifications if they do not believe the veteran is, in fact, qualified for the position or believe that the veteran does not possess the requisite experience."[245] The court concluded:

> The veteran's preference, then, does not ripen until the veteran can establish that he or she possesses the requisite qualifications for the position, and the VPA does not preclude a public employer from hiring a nonveteran applicant if the employer reasonably believes that the nonveteran applicant is substantially better qualified than the veteran.[246]

> Applying these principles to the Ann Arbor City Attorney's decision not to hire Carter, the court of appeals concluded that Carter had "failed to demonstrate that he had the ability to perform the job at the level of skill and with the expertise demanded by the defendant, the employer and thus, the preference never ripened."[247] The trial court's grant of summary disposition therefore was affirmed.[248]

The Sixth Circuit Court of Appeals was required to interpret a different provision of the VPA, in *Young v. Twp of Green Oak.*[249] Young, a veteran, was a police officer with the Township from 1978 until 2002.[250] In 1992, he injured his back during a training exercise, and thereafter received workers' compensation benefits for much of the next decade.[251] In 2002, the Township notified Young that it had scheduled a

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243. *Carter*, 271 Mich. App. at 431-32, 722 N.W.2d at 248.
244. *Id.* at 432, 722 N.W.2d at 249.
245. *Id.* at 433, 722 N.W.2d at 249.
246. *Id.* at 434, 722 N.W.2d at 250.
247. *Id.* at 438, 722 N.W.2d at 252.
248. *Id.*
249. 471 F.3d 674 (6th Cir. 2007). For a more detailed discussion of this case, see *supra* notes 62-83 and accompanying text.
250. *Id.* at 675.
251. *Id.* at 676.

hearing before the Township Board to determine whether Young's employment should be terminated because Young was "unable to perform the essential functions of a Green Oak Township police officer with or without accommodations."[252] After hearing the testimony of several witnesses, and receiving written and oral argument from attorneys for both Young and the township, the Board of Supervisors issued a written decision terminating Young's employment as of January 8, 2003.[253]

Young sued the township in federal court.[254] On motion by the township, the district court dismissed Young's claims under the doctrine of res judicata.[255] Young appealed to the Sixth Circuit, which agreed with the trial court's res judicata analysis as to all of Young's claims except for the due process claims arising from Young's 2003 termination, which had not yet occurred when the previous lawsuits were filed.[256]

The Sixth Circuit nevertheless affirmed dismissal of Young's VPA due process claim, concluding that the claim lacked merit.[257] The VPA dictates that a veteran cannot be discharged from his or her position with a public employer except for "official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency," and only then after a full hearing before the governing body of his employer.[258] Young argued that he did not receive the requisite full hearing, and that the stated basis for his termination did not fall within the bases specified by the VPA.[259]

The court rejected both arguments.[260] It first observed that Young was provided with 15 days notice of his termination hearing, precisely the notice dictated by the VPA.[261] Secondly, the court stated that Young had attorney representation at the hearing, and was permitted to present evidence, review the hearing transcripts and submit a post-hearing brief.[262] Finally, the Board issued a written decision, again in full

252. *Id.* at 677.
253. *Id.* at 676-77.
254. *Id.* at 677.
255. *Young*, 471 F.3d at 678. Young had filed numerous suits against the township prior to this federal court suit, making many of the same claims raised in this suit. *Id.*
256. *Id.* at 683. For a more thorough discussion of the res judicata issues presented by this case, see *supra* notes 62 to 83 and accompanying text.
257. *Id.*
258. MICH. COMP. LAWS ANN. § 35.402 (West 2001).
259. *Young*, 471 F.3d at 684.
260. *Id.* at 683-84.
261. *Id.* at 683 (citing MICH. COMP. LAWS ANN. § 35.402 (West 2001)).
262. *Id.* at 683-84.

compliance with the VPA.[263] Thus, the Sixth Circuit concluded, "Young was afforded all of the process that he was due under the VPA."[264]

The court then addressed Young's contention that the Township discriminated against him by terminating him for a reason not permitted under the VPA. The reason stated by the Township for Young's termination was that Young was "physically incompetent to return to full time police duties with the Township."[265] Young argued that "incompetency" under the VPA does not include a physical disability.[266] Because no Michigan court had interpreted the term "incompetency" under the VPA, the Sixth Circuit turned to a decision from the Minnesota Supreme Court addressing the same issue, under a statute substantially similar to Michigan's VPA.[267] In *Myers v. City of Oakdale*,[268] after surveying decisions from several states, the Minnesota Supreme Court determined that the word "incompetency" should be construed according to "its common and approved usage, which includes want of physical fitness."[269]

The Sixth Circuit stated that it was "persuaded that the Michigan Supreme Court would likewise conclude that the term 'incompetency" as used in the VPA encompasses an employee's physical inability to perform the essential functions of his or her job."[270] Because the Township provided unrefuted evidence supporting the conclusion that Young could no longer perform his job, Young's claim that the Township had failed to comply with the VPA was baseless.[271]

V. LABOR

Labor relations issues affecting Michigan public employees, such as teachers and law enforcement personnel are governed by the Public Employees Relations Act (PERA).[272] The PERA provides that public employees may engage in "lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection."[273] The Act

263. *Id.* at 684.
264. *Id.*
265. *Young*, 471 F.3d at 684.
266. *Id.* at 685.
267. *Id.*
268. 409 N.W.2d 848 (Minn. 1987)
269. *Id.* at 852.
270. *Young*, 471 F.3d at 686.
271. *Id.*
272. MICH. COMP. LAWS ANN. §§ 423.201-.217 (West 2001).
273. MCL section 423.209 states that:

> It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

MICH. COMP. LAWS ANN. § 423.209 (West 2001).

further states that it is "unlawful for a public employer or an officer or agent of a public employer . . . to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in [MCL section 423.209]."[274] During the *Survey* period, in *Ingham County v. Capitol City Lodge No. 141,*[275] the Michigan Court of Appeals concluded that the discipline of an employee for providing an internal departmental memorandum to her union's attorney did not violate the Act.[276] That the employer in question was a law enforcement agency played a crucial role in the court's decision.

On March 11, 2003, the Ingham County Sheriff's department emailed a memorandum to all of its detectives, including Laurie Siegrist.[277] That memorandum directed the detectives to carry their departmental pagers both on and off duty.[278] Siegrist, the president of the union local that represented the detectives, contacted the union's attorney as to whether such a policy change was lawful.[279] The union attorney asked Siegrist for a copy of the memorandum.[280] Siegrist complied.[281] As a result, the union attorney wrote to the Sheriff's Department, demanding that the department engage in collective bargaining regarding the pager policy.[282] Several days later, Siegrist received a written discipline, stating that her distribution of the March 11 memo had violated Rule 106 of the department's internal rules and regulations.[283] The discipline stated:

> Even though you are the Union President you do not have the right to freely distribute Department memo's [sic] and/or documents. It is not for you to decide which documents are to be made public. Your union has the ability to request public documents and certainly knows the procedure for doing this. The Sheriff's Office cannot and will not tolerate employees (even those who are union representatives) freely circulating Sheriff's Office documents. Procedures are in place to release documents and those procedures must be followed.[284]

Rule 106 stated in part that: "The Department recognizes that its Members, by virtue of their position, will gain access to sensitive and

274. MICH. COMP. LAWS ANN. § 423.210(1)(a) (West 2001).
275. 275 Mich. App. 133, 739 N.W.2d 95, (2007), *leave to appeal denied,* 480 Mich. 990, 742 N.W.2d 116 (2007).
276. *Id.* at 135, 739 N.W.2d at 97.
277. *Id.* at 137, 739 N.W.2d at 97-98.
278. *Id.* at 137, 739 N.W.2d at 97.
279. *Id.*
280. *Id.* at 138, 739 N.W.2d at 98.
281. *Ingham County*, 275 Mich. App. at 138, 739 N.W.2d at 97.
282. *Id.* at 137, 739 N.W.2d at 98.
283. *Id.* at 137-38, 739 N.W.2d at 98.
284. *Id.* at 138, 739 N.W.2d at 98.

restricted information. What is learned as a Member cannot be disseminated for other than Departmental purposes and then only through approved procedures."[285]

In response, the union filed a grievance with the Michigan Employment Relations Commission (MERC), asserting that the county and the sheriff had engaged in an unfair labor practice by disciplining Siegrist for engaging in concerted activity.[286] Ultimately, a hearing referee concluded that the county and sheriff had indeed violated PERA. That decision was upheld by the MERC.[287] The county and sheriff appealed as of right to the Michigan Court of Appeals.[288]

The court of appeals began its review by noting that legal conclusions of the MERC are reviewed *de novo*, and that a MERC decision may be set aside only if it is based on a "substantial and material error of law."[289] The court next observed that a three part test is used "[t]o analyze whether an employer can lawfully apply an employment rule to discipline an employee for engaging in what would otherwise be a protected activity" under PERA.[290] The first prong of the test looks at whether the action taken by the employer adversely affected the employee's right to engage in lawful concerted activity under the Act.[291] The second prong analyzes whether the employer has established a legitimate and substantial business justification for the rule in question.[292] The final prong requires a balancing of the "diminution of the employee's rights against the employer's interests that are protected by the rule."[293]

As to the initial prong, the court of appeals concluded that application of Rule 106 did not adversely impact Siegrist's right to engage in concerted activity because Siegrist could have obtained the memorandum for the union without violating the rule.[294] Rule 106 prohibited dissemination of internal documents to the public only if such dissemination occurred outside of "approved procedures."[295] Those procedures involved nothing more than a request for the document in question, made to the appropriate official.[296] There was evidence that Siegrist was aware of the rule, knew how to obtain documents through approved procedures, and had done so in the past, with no negative

285. *Id.* at 136, 739 N.W.2d at 97.
286. *Id.* at 137-38, 739 N.W.2d at 98.
287. *Ingham County*, 275 Mich. App. at 138-39, 739 N.W.2d at 98-99.
288. *Id.* at 140-41, 739 N.W.2d at 99-100.
289. *Id.* at 141, 739 N.W.2d at 100.
290. *Id.*
291. *Id.* at 141-42, 739 N.W.2d at 100.
292. *Id.* at 142, 739 N.W.2d at 100.
293. *Ingham County*, 275 Mich. App at 142, 739 N.W.2d at 100.
294. *Id.* at 146, 739 N.W.2d at 102.
295. *See supra* text accompanying note 285.
296. *Ingham County*, 274 Mich. App. at 136, 739 N.W.2d at 97.

consequence.[297] As the court noted, "while Rule 106 may make union activity slightly less convenient, the rule does not inhibit protected activity."[298]

The court of appeals rejected the union's assertion that Siegrist's discipline violated the Act simply because she was acting as union president when she sent the internal memorandum to the union's attorney.[299] According to the court, Michigan law does not automatically insulate from discipline an employee engaged in protected activity from discipline.[300] The court also rejected the contention that Siegrist's transmission of the memo to the union's attorney was not dissemination to the public, and so that did not violate Rule 106.[301] As the court noted, "The union and its counsel are members of 'the public' to the extent that they are not employees of the sheriff's department."[302]

Having concluded that the discipline of Siegrist for violation of Rule 106 did not adversely affect her concerted activity, the court next determined that the county and the sheriff had met their burden of demonstrating a legitimate and substantial business justification for Rule 106 and its application to Siegrist.[303] According to the court, the employer had a "substantial security interest in making sure than employees do not disseminate confidential information because of the sensitive nature of their work."[304] That the employer in question was a "paramilitary organization" was a significant factor in this analysis, according to the court, because such entities need to keep certain information confidential and secure.[305] This was so even though the memorandum at issue did not contain confidential information, because, as the court observed, "[t]he memorandum's content is irrelevant. What is relevant is the sheriff's interest in ensuring uniformity in disclosure of *potentially* sensitive internal documentation. And it is the employer, not the employee, who is in the position to assess the propriety of releasing internal documentation."[306]

Finally, the court found that "the county and the sheriff's interest in keeping all internal documents out of the public forum absent department authorization for release outweighs Detective Siegrist's right to engage in protected activity under PERA."[307] In reversing the decision of the MERC, the court concluded that "Siegrist's right to engage in a lawful

297. *Id.* at 145, 739 N.W.2d at 102.
298. *Id.* at 146, 739 N.W.2d at 102.
299. *Id.* at 146, 739 N.W.2d at 102-03.
300. *Id.* (citing AFSCME, Michigan Council, Local 574-A v. City of Troy, 185 Mich. App. 739, 744, 462 N.W.2d 847, 849 (1990)).
301. *Id.* at 148, 739 N.W.2d at 103.
302. *Id.* at 148, 739 N.W.2d at 103-04.
303. *Ingham County*, 275 Mich. App at 149, 739 N.W.2d at 104.
304. *Id.*
305. *Id.*
306. *Id.* at 149-50, 739 N.W.2d at 104.
307. *Id.* 275 Mich. App. at 151, 739 N.W.2d at 105.

concerted activity was not adversely affected when she knowingly violated a work rule that the sheriff created and enforced with the legitimate and substantial business justification of protecting the sensitive interworkings of the law enforcement agency."[308]

VI. OTHER STATE EMPLOYMENT STATUTES

A. Michigan Employment Security Act

The Michigan Employment Security Act (MESA),[309] was enacted to assist persons involuntarily unemployed.[310] The goal of the Act is to "provide relief to those persons 'able and available' to perform work but who are prevented from doing so by economic forces beyond their control."[311] Under section 29(1)(e) of the Act, however, an individual is disqualified from receiving unemployment benefits if that employee fails without good cause to accept suitable work offered.[312] The disqualification decision involves a two-part analysis: first, was the offered work "suitable," and second, did the employer reject the work for "good cause." [313] The statute does not, however, state which party—the employer or the claimant—bears the burden of proving each of these factors. During the *Survey* period, however, in *Eyre v. Saginaw Correctional Facility,*[314] the Michigan Court of Appeals addressed exactly that issue, concluding that the employer has the burden of proving "suitability" while the claimant must prove that she rejected the offer for "good cause."[315]

Janice Eyre was laid off from her clerical position at the Saginaw Correctional Facility.[316] She was offered a similar position at the Standish Maximum Correctional Facility, but declined the offer, citing health issues and the longer driving distance.[317] She initially received unemployment benefits, but after her employer protested, she was found to be disqualified under section 29(1)(e).[318] That determination was

308. *Id.* at 152, 739 N.W.2d at 105-06.

309. MICH. COMP. LAWS ANN. §§ 421.1-.75 (West 2001).

310. Empire Iron Mining P'ship v. Orhanen, 455 Mich. 410, 417, 565 N.W.2d 844, 848 (1997).

311. I.M. Dach Underwear Co. v. Employment Sec. Comm'n, 347 Mich. 465, 472, 80 N.W.2d 193, 197 (1956).

312. MICH. COMP. LAWS ANN. §§ 421.29(1), (1)(e) (West 2001). Those sections state that "[a]n individual shall be disqualified for benefits in all cases in which he or she . . . [f]ailed without good cause to accept suitable work offered to the individual." *Id.*

313. Chrysler Corp. v. Losada, 376 Mich. 209, 213, 135 N.W.2d 897, 898 (1965).

314. 274 Mich. App. 382, 733 N.W.2d 437.

315. *Id.* at 384, 733 N.W.2d at 439.

316. *Id.* at 383, 733 N.W.2d at 438.

317. *Id.*

318. *Id.* at 383-84, 733 N.W.2d at 438.

upheld at all stages, including an appeal to the circuit court. Eyre then appealed to the court of appeals.[319]

The court of appeals reversed and remanded, but without reaching the merits of the case, because it concluded that the burden of proof as to all issues had been improperly placed upon Eyre, the claimant.[320] In so doing, the court had to reconcile three previous decisions addressing the burden of proof in MESA cases: *Lasher v. Mueller Brass Co.*,[321] *Cooper v. University of Michigan*,[322] and *Tomei v. General Motors Corp.*.[323]

In *Lasher*, the court held that the burden of establishing suitability was on the employer, but did not address the issue of "good cause."[324] In *Cooper*, where the issue was whether, under section 29(1)(a) of the Act, the employee was disqualified for voluntarily resigning without good cause attributable to the employer, the court concluded that the burden of proof should be borne by the party with "exclusive knowledge" of the facts in question.[325] The *Cooper* court held that "potential disqualification, for benefits under [section 29(1)(a)] . . . requires inquiry into whether plaintiff's behavior in terminating employment was voluntary and plaintiff's reasons for doing so, the answers to these questions being within the exclusive knowledge of the claimant."[326] *Cooper* therefore placed the burden of proving those factors on the plaintiff/claimant.[327]

In contrast, the court of appeals in *Tomei* (also a section 29(1)(a) case, albeit in the context of a plant closing) found that "strict adherence to *Cooper* places on claimant the burden with regard to the voluntariness of his decision to retire."[328] Noting that in plant closing cases, employees are forced to rely on information provided by the employer in order to make their retirement decisions, the court placed the following burden of proof on the employer:

> [I]n plant-closing cases, the burden of proof in demonstrating the voluntariness of a claimant's decision to leave employment under § 29(1)(a) first falls on the employer to demonstrate that the choices it offered its employee were reasonable, viable, and clearly communicated to the employee. If the employer fails in carrying its burden such that a clearly communicated offer of viable, reasonable employment choices and their consequences

319. *Id.*
320. *Eyre*, 274 Mich. App. at 384, 733 N.W.2d at 438.
321. 62 Mich. App. 171, 233 N.W.2d 513 (1975).
322. 100 Mich. App. 99, 298 N.W.2d 677 (1980).
323. 194 Mich. App. 180, 486 N.W.2d 100 (1992).
324. *Lasher*, 62 Mich. App. at 177-78, 233 N.W.2d at 516.
325. *Cooper*, 100 Mich. App. at 103-04, 298 N.W.2d at 679.
326. *Id.*
327. *Id.* at 105, 298 N.W.2d at 681.
328. *Tomei*, 194 Mich. App. at 186, 486 N.W.2d at 103.

> are not demonstrated, the issue of voluntariness must be resolved in the claimant's favor. However, if the employer successfully carries this burden, the burden then shifts to the claimant to demonstrate that the decision to leave work was involuntary in order to qualify for unemployment benefits.[329]

The *Eyre* court found the *Tomei* analysis to be the most compelling, because it focused on "which party is better able to provide the information needed to answer the relevant inquiries."[330] Applying that rationale to section 29(1)(e) cases, the court determined that:

> [T]he employer is in the best position to establish that an offer of suitable employment has been made. The employer is more likely than the employee to be familiar with the job requirements and the working conditions of the new position and whether the employee can discharge those responsibilities. But the employee is more likely . . . to be aware of conditions personal to the employee that might provide good cause for refusing that employment.[331]

The court thus placed the burden of proving suitability on the employer, and the burden of showing good cause on the employee. Because the hearing referee had improperly imposed the entire burden on the employee, the matter was reversed and remanded to the referee.[332]

B. Bullard-Plawecki Employee Right to Know Act

Enacted in 1978, Michigan's Bullard-Plawecki Employee Right to Know Act (ERKA) [333] grants all employees the right to access and review their personnel files.[334] Under the Act, before an employer may release an employee's disciplinary records to a third party, the employer must provide the employee with written notice.[335] This notice must be provided by first class mail, mailed on or before the date on which the

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329. *Id.* at 186, 486 N.W.2d at 104.

330. *Eyre*, 274 Mich. App. at 385, 733 N.W.2d at 439.

331. *Id.*

332. *Id.* at 386, 733 N.W.2d at 439.

333. MICH. COMP. LAWS ANN. §§ 423.501-.512 (West 2001 & Supp. 2007).

334. MICH. COMP. LAWS ANN. § 423.503 (West 2001 & Supp. 2007).

335. MICH. COMP. LAWS ANN. § 423.506(1) (West 2001 & Supp. 2007). That section provides that:

> An employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party, to a party who is not a part of the employer's organization, or to a party who is not a part of a labor organization representing the employee, without written notice as provided in this section.

Id.

information is released.[336] Because the Act does not require that notice of the disclosure be mailed in advance of the disclosure itself, the Act does not provide the employee with the right to halt the disclosure.[337]

The Act does create a private cause of action for an employee who can demonstrate a violation by his employer.[338] Under the statute, damages are limited to actual damages plus costs. For willful and knowing violations, available damages are $200 plus costs, reasonable attorney's fee and actual damages.[339]

In 2003, the Michigan Court of Appeals provided a rare interpretation of the Act in *McManamon v. Charter Twp. of Redford.* [340] In that case, the court held that ERKA does not require that an employee first seek an order compelling his employer to comply with the Act, as a condition precedent to seeking monetary relief under the Act.[341] The case was remanded and proceeded to trial, resulting in a jury verdict for the plaintiff. Redford Township appealed, and, in *McManamon v. Charter Twp. of Redford,*[342] decided during the *Survey* period, the court considered whether the damage award received by the plaintiff was attributable to the Township's violation of ERKA.

Daniel McManamon managed an indoor ice arena operated by his employer, Redford Township.[343] In June 1997, he was suspended and subsequently terminated by the township supervisor.[344] "Around the same time, McManamon and two other township employees were charged with misdemeanor embezzlement."[345] McManamon was acquitted of those charges in September 1997.[346] Prior to McManamon's criminal trial, in June 1997, the township supervisor responded to requests for information from a newspaper, the *Redford Observer* by stating that McManamon had been "suspended due to problems in the performance of his duties beyond the embezzlement charge."[347] No notice of this disclosure was provided to McManamon.[348]

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336. MICH. COMP. LAWS ANN. § 423.506(2) (West 2001 & Supp. 2007) ("[t]he written notice to the employee shall be by first-class mail to the employee's last known address, and shall be mailed on or before the day the information is divulged from the personnel record.").

337. McManamon v. Charter Twp. of Redford, 256 Mich. App. 603, 613 n.5, 671 N.W.2d 56, 61 n.5 (2003) [hereinafter McManamon I].

338. MICH. COMP. LAWS ANN. § 423.511 (West 2001 & Supp. 2007).

339. *Id.*

340. *See generally McManamon I,* 256 Mich. App. 603, 671 N.W.2d 56.

341. *Id.* at 604, 671 N.W.2d at 57. For a complete discussion of *McManamon, see* Patricia Nemeth & Daniel Villaire, *Employment & Labor Law, 2003 Ann. Survey of Mich. Law,* 50 WAYNE L. REV. 517, 521-25 (2004).

342. 273 Mich. App. 131, 730 N.W.2d 757 (2006) [hereinafter McManamon II].

343. *McManamon I,* 256 Mich. App. at 605, 671 N.W.2d at 57.

344. *Id.*

345. *Id.*

346. *Id.*

347. *McManamon II,* 273 Mich. App. at 136, 703 N.W.2d at 761.

348. *Id.*

McManamon sued the township, seeking damages for violation of the ERKA, defamation, false-light publicity, and disclosure of embarrassing facts. All claims but the ERKA violation were dismissed prior to trial.[349]

The only issue at trial was the measure of damages, if any, suffered by McManamon as a result of the township's ERKA violation -- its failure to provide McManamon with notice of the disclosure of his employment-related disciplines to the newspaper.[350] McManamon was permitted to testify that, as a result of newspaper articles regarding his suspension and arrest, he failed to receive a job for which he had applied, and he was devastated and upset.[351] The jury awarded $100,000 in damages to McManamon, and the township appealed.[352]

The court of appeals first rejected that township's argument that it did not "divulge" McManamon's discipline, because the newspaper already had significant information about him.[353] Looking to the dictionary definition of the verb "divulge," the court noted that "to divulge" means to disclose or reveal something previously unknown.[354] The court thus concluded that the ERKA's notice provision is triggered by the release of disciplinary information that is previously unknown.[355] Because McManamon's suspension was not previously known to the newspaper, the township was required to provide notice of the disclosure to McManamon.[356] It did not do that, thereby violating the Act.[357]

The court then addressed the jury's damages award, holding that the award was not supported by evidence but based on speculation and conjecture.[358] Analyzing the evidence offered by McManamon at trial, the court noted that he had failed to establish that his damages were caused by the township's failure to provide him with notice of the disclosure.[359] Instead, according to the court, "[t]he evidence suggests that it was the *publication by* the *Redford Observer*, not the failure to give notice of the divulgence to the *Redford Observer*" that caused

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349. *McManamon II*, 273 Mich. App. at 142, 703 N.W.2d at 764 (Hoekstra, J., concurring).

350. *Id.* at 143, 703 N.W.2d at 764-65.

351. *Id.* at 143, 703 N.W.2d at 765.

352. *Id.* at 135-36, 703 N.W.2d at 761-62.

353. *Id.*

354. *Id.* at 136, 703 N.W.2d at 761.

355. *McManamon II*, 273 Mich. App. at 167, 703 N.W.2d at 761.

356. *Id.* at 136-37, 703 N.W.2d at 761.

357. *Id.* at 137, 703 N.W.2d at 761. The court of appeals rejected the township's arguments that it was required to provide the information under the Freedom of Information Act, [MCL sections 15.231-.246] and the First Amendment, because neither of those laws authorized Redford Township to release information regarding McManamon's suspension without notice to McManamon. *Id.* at 137-38, 703 N.W.2d at 761-62.

358. *Id.* at 139, 703 N.W.2d at 763.

359. *Id.*

McManamon to lose the job for which he applied, and to suffer embarrassment.[360] In fact, the court stated that there was no evidence at all that, even if McManamon had received notice of the disclosure, the newspaper would not have reported its story about McManamon.[361] The court reiterated its observation from *McManamon I,* that the notice required under the ERKA is intended only to provide the employee with an opportunity to counter the disclosure; the Act does not require notice so that that the employee can halt the disclosure.[362]

The court therefore concluded that the jury's verdict was based on "pure speculation and conjecture" and must be overturned.[363] The case was remanded for a new trial. [364]

VII. EMPLOYMENT AGREEMENTS

As this article illustrates, quite a number of Michigan statutes address the relationship between employers and employees. Apart from these legislative efforts to regulate that relationship, employees and employers also may agree to terms and conditions specific to their situation. Once that situation changes, though, the parties turn to the courts—and statutes—to sort out the details. During the *Survey* period, the parties in *Rooyakker & Sitz, P.L.L.C. v. Plante & Moran, P.L.L.C.*[365] and *Pandy v. Board of Water and Light*[366] likely believed that they had addressed all possible issues in their respective employment agreements— until everything fell apart. Then it was up to the courts to decide what the parties actually intended.

A. At-Will Employment

It is axiomatic in Michigan that employment relationships are presumed to be at-will, meaning that either party may terminate the relationship at any time for any reason, or for no reason, provided that the termination does not violate other employment laws.[367] Michigan courts have previously held, however, that specific terms of an

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

361. *McManamon II*, 273 Mich. App. at 140, 703 N.W.2d at 763.

362. *Id.* at 139-40, 703 N.W.2d at 763.

363. *Id.*

364. *Id.* In a separate opinion, Judge Hoekstra concurred with the reversal of the jury verdict, but focused his criticism instead on the flawed jury instructions and the admission of irrelevant evidence as to McManamon's distress at the information reported by the newspaper. According to Judge Hoekstra, neither the instruction nor the evidence adequately focused on the only true measure of damages—those caused by the township's failure to provide notice of the release of information to the newspaper. *Id.* at 147-48, 730 N.W.2d at 767 (Hoekstra, J., concurring).

365. 276 Mich. App. 146, 742 N.W.2d 409.

366. 480 Mich. 899, 739 N.W.2d 86.

367. Lytle v. Malady, 458 Mich. 153, 163-64, 579 N.W.2d 906, 910 (1998).

employment agreement may overcome that presumption.[368] In *Pandy v. Board of Water and Light*, however, the Michigan Supreme Court held that where an agreement clearly states that the relationship can be terminated at any time "with or without cause," the employment relationship is at-will, even if the agreement also contains severance pay provisions that vary with the reason for the termination.[369]

Joseph Pandy, Jr. was hired as the Director of the Lansing Board of Water and Light in 1984.[370] In July 1990, he and the Board of Commissioners entered into a five year agreement, which stated that the arrangement was "at-will," allowing the Board to terminate the agreement "at any time, with or without cause."[371] The agreement also provided that if Pandy were terminated for cause, he would receive his salary and benefits through the full term of the agreement.[372] In 1992, the parties executed a second contract with the same terms except that the agreement provided for automatic renewal on July 1 of each year, meaning that the active term of the agreement would always be five years.[373]

On September 10, 2002, however, the Board of Commissioners declared Pandy's contract to be invalid and terminated him without cause.[374] The Board had concluded that it was not bound by the agreement entered into by a predecessor Board.[375] The Board did not provide Pandy with the severance pay required under the agreement, presumably because it believed that the agreement was invalid.[376]

Pandy filed suit against the Board of Water and Light, alleging breach of contract and other claims.[377] The Board sought summary disposition of Pandy's breach of contract claim, which was denied by the trial court.[378] The Board then successfully sought leave to appeal to the court of appeals.[379]

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368. *Id.* at 164, 579 N.W.2d at 910-11. In *Lytle,* the Michigan Supreme Court held that an employee can establish a just cause agreement under certain circumstances. *Id.* Thus, a just cause agreement may exist if the agreement contains a definite term of employment provision or an express provision forbidding discharge without just cause; if an express agreement, written or oral, exists, clearly and unequivocally provides for job security; or if a contractual provision of just cause employment may be implied in law, based on the employer's policies and procedures. *Id.*

369. Pandy v. Bd. of Water and Light, 480 Mich. 899, 739 N.W.2d 86 (2007).

370. Pandy v. Bd. of Water and Light, No. 259784, 2006 WL 3421823 at *1 (Mich. Ct. App. Nov. 28, 2006).

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Pandy*, 2006 WL 3421823, at *1.

377. *Id.*

378. *Id.*

379. *Id.* at *1-2.

The court of appeals ruled that Pandy's contract was a for-cause agreement, despite the inclusion of at-will language.[380] The court viewed the existence of a definite term in the agreement (five years), and the provision guaranteeing full compensation for the entire minimum term of the contract as together creating a legitimate expectation of job security for at least that minimum defined term.[381]

Despite this finding, however, the court of appeals still reversed, ordering entry of judgment for the defendant on the breach of contract claim, because, under the city charter, the Board was not authorized to enter into just cause agreements.[382] Pandy's contract therefore was invalid.[383]

The Michigan Supreme Court peremptorily reversed, stating that the Lansing City Charter provided that the Director of the Board of Water and Light shall serve "at its pleasure."[384] The court further noted that Pandy's contract stated that he could be terminated at any time "with or without cause," which meant that, consistent with the city charter, that Pandy was serving "at the pleasure" of the Board.[385] The court concluded that the severance provisions of the agreement were just that—terms governing the pay owed to Pandy depending on whether he was terminated for cause or not.[386] In the court's view, those severance term did not effect the nature of the contract as an at-will agreement.[387] Apparently, if an employment agreement states that it is at-will, that is how it is to be viewed by Michigan courts.[388]

B. Non-Solicitation Agreements

As it has done during the last several *Survey* periods, the Michigan Court of Appeals again faced the question of whether an employment agreement violated Michigan's Antitrust Reform Act. (MARA),[389] in *Rooyakker & Sitz, P.L.L.C. v. Plante & Moran, P.L.L.C.*[390]

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380. *Id.* at *2-3.

381. *Id.* at *3.

382. *Pandy*, 2006 WL3421823, at *3.

383. *Id.*

384. *Pandy*, 480 Mich. at 899, 739 N.W.2d at 86.

385. *Id.*

386. *Id.*

387. Ironically, while at-will employment is normally viewed as a benefit for the employer, it may not turn out to be the case for the Lansing Board of Water and Light. The supreme court validated Pandy's contract, thereby making the severance term of the agreement applicable. *Id.* The Board may well be required to pay five years of wages and benefits to Pandy.

388. The Michigan Supreme Court has held that its peremptory orders constitute binding precedent as long as the order "contains a concise statement of the applicable facts and the reason for the decision." People v. Crall, 444 Mich. 463, 465 n.8, 510 N.W.2d 182, 183 n.8 (1993) (citing MICH. CONST. art. VI, § 6).

389. MICH. COMP. LAWS ANN. §§ 445.771-.788 (West 2000).

390. 276 Mich. App. 146, 742 N.W.2d 409.

Plaintiffs Rooyakker, Sitz and Burns were employed as accountants by the defendant, Plante & Moran, in that firm's Gaylord office.[391] As a condition of employment, each signed a "Practice Staff-Relationship Agreement," containing a client non-solicitation clause and an arbitration clause.[392] The non-solicitation clause specifically provided that:

> During the staff member's employment and during the two year period thereafter the staff member shall not directly or indirectly, render professional accounting, tax, consulting or any other service provided by the Firm at the date of termination (whether voluntary or involuntary), other than as a bona fide, full-time employee of a client, to any Firm client.[393]

The arbitration clause dictated that:

> [A]ny dispute or controversy arising out of or relating to this Agreement, may be settled by arbitration held in Oakland County, Michigan. . . . The decision of the arbitrator will be final, conclusive and binding on the parties. Judgment may be entered based on the arbitrator's decision in any court having jurisdiction.[394]

In July, 2005, Plante & Moran decided to close its Gaylord office.[395] Plaintiffs, along with all of the employees at that office, were provided with the opportunity to transfer to Plante & Moran's Traverse City office.[396] Plaintiffs elected not to relocate, instead opening their own accounting firm in Gaylord.[397] In that capacity, they provided services to a number of Plante & Moran's clients.[398]

When Plante & Moran learned that its clients now were being served by its former employees, the company sought to enforce its non-solicitation agreement through the arbitration clause included in that agreement.[399] In response, the plaintiffs filed suit against Plante & Moran, alleging that the non-solicitation agreement was unenforceable because it violated the MARA.[400] In response to the parties' competing

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391. *Id.* at 148, 742 N.W.2d at 413.
392. *Id.* at 149, 742 N.W.2d at 413.
393. *Id.* at 148-49, 742 N.W.2d at 413.
394. *Id.* at 149-50, 742 N.W.2d at 413-14.
395. *Id.* at 150, 742 N.W.2d at 414.
396. *Rooyakker & Sitz*, 276 Mich. App. at 150, 742 N.W.2d at 414.
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.* at 151, 742 N.W.2d at 414. The Act provides, in part that:
> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after

motions for summary disposition, the trial court denied the plaintiffs' motion and granted that of the defendant, upholding the arbitration clause and directing that issues regarding the non-solicitation clause be resolved by the arbitrator.[401]

On appeal, the plaintiffs first argued that the arbitration clause in the agreement was invalid because it failed to specify that the arbitrator's decision would be entered as a judgment in circuit court.[402] The plaintiffs relied on the Michigan Arbitration Act (MAA),[403] which specifically provides that arbitration provisions are valid, enforceable, and irrevocable only when the agreement is in writing and states that the arbitral decision may be entered as a judgment in circuit court.[404]

The court of appeals found this argument overly restrictive, noting that the recent Michigan Supreme Court decision in *Wold Architects and Engineers v. Strat,*[405] which interpreted the MAA, did not expressly require that an arbitration agreement specify that judgment be entered on the arbitrator's award specifically in the circuit court.[406] The court of appeals noted that the arbitration agreement in *Wold* contained no language at all regarding enforcement of the agreement in the courts.[407] In contrast, other courts had enforced arbitration agreements containing language similar to that included in the Plante & Moran agreement, which stated that the arbitration award could be enforced in "any court having jurisdiction."[408]

The court of appeals then addressed the validity of the non-solicitation clause. Each party relied upon the MARA to support its position. The plaintiffs argued that the non-solicitation clause violated that section of the MARA prohibiting the creation of contracts that place an unlawful restraint on trade.[409] In contrast, Plante & Moran argued that the MARA specifically permits employers to enter into agreements with employees that protect an employer's "reasonable competitive business

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termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

MICH. COMP. LAWS ANN. § 445.774a (West 2002 & Supp. 2007).

401. *Id.* at 151-52, 742 N.W.2d at 414-15.

402. *Rooyakker & Sitz*, 276 Mich. App. at 154, 742 N.W.2d at 416.

403. MICH. COMP. LAWS ANN. §§ 600.5001-.5035 (West 2000).

404. *Rooyakker & Sitz*, 276 Mich. App. at 153, 742 N.W.2d at 415-16 (citing MICH. COMP. LAWS ANN. § 600. 5001(2) (West 2000)).

405. 474 Mich. 223, 713 N.W.2d 750 (2006).

406. *Rooyakker & Sitz*, 276 Mich. App. at 154-55, 742 N.W.2d at 416.

407. *Id.* at 154, 742 N.W.2d at 416.

408. *Id.*

409. MCL section 445.772 states that, "[a] contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful." MICH. COMP. LAWS ANN. § 445.772 (West 2002).

interests" provided that the agreement is "reasonable as to its duration, geographical area, and the type of employment, or line of business."[410]

The court of appeals agreed with Plante & Moran, holding that the non-solicitation clause simply prohibited Plante & Moran employees from providing to Plante & Moran's clients the same services that Plante & Moran provided, during a two year period following termination of employment. The court viewed these limitations as being "reasonable in relation to Plante & Moran's reasonable business interests," by preventing Plante & Moran's former employees from using confidential information obtained while working for Plante & Moran for the purpose of gaining a competitive advantage.[411]

The appellate court also rejected the plaintiffs' alternative argument, which sought to excuse the plaintiffs' obligation to perform the contract because their purpose in signing the agreement was frustrated by Plante & Moran's decision to close its Gaylord office.[412] The court held that the plaintiffs had failed to establish the elements of a frustration-of-purpose claim, one of which is that the contract must be frustrated by an event not reasonably foreseeable at the time of the execution of the agreement.[413] The court concluded that the plaintiffs' own testimony revealed that Plante & Moran was considering closing its Gaylord office even before the plaintiffs were hired, and thus was foreseeable when the plaintiffs signed the agreement.[414]

The court of appeals' decision in *Rooyakker & Sitz* is especially interesting because, even though the employer terminated the employment relationship by closing its local office, the court recognized that the company retained a legitimate business interest in the area.[415]

VIII. EMPLOYMENT TORTS

Employment discrimination plaintiffs occasionally supplement their statutory claims by pleading tort claims, such as negligent hiring,

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410. MCL section 445.774a states that:

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

MICH. COMP. LAWS ANN. § 445.774(a) (West 2002).

411. *Rooyakker & Sitz*, 276 Mich. App. at 158-59, 742 N.W.2d at 418.

412. *Id.* at 159-60, 742 N.W.2d at 419.

413. *Id.*

414. *Id.*

415. *Id.* at 158-59, 742 N.W.2d at 418.

retention or supervision, or intentional infliction of emotional distress. Such claims have been met with varying responses from the courts. In its 2005 decision in *McClements v. Ford Motor Co.*,[416] for example, the Michigan Supreme Court ruled that an employee could not bring a common law claim for negligent retention in lieu of a sexual harassment claim, because the ELCRA[417] provides the exclusive remedy for employment-related harassment claims.[418] According to the court, that Act provides a remedial scheme limited to "a civil action for appropriate injunctive relief or damages, or both," and not a common law negligent retention claim.[419] The court therefore affirmed dismissal of the negligent retention claim brought by a non-employee against Ford Motor Company for the harassing conduct of a Ford supervisor.[420]

During this *Survey* period, the Michigan Supreme Court had occasion to again address a negligent retention claim, and again concluded that the plaintiff had failed to establish such a claim. In *Brown v. Brown*, the court reversed the decision of the lower court holding that an employer who had notice of an employee's violent propensities but failed to protect a non-employee from that violence could be directly liable for the violent acts of that employee, under a negligent retention theory.[421] The supreme court, divided along the now-familiar 4-3 lines, reversed, holding that words alone cannot place an employer on notice of an employee's criminal sexual propensities.[422]

The plaintiff in the case, Lisa Brown, was a security guard, assigned by her employer (Burns Security) to work at Samuel-Whittar Steel, Inc.[423] Michael Brown (no relation to Ms. Brown) was employed by Samuel-Whittar as a foreman.[424] During the period when Lisa Brown and Michael Brown worked at the same facility, Lisa reported on three different occasions that Michael made sexual statements to her.[425] Specifically, Ms. Brown testified at her deposition that Michael Brown "would tell me how he loved my long hair and how he would want to f*** me and pull my long hair and . . . [that] he liked how I shaked [sic] my a** and I had big t*** and just all the terrible things like that."[426] One night when both were on duty, Michael Brown sexually assaulted Ms. Brown.[427] Ms. Brown immediately reported the incident to the

416. 473 Mich. 373, 702 N.W.2d 166 (2005).
417. MICH. COMP. LAWS ANN. §§ 37.2101-.2804 (West 2001).
418. *McClements*, 473 Mich. at 383, 702 N.W.2d at 171.
419. *Id.* (quoting MICH. COMP. LAWS ANN. § 37.2801(1) (West 2001)).
420. *Id.*
421. 478 Mich. 545, 552, 739 N.W.2d 313, 316 (2007).
422. *Id.* at 552, 739 N.W.2d at 316.
423. *Id.* at 547, 739 N.W.2d at 314.
424. *Id.*
425. *Id.* at 539, 739 N.W.2d at 315.
426. *Id.*
427. *Brown*, 478 Mich. at 549-50, 739 N.W.2d at 315.

police. Michael Brown was charged with third degree criminal sexual assault, but pled no contest to attempted third degree sexual assault.[428]

Unable to return to work as a result of the trauma, Ms. Brown filed suit against Samuel-Whittar Steel, alleging that the defendant was vicariously liable for Michael Brown's actions under the *respondeat superior* doctrine.[429] Ms. Brown also alleged that the company had been negligent in failing to take reasonable steps to prevent the rape after it knew about Michael Brown's lewd comments.[430] The trial court granted Whittar's motion for summary disposition, and Ms. Brown appealed, challenging the dismissal of her negligence claim.[431]

The court of appeals reversed, holding that Ms. Brown had presented a genuine issue of material fact as to whether the defendant knew or should have known of Michael Brown's criminal sexual propensities.[432] The court relied upon several prior decisions addressing the circumstances under which an employer has a duty to protect an individual from harm caused by an employee, including *Hersh v. Kentfield Builders, Inc.*,[433] *Samson v. Saginaw Professional Building*,[434] and *Tyus v. Booth*.[435] While those cases each involved an individual who had a history of violent acts (as opposed to words alone), the court of appeals in *Brown* nonetheless determined that "the language and the circumstances were sufficient to create a jury question regarding whether [defendant] knew or should have known of Michael Brown's violent propensities."[436]

The supreme court disagreed. Writing the majority opinion, Justice Young began by noting that, to establish a negligence claim, a plaintiff must establish duty, breach of that duty, causation and damages. The threshold question in negligence cases, according to the Justice, is whether the defendant owed a duty to the plaintiff.[437] "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person."[438] In determining the existence of a legal duty, relevant factors include "foreseeability of the harm, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and . . . the burdens and consequences of imposing a duty and the resulting

428. *Id.* at 550, 739 N.W.2d at 315.
429. *Id.*
430. *Id.* Ms. Brown also sued Michael Brown for assault and battery.
431. *Id.* at 550, 739 N.W.2d at 316.
432. *Id.* at 551, 739 N.W.2d at 316.
433. 385 Mich. 410, 189 N.W.2d 286 (1971).
434. 44 Mich. App. 658, 205 N.W.2d 833 (1975).
435. 64 Mich. App. 88, 235 N.W.2d 69 (1975).
436. *Brown v. Brown*, 270 Mich. App. 689, 699, 716 N.W.2d 626, 632 (2006).
437. *Brown*, 478 Mich. at 552, 739 N.W.2d at 317.
438. *Id.* (quoting Moning v. Alfano, 400 Mich. 425, 438-39, 254 N.W.2d 759, 765 (1977)).

liability for breach."[439] According to the court, while foreseeability of harm is one factor to be considered, "the mere fact that an event is foreseeable does not impose a duty on the defendant."[440] Justice Young recalled that the court had recently limited the duty owed by an invitor regarding the criminal acts committed by an invitee, in *MacDonald v. PKT, Inc.*[441] In that case, the court wrote: "Subjecting a merchant to liability solely on the basis of a foreseeability analysis is misbegotten. Because criminal activity is irrational and unpredictable it is in this sense invariably foreseeable everywhere."[442]

Justice Young then extended this rationale to negligent retention claims against employers, noting that:

> [S]imilar concerns of foreseeability and duty arise in the negligent retention context when we consider whether an employer may be held responsible for its employee's criminal acts. Employers generally do not assume their employees are potential criminals, nor should they. Employers suffer from the same disability as invitors when attempting to predict an employee's future criminal activity.[443]

The court went on:

> [A]n employer can assume that its employees will obey our criminal laws. Therefore, it cannot reasonably anticipate that an employee's lewd, tasteless comments are an inevitable prelude to rape if those comments did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a specific victim.[444]

Even while casting doubt on foreseeability as the primary basis of a negligence claim against an employer, the *Brown* majority also concluded that, based on the specific facts of the case, the rape of Lisa Brown was *not* a foreseeable result of Michael Brown's offensive speech.[445] At most, the court concluded, Brown's statements gave notice to the defendant of Brown's propensity for vulgarity.[446] The court

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439. *Id.* at 553, 739 N.W.2d at 317 (quoting Valcaniant v. Detroit Edison Co., 470 Mich. 82, 86, 679 N.W.2d 689, 691 (2004)).

440. *Id.* (quoting Buczkowski v. McKay, 441 Mich. 96, 101, 490 N.W.2d 330, 333 (1992)).

441. 464 Mich. 322, 628 N.W.2d 33 (2001).

442. *Id.* at 335, 628 N.W.2d at 39.

443. *Brown*, 478 Mich. at 554, 739 N.W.2d at 318.

444. *Id.* at 555, 739 N.W.2d at 318.

445. *Id.* at 554-55, 739 N.W.2d at 318.

446. *Id.*

cautioned, "[c]omments of a sexual nature do not inexorably lead to criminal sexual conduct any more than an exasperated, angry comment inexorably results in a violent criminal assault."[447]

That Samuel-Whittar could not reasonably foresee that Michael Brown would rape Lisa Brown was, according to Justice Young, borne out by Ms. Brown's own assessment of Michael Brown's words. Lisa Brown testified that, while she thought Mr. Brown was "weird," his offensive speech did not cause her to be afraid that he would physically attack her.[448] As Justice Young wrote: "It is inconceivable that defendant's management officials should have anticipated or predicted Brown's behavior any better than plaintiff, who directly witnessed the tone and tenor of Brown's offensive statements.... the lack of foreseeability of the harm in this case weighs definitively against imposing a duty on defendant."[449] The court went on to consider the other relevant factors in assessing the existence of a legal duty (moral blame, closeness of connection between Brown's statements and the rape, and the burdens and consequences of assessing blame) and determined that none of the factors weighed in favor of imposing a duty.[450] Justice Young concluded this analysis as follows:

> As a general rule, an employer cannot accurately predict an employee's future criminal behavior solely on the basis of the employee's workplace speech. An employer diligently seeking to avoid such broad tort liability would inevitably err on the side of over-inclusiveness and cast a wide net scrutinizing *all* employee speech that could be remotely construed as threatening. However, as this Court astutely observed in *Hersh*, "not every infirmity of character" is sufficient to forewarn the employer of its employee's violent propensities. If every inappropriate workplace comment could supply sufficient notice of an employee's propensity to commit future violent acts, a prudent employer operating under the duty fashioned by the Court of Appeals *ought* to treat every employee who makes inappropriate workplace comments as a potentially violent criminal. The additional social and economic costs associated with this type of monitoring, not to mention the burden on otherwise innocent employees who make inappropriate comments in the workplace but harbor no violent propensities, weigh further against imposing the duty created by the Court of Appeals.[451]

447. *Id.* at 555, 739 N.W.2d at 318.
448. *Id.* at 556, 739 N.W.2d at 319.
449. *Brown*, 478 Mich. at 556, 739 N.W.2d at 319.
450. *Id.* at 556-57, 739 N.W.2d at 319.
451. *Id.* at 557-58, 739 N.W.2d at 319-20.

Justice Young also distinguished the 1971 case relied upon by the court of appeals (and by the dissenting Justices), *Hersh v. Kentfield Builders, Inc.*[452] In *Hersh*, the supreme court held that, if an employer knew or should have known of an employee's violent propensities, the employer may be liable for intentional torts committed by the employee, even if that employee acts outside the scope of his employment.[453] In that case, Benton Hutchison, an employee of Kentfield Builders, attacked Melvin Hersh when Hersh visited one of the builders' model homes.[454] Kentfield was aware that Hutchison had a criminal history, and in fact, Hutchison was later committed to a home for the criminally insane.[455] The court in *Hersh* concluded that the question of whether the employer knew, or should have known of its employee's vicious propensities was a question for the jury.[456] The court stated that "[t]he employer's knowledge of past acts of impropriety, violence, or disorder on the part of the employee is generally considered sufficient to forewarn the employer who selects or retains such employee in his service that he may eventually commit an assault . . . ."[457]

The court of appeals in *Brown* had observed that there was no "requirement, in *Hersh,* or elsewhere, that an employer must know that the employee had a propensity to commit the actual crime that occurred. Rather, it is enough if the employer knows of the employee's 'impropriety, violence, or disorder.'"[458] Justice Young criticized this reliance *Hersh* because, in that case, the employee who assaulted a third party in fact had committed a prior violent act.[459] The *Hersh* court imposed liability based upon the employer's awareness of that act, not words alone.[460] This, according to Justice Young, was sufficient to distinguish *Hersh* from *Brown*, where the employee had made only statements.[461]

Justice Cavanagh, joined by Justices Kelly and Weaver, vigorously dissented. Insistent that *Hersh* was not limited to instances in which the employee had shown his criminal propensities through actions, Justice Cavanagh opined that there was sufficient evidence to raise a jury question as to whether Samuel-Whittar was on notice that Michael Brown might rape Lisa Brown.[462] Justice Cavanagh also attacked the "irrational burden" placed upon employees by the majority decision, who

452. 385 Mich. 410, 189 N.W.2d 286 (1971).
453. *Id.* at 412-13, 189 N.W.2d at 287-88.
454. *Id.* at 411-12, 189 N.W.2d at 287.
455. *Id.* at 412-14, 189 N.W.2d at 287-88.
456. *Id.* at 415, 189 N.W.2d at 289.
457. *Id.* at 413, 189 N.W.2d at 288.
458. *Brown*, 270 Mich. App. at 701, 716 N.W.2d at 633.
459. *Brown*, 478 Mich. at 561, 739 N.W.2d at 331.
460. *Id.* at 562, 739 N.W.2d at 332.
461. *Id.*
462. *Id.* at 570-71, 739 N.W.2d at 326-27 (Cavanagh, J., dissenting).

now must "specifically state to an employer 'I believe that I might be killed,' or 'I believe that I might be raped."[463]

Although both the majority and the dissenters claim that the opposing view will result in immeasurable harm to the workplace, it seems probable that neither of the imaginary horribles will occur. With this ruling, employers need not become "speech police," but neither should they be overly sanguine about ignoring reports of inappropriate workplace comments. As Justice Young noted, such comments, if not addressed, place the employer at risk of a hostile work environment claim under the ELCRA.[464] Justice Young also took pains to note that the majority was not holding that "an employee's words alone can *never* create a duty owed by the employer to a third party." Employers thus must take care to avoid creating the case in which the supreme court would find that such a duty had been created.[465]

IX. FAMILY MEDICAL LEAVE ACT

The Family and Medical Leave Act (FMLA),[466] which allows eligible employees to take leave from work for certain delineated reasons without fear of losing their jobs, remains a source of litigation for both employers and employees. Although the FMLA was enacted more than fifteen years ago, courts continue to provide nuances to its interpretation and to the meaning and applicability of the Department of Labor FMLA regulations, although the pace of reported decisions involving the statute appears to be slowing.

The FMLA provides that litigation of FMLA issues may proceed in either state or federal courts.[467] FMLA claims most often are resolved in federal courts, either initially filed in federal court or removed there pursuant to federal question jurisdiction.[468] As the following cases illustrate, the FMLA issues presented to the courts are becoming increasingly complex.

The FMLA defines an employer as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year."[469] Employers are further defined to include those acting in the employer's interest and those that are "successors in interest."[470]

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463. *Id.* at 571, 739 N.W.2d at 327.
464. *Id.* at 555, 739 N.W.2d at 318.
465. *Brown*, 478 Mich. at 556, 739 N.W.2d at 318 (emphasis in original).
466. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2006).
467. 29 U.S.C. § 2617(a)(2) (2006).
468. *See* 28 U.S.C. § 1331 (2006).
469. 29 U.S.C. § 2611(4)(A)(i) (2006).
470. 29 U.S.C. § 2611(4)(A)(ii)(I)(II) (2006).

Eligible employees are those who have been employed by the employer for twelve months and who have worked at least 1250 hours in the twelve-month period preceding the request for FMLA leave.[471] Eligible employees are entitled to take up to twelve weeks unpaid leave in a twelve month period for the employee's own serious health condition, or to care for a family member suffering from a serious health condition, or for the birth or adoption of a child.[472]

Two distinct theories of liability under the FMLA have been recognized. They are: (1) interference (or entitlement) claims[473] and (2) retaliation (or discrimination) claims.[474] Interference/entitlement claims require a plaintiff to prove that: (1) he/she is an eligible employee; (2) the defendant is an employer subject to the FMLA; (3) the employee was entitled to FMLA leave; (4) the employer had notice of the need for FMLA leave; and (5) the employer denied the FMLA benefits the employee was entitled to receive.[475] Retaliation/discrimination claims require that the plaintiff prove that: (1) he/she was engaged in a FMLA protected activity; (2) the employer had knowledge of that protected activity; (3) with knowledge the employer took adverse action against the employee; and (4) there was a causal connection between the protected activity and the adverse employment action.[476]

A. Eligibility

To qualify for the protections of the FMLA, an employee must have worked for the employer for twelve months and worked 1,250 hours in the twelve months preceding the leave request.[477] During the *Survey* period, questions as to how those eligibility requirements are to be calculated were addressed in several cases.

In *O'Connor v. Busch's, Inc.*,[478] United States District Court Judge Lawrence Zatkoff considered the question of whether an employee can combine separate periods of employment with the same employer in order to meet the twelve months of service requirement. In that case, Caryn O'Connor had worked for Busch's for a period of time in the mid-

471. 29 U.S.C. § 2611(2)(A)(i)(ii) (2006).
472. 29 U.S.C. § 2612 (2006).
473. 29 U.S.C. § 2615(a)(1) (2006).
474. 29 U.S.C. § 2615(a)(2) (2006).
475. Walton v. Ford Motor Co., 424 F.3d 481, 485 (6th Cir. 2005).
476. Arban v. West Publ'g Corp., 345 F.3d 390, 404 (6th Cir. 2003).
477. 29 U.S.C. § 2611(2)(A) states that:
> The term 'eligible employee' means an employee who has been employed-- (i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

Id.
478. 492 F. Supp.2d 736 (E.D. Mich. 2007).

eighties.[479] In May 2005, O'Connor again was hired by Busch's, this time as the Vice President of Finance.[480]

That summer, O'Connor was involved in a car accident in which she suffered numerous injuries, including post-concussive syndrome.[481] Despite her injuries, O'Connor continued working. In August 2005, O'Connor received a performance review rating her performance as "needing improvement" in four areas, three of which specifically referenced absences related to her accident.[482] In September 2005, O'Connor provided Busch's with medical documentation describing the nature and severity of her injury but continued working without requesting medical leave.[483] In December 2005, however, while O'Connor was working extra hours to complete the annual budget, her symptoms worsened, leading her to request time off to seek medical attention.[484] O'Connor's supervisor, John Busch, told O'Connor that she would not be permitted to take leave until the budget was complete.[485] By January 5, 2006, even though the budget was not complete, O'Connor could no longer wait to seek medical attention, and so she resigned.[486]

O'Connor subsequently filed suit, claiming that, in denying her request for FMLA leave, Busch's interfered with her FMLA rights and constructively discharged her from her position as Vice President of Finance.[487] In response, Busch's argued that O'Connor had not been eligible under the FMLA, because she had only worked for seven months immediately preceding her leave request.[488]

The issue thus was whether O'Connor's prior years of service with Busch's could be counted in the calculation of the twelve months of service.[489] O'Connor argued that they could, under the applicable Department of Labor (DOL) regulation[490] and the First Circuit Court of Appeals decision in *Rucker v. Lee Holding Co.*[491]

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479. *Id.* at 737. The precise dates of O'Connor's previous employment with Busch's are unclear from the opinion, which states merely that, "Plaintiff was employed by Defendant for several years in the mid-1980's, after which she ceased working for Defendant." *Id.*

480. *Id.*

481. *Id.*

482. *Id.*

483. *O'Connor*, 492 F. Supp.2d at 738.

484. *Id.* at 738.

485. *Id.*

486. *Id.*

487. *Id.*

488. *Id.*

489. *O'Connor*, 492 F. Supp.2d at 738.

490. Department of Labor FMLA Eligibility Rule, 29 C.F.R. § 825.110(b) (1995) (stating that: "[t]he 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health plan benefits, etc.), the week counts as a week of

Kenneth Rucker worked as a car salesman for Lee Holding Company for five years before leaving to work elsewhere for another five years.[492] He then returned to work for Lee.[493] After seven and a half months at Lee, Rucker ruptured a disc in his back and required 13 days off work.[494] Lee terminated Rucker because of those absences.[495] When Rucker sued under the FMLA, Lee argued that Rucker was not entitled to the protections of that Act because he had only been employed for seven and a half months, far short of the twelve months required for eligibility under the Act.[496] The trial court agreed, dismissing Rucker's claims.[497] Rucker appealed to the First Circuit Court of Appeals.[498]

That appellate court noted first that the FMLA itself is ambiguous as to whether previous periods of employment count toward the twelve-month requirement.[499] Thus, the *Rucker* court held, "We are . . . in a situation in which Congress has not addressed the precise question at issue, and in which deference to a reasonable agency interpretation is appropriate."[500] The court then analyzed whether the DOL regulation was a reasonable interpretation of the Act.[501] In so doing, the court also found the DOL regulation to be somewhat ambiguous, noting that it was not clear as to whether the second and third sentences of the regulation limit the application of the first sentence.[502] The first sentence of the regulation states that "the 12 months . . . need not be consecutive months."[503] The second and third sentences then address how weeks of employment are to be counted, especially when the employee is an intermittent or casual employee, but still maintains continuing connection to the employer.[504] The question addressed by the *Rucker* court was whether that "continuing connection" requirement is imported from the second and third sentences of the regulation into the first.[505]

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employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as 'at least 12 months,' 52 weeks is deemed to be equal to 12 months").

491. 471 F.3d 6 (1st Cir. 2006).

492. *Id.* at 8.

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.*

497. *Rucker*, 471 F.3d at 9.

498. *Id.*

499. *Id.* at 10.

500. *Id.* at 11 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)).

501. *Id.* at 12.

502. *Id.*

503. Department of Labor FMLA Eligibility Rule, 29 C.F.R. § 825.110(b) (1995). For the full text of the regulation see *supra* note 490.

504. *Id.*

505. *Rucker*, 471 F.3d at 12.

In trying to resolve this ambiguity, the court looked to the regulation's preamble, which specifically rejected three limitations to the twelve-month calculation proposed by employers during the proposed rule's comment period.[506] The rejection of those limitations made it clear, according to the First Circuit, that the DOL intended that employees would be permitted to use previous periods of employment with the same employer to qualify for the protections of the FMLA.[507] The court concluded that this interpretation of the regulation by the DOL was reasonable and therefore entitled to deference.[508] Based on this, the court held that Rucker was entitled to the protections of the FMLA because his previous period of employment at Lee, combined with his most recent period of employment, exceeded twelve months.[509]

In *O'Connor,* Judge Zatkoff ultimately reached the same conclusion as the *Rucker* court, and held that O'Connor's previous periods of employment should be combined with her current period of employment when evaluating her eligibility.[510] In reaching this holding, the district court noted that the FMLA was intended to balance the interests of employers and employees, and that forcing an employer to count prior employment could be burdensome for employers.[511] Judge Zatkoff further recognized that the period of separation here (more than 20 years) far exceeded the two-year limitation on separation rejected by the DOL in its preamble.[512] Nonetheless, the court ultimately concluded that, if a definitive time limit was to be set, it should be done by Congress or the Department of Labor, rather than by the judiciary.[513] Thus the court held that O'Connor was entitled to the protections of the FMLA because her most recent period of employment combined with her prior employment with Busch's exceeded twelve months.[514]

Judge Zatkoff's decision in *O'Connor* was consistent with the earlier decision of Judge John Feikens of the U.S. District Court for the Eastern District of Michigan Court in *Bell v. Prefix, Inc.*[515] Judge Feikens also concluded that the FMLA's twelve month requirement did not require that the months be consecutive or continuous for the employee.[516] Bell's periods of employment in that case, however, were separated only by three months, in contrast to the twenty year separation in *O'Connor.*[517] Judge Zatkoff thus was presented with the harder question. His decision,

506. *Id.* (citing 60 Fed. Reg. 2185).
507. *Id.* at 12-13.
508. *Id.* at 13 (citing United States v. Mead Corp., 533 U.S. 218, 229 (2001)).
509. *Id.*
510. *O'Connor*, 492 F. Supp.2d at 743.
511. *Id.* at 741.
512. *Id.*
513. *Id.*
514. *Id.* at 742.
515. 422 F. Supp.2d 810 (E.D. Mich. 2006).
516. *Id.* at 812-13.
517. *Id.*

as well as that of the First Circuit Court of Appeals in *Rucker,* exemplifies judicial unwillingness to impose arbitrary limitations on the length of time between periods of employment, when the employee seeks to combine separate periods of employment with the same employer to qualify for the protections of the FMLA.

The other component of employee eligibility under the FMLA—the 1,250 hours of service requirement—was at issue in *Mutchler v. Dunlap Memorial Hospital.*[518] In that case, the Sixth Circuit Court of Appeals examined whether hours paid but not worked should be included in the calculation of the 1,250 hours.[519] Carla Mutchler, a nurse, participated in Dunlap Memorial Hospital's Weekender Program, under which nurses worked two twelve-hour shifts every weekend plus one assigned holiday each year.[520] Weekender Program participants received 68 hours of pay for 48 hours of work, provided that they worked all four scheduled shifts during the pay period [521]

After learning that she needed surgery on both hands to correct severe carpal tunnel syndrome, Mutchler submitted a single leave request, stating that she would be absent from May 13 through June 7 for her first surgery.[522] Mutchler did not seek leave for her second surgery in this first leave request, although she did note on the request form that she expected to need another leave in June or July for the second surgery.[523]

Dunlap Memorial Hospital approved Mutchler's leave request without verifying that she had satisfied the 1,250 hours of service requirement contained in the FMLA.[524] During Mutchler's leave, however, the hospital discovered that Mutchler had only worked 1,242.8 hours in the twelve months preceding her leave.[525] The hospital then informed Mutchler that it would honor her current approved FMLA leave but would not grant additional FMLA leave or extend her leave period beyond June 4.[526] Despite this, Mutchler contacted her physician and scheduled surgery on her other hand for June 3, thereby delaying her return to work until July 5.[527] Following the second surgery, Mutchler submitted a "Request for Leave Not Subject to the F.M.L.A."[528] The hospital did not treat Mutchler's June 4- July 5 leave as an FMLA-qualifying leave.[529] Rather, the hospital replaced Mutchler with another

518. 485 F.3d 854 (6th Cir. 2007).
519. *Id.* at 857.
520. *Id.* at 855.
521. *Id.*
522. *Id.*
523. *Id.*
524. *Mutchler*, 485 F.3d at 856.
525. *Id.*
526. *Id.*
527. *Id.*
528. *Id.*
529. *Mutchler*, 485 F.3d at 856.

employee who had expressed interest in the Weekender Program.[530] When Mutchler returned to work on July 5, she was scheduled to weekday shifts instead of weekends and her attempts to return to the Weekender program were unsuccessful.[531]

Mutchler filed sued against the hospital in state court, alleging violations of the FMLA.[532] The hospital successfully removed the action to federal court and, upon completion of discovery, sought summary judgment, arguing that Mutchler was not an eligible employee under the Act.[533] The district court granted the hospital's motion, finding that Mutchler did not meet the hours of service requirement and that Mutchler could not invoke the doctrine of equitable estoppel.[534]

Mutchler appealed, arguing that, while she had only worked 1,242.8 hours in the twelve months that preceded her leave, she had been paid for more than 1,250 hours during that time period.[535] She argued that all of the hours for which she had received pay should count toward the calculation of her hours of service for FMLA eligibility.[536]

The Sixth Circuit disagreed with Mutchler's assertion that the bonus hours for which she received pay but did not work should be included in the calculation of her 1,250 hours of service requirement under the FMLA.[537] The court began its analysis by noting that the FMLA does not itself define "hours of service," but instead adopted by reference the legal standards established under section 7 of the Fair Labor Standards Act (FLSA).[538] The Department of Labor regulations interpreting the FMLA further provide that "[t]he determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA."[539]

The *Mutchler* court therefore turned to the applicable provisions of the FLSA and its accompanying regulations.[540] According to regulations enacted under the FLSA, "working time" includes "hours worked which the employee is required to give to his employer."[541] The court also

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530. *Id.*
531. *Id.*
532. *Id.*
533. *Id.*
534. *Id.* at 856-57.
535. *Mutchler*, 485 F.3d at 857.
536. *Id.*
537. *Id.* at 859.
538. *Id.* (citing 29 U.S.C. § 2611(2)(C) (1993)).
539. Department of Labor FMLA Eligibility Rule, 29 C.F.R. § 825.110 (1995).
540. *Mutchler*, 485 F.3d at 857-58.
541. Department of Labor FLSA Judicial Construction Rule 29 C.F.R. § 785.7 (2008). The regulation states in part:

> [A]ll hours are hours worked which the employee is required to give his employer, that 'an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as

relied upon a determination made by the First Circuit Court of Appeals in *Plumley v. Southern Container, Inc.*,[542] that hours of service under the FMLA "include only those hours actually worked in the service and at the gain of the employer."[543]

The Sixth Circuit then applied these principles to Mutchler, determining that the 20 hours for which Mutchler received pay but did not work were not "hours of service" under the FMLA.[544] The court instead viewed the payment for this time as "incentive" pay for Mutchler's participation in the Weekender Program—not pay for time that Mutchler was required to give to the hospital.[545]

In reaching this conclusion, the Sixth Circuit emphasized that its decision was not intended to disturb its prior holding in *Ricco v. Potter*.[546] In *Ricco*, the plaintiff's termination had been reversed by an arbitrator, and she was reinstated pursuant to a "make whole" award.[547] Shortly after returning to work, Ricco requested an FMLA leave.[548] Her leave request was denied because she had not met the hours of service requirement in the twelve months prior to her leave.[549] When Ricco sued under the FMLA, the Sixth Circuit found that she was entitled to credit for the hours that she would have worked if her employer had not wrongly terminated her employment.[550] The *Mutchler* court noted that the "critical point" in *Ricco* was that Ricco's inability to work the requisite 1,250 hours was the result of her employer's wrongful act, and that the issue in the case remained "hours worked," rather than "hours not worked but paid," as in *Mutchler*.[551] Because Mutchler's failure to meet the statutory requirement was not the result of any wrongful act by her employer, *Ricco* was inapplicable.[552]

> much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer.

Id.

542. 303 F.3d 364 (1st Cir. 2002) (concluding that "hours of service" did not include compensation resulting from an arbitral award of back pay for wrongful termination, because those hours were not actually worked). *Compare* Plumley v. Southern Container, Inc., 303 F.3d 364, *with* Ricco v. Potter, 377 F.3d 599 (6th Cir. 2004).

543. *Mutchler*, 485 F.3d at 858 (quoting *Plumley*, 303 F.3d at 372).

544. *Id.* at 858.

545. *Id.*

546. *Id.* at 858-59 (citing *Ricco*, 377 F.3d 599). For a detailed analysis of *Ricco*, *see* Patricia Nemeth & Deborah Brouwer, *Employment & Labor Law, 2005 Ann. Survey of Mich. Law*, 52 WAYNE L. REV. 565, 613-15 (2006).

547. *Ricco*, 377 F.3d at 600.

548. *Id.*

549. *Id.*

550. *Id.*

551. *Mutchler*, 485 F.3d at 859.

552. *Id.*

B. Estoppel

Increasingly, FMLA plaintiffs are relying on estoppel in response to the employer-defendant's claims that the plaintiff was not entitled to the requested leave. Thus, the plaintiff typically contends that that the employer is precluded, or estopped, from contesting the plaintiff's entitlement to leave due to the employer's alleged failure to comply with the Act.[553] Such arguments are predicated on the common law doctrine of equitable estoppel, which the Sixth Circuit has recognized is a "judicial doctrine of equity which operates apart from any underlying statutory scheme."[554] Consequently, "even in the absence of a formal regulation, the doctrine of equitable estoppel itself may apply where an employer who has initially provided notice of eligibility for leave later seeks to challenge that eligibility."[555] Thus, in the Sixth Circuit, a claimant asserting equitable estoppel must show:

> (1) conduct or language amounting to a representation of material fact; (2) awareness of true facts by the party to be estopped; (3) an intention on the part of the party to be estopped that the representation be acted on, or conduct toward the party asserting the estoppel such that the latter has a right to believe that the former's conduct is so intended; (4) unawareness of the true facts by the party asserting the estoppel; and (5) detrimental and justifiable reliance by the party asserting estoppel on the representation.[556]

During the *Survey* period, the plaintiff in *Mutchler* argued that her employer was equitably estopped from disputing her eligibility for FMLA leave because it had initially approved that leave.[557] The Sixth Circuit disagreed, reasoning that Mutchler had failed to demonstrate fifth element of such a claim—that she relied, to her detriment, on the hospital's approval of her leave.[558] According to the court, while Mutchler may have relied on the hospital's representation that she was eligible for an FMLA leave regarding her request for leave for her the first surgery, that reliance was not to her detriment. Mutchler took the leave, and her position was held for her return during that leave period.[559] As to the second leave request, Mutchler failed to meet the

553. *See, e.g.*, Sorrell v. Rinker Materials Corp., 395 F.3d 332, 336 (6th Cir. 2005).

554. *Mutchler*, 485 F.3d at 861 (quoting Kosakow v. New Rochelle Radiology Assoc., P.C., 274 F.3d 706, 724 (2d Cir. 2001)).

555. *Id.* (quoting Woodford v. Cmty Action of Greene County, Inc., 268 F.3d 51, 57 (2d Cir. 2001)).

556. *Id.* (citing Tregoning v. Am. Cmty. Mut. Ins. Co., 12 F.3d 79, 83 (6th Cir. 1993)).

557. *Id.* at 860.

558. *Id.* at 861.

559. *Id.*

fourth element of her estoppel claim, because she was not misled as to the true facts. The hospital expressly informed Mutchler that, with respect to her second leave request, she was not eligible for FMLA leave and therefore no such leave would be granted.[560] Fully aware that her leave would not be approved under the Act, Mutchler nonetheless took the leave.[561] Mutchler could not establish the facts necessary for an equitable estoppel claim, and so the Sixth Circuit rejected her estoppel argument and affirmed the district court's dismissal of her claims.[562]

C. Limitation Periods

Claims under the FMLA must be brought within two years of the last alleged violation of the Act, or, if the alleged violation is willful, within three years of the violation.[563] Under the "continuing violations" doctrine, however, a plaintiff may recover damages for unlawful acts that occurred prior to the applicable limitation period, provided that the plaintiff is able to establish that the timely violation is part of a pattern of violations by the employer.[564] Recently, the doctrine has been disavowed in certain contexts. In *National R.R. Passenger Corp. v. Morgan*,[565] a 2002 decision, the United States Supreme Court rejected the doctrine with respect to discrete claims of employment discrimination brought under Title VII.[566] Three years later, in *Garg v. Macomb County Community Mental Health Servs.*,[567] the Michigan Supreme Court abrogated the continuing violations doctrine with respect to all civil

560. *Mutchler*, 485 F.3d at 861.

561. *Id.*

562. *Id.* The court summarily rejected Mutchler's argument that the DOL regulation found at 29 C.F.R. § 825.110(d) precluded her employer from challenging her eligibility for leave. *Id.* at 859-60. That regulation states that that "if the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility." 29 C.F.R. § 825.110(d) (1995). As the *Mutchler* court noted, that regulation has been invalidated by numerous circuit and district courts as exceeding the authority granted to the DOL. *Mutchler*, 458 F.3d at 859. Further, the court found that the hospital did not take inconsistent positions as to Mutchler's eligibility for her first leave, and so the regulation, even if valid, was inapplicable to the facts of the case. *Id.* at 860.

563. 29 U.S. C. § 2617(c) (2004). The statute states in part:

> (1) In general - Except as provided in paragraph (2), an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought. (2) Willful violation - In the case of such action brought for a willful violation of section 2615 of this title, such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.

Id.

564. *See, e.g.*, Sharpe v. Cureton, 319 F.3d 259, 267 (6th Cir. 2003).

565. 536 U.S. 101 (2002).

566. *See generally id.* (involving the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17).

567. 472 Mich. 263, 696 N.W.2d 646 (2005).

rights claims brought under Michigan's Elliott-Larsen Civil Rights Act (ELCRA).[568] The impact of these rulings on the FMLA arose during the *Survey* period, in *Tafelski v. Novartis Pharmaceutical.*[569] In that case, Judge Denise Page Hood of the U.S. District Court for the Eastern District of Michigan considered whether the continuing violations doctrine applied to claims brought under the FML, concluding that it did not.[570]

Thomas Tafelski worked for Novartis Pharmaceuticals as a specialty representative, responsible for calling physicians to provide them with information about Novartis products.[571] At some point, Talfelski's supervisor became concerned about Tafelski's call records and began to monitor them.[572] In April 2004, after the company discovered Tafelski had been falsifying time records, he was given the option of resigning or termination.[573] Tafelski resigned.

On April 20, 2005, Tafelski filed suit alleging that Novartis had interfered with his rights under the FMLA and retaliated against him for taking FMLA leave.[574] The suit was based on three separate leaves taken by Tafelski, the first of which occurred in October 2002 for surgery on Tafelski's Achilles tendon and his recovery from that surgery.[575] According to Tafelski, while he was on this leave, his supervisor contacted him and told him that his career would be negatively affected if he did not attend his boss' Christmas party.[576] Tafelski claimed that this call constituted interference with his right to take an FMLA leave.[577] Novartis defended against this particular complaint by arguing that any claims related to this leave were time barred because Tafelski filed his complaint more than two years after the alleged incident.[578]

The statute of limitations begins to toll when "the plaintiff knows or has reason to know of the injury which is the basis of his action" and that occurs when the plaintiff should have discovered his injury with reasonable diligence.[579] Tafelski had testified that, at the time of his supervisor's call, he knew that he should not be receiving work-related requests while on leave.[580] Based on this undisputed fact, Judge Page Hood concluded that Tafelski's claim regarding this surgery had accrued

568. MICH. COMP. LAWS ANN. §§ 37.2201-.2804 (West 2001).
569. No. 05-71547, 2007 WL 1017302 (E.D. Mich. Mar. 28, 2007).
570. *Id.* at *4.
571. *Id.*
572. *Id.*
573. *Id.*
574. *Id.*
575. *Tafelski*, 2007 WL 1017302, at *4.
576. *Id.*
577. *Id.* at *3.
578. *Id.*
579. *Id.*
580. *Id.* at *3-4.

in the fall 2002. Because Tafelski did not file suit until April 2005, this claim was time-barred.[581]

Tafelski claimed, however, that his claim was still available to him under the continuing violations doctrine.[582] Judge Page Hood rejected this argument, however, noting first that Tafelski had cited no authority applying the continuing violations exception to the FMLA.[583] The Court further observed that in *Morgan,* the U.S. Supreme Court had abrogated the continuing violations doctrine in suits brought under Title VII alleging that discrete acts, such as a discipline or termination, were discriminatory The Court approved reliance on the doctrine only in cases involving hostile environment claims, which involve cumulative, rather than discrete acts.[584] According to Judge Page Hood, Tafelski's claim for interference with his FMLA leave was more akin to a Title VII discrete act claim, for which the continuing violations doctrine is not available. The court therefore dismissed Tafelski's claim as to his 2002 surgery as untimely.[585]

X. CONCLUSION

This *Survey* period was not lacking in high-profile employment decisions from the Michigan Supreme Court, ranging from the scope of the Whistleblower's Protection Act to employer liability for the violent acts of employees against third parties. Important issues in employee-employer relations remain for future consideration, including whether evidence of untimely (and hence not actionable) claims is admissible as relevant "background" evidence, whether so-called "me too" evidence from co-workers can be used to prove a discrimination claim, and the circumstances under which a supervisor is an agent so that he becomes individually liable for sexual harassment.

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581. *Tafelski*, 2007 WL 1017302 at *3-4.

582. *Id.*

583. *Id.* at *4.

584. *Id.* (citing *Morgan*, 536 U.S. at 115).

585. *Id.* The court also Tafelski's other FMLA interference and retaliation claims. The claim arising from Tafelski's request for leave prior to the birth of his child was rejected because Tafelski failed to comply with the notice requirements under the Act. *Id.* at *6 The court also dismissed Tafelski's claim that he was terminated for taking FMLA leave, concluding that he failed to present evidence that his leave, rather than his falsification of records, caused his termination. *Id.* at *9.