EMPLOYMENT AND LABOR LAW

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I. INTRODUCTION

The 2007-2008 *Survey* period was relatively quiet on the employment/labor front, unlike years past, in which a Michigan Supreme Court decision led to the downfall of a big city mayor.[1] In fact, the Michigan Supreme Court issued no employment decisions during the *Survey* period, and the court of appeals addressed only a few areas of

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

significance: whether same sex harassment is actionable under Michigan's employment discrimination laws,[2] and whether the employment decisions of religious institutions are exempt under those same laws.[3] Public employment relationships were the source of several other decisions, as the court of appeals ventured into the thicket of governmental immunity, analyzing the circumstances under which a public employer is immune from employment-related suits.[4] Retaliatory discharge claims arising from the plaintiff's protective activity continues to be a fertile area for litigation, as the court of appeals addressed the outer bounds of the Whistleblower's Protection Act's exclusive remedy provisions,[5] and whether the employer's retaliatory motive must be the sole, rather than only one, reason for the plaintiff's termination.[6] The court of appeals also was called upon (by the Michigan Supreme Court, no less) to address the appropriate standard of review for the State Tenure Commission to use in reviewing hearing officer decisions regarding teacher discipline and discharge.[7]

II. DISCRIMINATION CLAIMS

In most employment discrimination cases, subject matter jurisdiction is straightforward. If the plaintiff asserts only state law claims, only the state court has subject matter jurisdiction (absent diversity between the parties). If the plaintiff also relies on claims arising under federal law, either the state or federal court will have subject matter jurisdiction. Accordingly, lack of subject matter jurisdiction is not often the basis for a dispositive motion in employment discrimination suits. During the *Survey* period, however, in *Weishuhn v. Catholic Diocese of Lansing*,[8] the Michigan Court of Appeals held that the trial court may have lacked subject matter jurisdiction to hear Weishuhn's Elliott-Larsen Civil Rights Act (ELCRA) retaliation claim because of a "non-statutory,

2. *See generally* Robinson v. Ford Motor Co., 277 Mich. App. 146, 744 N.W.2d 363 (2008).

3. *See generally* Weishuhn v. Catholic Diocese of Lansing, 279 Mich. App. 150, 756 N.W.2d 483 (2008).

4. *See generally* Riopelle v. Zitell, No. 275403, 2008 WL 2117498 (Mich. Ct. App. May 20, 2008); Cox v. Dept. of Transp., No. 278452, 2008 WL 4005027 (Mich. Ct. App. Aug. 28, 2008); Thompson v. Wayne County Treasurer, No. 277837, 2008 WL 1986269 (Mich. Ct. App. May 8, 2008).

5. *See generally* Kimmelman v. Heather Downs Mgmt. Ltd., 278 Mich. App. 569, 753 N.W.2d 265 (2008).

6. *See generally* Silberstein v. Pro-Golf of Am., 278 Mich. App. 446, 750 N.W.2d 615 (2008).

7. *See generally* Lewis v. Bridgman, 279 Mich. App. 488, 760 N.W.2d 242 (2008).

8. 279 Mich. App. 150, 756 N.W.2d 483 (2008).

constitutionally compelled exception" to such claims, rooted in the First Amendment's Establishment and Free Exercise of Religion Clauses.[9] This "ministerial exception," according to the court, "generally bars inquiry into a religious institution's underlying motivation for a contested employment decision" involving that institution and its ministerial employees.[10]

In August 1999, after spending the previous eight years as the director of religious education for a Catholic church, Madeline Weishuhn was hired as a teacher at St. Mary's Elementary School in Mount Morris, Michigan, teaching a mixture of mathematics and religion classes.[11] Weishuhn, however, was terminated in the spring of 2005 "after a series of employment-related incidents, none of which involved the subject of religion."[12] Weishuhn sued the Lansing Diocese and St. Mary's, alleging violations of Michigan's Whistleblower's Protection Act (WPA)[13] and Elliott-Larsen Civil Rights Act[14] for retaliatory termination.[15]

The trial court dismissed Weishuhn's WPA claim on the defendants' motion for summary disposition under MCR 2.116(C)(10), but declined to dismiss the ELCRA claim.[16] The defendants then moved for summary disposition pursuant to MCR 2.116(C)(4), arguing that the court lacked subject matter jurisdiction as to Weishuhn's claim under the ministerial exception because her duties at St. Mary's included a "spiritual function."[17] In denying that motion also, the trial court noted that case law indicated that the spiritual function must have been Weishuhn's "primary" function, and found that a question of fact for the jury existed as to whether that was the case, because there appeared to be considerable overlap between her secular and religious teaching duties.[18] The trial court also observed that "this is a case that maybe could create some new law in this area, at least maybe get some clarification as to whether or not there needs to be an analysis by the court with respect to this primary or secondary purpose."[19]

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9. *Id.* at 152, 756 N.W.2d at 486.
10. *Id.*
11. *Id.* at 153, 756 N.W.2d at 486.
12. *Id.* at 154, 756 N.W.2d at 487.
13. MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 2004).
14. MICH. COMP. LAWS ANN. §§ 37.2201-.2205(a) (West 2001).
15. *Weishuhn*, 279 Mich. App. at 154, 756 N.W.2d at 487.
16. *Id.*
17. *Id.*
18. *Id.* at 155, 756 N.W.2d at 487.
19. *Id.*

The Diocese and St. Mary's sought leave to appeal, which the court of appeals granted.[20] On appeal, the court reversed the trial court's denial of the defendants' (C)(4) motion, holding first, that the ministerial exception does exist in Michigan, and second, that the court below had erred in concluding that resolution of whether Weishuhn was a ministerial employee was a question for the jury, rather than the court.[21]

To reach these conclusions, the appellate court first surveyed prior case law on the ministerial exception, initially focusing on the seminal 1972 decision of *McClure v. Salvation Army*,[22] in which the Fifth Circuit Court of Appeals held that the First Amendment exempted a church, such as the Salvation Army, from federal civil rights laws.[23] In that case, an ordained minister asserted a Title VII discrimination and retaliation claim against his employer, the Salvation Army.[24] Applying a strict scrutiny analysis to the constitutional argument before it, the Fifth Circuit concluded that applying federal civil rights laws to McClure's employment relationship with the Salvation Army "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."[25] Since then, many federal circuit courts have recognized the ministerial exception, applying it not only to Title VII claims, but also to claims under the Americans With Disabilities Act (ADA)[26] and the Age Discrimination in Employment Act (ADEA).[27] Further, while the exception initially was applied only to ordained ministers,[28] subsequent judicial decisions have extended the exception to church music directors, a choir director, and an archdiocese communications manager.[29]

The *Weishuhn* court analyzed, in detail, the Sixth Circuit Court of Appeals' decision in *Hollins v. Methodist Healthcare, Inc.*,[30] which held

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20. *Id.* at 152, 756 N.W.2d at 486.

21. *Weishuhn*, 279 Mich. App. at 152, 756 N.W.2d at 486.

22. 460 F.2d 553 (5th Cir. 1972).

23. *Weishuhn*, 279 Mich. App. at 161, 756 N.W.2d at 490.

24. *McClure*, 460 F.2d at 554.

25. *Id.* at 560.

26. 42 U.S.C. §§ 12101-12213 (2008). *See* Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007); Werft v. Desert Southwest Annual Conference of United Methodist Church, 377 F.3d 1099 (9th Cir. 2004); Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999).

27. 29 U.S.C. §§ 621-634 (2009); *See* Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990).

28. *Weishuhn*, 279 Mich. App. at 161 n.41, 756 N.W.2d at 490 n.41.

29. *Id.* at 162 nn.42, 44, 756 N.W.2d at 490 nn.42, 44.

30. 474 F.3d 223 (6th Cir. 2007).

that "the ministerial exception applies when (1) the employer is a religious institution, and (2) the employee is a ministerial employee."[31] Under the Sixth Circuit analysis, to be considered a "religious institution" for purposes of the exception, the initial question is whether the employer's mission is "marked by clear or obvious religious characteristics."[32] The next inquiry is whether the employee is considered a "ministerial employee," which occurs when "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."[33] When these two elements are met, the ministerial exception "precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees."[34] In *Hollins,* the Sixth Circuit concluded that a resident in a church-affiliated hospital's Clinical Pastoral Education program was such a ministerial employee, and was therefore prohibited from proceeding with her ADA claim.[35]

Having found wide application of the ministerial exception to federal civil rights claims, the *Weishuhn* court then traced the nascent ministerial exception through three prior Michigan appellate decisions: *McLeod v. Providence Christian School*,[36] *Assemany v. Archdiocese of Detroit*,[37] and *Porth v. Roman Catholic Diocese of Kalamazoo*.[38] In *McLeod,* a teacher who had been terminated by a church-affiliated school after the birth of her child sued for gender discrimination under the ELCRA.[39] The court of appeals did not discuss the ministerial exception, but applied a First Amendment balancing test, measuring the school's religious belief (that women belonged at home raising their children rather than in the workforce) against the ELCRA's ban on gender discrimination.[40] The court concluded that requiring the school to comply with the ELCRA did not unduly burden the school or force it to

31. *Weishuhn*, 279 Mich. App. at 159, 756 N.W.2d at 489-90 (citing *Hollins*, 474 F.3d at 225).

32. *Id.* (citing *Hollins*, 474 F.3d at 226).

33. *Id.* at 160, 756 N.W.2d at 490 (citing Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985)).

34. *Id.* at 173, 756 N.W.2d at 497 (citing *Hollins*, 474 F.3d at 225).

35. *Hollins*, 474 F.3d at 226.

36. 160 Mich. App. 333, 408 N.W.2d 146 (1987).

37. 173 Mich. App. 752, 434 N.W.2d 233 (1988).

38. 209 Mich. App. 630, 532 N.W.2d 195 (1995).

39. *McLeod*, 160 Mich. App. at 337-38, 408 N.W.2d at 148.

40. *Id.* at 343-44, 408 N.W.2d at 151.

make the "hard choice," because the school could have sought a Bona Fide Occupational Qualification (BFOQ) exemption under the Act.[41]

In *Assemany,* the court, in essence, adopted the ministerial exception, albeit without using that precise phrase. Citing the Fourth Circuit's *McClure* decision, the court concluded that a church music director responsible for all liturgical music in the parish was, in essence, a member of the clergy, and therefore barred from pursuing a discrimination claim.[42]

The *Weishuhn* court gave short shrift to the third case, *Porth*, in which a Protestant teacher's failure-to-hire suit against a Catholic school was dismissed as violative of the federal Religious Freedom Restoration Act of 1993 (RFRA).[43] The *Weishuhn* court observed that the United States Supreme Court had subsequently nullified the RFRA, mooting most of the *Porth* analysis.[44] The court concluded that a footnote in *Porth*, in which that court said that it "question[ed] but [did] not decide the applicability of the 'ministerial exception,'" did not mean that the *Porth* panel had rejected the ministerial exception in concept, but only questioned its applicability to the case before it.[45] The court thus held that, "under *Assemany* and the cases on which that decision relied, the ministerial exception exists in Michigan."[46]

The exception recognized by the court was, however, a narrow one, requiring that courts "determine only whether the resolution of a plaintiff's claim would limit a religious institution's right to choose who will perform particular spiritual functions. It is a tailored exception to the application of employment-discrimination and other similar statutes, not an invalidation of such statutes."[47] Further, the exception does not apply to all claims brought by any employee of a religious institution.[48]

Applying these principles to the *Weishuhn* case, the court held that the trial court had erred in holding that whether Weishuhn was a ministerial employee was a question of fact for the jury.[49] Because

41. *Id.* at 344, 408 N.W.2d at 151. MICH. COMP. LAWS ANN. § 37.2208 (West 2001) (providing that an employer may apply for an exemption from its provisions "on the basis that religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise").

42. *Assemany*, 173 Mich. App. at 763, 434 N.W.2d at 238.

43. 42 U.S.C. § 2000bb (2009).

44. *Weishuhn*, 279 Mich. App. at 172-23, 756 N.W.2d at 497.

45. *Id.* (citing *Porth*, 209 Mich. App at 633 n.1, 532 N.W.2d at 197 n.1).

46. *Id.* at 173, 756 N.W.2d at 497.

47. *Id.* at 173-74, 756 N.W.2d at 498.

48. *Id.*

49. *Id.* at 175-76, 756 N.W.2d at 499.

application of the exception denies the court subject matter jurisdiction, the issue is for the court, not the jury to resolve.[50]

The court of appeals did provide explicit guidance to the trial court. The court noted first that there was no question that St. Mary's "exists not only for educational purposes, 'but also for the purpose of disseminating the Catholic doctrine,'"[51] thereby concluding that the first prong of the ministerial exception analysis had been met conclusively.[52] The court thus directed the trial judge to assess the "totality of Weishuhn's duties and responsibilities, her position, and her functions."[53] More specifically, the court provided the following non-exhaustive list of factors for the trial court to consider:

> (1) whether Weishuhn had primarily religious *duties* and *responsibilities* in the sense that her primary *duties* consisted of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship; (2) whether Weishuhn's *duties* had religious significance; (3) whether Weishuhn's *position* was inherently, primarily, or exclusively religious, whether that *position* entailed proselytizing on behalf of defendants, whether that *position* had a connection to defendants' doctrinal mission, and whether that *position* was important to defendants' spiritual and pastoral mission; and (4) whether Weishuhn's *functions* were essentially liturgical, that is, related to worship, and whether those *functions* were inextricably intertwined with defendants' religious doctrine in the sense that Weishuhn was intimately involved in the propagation of defendants' doctrine and the observance and conduct of defendants' liturgy by defendants' congregation.[54]

Finally, the court stated that if the trial court determined that Weishuhn was a ministerial employee, her discrimination claim should be dismissed altogether.[55]

Thus, in a comprehensive decision, the Michigan Court of Appeals officially recognized the ministerial exception in Michigan, and also provided welcome clarity as to how the exception should be applied.

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50. *Weishuhn*, 279 Mich. App at 175-76, 756 N.W.2d at 498-99.
51. *Id.* at 177, 756 N.W.2d at 499.
52. *Id.*
53. *Id.* at 178, 756 N.W.2d at 500.
54. *Id.* (emphasis in original).
55. *Id.* at 179, 756 N.W.2d at 500.

III. HARASSMENT

During the *Survey* period, in *Robinson v. Ford Motor Company*,[56] the Michigan Court of Appeals, for the first time, recognized that same sex harassment cases are cognizable under the ELCRA.[57] Moreover, the court determined that employees attempting to prove sexual harassment claims need not show that the alleged harasser acted out of, or for the sake of, sexual desire or gratification.[58]

Robert Robinson worked in one of Ford Motor Company's manufacturing plants, alongside co-worker Darren Smith.[59] Smith and several other workers were known to engage in frequent horseplay at work, catching each other by surprise and hitting each other on the buttocks with wooden paddles, throwing snow at each other, and spraying each other with fire extinguishers.[60] When one of these workers left the unit, Smith's attention was redirected towards Robinson.[61] Between 2001 and 2003, according to Robinson, Smith engaged in a variety of unwelcome conduct, including "slapping [Robinson] on the buttocks, pinching his nipples, pulling down plaintiff's pants to expose his underwear . . . exposing his testicles to another coworker while grasping [Robinson's] hand and attempting to or actually making [Robinson] touch them."[62] Other alleged incidents were even more overtly sexual in nature.[63] Robinson eventually suffered a breakdown in March 2003 after Smith allegedly penetrated Robinson's mouth with his fingers while riding on Robinson's back with an erect penis.[64] Robinson reported this and other incidents to his supervisor.[65]

Eventually, Robinson filed a suit claiming hostile environment sexual harassment under the ELCRA.[66] Ford moved for summary disposition, claiming that "sexual horseplay by a heterosexual male directed against another male fell outside the statutory definition of sexual harassment."[67] The trial court denied the motion and Ford sought leave to appeal to the court of appeals, which was granted on two

56. 277 Mich. App. 146, 744 N.W.2d 363 (2008)
57. MICH. COMP. LAWS ANN. §§ 37.2201-.2205(a) (West 2001).
58. *Robinson*, 277 Mich. App. at 155, 744 N.W.2d at 368.
59. *Id.* at 148, 744 N.W.2d at 365.
60. *Id.* at 148-49, 744 N.W.2d at 365.
61. *Id.* at 149, 744 N.W.2d at 365.
62. *Id.*
63. *Id.*
64. *Robinson*, 277 Mich. App. at 149, 744 N.W.2d at 365-66.
65. *Id.* at 149, 744 N.W.2d at 366.
66. *Id.* at 150, 744 N.W.2d at 366.
67. *Id.*

specific issues: whether a same sex harassment claim was cognizable under the ELCRA; and whether a plaintiff in such a suit must present evidence of homosexuality or otherwise inherently sexual conduct.[68]

The court of appeals began its analysis with a survey of sexual harassment law in Michigan. The court observed that, to establish a claim of hostile environment harassment in the workplace under the ELCRA, the plaintiff must prove that:

> 1) the employee belonged to a protected group; 2) the employee was subjected to conduct or communication on the basis of sex; 3) the conduct or communication was unwelcome; 4) the unwelcome conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and 5) respondeat superior.[69]

Because the Michigan Supreme Court has not yet addressed same sex harassment under the ELCRA, the court of appeals turned to the United States Supreme Court decision of *Oncale v. Sundowner Offshore Services, Inc.*[70] In that case, a roustabout employed on an oil rig platform with seven other men sued for sexual harassment under Title VII, claiming that his coworkers had subjected him to sex-related, humiliating actions.[71] The Supreme Court concluded that such a claim could be brought under Title VII, writing that "[w]e see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII."[72]

The *Robinson* court noted that the ELCRA contains language identical to that interpreted by the Supreme Court in *Oncale,* prohibiting "discriminat[ion] . . . because of . . . sex" in a term or condition of employment.[73] Based on a plain reading of that language, the court therefore rejected Ford's argument that the ELCRA excludes same sex hostile work environment claims.[74]

The court then turned to Ford's contention regarding the ELCRA's definition of sexual harassment as "unwelcome sexual advances, requests

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68. *Id.*

69. *Id.* at 151 n.1, 744 N.W.2d at 366 n.1.

70. 523 U.S. 75 (1998).

71. *Robinson*, 277 Mich. App. at 152-53, 744 N.W.2d at 367 (citing *Oncale*, 523 U.S. at 77).

72. *Id.* at 153, 744 N.W.2d at 367 (quoting *Oncale*, 523 U.S. at 79-80).

73. *Id.* at 153, 744 N.W.2d at 368 (citing MICH. COMP. LAWS ANN. § 37.2202(i)(a) (West 2001)).

74. *Id.*

for sexual favors, and other verbal or physical conduct or communication of a sexual nature."[75] Ford argued that the phrase "of a sexual nature" meant behavior pertaining to sexual relations and therefore could not be applied to members of the same sex if the conduct did not involve homosexual advances or desires.[76] Following this line of reasoning, Ford argued that it should not be held liable for Smith's conduct because Robinson presented no evidence that Smith was acting out of a desire for homosexual gratification, and thus failed to prove that Smith's alleged actions were "because of sex."[77]

The court disagreed, noting that the term "sexual harassment" is defined under the Act to include three different types of conduct: "1) unwelcome sexual advances; 2) requests for sexual favors; and 3) other verbal or physical conduct of a sexual nature."[78] The court concluded that the first two actions require an element of sexual desire or gratification.[79] However, the third action—verbal or physical conduct of a sexual nature—was previously interpreted by the Michigan Supreme Court in *Corley v. Detroit Board of Education*[80] to mean "conduct or communication that inherently pertains to sex."[81] The court of appeals noted that, in *Corley,* the Supreme Court did not mention proof of sexual desire as a necessary element of a harassment claim.[82] The court concluded by noting that Robinson had indeed presented sufficient evidence that at least some of Smith's conduct "inherently pertained to sex," referencing Smith's forcing Robinson to touch Smith's exposed testicles and digitally penetrating Robinson's buttocks, among other actions.[83]

The appellate court thus remanded the case to the trial court, but not before addressing the question of whether the second element of a harassment claim—that the harasser is motivated by sex—can be proven merely because the complained-of conduct inherently pertains to sex.[84] The court reasoned that it is an error to conclude "that all harassment of a

75. *Id.* at 153-54, 744 N.W.2d at 368 (citing MICH. COMP. LAWS ANN. § 37.2103(i) (West 2001)).

76. *Id.*

77. *Robinson*, 277 Mich. App. at 153-54, 744 N.W.2d at 368.

78. *Id.* at 154, 744 N.W.2d at 368 (quoting MICH. COMP. LAWS ANN. 37.2103(i)*(iii)* (West 2001)).

79. *Id.*

80. 470 Mich. 274, 681 N.W.2d 342 (2004).

81. *Robinson*, 277 Mich. App. at 154-54, 744 N.W.2d at 368 (citing Corley v. Detroit Bd. of Educ., 470 Mich. 274, 279, 681 N.W.2d 342, 345 (2004)).

82. *Id.* at 155, 744 N.W.2d at 368.

83. *Id.*

84. *Id.* at 155-56, 744 N.W.2d at 369 (citing Equal Employment Opportunity Comm. v. Harbert-Yeargin, Inc., 266 F.3d 498, 521 (6th Cir. 2001)).

sexual nature amounts to gender . . . discrimination."[85] Because sexual harassment is a subset of gender harassment, a plaintiff must still "show that he was subjected to a sexually hostile workplace 'because of sex.'"[86] There are several ways a plaintiff could establish that a same sex harassment claim is gender-based: 1) prove the harasser making the sexual advances was "acting out of sexual desire;" 2) show that the harasser was "motivated by general hostility to the presence of men in the workplace;" or 3) offer "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[87] The trial court had failed to determine whether Smith was acting from sexual desire, or whether Smith was motivated by general hostility towards males in the workplace, or whether Smith treated both genders in the workplace equally.[88] On remand, the trial court was to address those issues.[89]

IV. RETALIATION

Michigan courts have long recognized that at-will employment can be terminated by either party, at any time, for any reason, unless proscribed by public policy.[90] In *Suchodolski v. Michigan Consolidated Gas Co.*, the Michigan Supreme Court recognized three situations in which "public policy" prohibits termination of at-will employment: (1) "adverse treatment of employees who act in accordance with a statutory right or duty," (2) an employee's "failure or refusal to violate a law in the course of employment," or (3) an "employee's exercise of a right conferred by a well-established legislative enactment."[91]

Michigan courts also have recognized that, as a general rule, when a statute creates a new right or imposes a new duty having no counterpart in the common law, the remedies provided for in that statute are exclusive and not cumulative.[92] Thus, after Michigan's Whistleblower's Protection Act (WPA)[93] was enacted in 1980, courts concluded that,

85. *Id.* at 156, 744 N.W.2d at 369.

86. *Id.*

87. *Robinson*, 277 Mich. App. at 157, 744 N.W.2d at 370 (citing *Oncale*, 523 U.S. at 80-81).

88. *Id.* at 157-58, 744 N.W.2d at 370.

89. *Id.*

90. Suchodolski v. Mich. Consol. Gas Co., 412 Mich. 692, 695, 316 N.W.2d 710 (1982).

91. *Id.* at 695-96, 316 N.W.2d at 711-12.

92. *See* Shutterworth v. Riverside Osteopathic Hosp., 191 Mich. App. 25, 477 N.W.2d 453 (1991).

93. MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 2004).

because there is no common law right to be free from retaliation for reporting a violation of the law, the WPA is the exclusive remedy for an employee who is terminated for that reason.[94] Therefore, if a plaintiff's claims fall within the scope of the WPA, that plaintiff cannot bring a public policy claim under *Suchodolski.*

Under the WPA, an employer may not:

> discharge, threaten, or otherwise discriminate against an employee . . . because the employee . . . reports or is about to report . . . a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state . . . to a public body . . . *or* because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.[95]

An individual alleging a violation of the WPA must file suit "within 90 days after the occurrence of the alleged violation," or the claim will be barred.[96]

During the *Survey* period, in a somewhat unusual holding in *Kimmelman v. Heather Downs Management Ltd.*,[97] the court of appeals interpreted the WPA to deny the plaintiff any remedy for his alleged wrongful discharge.[98]

To establish liability under the WPA, a plaintiff must first show that he was engaged in a protected activity as defined by the Act.[99] "'Protected activity' under the WPA consists of (1) reporting to a public body a violation of a law, regulation, or rule, (2) being about to report such a violation to a public body, or (3) being asked by a public body to participate in an investigation."[100] Accordingly, in order for a plaintiff to *avoid* the exclusive remedy rule established in *Dudewicz* and raise a viable public policy claim, the plaintiff must establish that he did *not* engage in "protected activity."[101]

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94. Dudewicz v. Norris-Schmid, Inc., 443 Mich. 68, 78-80, 503 N.W.2d 645 (1993), *overruled by* Brown v. Detroit, 478 Mich. 589, 734 N.W.2d 514 (2007) (on other grounds).

95. MICH. COMP. LAWS ANN. § 15.362 (West 2004) (emphasis added).

96. MICH. COMP. LAWS ANN. § 15.363(1) (West 2004).

97. 278 Mich. App. 569, 753 N.W.2d 265 (2008).

98. *Id.* at 576-77, 753 N.W.2d at 270.

99. Chandler v. Dowell Schlumberger Inc., 456 Mich. 395, 399, 572 N.W.2d 210 (1998).

100. Roulston v. Tendercare, Inc., 239 Mich. App. 270, 279, 608 N.W.2d 525 (2000).

101. *Id.*

David Kimmelman was employed by Heather Downs Management Limited (Heather Downs) and Legacy Golf Course LLC (Legacy) as a mechanic.[102] When one of the defendants' owners, Joseph Garverick, sexually assaulted one of Kimmelman's coworkers, Kimmelman agreed to give a statement to the Michigan State Police regarding the incident.[103] Although Kimmelman subsequently was subpoenaed as a trial witness, he was not required to testify because Garverick entered into a plea agreement.[104] On September 21, 2006, Kimmelman voluntarily chose to accompany the victim to Garverick's sentencing.[105] When he reported to work the next day, Kimmelman was terminated.[106]

Kimmelman sued his employer, alleging common-law wrongful discharge, specifically claiming that his termination was "retaliation for his cooperation with the criminal investigation and prosecution and his presence at the sentencing."[107]

Heather Downs moved for dismissal under MCR 2.116(C)(8), arguing that the alleged bases for Kimmelman's termination—his cooperation with the criminal investigation and his attendance at the sentencing hearing—were protected activities under the WPA.[108] According to the defendants, the WPA therefore was Kimmelman's exclusive remedy.[109] The trial court agreed and granted summary disposition in favor of Heather Downs and Legacy because Kimmelman had failed to file his suit within the 90 days provided for in the WPA.[110] Kimmelman appealed.[111]

The issue before the appellate court thus turned on "whether any of [Kimmelman's] alleged bases for his termination fell outside the scope of the WPA," leaving Kimmelman with a claim for discharge in violation of public policy.[112]

As an initial matter, the court determined that, in the absence of any evidence to the contrary, Kimmelman was an at-will employee.[113] As

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102. *Kimmelman*, 278 Mich. App. at 571, 753 N.W.2d at 267.
103. *Id.*
104. *Id.*, 753 N.W.2d at 267-68.
105. *Id.* at 572, 753 N.W.2d at 268.
106. *Id.*
107. *Id.*
108. *Kimmelman*, 278 Mich. App. at 572, 753 N.W. 2d at 268.
109. *Id.*
110. *Id. See also* MICH. COMP. LAWS ANN. § 15.363(1) (West 2004) (providing that "[a] person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act").
111. *Kimmelman*, 278 Mich. App. at 570, 753 N.W.2d at 267.
112. *Id.*
113. *Id.*

such, "his employment was terminable at any time and for any-or no-reason, unless that termination was contrary to public policy."[114]

Taking note of the three situations identified in *Suchodolski* as basis for a public policy wrongful discharge claim,[115] the court observed that the *Suchodolski* list was not exhaustive.[116] The court further observed, though, that "where there exists a statute explicitly proscribing a particular adverse employment action, that statute is the exclusive remedy, and no other 'public policy' claim for wrongful discharge can be maintained."[117]

The court first stated that it was undisputed that Kimmelman had not engaged in the most common protected activities under the WPA, because he had not reported, nor was he about to report, any violation of law.[118] Further, the activities that Kimmelman contended caused his retaliatory termination—the criminal investigation and court action—did not involve his actual employment or even his employer, but only the company's co-owner, in his individual capacity.[119] Nonetheless, according to the court:

> [t]he language in the WPA is unambiguous; an employee need only be requested by a public body to participate in *an* investigation, hearing, inquiry, or court action (or, under the first part of the statute, report be about to report *a* violation of law). There is absolutely nothing, express or implied, in the plain wording of the statute that limits its applicability to violations of law *by the employer* or to investigations *involving the employer*.[120]

Because Kimmelman had alleged that his employment was terminated in retaliation for his participation in a criminal investigation and the subsequent court action, and because these are protected activities under the "plain language" of the WPA, Kimmelman's exclusive remedy was a claim under the WPA.[121] Accordingly, the court held that the trial court had properly granted summary disposition in

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114. *Id.* at 572-73, 753 N.W.2d at 268 (citing *Suchodolski*, 412 Mich. 692, 695, 316 N.W.2d 710 (1982)).

115. *Id.* at 573, 753 N.W.2d at 268.

116. *Id.*

117. *Kimmelman*, 278 Mich. App. at 573, 753 N.W.2d at 268 (citing Dudewicz v. Norris-Schmid, Inc., 443 Mich. 68, 78-80, 503 N.W.2d 645 (1993)).

118. *Id.* at 574, 753 N.W.2d at 269.

119. *Id.*

120. *Id.* at 575, 753 N.W.2d at 269 (emphasis in original).

121. *Id.* at 576, 753 N.W.2d at 270.

Heather Downs and Legacy's favor because Kimmelman had failed to file his only possible claim—a WPA claim—within the 90-day limitations period contained in that Act.[122]

The court then addressed the question of whether Kimmelman's alleged termination for attending Gaverick's sentencing hearing could form the basis for a public policy discharge claim.[123] Heather Downs and Legacy had conceded that Kimmelman's attendance at Garverick's sentencing hearing was not "protected activity" under the WPA, so Kimmelman was not obliged to bring this aspect of his claim under that Act.[124] Nevertheless, the appellate court agreed that this too was not a sufficient basis for a public policy claim.[125] A common law public policy discharge claim still must be based on an objective source specifically defining the public policy that would be undermined by an employee's termination. Kimmelman identified no such objective source setting forth the duty or right of a non-victim, non-witness to attend a sentencing hearing, and so the court rejected his claim.[126]

Thus, by strictly adhering to the language of the WPA, the court effectively denied Kimmelman any remedy for his alleged retaliatory discharge because the only non-protected activity he engaged in was insufficient to support a public policy claim.

The public policy exception to at-will employment announced in *Suchodolski* was also an issue in *Silberstein v. Pro-Golf of America.*[127] The defendants in that wrongful discharge suit argued that the public policy exception applies only when the sole reason for the termination is the employee's refusal or failure to violate the law.[128] The court of appeals disagreed.[129]

Ronald Silberstein was the Chief Financial Officer and Chief Administrative Officer of Pro-Golf of America (PGOA) and Pro-Golf International (PGI), as well as for their publicly traded parent company, Ajay Sports, Inc.[130] Tom Itin was the Chief Executive Officer and Chairman of the Board for the same companies.[131] In January 2004,

122. *Id.*
123. *Kimmelman*, 278 Mich. App. at 576, 753 N.W.2d at 270.
124. *Id.*
125. *Id.*
126. *Id.* at 576-77, 753 N.W.2d at 270.
127. 278 Mich. App. 446, 750 N.W.2d 615 (2008).
128. *Id.* at 452, 750 N.W.2d at 621.
129. *Id.* at 453, 750 N.W.2d at 622.
130. *Id.* at 448, 750 N.W.2d at 619.
131. *Id.*

Silberstein was terminated, allegedly in conjunction with cost reductions mandated by the companies' financial downturn.[132]

Silberstein filed suit against his former employers, alleging wrongful discharge in violation of public policy, tortious interference with an advantageous relationship, and conversion.[133] He claimed that he had been terminated because he had resisted pressure from CEO Itin to make accounting entries in violation of securities and franchise laws.[134] The defendants responded with a motion for summary disposition, arguing that Silberstein's termination did not fall within the public policy exception to at-will employment, and that Silberstein was, in fact, terminated for poor work performance.[135] The trial court denied the defendants's motion as to Silberstein's public policy claim, except to the extent that Silberstein claimed that he was terminated for failure to violate Generally Accepted Accounting Principles (GAAP), which the court determined was not a sufficient basis for a public policy claim.[136] The dispute then went to trial, resulting in a judgment of $1,320,168.43 (including interest, attorney fees, and costs) for Silberstein.[137] The defendants appealed.

The defendants' primary issue on appeal was a challenge to the jury instruction given for Silberstein's public policy claim.[138] The trial court had instructed the jury that Silberstein had to establish that his refusal or failure to violate the law was "*one of the motives or reasons* for [his] discharge" but that "[t]his does not have to be the only reason, or even the main reason, but it does have to be *one of the reasons* which made a difference in determining whether or not to discharge" Silberstein.[139]

The defendants argued that the instruction was erroneous, pointing to language in *Suchodolski* stating that "a cause of action for wrongful termination . . . has been found to be implied where *the* alleged reason for the discharge of the employee was the failure or refusal to violate the

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132. *Id.*

133. *Silberstein*, 278 Mich. App. at 448, 750 N.W.2d at 619.

134. *Id.* at 449, 750 N.W.2d at 619-20.

135. *Id.* The defendants also filed a counterclaim against Silberstein alleging breach of contract, breach of fiduciary obligations, and fraud. The counterclaim accused Silberstein of breaching his confidentiality agreement with the defendants, and of taking "kickbacks" from PGOA's independent auditors. *Id.* at 449, 750 N.W.2d at 620. Silberstein moved for summary disposition as to the defendants' breach of contract and breach of fiduciary claims, which were dismissed. *Id.* at 449-50, 750 N.W.2d at 620.

136. *Id.* at 449-50, 750 N.W.2d at 620.

137. *Silberstein*, 278 Mich. App. at 451, 750 N.W.2d at 621.

138. *Id.*

139. *Id.* at 453 n.2, 750 N.W.2d at 622 n.2 (emphasis in original).

law."[140] The appellate court disagreed with the defendants's interpretation of this language as requiring a public policy claim plaintiff to prove that retaliation was the sole reason for his termination, noting that the plaintiff's burden of proof was not an issue before the court in *Suchodolski.*[141] The court of appeals found the Sixth Circuit Court of Appeals' decision in *Pratt v. Brown Machine Co.*[142] to be more persuasive guidance.[143] In *Pratt,* the Sixth Circuit, applying *Suchodolski,* upheld a jury instruction stating that a plaintiff asserting a public policy wrongful discharge claim was required to prove that his refusal to violate the law "was *a determinative factor*" in the employer's termination decision.[144]

The court of appeals further noted that, contrary to the defendants' contention, the instruction given by the trial court was consistent with the model jury instruction applicable to claims brought under the WPA, which courts have held to be analogous to public policy wrongful discharge claims.[145] The court thus concluded that the trial court had properly instructed the jury on this issue.[146]

The defendants next questioned the trial court's denial of their motion for a directed verdict, arguing that Silberstein had not established that he was terminated for his refusal to violate a law sufficient to trigger the protection of *Suchodolski.*[147] The defendants likened Silberstein's case to *Suchodolski,* where the court held that refusal to violate an internal ethics code for auditors was insufficient to establish a public policy.[148] The court of appeals again demurred, observing that Silberstein had alleged a refusal to violate "laws and regulations specifically designed to protect the public, i.e., the Sarbanes-Oxley Act, the Securities Exchange Act, and the Code of Federal Regulations."[149] The court concluded that, viewing the evidence in the light most favorable to Silberstein, there was "more than enough" evidence for a reasonable jury to conclude that one of the reasons for Silberstein's

140. *Id.* at 452-53, 750 N.W.2d at 622 (quoting *Suchodolski,* 412 Mich. at 695, 316 N.W.2d at 711 (1982) (omission in original).

141. *Id.*

142. 855 F.2d 1225 (6th Cir. 1988).

143. *Silberstein,* 278 Mich. App. at 453, 750 N.W.2d at 622.

144. *Id.* (quoting *Pratt,* 855 F.2d at 1236 (emphasis in original)).

145. *Id.* at 453-54, 750 N.W.2d at 622.

146. *Id.* at 454, 750 N.W.2d at 623.

147. *Id.* at 455, 750 N.W.2d at 623.

148. *Id.* (citing *Suchodolski,* 412 Mich. at 696, 316 N.W.2d at 712).

149. *Silberstein,* 278 Mich. App. at 456, 750 N.W.2d at 623.

termination was his refusal to violate the law.[150] The jury's verdict was affirmed.[151]

V. PUBLIC SECTOR EMPLOYMENT

A. Governmental Immunity

Under Michigan's Governmental Tort Liability Act (GTLA),[152] governmental agencies and public officials generally are immune from tort liability. Specifically, the statute provides that, "[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function."[153] The statute further 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."[154] Only an express statutory enactment, either within the GTLA or in another statute, or a necessary inference from a statute, can create an exception to governmental immunity not already provided for by the GTLA.[155]

During the *Survey* period, the Michigan Court of Appeals considered three cases in which governmental immunity was at issue, concluding that governmental immunity barred only one of the claims.

In the unpublished decision of *Riopelle v. Zitell*,[156] the plaintiff, Norman Riopelle, a long-term employee of Grand Blanc Township, claimed that copies of his disciplinary notices had been improperly faxed to *The Flint Journal* by the township clerk, in violation of Michigan's Bullard-Plawecki Employee Right to Know Act (ERKA).[157] The trial

150. *Id.*

151. *Id.* at 465, 750 N.W.2d at 628.

152. MICH. COMP. LAWS ANN. §§ 691.1401-.1419 (West 2000).

153. MICH. COMP. LAWS ANN. § 691.1407(1) (West 2000).

154. MICH. COMP. LAWS ANN. § 691.1407(5) (West 2000).

155. State Farm Fire & Cas. Co. v. Corby Energy Svcs., Inc., 271 Mich. App. 480, 722 N.W.2d 906 (2006).

156. No. 275403, 2008 WL 2117498 (Mich. App. May 20, 2008).

157. *Id.* at *1-2. *See also* MICH. COMP. LAWS ANN. §§ 423.501-423.512 (West 2001). Under the ERKA, before an employer may release an employee's disciplinary records to a third party, the employer must provide the employee with written notice of the impending disclosure. MICH. COMP. LAWS ANN. § 423.506(1) (West 2001). This notice must be sent by first class mail on or before the day on which the information is released. MICH. COMP. LAWS ANN. § 423.506(2) (West 2001). Because the ERKA does not require that notice of the disclosure be mailed in advance of the disclosure itself, the Act does not

court summarily dismissed Riopelle's Bullard-Plawecki claim, finding that the township was immune from suit.[158] On appeal, the Michigan Court of Appeals readily concluded that the trial court had "incorrectly deemed the [plaintiff's] Bullard-Plawecki claim barred by governmental immunity," and reversed the trial court's dismissal as to that claim.[159]

In so doing, the court of appeals looked to the language of the Bullard-Plawecki Act, specifically the definition of "employer."[160] Section 2(b) of the Act defines "employer" as: "[a]n individual, corporation, partnership, labor organization, unincorporated association, the state or any agency or a political subdivision of the state, or any other legal, business, or commercial entity which has 4 or more employees and includes an agent of the employer."[161] Accordingly, the court held that "[t]he act's inclusion of 'the state, or an agency or a political subdivision of the state,' within the definition of '[e]mployer,' clearly and unambiguously signifies that the act applies to defendants."[162] Riopelle's Bullard-Plawecki claim thus should not have been dismissed under the GTLA.[163]

Such was not the case, however, in another unpublished Michigan Court of Appeals' case, *Thompson v. Wayne County Treasurer*.[164] There, Marilyn Thompson, Director of Community Relations for the Wayne County Treasurer's Office, learned that several properties owned by her late father, which had been deeded to her without her knowledge, were subject to foreclosure proceedings for non-payment of property taxes.[165] Thompson made efforts to contest the tax assessment, but her efforts were hindered "by lack of notice, hospitalizations, and family conflicts."[166]

When Wayne County Treasurer Raymond Wojtowicz learned of Thompson's tax delinquency, he "informed plaintiff that she, as senior management for the office of the Treasurer, was expected not to become delinquent in her property taxes and insisted that she resolve the tax issues within several days."[167] When Thompson failed to resolve the tax

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provide the employee with the right to halt the disclosure. McManamon v. Charter Twp. of Redford, 256 Mich. App. 603, 613 n.5, 671 N.W.2d 56, 61 n.5 (2003).

158. *Riopelle*, 2008 WL 2117498 at *2.

159. *Id.* at *3.

160. *Id.*

161. MICH. COMP. LAWS ANN. § 423.501(2)(b) (West 2000).

162. *Riopelle*, 2008 WL 2117498 at *3.

163. *Id.*

164. No. 277837, 2008 WL 1986269 (Mich. App. May 8, 2008).

165. *Id.*

166. *Id.*

167. *Id.*

issues by the deadline imposed by Wojtowicz, Thompson was terminated.[168]

Thompson filed suit against both Wayne County and Wojtowicz, claiming that she had been wrongfully discharged in violation of public policy following her "exercise of a right conferred by a well-established legislative enactment or acts in accordance with a statutory right or duty," essentially asserting that she had been wrongfully terminated for exercising "her right to contest the assessment of property taxes."[169]

The defendants asserted governmental immunity as to Thompson's wrongful discharge claim and moved for summary disposition.[170] The trial court granted the motion as to Wojtowicz because Thompson had failed to identify Wojtowicz's tortious conduct, but denied the motion as to Wayne County, finding that Thompson had valid public policy grounds for her wrongful discharge claim.[171]

The court of appeals reversed, concluding that Thompson's public policy claim was barred by governmental immunity.[172] In so holding, the court relied upon *Suchodolski v. Michigan Consolidated Gas,*[173] in which the Michigan Supreme Court had "recognized an employer's prerogative to terminate an at-will employee for any reason, or no reason, but recognized also that an exception existed 'based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable.'"[174] "[T]ermination as retaliation for an employee's 'exercise of a right conferred by a well-established legislative enactment'" is included in the short list of actionable public policy bases.[175]

Thus, because only judicially recognized public policy, and not a statute, supports retaliatory termination as an actionable tort, and because that tort thus is not among the statutory exceptions to governmental immunity, retaliatory termination in response to an assertion of property rights is not actionable against a governmental agency.[176] The court therefore remanded the case to the trial court with instructions to grant

168. *Id.*
169. *Id.* at *1.
170. *Thompson*, 2008 WL 1986269 at *1.
171. *Id.*
172. *Id.* at *2.
173. 412 Mich. 692, 316 N.W.2d 710.
174. *Thompson*, 2008 WL 1986269 at *2 (citing *Suchodolski*, 412 Mich. at 695, 316 N.W.2d at 171).
175. *Id.* at *2 (citing *Suchodolski*, 412 Mich. at 696, 316 N.W.2d at 712).
176. *Id.* at *2.

summary disposition of Thompson's public policy wrongful discharge claim.[177]

Finally, in *Cox v. Department of Transportation*,[178] the court of appeals determined that Steven Cox's claim of wrongful discharge in violation of public policy was barred under the GTLA.[179]

In his suit, Cox alleged that he was instructed by his employer, the Michigan Department of Transportation (MDOT), to perform electrical repairs without proper safety equipment.[180] After Thompson complained to MDOT's Safety Board about this, MDOT discharged him.[181] The trial court denied MDOT's motion for summary disposition based on governmental immunity.[182]

The court of appeals disagreed. The court first observed that MDOT's essential functions of maintenance and repair of highways are governmental functions and MDOT is thus protected from tort liability by the GTLA.[183] The court further noted that claims of retaliatory discharge from employment are tort claims.[184] Retaliation, by definition, is an intentional tort, according to the court. Because there is no intentional tort exception to governmental immunity, MDOT was immune from liability for Cox's termination.[185]

Responding to Cox's claim that a claim of wrongful discharge in violation of public policy was his sole remedy against MDOT, the court wrote that "because immunity necessarily implies that a 'wrong' has occurred, it is inevitable that some tort claims against a governmental agency will go unremedied."[186] The court thus reversed the trial court and remanded for entry of an order of summary disposition to MDOT.[187]

B. Teacher Tenure Act

In a judicial game of ping-pong conducted during the *Survey* period, the Michigan Court of Appeals and Michigan Supreme Court traded views of the appropriate standard of review to be applied by the State Tenure Commission when reviewing hearing referee decisions as to the

177. *Id.* at *3.
178. No. 278452, 2008 WL 4005027 (Mich. App. Aug. 28, 2008).
179. *Id.* at *2.
180. *Id.* at *1.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Cox*, 2008 WL 4005027 at *1.
185. *Id.* at *2.
186. *Id.*
187. *Id.*

discharge of tenured teachers, as set forth by Michigan's Teacher Tenure Act.[188]

That Act protects the employment of tenured public school teachers, by requiring that such teachers be discharged or demoted only for reasonable and just cause.[189] The Act provides that discipline decisions be subject to due process in order to "eliminate arbitrary and capricious demotions or dismissals by boards of education."[190] Originally, that process involved review of school board decisions by the State Tenure Commission, vested with decision-making authority as to the appropriate penalty for teacher misconduct.[191] In 1993, however, the State Legislature enacted 1993 PA 60, amending the Act to add a hearing referee "as an interim procedural step between a controlling board's [i.e., the school board's] decision to proceed with charges against a tenured teacher and review by the tenure commission."[192] The procedure for the hearing referee's review of the controlling board's decision, and then the procedure for the tenure commission's review of the hearing referee's decision, is specifically detailed in the Act.[193]

Historically, the tenure commission had engaged in de novo reviews of school board decisions. The Act did not expressly authorize such practice, although the portion of the Act that addressed the hearing procedures for termination of a teacher appeared to apply the same procedures (which permitted testimony and evidence) to both the school board and any subsequent tenure commission procedure.[194] Further, in 1957, the Michigan Supreme Court ruled that the Act "discloses clear legislative intent that the commission—following appeal by a teacher under said Article 6 be vested with duty and authority to determine, anew and as original questions, all issues of fact and law theretofore decided by the controlling [i.e., school] board."[195]

The 1993 amendment to the Act, adding hearing referees, clarified the role of the tenure commission; the Act now states that:

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188. MICH. COMP. LAWS ANN. §§ 38.71-.191 (West 2008).

189. MICH. COMP. LAWS ANN. § 38.101 (West 2008).

190. Goodwin v. Kalamazoo Bd. of Ed., 82 Mich. App. 559, 573, 267 N.W.2d 142, 149 (1978).

191. MICH. COMP. LAWS ANN. § 38.101 (West 2008); Lakeshore Bd. of Ed. v. Grindstaff, 436 Mich. 339, 461 N.W.2d 651 (1990).

192. Lewis v. Bridgman Pub. Schools, 275 Mich. App. 435, 439, 737 N.W.2d 824 (2007), *rev'd*, 480 Mich. 1000, 742 N.W.2d 352 (Mich. 2007).

193. MICH. COMP. LAWS ANN. § 38.104 (West 2008).

194. MICH. COMP. LAWS ANN. § 38.104 (West 1992).

195. Long v. Bd. of Educ. Dist. No. 1 FR Royal Oak Twp., 350 Mich. 324, 327, 86 N.W.2d 275, 276 (1957).

> If exceptions are filed, the tenure commission, after review of the record and exceptions, may adopt, modify, or reverse the preliminary decision and order. The tenure commission *shall not hear* any additional evidence and its review *shall be limited* to consideration of the issues raised in the exceptions based solely on the evidence contained in the record from the hearing.[196]

Based on this rather clear language, it would seem that the days of de novo review of teacher termination decisions by the tenure commission would be over. In fact, that was the determination made by the court of appeals in *Lewis v. Bridgman Public Schools* (*Lewis I*),[197] although the ruling did not stand for long.

James Lewis, a high school teacher with twelve years of experience, was discharged by the Bridgman Public Schools after he gave his eighteen year old male teaching assistant an air gun as a Christmas gift.[198] The teaching assistant was also a student at the high school, and his possession of the gun, an "accurate replica of a Ruger semi-automatic handgun," on school property violated school rules.[199] When the teaching assistant took the air gun home and told his parents about the gift, they complained to the school. Lewis was terminated.[200]

Lewis appealed his discharge to a hearing referee, who conducted a four day hearing and then issued a preliminary decision holding that the school district had established that Lewis' discharge was based on just cause.[201] After the parties filed exceptions to the referee's preliminary decision, the tenure commission issued a final decision and order.[202]

In that decision, the tenure commission rejected Lewis' claim that the school district had not proven that Lewis demonstrated "a serious lack of professional judgment."[203] The tenure commission noted that Lewis' failure to consider "possible ramifications" of presenting an air gun resembling an actual weapon to the student while on school property evidenced his lack of judgment.[204]

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196. MICH. COMP. LAWS ANN. § 38.104(5)(m) (West 2008) (emphasis in original).
197. 275 Mich. App. 435, 737 N.W.2d 824.
198. *Id.* at 436, 737 N.W.2d at 825.
199. *Id.*
200. *Id.* at 437, 737 N.W.2d at 826.
201. 275 Mich. App. at 444, 737 N.W.2d at 829.
202. *Id.*
203. *Lewis*, 275 Mich. App. at 444, 737 N.W.2d at 829.
204. *Id.*

The tenure commission also rejected Lewis' claim that he had not put the student at risk of expulsion, given that school rules require the expulsion of any student in possession of a dangerous weapon.[205]

Next, the commission agreed that the school district had proven violations of the school's weapon policy, despite expert testimony offered by Lewis that the air gun was not capable of inflicting serious bodily harm or property damage.[206] Air guns were expressly prohibited by the district's weapon policy.[207]

Lewis next objected to the referee's consideration of his prior employment history, arguing that any prior incidents were unrelated to the charges resulting in his discharge.[208] The tenure commission again disagreed, observing that consideration of prior misconduct to determine penalty was not akin to double jeopardy, and that the prior incidents at issue were relevant because they also involved lapses of professional judgment.[209]

Finally, the tenure commission agreed with the referee's finding that Lewis' misconduct "was both egregious and a clear violation of the conduct expected of a teaching professional" and that Lewis did not "appear to appreciate the seriousness of his present misconduct."[210]

Nonetheless, the tenure commission determined that the proper penalty was a lengthy unpaid suspension rather than termination, due to Lewis' lack of "improper motive" and his past contributions as a teacher.[211]

Pursuant to the Teacher Tenure Act, the school district sought review of the State Tenure Commission's decision in the court of appeals. In a 2-1 decision, the court reversed, concluding that the commission had failed to give sufficient deference to the hearing referee's factual finding as to penalty (*Lewis I*).[212]

The school district appealed on leave granted.[213] In a 2-1 decision, the court of appeals reversed, concluding that the Tenure Commission had erred in reviewing the referee's decision de novo, as evidenced by the fact that, despite accepting the referee's factual findings as correct, the commission reduced Lewis' discharge to a suspension.[214] This,

205. *Id.* at 445, 737 N.W.2d at 829.
206. *Id.* at 445, 737 N.W.2d at 830.
207. *Id.*
208. *Id.* at 446, 737 N.W.2d at 830.
209. *Lewis*, 275 Mich. App. at 446, 737 N.W. 2d at 830.
210. *Id.* at 447, 737 N.W. 2d at 831.
211. *Id.*
212. *Id.* at 448-49, 737 N.W.2d at 832.
213. *Id.* at 436, 737 N.W.2d at 825.
214. *Id.* at 448-49, 737 N.W.2d at 831.

according to the court, violated the Act.[215] The court observed that, under the amended Act, the tenure commission is "precluded from taking new evidence and must limit its review 'to consideration of the issues raised in the exceptions based solely on the evidence contained in the record from the hearing.'"[216] As such, the court concluded that the commission's review was limited "to addressing the propriety and manner of the hearing conducted by the hearing referee to assure the decision for the discharge or demotion of a tenured teacher is not arbitrary or capricious."[217] This meant that the appropriate standard of review for the commission was "clearly erroneous" and not de novo.[218]

Because the tenure commission exceeded its authority in reviewing the hearing referee's decision upholding the school board's discharge of Lewis, the court of appeals reversed the commission's decision and remanded to the tenure commission.[219]

Lewis then sought leave to appeal to the Michigan Supreme Court. In lieu of granting leave, the Supreme Court reversed and remanded the case to the court of appeals, in *Lewis v. Bridgman Public Schools* (*Lewis II*).[220] In so doing, the Court stated that the Teacher Tenure Act "does not require the state Tenure Commission to apply a 'clear error,' rather than a 'de novo,' standard of review to its consideration of the preliminary decisions of administrative law judges."[221] Accordingly, the case was returned to the court of appeals "for consideration of whether the Commission's decision was arbitrary, capricious, or an abuse of discretion; or unsupported by competent, material, and substantial evidence on the whole record."[222]

Following this directive from the Supreme Court, the Michigan Court of Appeals, in *Lewis v. Bridgman Public Schools* (*Lewis III*),[223] revisited the State Tenure Commission's decision, assessing whether the commission's decision regarding the hearing referee's opinion was arbitrary or capricious.[224] The court concluded that it had not been, and

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215. *Lewis*, 275 Mich. App. at 448-49, 737 N.W.2d at 831.

216. *Id.* at 441, 737 N.W.2d 828 (quoting MICH. COMP. LAWS ANN. § 38.104(5)(m) (West 2008)).

217. *Id.* at 442, 737 N.W.2d at 828.

218. *Id.*

219. *Id.* at 448-49, 737 N.W.2d at 831.

220. 480 Mich. 1000, 742 N.W.2d 352 (2007).

221. *Id.*

222. *Id.* The Supreme Court subsequently denied reconsideration of its order. 480 Mich. 1140, 745 N.W.2d 776 (2008).

223. 279 Mich. App. 488, 760 N.W.2d 242 (2008).

224. *Id.* at 490, 760 N.W.2d at 244.

thus affirmed the reduction of Lewis' termination to a suspension.[225] According to the court:

> [t]he tenure commission's finding of reasonable and just cause to reduce Lewis's discipline . . . was supported by competent, material, and substantial evidence on the whole record. The tenure commission differed with the hearing officer's conclusions only with regard to the appropriate level of discipline, and it gave several reasons for its decision . . . to impose a less severe penalty.[226]

Those reasons included Lewis' community service and the quality of his teaching, evidence as to which was not disputed.[227]

Judge Michael Talbot wrote in concurrence, noting first that he was "constrained by the language of the Supreme Court's remand order,"[228] and taking issue with "the abbreviated review engaged in by [the] Supreme Court, which focused solely on the standard of review and failed to address the substantive issue pertaining to the effect of statutory changes on the role and authority of the Tenure Commission."[229] In support of his contention that 1993 PA 60 had "substantively changed the procedure to be used in the appeal of a decision by a controlling board,"[230] Judge Talbot then outlined the tenure commission's role throughout the history of the Tenure Act. Judge Talbot noted that, "[e]ven before amendment of the act, our Supreme Court [had] acknowledged that many of its rulings pertaining to the authority of the tenure commission came, not from the language of the statute itself, but rather were the result of judicial construction."[231] Thus, Judge Talbot wrote, "a renewed look at the effect of the statutory changes on the process of reviewing controlling-board rulings" was necessitated.[232] Apparently, however, *Lewis v. Bridgman* was not the right case, at the right time, to support such a review.

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225. *Id.* at 498, 760 N.W.2d at 248.
226. *Id.* at 497, 760 N.W.2d 248.
227. *Id.*
228. *Id.* at 498. 760 N.W.2d 248 (Talbot, J., concurring).
229. *Lewis*, 279 Mich. App. at 499, 760 N.W.2d 248-49 (Talbot, J., concurring).
230. *Id.* at 501, 760 N.W.2d 250 (Talbot, J., concurring).
231. *Id.* at 502, 760 N.W.2d 250 (Talbot, J., concurring).
232. *Id.* at 501, 760 N.W.2d 250 (Talbot, J., concurring).

C. Public Employment Relations Act

Michigan's Public Employment Relations Act (PERA)[233] governs the relationship between public employers and their employees, including the collective bargaining process. Among other issues, PERA establishes the mandatory subjects of collective bargaining between public employers and their employees' representatives: "wages, hours, and other terms and conditions of employment."[234] Given this somewhat general list of "mandatory subjects," whether an issue is a mandatory subject of bargaining is determined on a case-by-case basis.[235] Generally, however, any matter that has a *significant impact* on wages, hours, or other terms and conditions of employment is subject to mandatory bargaining.[236]

Pursuant to this duty to bargain, "[a]n employer must bargain to impasse [i.e., the point at which the parties cannot agree] regarding mandatory subjects of bargaining."[237] Upon reaching an impasse during negotiations, the public employer can then unilaterally implement its final offer to the union.[238]

On the other hand, issues that are not deemed "mandatory" are either "permissive" or illegal subjects of bargaining.[239] Unlike mandatory subjects, the parties "may bargain by mutual agreement on a permissive subject, but neither side may insist on bargaining to a point of impasse."[240]

In *Oak Park Public Safety Officers Ass'n v. City of Oak Park*,[241] decided during the *Survey* period, the Michigan Court of Appeals explored whether minimum staffing requirements (*i.e.*, the minimum number of union employees required to be employed and/or working at any given time) is a mandatory subject of collective bargaining under PERA.[242]

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233. MICH. COMP. LAWS ANN. §§ 423.201-.217 (West 2007).

234. MICH. COMP. LAWS ANN. § 423.215 (West 2007).

235. Oak Park Public Safety Officers Ass'n v. City of Oak Park, 277 Mich. App. 317, 325, 745 N.W.2d 527 (2007) (citing Detroit v. Detroit Fire Fighters Ass'n, Local 344, IAFF, 204 Mich. App. 541, 553, 745 N.W.2d 527 (1994)).

236. *Id.* at 325, 745 N.W.2d at 533.

237. Gilbraltar School Dist. v. Gilbraltar MESCP-Transp., 443 Mich. 326, 346, 505 N.W.2d 214 (1993).

238. Detroit Police Officers Ass'n v. City of Detroit, 391 Mich. 44, 56, 214 N.W.2d 803, 809 (1974).

239. *Id.* at 55 n.6, 214 N.W.2d at 809 n.6.

240. *Id.*

241. 277 Mich. App. 317, 745 N.W.2d 527, *leave denied*, 481 Mich. 942, 751 N.W.2d 43 (2008).

242. *Id.* at 318, 745 N.W.2d at 529.

When the collective bargaining agreement between Oak Park and the Oak Park Public Safety Officers Association ("the union") expired on June 30, 2001, the city indicated that it would not negotiate the minimum staffing provisions provided for in the previous agreement, because such provisions were permissive, not mandatory, subjects of bargaining.[243] These minimum staffing provisions included: a minimum number of PSOs (public safety officers) (1) per platoon, (2) per shift, (3) in a patrol car during the night shift, and (4) in the operations division.[244]

Pursuant to Act 312,[245] employees of public police and fire departments are not allowed to strike and thus must engage in compulsory arbitration to settle their disputes.[246] Therefore, after the Oak Park Public Safety Officers Association continued to push to preserve the minimum staffing provisions in the expired contract, and the city continued to refuse to negotiate, an impasse developed.[247] The union responded with a petition for compulsory arbitration.[248] In return, Oak Park filed an unfair labor practice (ULP) charge against the union with the Michigan Employment Relations Commission (MERC)[249] for unlawfully demanding bargaining on a permissive subject of bargaining, i.e., the minimum staffing provisions.[250]

After a five-day ULP hearing, the MERC hearing referee held that "to establish that a minimum staffing proposal constitutes a mandatory subject of bargaining, the evidence must demonstrate that the proposal is inextricably intertwined with the safety of its members; i.e. that the staffing proposal has a genuine or significant impact on safety."[251] Further, because the union had failed to establish that its minimum staffing proposal had a significant impact on the safety of its members, the hearing referee held that the minimum staffing clause was a permissive subject of bargaining.[252] As such, the referee found that the ULP charge against the union was proved and ordered the provisions to be withdrawn.[253]

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243. *Id.* at 319, 745 N.W.2d at 529.
244. *Id.* at 318, 745 N.W.2d at 579.
245. MICH. COMP. LAWS ANN. §§ 423.231-.47 (West 2007).
246. MICH. COMP. LAWS ANN. § 423.231 (West 2007).
247. *Oak Park*, 277 Mich. App. at 319, 745 N.W.2d at 529.
248. *Id.*
249. MICH. COMP. LAWS ANN. §§ 423.1-.30 (West 2007). MERC has exclusive jurisdiction to determine unfair labor practice charges. *See* Lamphere Schools v. Lamphere Fed'n of Teachers, 400 Mich. 104, 118, 252 N.W.2d 818, 824 (1977).
250. *Oak Park*, 277 Mich. App. at 319, 745 N.W.2d at 529-30.
251. *Id.* at 321, 745 N.W.2d at 531.
252. *Id.*
253. *Id.*

The union filed exceptions to the referee's decision and recommended order with MERC.[254] MERC upheld the hearing referee's decision, concluding that the referee had applied the correct standard when determining whether the minimum staffing proposals were mandatory subjects of bargaining.[255] Specifically, MERC found that, while the standard may be whether there is a "significant impact" on firefighter safety, the referee's use of an "inextricably intertwined with safety" standard was equivalent in application because both standards required "competent evidence that a manning proposal has an impact upon the risk of injury or harm to a member or members of the bargaining unit" in order to be a mandatory subject of bargaining.[256] Further, MERC noted that "[t]o mandate bargaining as to the number of officers per shift would be to mandate bargaining as to the total size of the work force, a determination clearly reserved to management."[257]

The union disagreed with MERC's decision to the extent that it held minimum staffing proposals must be *inextricably* intertwined with employee safety before they can be considered to have a significant impact on the safety of those employees and, thus, be deemed mandatory subjects of bargaining.[258] The union therefore appealed MERC's decision as of right to the Michigan Court of Appeals.[259]

On appeal, the union did not dispute MERC's factual determinations, but rather argued that the proper legal standard for determining whether minimum staffing proposals are a mandatory subject of bargaining is "whether there is a significant impact on safety to the extent that safety concerns are *arguably* intertwined with and inseparable from the minimum staffing issue."[260] Under the standard of review, the appellate court could only set aside MERC's legal determinations if "they violate[d] a constitutional or statutory provision or they [were] based on a substantial material error of law."[261]

While the union argued that *Alpena v. Alpena Fire Fighters Ass'n, AFL-CIO*,[262] which held that a minimum staffing proposal must only "concern" or "affect" safety to be a mandatory subject of bargaining was controlling, the court of appeals found the union's reliance on the case to

254. *Id.*
255. *Id.* at 321, 745 N.W.2d at 531.
256. *Oak Park*, 277 Mich. App. at 321, 745 N.W.2d at 531.
257. *Id.* at 323, 745 N.W.2d at 531.
258. *Id.* at 333, 745 N.W.2d at 532.
259. MICH. COMP. LAWS ANN. § 423.216(e) (West 2007).
260. *Oak Park*, 277 Mich. App. at 324, 745 N.W.2d at 532 (emphasis added).
261. *Id.*
262. 56 Mich. App. 568, 224 N.W.2d 672 (1974), *overruled on other grounds by* City of Detroit v. Detroit Police Officers Ass'n, 408 Mich. 410, 294 N.W.2d 68 (1980).

be misguided.[263] Specifically, the court noted that the issue in *Alpena* was not the standard for determining if whether a minimum staffing proposal was subject to mandatory bargaining, as in *Oak Park*.[264] Rather, in *Alpena*, the issue was whether an Act 312 arbitration panel[265] had jurisdiction under the statute to issue a "manpower award" to maintain the status quo after an impasse had been reached between the City of Alpena and Fire Fighters' union.[266] Because the court in *Alpena* was faced with extensive union testimony that the number of firefighters on duty affected the safety of the public and other firefighters, which was not rebutted by the City, the *Alpena* court easily found that the number of firefighters on duty affected firefighter safety and, thus, was a condition of employment over which it had jurisdiction.[267] Because the evidence was not rebutted by the City, the court in *Alpena* never had to consider the degree to which the *number* of firefighters on duty affected their safety and, accordingly, whether it was a mandatory subject of bargaining.[268]

Instead, the *Oak Park* court relied on *Trenton v. Trenton Fire Fighters Union, Local 2701, IAFF*,[269] in which that court had applied the "inextricably intertwined with safety" standard used by the MERC hearing referee in *Oak Park*.[270] The *Oak Park* court recognized that, although the "inextricably intertwined with safety" standard had not specifically been adopted by the Michigan Supreme Court, "such standard conveys that a significant relationship must be proven to exist between the minimum staffing proposal and, for example, safety, before the issue is subject to mandatory [bargaining]."[271] The court further found that the "inextricably intertwined with safety" standard properly balanced the rights of the parties by allowing the city to establish the number of employees required to provide the level of services needed, while still protecting the employees' rights to not be forced to work in unsafe conditions.[272]

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263. *Oak Park*, 277 Mich. App. at 327, 745 N.W.2d at 534.

264. *Id.*

265. Act 312 provides for a three person panel to determine labor disputes required to submit to mandatory arbitration. The panel consists of one delegate chosen by the employer, one delegate chosen by the employee, and an impartial arbitrator selected by the two delegates. MICH. COMP. LAWS ANN. §§ 423.234-.235 (West 2007).

266. *Oak Park*, 277 Mich. App. at 327, 745 N.W.2d at 534.

267. *Id.* at 328, 745 N.W.2d at 534.

268. *Id.*

269. 166 Mich. App. 285, 420 N.W.2d 188 (1988).

270. *Oak Park*, 277 Mich. App. at 329, 244 N.W.2d at 535.

271. *Id.*

272. *Id.*

As such, the court held that the standards used by the hearing referee and MERC were "consistent with the requirement that only those matters that have a significant impact on conditions of employment are subject to mandatory bargaining," and not those that may only *arguably* exist.[273] The court further stated that:

> [t]o adopt the union's position would be tantamount to requirement that most, if not all, minimum staffing proposals—particularly with regard to PSOs, police officers, firefighters, and others engaged in high-risk professions—be subject to mandatory bargaining, given that a reduction in the number of these employees will arguably have some—albeit minimal—impact on safety. Such a conclusion would have the effect of invading the city's prerogative to determine the size and scope of its business, including the services it will provide.[274]

Therefore, the court of appeals affirmed MERC's decision that the union's minimum staffing proposal was not a mandatory subject of bargaining within the meaning of PERA, thus requiring the union to withdraw its minimum staffing proposal.[275]

VI. CONTRACTS NOT TO COMPETE

During the last decade, it has become increasingly common for employers to require newly hired employees to sign non-competition agreements. Such agreements typically limit an employee's ability to work in the same industry, within a defined geographic area and for a defined period of time, once that employee is terminated (voluntarily or otherwise) from her current employment. The legal validity of such agreements has swung back and forth over time, likely due to varying economic conditions; however, in 1984, the Michigan Antitrust Reform Act (MARA) repealed all previous statutory provisions regarding covenants not to compete.[276]

While MARA proclaimed that contracts made "in restraint of, or to monopolize trade or commerce"[277] were unlawful, the Act also expressly stated that

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273. *Id.* at 330, 745 N.W.2d at 535.

274. *Id.*

275. *Id.* at 331, 745 N.W.2d at 536.

276. Michigan Antitrust Reform Act, MICH. COMP. LAWS ANN. §§ 445.771-.788 (West 2007).

277. MICH. COMP. LAWS ANN. § 445.772 (West 2007).

> [a]n 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.[278]

Despite the current difficult economic climate in Michigan, during the *Survey* period, the Michigan Court of Appeals continued to strictly interpret non-compete agreements, addressing whether an employer who breaches an employment contract by terminating an employee without just cause is precluded from enforcing a non-competition clause contained in that contract.

In *Coates v. Bastian Brothers, Inc.*,[279] the plaintiff, Pamela Coates, had worked for defendant Bentley & Associates, a graphic communications and advertising firm, since 1980.[280] When Coates was promoted to general manager in 1987, she entered into an employment contract that included not only a provision prohibiting termination without just cause, but also a noncompetition provision, which stated:

> Employee will not for a period of one (1) year after termination of employment with the Company, regardless of the reason for termination of employment, participate either personally or financially in any enterprise in competition with the Company. If the physical location of an enterprise is not within one hundred (100) miles of any business location of the Company, that enterprise will not be viewed as in competition with the Company.[281]

In October 2002, Coates was discharged.[282] She accepted a position with a competitor and Bentley filed suit for breach of the non-

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278. MICH. COMP. LAWS ANN. § 445.774a (West 2007). This provision was enacted more than two years after the initial Act had taken effect. It is applicable only to those contracts entered into after March 29, 1985.

279. 276 Mich. App. 498, 741 N.W.2d 539 (2007).

280. *Id.* at 508, 741 N.W.2d at 546.

281. *Id.* at 501, 507, 741 N.W.2d at 542, 545.

282. *Id.* at 501, 741 N.W.2d at 542.

competition clause.[283] Coates counter-sued and asserted her own breach of contract claim against Bentley for terminating her without cause.[284]

After the trial court denied both parties' motions for partial directed verdict, the case was tried in front of a jury.[285] The jury found that Coates had breached the non-competition clause of her employment contract, but that Bentley violated the just cause provision, as well as two other provisions of the contract, resulting in a net judgment in Coates' favor.[286] Both parties appealed.[287]

On appeal, Coates asserted that the trial court should have granted her motion for partial directed verdict because (1) the non-competition clause was unenforceable as a matter of law under MARA, and (2) Bentley was barred from enforcing the noncompetition provision, because it breached the employment contract first by terminating Coates without cause.[288] For support of the latter argument, Coates relied on the first-breach doctrine.[289]

The court of appeals initially examined whether Coates' employment agreement was enforceable as a matter of law.[290] Under MARA, a non-competition clause is enforceable only to the extent that it is reasonable.[291] Further, although courts are to presume the legality, validity and enforceability of contracts as a general matter,[292] if a party to a non-competition clause challenges its enforceability, the court must assess the reasonableness of that specific clause.[293] In this assessment, "[t]he burden of demonstrating the validity of the agreement is on the party seeking enforcement."[294] When the material facts are not in

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283. *Id.* at 501-02, 741 N.W.2d at 542.

284. *Id.* Coates also asserted that Bentley breached the right of first-refusal provision in the employment contract by failing to give her the opportunity to purchase stock when the company redeemed outstanding shares. The court of appeals held that the first-refusal provision did not cover redemption of outstanding stock and reversed the trial court's prior denial of the defendant's motion for directed verdict as to this issue. *Coates*, 276 Mich. App. at 502-05, 741 N.W.2d at 542-44.

285. *Id.* at 502, 741 N.W.2d at 542.

286. *Id.* at 502, 741 N.W.2d 542.

287. Bentley's appeal focused on the right of first-refusal issue. *Id.* at 542, 741 N.W.2d at 541. *See also supra* note 284.

288. *Coates*, 276 Mich. App. at 505-06, 741 N.W.2d at 544.

289. *Id.*

290. *Id.* at 506-09, 741 N.W.2d at 544-46.

291. *Id.* at 507, 741 N.W.2d at 545. *See also* MICH. COMP. LAWS ANN. § 445.774a (West 2007).

292. *Coates*, 276 Mich. App. at 507-08, 741 N.W.2d at 545 (citing Cruz v. State Farm Mutual Automobile Ins. Co., 466 Mich. 588, 599, 648 N.W.2d 591 (2002)).

293. *Id.* (citing Woodward v. Cadillac Overall Supply Co., 396 Mich. 379, 389-91, 240 N.W.2d 710 (1976)).

294. *Id.* at 507-08, 744 N.W.2d at 545.

dispute, the trial court cannot leave the issue of reasonableness to the jury, but must decide the reasonableness of the non-competition clause as a matter of law.[295]

In short order, the court of appeals determined that the facts relevant to the reasonableness of the non-competition clause—(1) temporal scope; (2) geographic scope; and (3) length of Coates's employment—were undisputed and the trial court had erred in not determining that the contract was reasonable as a matter of law.[296] The court therefore held, without further explanation, that the clause's limited temporal scope (one year), modest geographic scope (one hundred miles), and Coates' length of employment with Bentley (twenty-two years), combined to make the provision reasonable and enforceable as a matter of law.[297]

The court next considered whether Bentley was barred from enforcing the non-competition clause against Coates because Bentley breached the employment contract first, despite the contract's enforceability.[298]

Under the "first-breach doctrine," the first party to materially breach a contract cannot then maintain a cause of action against the other party to the contract for her subsequent breach.[299] Because Coates had failed to preserve her first-breach issue in the trial court, the court of appeals rejected the argument altogether.[300] The court nonetheless ruled, alternatively, that the plain language of the non-competition clause would have prevented Coates from asserting it as a defense to Bentley's claim.[301] In particular, the court found that the clause prohibited Coates from working for a competitor for one year "*regardless of the reason for termination of [Coates's] employment*," which the court read as meaning whether Coates was terminated in conformity with the contract or not.[302] According to the appellate court, "under this clause's plain terms, plaintiff cannot argue that because her employment was terminated without cause, Bentley was barred from enforcing the noncompetition clause. Such an interpretation contravenes the plain terms of the clause and therefore must be rejected."[303] To hold otherwise would be in

295. *Id.* at 508, 741 N.W.2d at 545-46 (citing St. Clair Medical, P.C. v. Borgiel, 270 Mich. App. 260, 267-69, 715 N.W.2d 914 (2006)).

296. *Id.*, 741 N.W.2d at 546.

297. *Id.*

298. *Coates*, 276 Mich. App. at 508, 741 N.W.2d at 546.

299. *Id.* (citing Michaels v. Amway Corp., 206 Mich. App. 644, 650, 522 N.W.2d 703 (1994)).

300. *Id.* at 509-10, 741 N.W.2d at 546.

301. *Id.* at 509-10, 741 N.W.2d at 546-47.

302. *Id.* at 510, 741 N.W.2d at 546-47.

303. *Id.*

conflict with the parties' right to contractually avoid what otherwise would be an applicable rule of law, namely the first-breach doctrine.[304]

The court of appeals thus concluded that the trial court did not err in denying Coates' motion for partial directed verdict on the basis of the unenforceability of the non-competition clause, either because it was invalid as a matter of law or because the defendants were barred from enforcing it.[305] The case was remanded to the lower court with an order to modify the net judgment previously found in Coates' favor on other grounds.[306]

In a notable partial dissent, court of appeals Judge Michael R. Molenski agreed that Coates' motion for partial directed verdict should have been denied at the trial level, but only because Coates' first-breach issue had not been preserved.[307] As to the alternative ruling of the majority regarding the plain language of the non-competition clause preventing application of the first-breach doctrine, Molenski would have ignored that language for policy reasons, stating that:

> [b]ecause defendants breached the just-cause provision of the employment agreement, I would hold that the plaintiff is not bound by the noncompetition provision of the employment agreement. The employer should not be allowed to wrongfully terminate plaintiffs' employment and then gain by this wrongful conduct the advantage of preventing the wrongfully discharged employee from securing employment, in her field, with defendants' competitor.[308]

VII. WAGES

A. Sales Representative Commissions Act

Michigan's Sales Representative Commissions Act (SRCA)[309] supplements the common law right of a sales representative to be paid commissions under a sales representative agreement, by requiring that all commissions due upon termination of the contract between the principle and sales representative be paid within forty-five days, and that all commissions that become due after the termination of the contract must

304. *Coates*, 276 Mich. App. at 510, 741 N.W.2d at 546-47.
305. *Id.* at 512, 741 N.W.2d at 548.
306. *Id*
307. *Id.*
308. *Id.*
309. MICH. COMP. LAWS ANN. § 600.2961 (West 2007).

be paid within forty-five days of the date on which those commissions become due.[310] Failure to comply with these provisions can subject the principal to double damages, not to exceed $100,000, as well as costs and attorney fees.[311]

The Act does not determine whether the employee is entitled to those commissions, but rather is designed to ensure that employees are paid commissions that are owed.[312] Entitlement to commissions is determined under the terms of the contract between the employer and the sales representative.[313] If the contract is silent on this issue, past practices between the parties control. If no past practice exists, the custom and usage prevalent in the industry at issue controls.[314]

In an opinion released during the *Survey* period, the United States Court of Appeals for the Sixth Circuit applied an interpretation of the Act established in *Steinke & Associates, Inc. v. Loudon Steel, Inc.*,[315] an unpublished Michigan Court of Appeals decision holding that the SCRA does not, by itself, create a right to post-termination commissions.[316]

In *Eungard v. Open Solutions, Inc.*,[317] the Sixth Circuit examined the effect of termination of employment upon the receipt of commissions under the SRCA. Scott Eungard, a salesman, sued his former employer, claiming that he had been denied full commissions owed to him upon the termination of his employment.[318] Eungard sold computer software systems and hardware to banks and credit unions in the company's Great Lakes region.[319] In 2004, Eungard traveled to Ohio to finalize a sales contract. By the end of the day on June 30, negotiations "had gotten pretty heated," but no agreement was reached and Eungard returned home.[320] On July 2, within thirty-six hours of leaving Ohio, Eungard was terminated for claimed poor performance.[321] Eungard's supervisor allegedly promised Eungard that his commissions would be paid.[322]

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310. MICH. COMP. LAWS ANN. § 600.2961(4) (West 2007).

311. MICH. COMP. LAWS ANN. §§ 600.2961(5)-(6) (West 2007).

312. *See, e.g.*, Flynn v. Flint Coatings, Inc., 230 Mich. App. 633, 637, 584 N.W.2d 627, 629.

313. MICH. COMP. LAWS ANN. § 600.2961(2) (West 2007).

314. MICH. COMP. LAWS ANN. § 600.2961(3) (West 2007).

315. No. 263362, 2006 WL 664346 (Mich. Ct. App. Mar. 16, 2006). For a complete discussion of *Steinke*, see Patricia Nemeth and Deborah Brouwer, *Employment & Labor Law, Ann. Survey of Mich. Law*, 53 WAYNE L. REV. 223, 284-86 (2007).

316. *Steinke & Assoc., Inc.*, 2006 WL 664346, at *3.

317. 517 F.3d 891 (6th Cir. 2007).

318. *Id.* at 894.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Eungard*, 517 F.3d at 893.

During the two days between Eungard's departure from Ohio and his termination, the parties to the previous failed sales contract reconciled their differences.[323] A contract, backdated to June 30, was signed a few hours after Eungard was discharged.[324] Open Solutions paid Eungard the first half of the commission on this sale, but refused to pay him the remainder.[325]

The district court granted summary disposition to Open Solutions, concluding that further commissions were not owed to Eungard because the sales contract had not been signed as of his termination.[326] On appeal, the Sixth Circuit reversed, finding material facts regarding the interpretation of the employment contract between the parties.[327] At issue was a provision of the employment contract that entitled Open Solutions' employees to commissions on "all of the employee's closed orders as of their termination date which will be reviewed for calculation of commission payments based on their status of that date . . . ."[328] The court concluded that, under Michigan law, the client's orders, which were placed by their signing of the sales contract and mailing payment to Open Solutions, were "closed orders" within the meaning of the sales commission plan.[329] The court found it immaterial that Open Solutions, the seller, did not sign the contract until July 6, because the term "order" connotes action on the part of the buyer and does not turn on the seller's formalization of an already submitted request.[330] The court acknowledged that the contract used the word "date" in determining the status of Eungard's orders, rather than time, but remanded the case for determination of whether the contract called for Eungard's commissions to be paid, even though the contract was signed several hours after his termination.[331]

The Sixth Circuit did observe that the SRCA only creates remedial rights to enforce the terms of the contract between the principal and sales representative regarding when a commission becomes due.[332] The court

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323. *Id.* at 893-94.

324. *Id.* at 894.

325. Open Solutions explained its payment to Eungard of the first half of the sales contract ($11,343) by saying it was being paid "per the comp plans." The company later said that the payment was made as part of a "business decision" designed "to avoid litigation." *Id.* at 894.

326. *Id.*

327. *Id.* at 895-98.

328. *Eungard*, 517 F.3d. at 899.

329. *Id.* at 894.

330. *Id.* at 895.

331. *Id.* at 895-96.

332. *Id.* at 898.

stated that the SRCA "sets forth only a deadline for the payment of commissions that 'become due after the termination date,' . . . and no commission can ever become 'due' if the written contract between the parties precludes it."[333] Thus, while the SRCA prevents employees from waiving their statutory rights,[334] it "does not grant every employee a right to post-termination commissions."[335] Thus, the plaintiff in *Eungard* was left to establish his right to unpaid commissions pursuant to the company's sales commission plan.[336]

B. Fair Labor Standards Act

The Fair Labor Standards Act (FLSA)[337] was enacted by the United States Congress in 1938 to ensure that employees who work hours beyond a statutory maximum are compensated for those additional hours.[338] The FLSA thus requires employers to pay their employees time-and-a-half overtime for all work performed in excess of forty hours per week.[339] The FLSA does, however, provide an exemption from overtime pay for bona fide executive, administrative, or professional employees, known generally as the "executive exemption."[340]

During the *Survey* period, the Sixth Circuit Court of Appeals examined the executive exemption in *Thomas v. Speedway SuperAmerica, L.L.C.*,[341] through an extensive analysis of the FLSA and its accompanying regulations, which provide the day-to-day instructions on how to apply the exemption. These regulations were amended by the Secretary of Labor in 2004, but because the plaintiff in *Thomas* was terminated prior to those amendments, the former regulations were controlling.[342] The court in *Thomas* specifically noted, however, that even though the current regulations are not identical to those in place

333. *Id.*

334. *Eungard*, 517 F.3d. at 898-99. *See also* Walters v. Bloomfield Hills Furniture, 228 Mich. App. 160, 577 N.W.2d 206 (1998) (holding mid-employment contract improperly waived employee's rights to post-termination commissions). *Cf. Gerard Thomas Co. v. Swanson*, No. 226163, 2001 WL 11335937 (Mich. Ct. App. Oct. 30, 2001) (enforcing a contractual ban on post-termination commissions where the employer has not "subsequently changed th[e] terms" of the employment and merely enforces certain "conditions" to which the employee agreed to at the outset).

335. *Eungard*, 517 F.3d at 898.

336. *Id.*

337. 29 U.S.C. §§ 201-219 (2007).

338. Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 460 (1948).

339. 29 U.S.C. § 207(a)(1) (2007).

340. 29 U.S.C. § 213(a)(1) (2007).

341. 506 F.3d 496 (6th Cir. 2007).

342. *Id.* at 502, 503 n.5.

prior to the amendment, they are so similar that the court's analysis provides guidance for cases arising under the current regulations.[343]

Speedway operates more than 600 gas station/convenience stores nationwide, under a corporate structure that provides for individual stations to be run and operated by a store manager.[344] To ensure consistency among its stores, each store manager is supervised by a district manager who generally visits each store once or twice each week and remains in constant telephone contact.[345] The company also supplies detailed company policies and standardized operating procedures.[346]

The plaintiff, Mabel Kay Thomas, managed one such Speedway store and, thus, was the most senior on-site employee at that station.[347] Thomas considered herself as the ultimate person "in charge" of her store.[348] As a store manager, Thomas earned approximately $522 per week, with a possible bonus each month up to $2,500 based on the sale of certain products in her store.[349] In return, Thomas was expected to work at least fifty hours per week, and remain on-call at all times.[350]

Thomas' duties included a mix of managerial and non-managerial tasks. For approximately sixty percent of her time, Thomas performed non-managerial tasks, "such as stocking merchandise, sweeping floors, cleaning bathrooms, operating the register, and performing routine clerical duties."[351] The remaining forty percent of her time was devoted to managerial functions, such as:

> supervis[ing], interview[ing], hir[ing], train[ing], and disciplin[ing] employees; . . . preparing[ing] weekly work schedule[s] for her employees; . . . resolv[ing] employee complaints; . . . monitor[ing] her employees' performance with formal evaluations; . . . recommend[ing] salary or merit increases for her employees (most of which were accepted by her district manager; . . . recommend[ing] employee terminations to her district manager; and . . . even terminat[ing] some employees without prior approval from her district manager.[352]

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343. *Id.*
344. *Id.* at 499.
345. *Id.*
346. *Id.*
347. *Thomas*, 506 F.3d at 499.
348. *Id.*
349. *Id.*
350. *Id.*
351. *Id.*
352. *Id.*

Speedway terminated Thomas after five years of employment.[353] She filed suit, claiming violations of the FLSA and Ohio's wage statute (which defers to the FLSA) for failing to pay overtime wages.[354] Speedway moved for summary judgment on the basis of the executive exemption.[355] The trial court granted Speedway's motion, finding that Thomas had been a bona fide executive and exempt from overtime pay under the statute. Thomas appealed.[356]

As an initial matter, the Sixth Circuit noted that "overtime exemptions are 'affirmative defenses on which the employer has the burden of proof.'"[357] Thus, the employer is required to meet every requirement, or element, of an exemption in order to receive its benefits.[358]

Accordingly, Speedway was required to prove by "clear and affirmative evidence" that Thomas was a "bona fide executive," as defined by the federal regulations.[359] Based on the level of Thomas' salary, the former regulations required that Speedway prove Thomas was an executive using the "short test."[360] Under this test, an employee qualified for the executive exemption if: "(1) her 'primary duty consists of the management of the enterprise' and (2) her primary duty 'includes the customary and regular direction of the work of two or more other employees.'"[361] Because Thomas testified that she regularly supervised

353. *Thomas*, 506 F.3d at 499.

354. *Id.* at 499-500. Thomas also brought claims of age discrimination and wrongful discharge in violation of Ohio public policy; these claims were later dismissed pursuant to a separate motion for summary judgment brought by Speedway and were not at issue on appeal. *Id.*

355. *Id.* at 500.

356. *Id.*

357. *Id.* at 501 (citing Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974)).

358. *Thomas*, 506 F.3d at 501 (citing Ale v. Tennessee Valley Authority, 269 F.3d 680, 691 n.4 (6th Cir. 2001)).

359. *Id.* at 501-02.

360. *Id.* at 502. The 2003 regulations included both a "short test" and a more stringent "long test," based on the salary of the employee. *Id.* at 502. These dual tests were eliminated in the amended regulations, leaving the prior "short version" as the surviving test, with a modification to the salary qualifier (now $455 per week) and adding an additional element: "has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight." *Id.* at 502 n.3; 29 C.F.R. § 541.100(a) (2007). Although the court did not make this observation, Speedway likely would have been able to establish this element because Thomas did have authority to hire, fire, and make suggestions that were often followed by her district manager. *Thomas*, 506 F.3d at 499.

361. *Id.* at 502 (citing 29 C.F.R. § 541.119(a) (2003); 29 C.F.R. § 541.1(f) (2003); and *Ale*, 269 F.3d at 683-84).

two or more employees, the second prong was easily met, and the only issue before the court was whether Thomas' "primary duty" was management of the station.[362] In its analysis of this issue, the court extensively cited factually similar cases from other jurisdictions.[363] The court cautioned, however, that those cases did not stand for the proposition that the person designated as "in charge" is automatically an exempt executive, despite the fact that some cases used the term "in charge" in their analyses.[364] Instead, the court emphasized that that the employee's actual duties must be examined in order to determine whether the executive exemption applies.[365]

The court then turned its attention to the former regulations governing the definitions of "management" and "primary duty."[366] Pursuant to the former regulations, "management" includes:

> [i]nterviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies,

362. *Thomas*, 506 F.3d. at 502.

363. *Id.* at 503. References to these cases are made throughout according to the abbreviated name as used in *Thomas*:

> *Donovan v. Burger King Corp. (Burger King I)*, 672 F.2d 221, 226-27 (1st Cir. 1982) (holding that "Burger King assistant managers have management as their primary duty"); *Donovan v. Burger King Corp. (Burger King II)*, 675 F.2d 516, 520-22 (2d Cir. 1982) (holding that Burger King assistant managers "have, as their 'primary duty,' managerial responsibilities"); *Murray v. Stuckey's Inc. (Murray I)*, 939 F.2d 614, 617-20 (8th Cir. 1991) (holding that the store manager of "an isolated gasoline station, convenience store[,] and restaurant[ ] had management as his or her primary duty"); *Sturm v. TOC Retail, Inc.*, 864 F. Supp. 1346, 1352-53 (M.D.Ga. 1994) (finding that the managers of a convenience store had management as their primary duty); *Horne v. Crown Cent. Petroleum, Inc.*, 775 F. Supp. 189, 190-91 (D.S.C. 1991) (finding that a manager of a convenience store had "management of her store" as her "primary duty"); *Moore v. Tractor Supply Co.*, 352 F. Supp. 2d 1268, 1279 (S.D.Fla. 2004) (finding that a manager of a retail store had management as his primary duty).

Thomas, 506 F.3d. at 503.

364. *Id.*

365. *Id.*

366. *Id.* at 503-04.

> machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety of the men and the property. [367]

Further, "primary duty" "does not mean the most time-consuming duty; it instead connotes the 'principal' or 'chief'—meaning the most important—duty performed by the employee."[368] However, under the former regulations, "the amount of time spent in performance of . . . managerial duties is a useful guide in determining whether management is the primary duty of an employee."[369]

Where an employee spends less than fifty percent of her time on managerial duties, as in Thomas' case, additional factors can be used to establish that the employee's primary duty is nonetheless management.[370] Under the former regulations, these factors include: (1) "the relative importance of the managerial duties as compared with other types of duties"; (2) "the frequency with which the employee exercises discretionary powers"; (3) "[the employee's] relative freedom from supervision"; and (4) "the relationship between [the employee's] salary and the wages paid other employees for the kind of nonexempt work performed by [her]."[371]

The trial court had evaluated each of these factors, concluding that each weighed in favor of Thomas as a bona fide executive subject to the exemption.[372] On appeal, Thomas challenged the trial court's findings on each factor; the Sixth Circuit therefore reexamined each factor, as applied to Thomas.[373]

The first factor—"the relative importance of the managerial duties as compared with other types of duties"—can be properly analyzed by "consider[ing] Thomas' non-managerial duties on the one hand, which includ[ed] stocking merchandise, sweeping floors, and cleaning

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367. *Id.* (citing 29 C.F.R. § 541.102(B) (2003)).

368. *Id.* at 504 (citing *Burger King I*, 672 F.2d at 226). Note that the 2003 regulations provided that "(i)n the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time;" however, since courts did not seem to agree with this interpretation, as evidenced by *Burger King I*, the regulation was amended and now reads: "'primary duty' means the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.103 (2003); 29 C.F.R. § 541.700(a) (2007).

369. *Thomas*, 506 F.3d at 504 (citing 29 C.F.R. § 541.103 (2003)).

370. *Id.* at 504-05 (citing 29 C.F.R. § 541.103 (2003)).

371. *Id.* at 505 (citing 29 C.F.R. § 541.103 (2003)).

372. *Id.* at 505.

373. *Id.*

bathrooms," and on the other "consider Thomas[] managerial duties, which includ[ed] hiring employees, training employees, and assigning the weekly work schedule."[374] Such analysis is to be done while "keeping in mind the end goal of achieving the overall success of the company."[375] Therefore, while Thomas could, and did, try to argue that nonexempt employees were perhaps more critical to the success of the station than the manager, the court noted that she would be woefully mistaken, because while the station would continue to run without non-managerial employees with a varying degree of success and/or failure, the station would cease to function if Thomas did not perform her managerial duties, such as hiring, training, and scheduling.[376] Accordingly, the court found that Thomas's managerial duties were more important to Speedway's success than her non-managerial tasks and, thus, the first factor weighed in favor of finding Thomas's primary duty consisted of management.[377]

The second factor—"the frequency with which the employee exercises discretionary powers"—is strengthened by a showing of discretionary powers over important matters.[378] Thomas argued that, because of the constant supervision of the district manager, she was not able to frequently exercise discretion; however, the court found Thomas' argument made much ado about very little.[379] In particular, the court noted that "as a matter of law, 'active supervision and periodic visits by a [district] manager do not eliminate the day-to-day discretion of the on-site store manager.'"[380] In particular, Thomas' district manager visited only one or two times per week, and merely made himself available to the store managers through telecommunications on a constant basis.[381] As such, the court did not find that this contact alone deprived Thomas of her daily ability to exercise discretion in how to manage her station successfully.[382] Therefore, the appellate court also found the second factor to weigh in favor of finding Thomas' primary duty to consist of management.[383]

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374. *Id.*
375. *Thomas*, 506 F.3d. at 505 (citing *Burger King II*, 675 F.2d at 521).
376. *Id.* at 505.
377. *Id.* at 505-06.
378. *Id.* at 506 (citing 29 C.F.R. § 541.207(a) (2003)). The amended version can be found in 29 C.F.R. § 541.202(a) (2007).
379. *Thomas*, 506 F.3d. at 506.
380. *Id.*
381. *Id.* at 506.
382. *Id.* at 506-07.
383. *Id.* at 507.

The court then moved on to the third factor—"relative freedom from supervision."[384] Thomas again argued that the district manager's visits and contact via telecommunications meant that he constantly monitored her job performance and, thus she was not free from supervision.[385] However, the court reiterated that it had already rejected the argument that the district manager's oversight was "consistent, meticulous, and overbearing."[386] The court further observed that while the district manager visited periodically and remained in constant contact, that establish[ed] only that Thomas was not completely free from oversight.[387] The third factor considered only the "*relative* freedom from supervision"; and did not demand complete freedom from supervision, such that Thomas was answerable to no one, "as this would disqualify all but the chief executive officer from satisfying this factor of the primary duty inquiry."[388]

In particular, the court made note of two cases in which courts had found retail store managers not to be exempt executives under the FLSA, based on the level of supervision employed by the district managers: *Smith v. Heartland Automotive Services, Inc.*,[389] where the district managers "were at the stores almost every day of the week for hours at a time;" and *Cowan v. Treetop Enterprise, Inc.*,[390] where the unit managers only had "responsibility for three restaurant units in a defined geographical area."[391] The court then pointed to two other cases in which the store managers *were* exempt executives based on the level of supervision employed by the district managers: *Posely v. Eckerd Corporation*,[392] where district managers "supervised over 25 stores at any given time;" and *Light v. MAPCO Petroleum, Inc.*,[393] where the district manager "supervised an average of twelve different stores at a time."[394] Because Thomas' district manager supervised ten to twelve stores, the court found Thomas' situation to be more similar to the latter cases and, thus, the court found that Thomas was relatively free from

384. *Id.*
385. *Thomas*, 506 F.3d at 507.
386. *Id.*
387. *Id.*
388. *Id.*
389. 418 F. Supp.2d 1129, 1137 (D. Minn. 2006).
390. 120 F. Supp.2d 672, 675 (M.D.Tenn. 1999).
391. *Thomas*, 506 F.3d at 508.
392. 433 F. Supp.2d 1287, 1304 (S.D.Fla.2006).
393. 2005 WL 1868766, at *9 (M.D. Tenn. Aug 4, 2005).
394. *Thomas*, 506 F.3d at 508.

supervision.[395] As such, the third factor also supported a finding that her primary duty was management.

Finally, the fourth factor—"the relationship between [the employee's] salary and wages paid other employees for the kind of nonexempt work performed by [her]"[396]—was an exercise in mathematics. In its analysis, the court divided Thomas's weekly wage ($522 per week) by the average number of hours she worked (fifty hours), to determine that Thomas's weekly salary equaled $10.44 per hour.[397] Although Thomas argued that she often worked more than fifty hours per week, the court noted that Thomas was able to earn up to an additional $600 per week through a manager bonus program, increasing her average hourly earnings substantially.[398] Therefore, compared to the approximate seven dollars per hour earned by non-managerial employees at her store, Thomas earned approximately thirty-five percent more for the same non-managerial tasks performed by her non-managerial staff.[399] This also supported the conclusion that Thomas's primary duties were managerial.[400]

Based on its review of these four factors, the appellate court concluded that Thomas was a qualified bona fide executive employee under the FLSA, and so affirmed the lower court's dismissal of Thomas' claim.[401]

VIII. FAMILY MEDICAL LEAVE ACT

The Family and Medical Leave Act (FMLA)[402] provides eligible employees with unpaid leave, without the fear of job loss, for specific reasons enumerated in the statute. Under the Act, an eligible employer must permit eligible employees to take annual leave of up to twelve weeks to address the health-related issues of family members.

An eligible employer under the Act is "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

395. *Id.*
396. *Id.*
397. *Id.*
398. *Id.* at 508-09.
399. *Id.* at 509.
400. *Id.*
401. *Thomas*, 506 F.3d. at 509.
402. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (1993).

year."[403] Employers are further defined to include those acting in the employer's interest and those that are "successors in interest."[404]

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.[405] 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, to care for a family member suffering from a serious health condition, or for the birth or adoption of a child.[406]

A. Military Family Leave Amendments

In January 2008, President Bush signed the National Defense Authorization Act for Fiscal Year 2008 (NDAA). Among other things, the NDAA amended the FMLA to permit Military Family Medical Leave (MFML).[407] These were the first revisions to the Family and Medical Leave Act since its enactment in 1993.[408] The amendments extend FMLA protection to cover two new sets of workers.

First, the amendments entitle a spouse, son, daughter, or parent of a service member who is assigned to active duty to take unpaid leave if there is a "qualifying exigency" arising out of the service member's active duty or notice of an impending call or order to active duty.[409] Congress did not define "qualifying exigency," instead leaving it to the Department of Labor to develop appropriate regulations. Employees who qualify for leave under the amendments are entitled to the all protections extended by the Act, including twelve weeks of unpaid leave in any twelve-month period, job protection, and the continuation of employee benefits during the FMLA leave.[410]

Second, the amendments require that employers grant eligible employees up to twenty-six weeks of unpaid leave to care for a wounded service member.[411] The service member must be the employee's spouse,

403. 29 U.S.C. § 2611(4)(A)(i) (1993).
404. 29 U.S.C. § 2611(4)(A)(ii)(I)(II) (1993).
405. 29 U.S.C. § 2611(2)(A)(i)(ii) (1993).
406. 29 U.S.C. § 2612 (1993).
407. Pub. L. 110-81.
408. In addition, the Department of Labor issued new FMLA regulations on November 17, 2008, effective January 16, 2009. These regulations thus fall outside the time period addressed in this article. The regulations are collected at 29 C.F.R. §§ 825.100 *et seq.*, *available at* www.dol.gov (last visited Apr. 14, 2009).
409. 29 U.S.C. § 2612(a)(1)(E) (1993).
410. 29 U.S.C. § 2614 (1993).
411. 29 U.S.C. § 2612(a)(3) (1993).

child, parent, or "next of kin."[412] Extension of FMLA protection to the "next of kin" is a first under the Act, which previously required a spousal or parent/child relationship. "Next of kin" includes anyone related to the service member in any manner, as long as the employee is the "nearest blood relative" of the service member.[413]

A covered service member is defined as "a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness."[414] A serious injury or illness is defined as "an injury or illness incurred by the member in the line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating."[415] All twenty-six weeks of leave must be used during a single twelve-month period, which will not renew once a new twelve-month period begins.[416] It is expected that, as employees begin to request leave under these new provisions, any interpretive gaps will be filled in by the courts confronted with those issues.

B. Theories of Recovery Under the FMLA

The FMLA provides that litigation of FMLA issues may proceed in either state or federal courts.[417] FMLA claims most often are resolved in federal courts, either because they were initially filed there or because they were removed to federal courts pursuant to federal question jurisdiction.[418]

Two distinct theories of liability under the FMLA have been recognized: (1) interference (or entitlement) claims[419] and (2) retaliation (or discrimination) claims.[420] 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

412. *Id.*
413. 29 U.S.C. § 2611(18) (1993).
414. 29 U.S.C. § 2611(16) (1993).
415. 29 U.S.C. § 2611(19) (1993).
416. 29 U.S.C. § 2612(a)(4). Under the 2009 regulations, such leave may be taken intermittently or on a reduced schedule basis. 29 C.F.R. § 825.202(b)(2)(d) (2009).
417. 29 U.S.C. § 2617(a)(2) (1993).
418. *See* 28 U.S.C. § 1331 (1980).
419. 29 U.S.C. § 2615(a)(1) (1993).
420. 29 U.S.C. § 2615(a)(2) (1993).

employee was entitled to receive.[421] Retaliation/discrimination claims require that the plaintiff prove that: (1) he/she was engaged in an 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.[422]

C. Employer Eligibility - Secondary Employers

During the *Survey* period, in *Grace v. USCAR,*[423] the Sixth Circuit Court of Appeals held that a secondary employer can be liable under the FMLA even if it does not independently meet the requirements for FMLA coverage.[424] A contract/temporary employee relationship thus can create FMLA liability where it might not otherwise exist.

Rosalyn Grace worked for USCAR, a research and development firm jointly operated by Ford, DaimlerChrysler, and General Motors, as a contract employee provided by a staffing firm.[425] USCAR was not her employer; in fact, USCAR did not directly employ any workers.[426] Grace was employed by a series of staffing agencies that provided workers for USCAR.[427] Grace's job duties remained the same for USCAR even though her actual employer changed several times during her tenure.[428] Grace's last employer was Bartech, who assumed the staffing contract with USCAR in January 2004.[429]

In November 2004, Grace requested medical leave under the FMLA after she was hospitalized for severe asthma.[430] While Grace was on leave, Bartech informed her that her position had been eliminated due to USCAR's restructuring of its Information Technology department.[431] However, USCAR did hire an individual on a part-time basis to take care of Grace's job duties.[432]

Grace contended that this restructuring was merely a pretext and sued USCAR and Bartech for failing to restore her to the same or

421. *See* Walton v. Ford Motor Co., 424 F.3d 481, 485 (6th Cir. 2005).
422. *See* Arban v. West Publ'g Corp., 345 F.3d 390, 404 (6th Cir. 2003).
423. 521 F.3d 655 (6th Cir. 2008).
424. *Id.*
425. *Id.* at 659.
426. *Id.*
427. *Id.* at 659-60.
428. *Id.* at 660.
429. *Grace*, 521 F.3d. at 660.
430. *Id.*
431. *Id.*
432. *Id.*

equivalent position following her FMLA leave, in violation of the Act.[433] The district court granted summary judgment in favor of the defendants and Grace appealed.[434]

On appeal, USCAR argued that it was not an "employer" subject to the FMLA because it did not directly employ anyone.[435] The Sixth Circuit first considered whether USCAR was a joint employer with Bartech.[436] The court noted that, although the FMLA is silent on the issue, Department of Labor (DOL) regulations provide for an "integrated employer" test and a "joint employer" test.[437] Relying on the Second Circuit Court of Appeals' decision in *Engelhardt v. S. P. Richards Co.*,[438] the court observed that "the difference between the 'joint employer' and the 'integrated employer' tests turns on whether the plaintiff seeks to impose liability on her legal employer or another entity."[439] In the former situation, the question is whether sufficient indicia of an employer/employee relationship exist to justify imposing liability on a plaintiff's non-legal (i.e., secondary) employer.[440] In the latter situation, the plaintiff argues that another entity is sufficiently related to the legal employer so that its actions should be attributed to the legal employer, for the purpose of imposing liability.[441]

The integrated employer test helps to ensure that employees working for multiple employers who, together, are considered to be an "integrated employer" are aggregated for purposes of the Act's numerosity test.[442] The factors used to determine whether two or more entities constitute an "integrated employer" under the Act are: (1) common management, (2) interrelation between operations, (3) centralized control of labor relations, and (4) degree of common ownership/financial control.[443] Applying this test, the Sixth Circuit found that USCAR and Bartech did not qualify as an "integrated employer," because none of the four factors were met.[444]

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433. *Id.* at 660-61. Plaintiff also alleged gender discrimination and a hostile work environment under Title VII. The Sixth Circuit affirmed the district court's dismissal of those claims. *Id.* at 680.

434. *Grace*, 521 F.3d. at 661.

435. *Id.* at 661-62.

436. *Id.* at 662-63.

437. *Id.* at 663.

438. 472 F.3d 1 (2d Cir. 2006).

439. *Grace*, 521 F.3d at 663 n.8.

440. *Id.*

441. *Id.*

442. *Id.* at 664.

443. *Id.* (citing 29 C.F.R. §§ 825.104(c)(2)(i)-(iv)).

444. *Id.* at 664-65.

The court did find, however, that the two companies met the "joint employer" test.[445] Under FMLA regulations, "joint employment" encompasses situations where "two or more businesses exercise some control over the work or working conditions of the employee."[446] The regulations specifically state that "joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer."[447] Thus, the Sixth Circuit held that because Bartech was responsible for providing specialized technical staff to USCAR, and thus exercised significant control over Grace for USCAR's benefit, USCAR and Bartech were joint employers and equally liable to Grace for any violation of the Act.[448]

The court then had to determine which of the two companies was the "primary" employer under the DOL regulations, because responsibility for FMLA compliance rests upon the "primary" employer, even though both employers must honor an employee's leave request, and neither may engage in retaliatory action, especially with respect to reinstatement.[449] Specifically, while the primary employer is responsible for job restoration, "[t]he secondary employer is responsible for accepting the employee returning from FMLA leave in the place of the replacement employee if the secondary employer continues to utilize an employee from the temporary or leasing agency, and the agency chooses to place the employee with the secondary employer."[450]

DOL regulations prescribe a four factor test for determination of the the primary employer: (1) the authority/responsibility to hire and fire; (2) the ability to assign/place the employee; (3) the employer making payroll; and (4) the employer responsible for providing employment benefits.[451] In addition, the default rule under the DOL regulations applicable to staffing agencies and their client employers is that for "employees of temporary help or leasing agencies the placement agency most commonly would be the primary employer."[452]

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445. *Grace*, 521 F.3d at 665-67. The court relied on Mahoney v. Nokia, 444 F. Supp. 2d 1246 (N.D.Fla. 2006), *aff'd by* 236 F. Appx. 574 (11th Cir. 2007), which held that a staffing agency that managed benefits and payroll functions and was acknowledged as the employer was a joint employer along with Nokia, which exercised considerable control over the employees. *Grace*, 521 F.3d. at 667.

446. *Id.* at 666 (citing 29 C.F.R. § 825.106(a)).

447. *Id.* (citing 29 C.F.R. § 825.106(b)).

448. *Id.* at 666-67.

449. *Id.* at 667.

450. 29 C.F.R. § 825.106(e).

451. *Grace*, 521 F.3d at 667.

452. 29 C.F.R. § 825.106(c).

The court in *Grace* concluded that Bartech was the primary employer and USCAR was the secondary employer, because Bartech ultimately possessed the authority to hire and fire, assign employees, and control payroll and benefits.[453]

The court then considered whether Grace's position would have been eliminated regardless of her leave.[454] Because Grace alleged that Bartech and USCAR failed to reinstate her as required by the FMLA, her claim was an entitlement claim.[455] To prevail under such a theory, "an employee must prove that: (1) she was an eligible employee, (2) the defendant was an employer as defined under the FMLA, (3) she was entitled to leave under the FMLA, (4) she gave the employer notice of her intention to take leave, and (5) the employer denied the employee FMLA benefits to which she was entitled."[456] An employer does not violate the Act if the alleged interference occurred for a "legitimate reason unrelated to the exercise of FMLA rights."[457]

Relying on that defense, Bartech and USCAR contended that the decision to terminate Grace did not violate the Act because it occurred as a result of a legitimate economic reason—the restructuring of the IT division—unrelated to Grace's FMLA leave.[458] The court was not persuaded, however, based on notes from a meeting regarding the elimination of Grace's position which stated, "[c]an the lawyers construct a way to make it [her termination] doable."[459] The court viewed this as a "smoking gun," raising a jury issue as to whether the defendants' restructuring claim was a pretext.[460] That Grace was replaced by another employee who was compensated a higher rate also was deemed significant by the court.[461]

Finally, Bartech argued that Grace was not eligible for FMLA leave because she had not worked for Bartech for the requisite twelve months.[462] While Grace had worked at USCAR for eight years, she had only been under the authority of Bartech for eleven months prior to her leave.[463] Under the FMLA, however, an employer includes all

453. *Grace*, 521 F.3d at 668-69.
454. *Id.* at 669-71.
455. *Id.* at 669.
456. *Id.* (citing Edgar v. JAC Products, 443 F.3d 501, 507 (6th Cir. 2006)).
457. *Id.* at 670 (citing *Edgar*, 443 F.3d at 507).
458. *Id.* at 670.
459. *Grace*, 521 F.3d at 670.
460. *Id.*
461. *Id.* at 670-71.
462. *Id.* at 671.
463. *Id.*

"successors in interest."[464] The DOL regulations set forth eight factors, to be viewed in totality, to determine whether an employer is a successor in interest.[465] The Sixth Circuit found that Bartech was indeed a successor company to its predecessor, because Grace's job duties remained constant.[466] Grace thus satisfied the FMLA's twelve month employment eligibility threshold.[467]

This case has particular significance for employers that hire temporary or leased workers from staffing agencies. Under the FMLA, only the primary employer (in most cases the staffing agency) is responsible for providing notices to employees required by the Act, as well as for providing the FMLA leave itself. The DOL regulations, however, require *both* the primary and secondary employer to comply with the Act's job reinstatement obligations. As this case illustrates, the secondary employer often will be considered a joint employer and can be held liable for not accepting a returning employee from FMLA leave.

D. Questionable Leave Requests

The Sixth Circuit Court of Appeals considered other FMLA eligibility issues during the *Survey* period in *Novak v. MetroHealth Medical Center.*[468] There, the court provided guidance regarding questionable requests for FMLA leave, including those involving inadequate FMLA certifications. In *Novak,* the court held that Donna Novak was not entitled to FMLA leave to care for her adult child who was suffering from postpartum depression.[469] In addition, the court concluded that Novak had failed to establish that she was entitled to FMLA leave for her own back problem, because the medical certifications she submitted were suspicious, contradictory, and unreliable.[470]

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464. 29 U.S.C.§ 2611(4)(A)(ii) (1993).

465. *Grace*, 521 F.3d at 671 (citing Cobb v. Contract Transp., Inc., 452 F.3d 543, 551 (6th Cir. 2006), (quoting 29 C.F.R. § 825.107)). The following eight factors are used to determine whether an employer is a successor in interest: (1) substantial continuity of the same business operations; (2) use of the same plant; (3) continuity of work force; (4) similarity of jobs and working conditions; (5) similarity of supervisory personnel; (6) similarity in machinery, equipment, and production methods; (7) similarity of products and services; and (8) ability of the predecessor to provide relief. *Id.*

466. *Id.* at 676.

467. *Id.*

468. 503 F.3d 572 (6th Cir. 2007).

469. *Id.* at 583.

470. *Id.* at 578.

Novak worked for MetroHealth as a financial counselor.[471] MetroHealth had a no-fault attendance policy that assigned points based on an employee's unexcused absences.[472] An employee who accumulated 112 points in a twelve-month period was subject to discharge. Novak was discharged when she accumulated 124 points in twelve months.[473] In the months leading up to the discharge, Novak called into work on several occasions, citing back pain and her daughter's postpartum depression as reasons for her absence.[474] After realizing that she exceeded the allotted attendance points, Novak applied for FMLA leave.[475]

Novak asked her regular physician, Dr. Wloszek, to complete an FMLA certification, but the form came back incomplete, lacking specific medical facts or a prognosis for Novak's back problem.[476] Novak then contacted Dr. Wloszek's assistant and insisted that the form be completed and returned to MetroHealth. Novak told the assistant exactly what to write on the form.[477] The assistant completed the form and returned it to MetroHealth without consulting Dr. Wloszek.[478]

MetroHealth held a "pre-discharge" meeting with Novak, at which she was given additional time to obtain satisfactory medical certification for her leave request.[479] Dr. Wloszek eventually informed MetroHealth that she had not treated Novak since 2003 and did not have any personal knowledge of Novak's March 2004 condition.[480] Dr. Wloszek also confirmed that a third form that she had completed for Novak was based only on what Novak reported she had been told by another physician.[481]

Novak also submitted physician's certifications concerning her daughter's postpartum depression.[482] Dr. Schubeck had completed a form stating that Novak's eighteen-year-old daughter suffered postpartum depression following the recent birth of her child.[483] Dr. Schubeck estimated that Novak's daughter would need held help caring for her child for one week.[484]

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471. *Id.* at 575.
472. *Id.*
473. *Id.*
474. *Novak*, 503 F.3d at 575.
475. *Id.*
476. *Id.* at 576.
477. *Id.*
478. *Id.*
479. *Id.*
480. *Novak*, 503 F.3d at 576.
481. *Id.*
482. *Id.*
483. *Id.*
484. *Id.*

MetroHealth determined that Novak's absences did not qualify for FMLA leave and terminated her employment under the company's absenteeism policy.[485] Novak sued, alleging three counts of employment discrimination under Ohio law.[486] She then amended her complaint, adding FMLA interference and retaliation claims.[487] MetroHealth removed the case to federal court.[488] The district court granted MetroHealth's motion for summary judgment as to Novak's FMLA claims.[489] Novak appealed.[490]

On appeal, the Sixth Circuit upheld the district court's conclusion that no violation of the Act occurred, because Novak had not been entitled to FMLA leave.[491] The court began its analysis by noting that, while medical certification provided by an employee is presumptively valid if it contains the required information and is signed by the health care provider, an employer may overcome this presumption by showing that the certificate is invalid or inauthentic.[492]

The court found Novak's certification forms to be "suspicious and contradictory" and therefore "insufficient to establish the existence of a serious health condition for purposes of the FMLA."[493] The court noted that, while Novak submitted a number of certification forms, the original form from Dr. Wloszek was insufficient because it failed to contain the date on which the condition began, the probable duration of the condition, and appropriate medical facts within the health care provider's knowledge.[494] The second medical certification was inauthentic because the evidence revealed that it had been completed by an office assistant without authorization from the health care provider.[495] The third medical certification form was unreliable because Dr. Wloszek acknowledged she was no longer treating Novak at the time the leave was sought and had no personal knowledge of her condition at that time.[496] Therefore, the court ruled that MetroHealth had satisfied its burden of showing that the certifications was unreliable and insufficient.[497]

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485. *Id.*
486. *Novak*, 503 F.3d at 576.
487. *Id.* at 576-77.
488. *Id.*
489. *Id.* at 577.
490. *Id.*
491. *See generally Novak*, 503 F.3d 572.
492. *Id.* at 578.
493. *Id.* at 578.
494. *Id.*
495. *Id.*
496. *Id.* at 578-79.
497. *Novak*, 503 F.3d at 578-79.

Novak countered by claiming that MetroHealth was obligated to warn her that the certifications she submitted were not satisfactory.[498] The Sixth Circuit agreed that an employer that finds a certification to be incomplete has a duty to inform the employee of the deficiency and provide the employee with a reasonable opportunity to cure.[499] In this case, however, the court concluded that MetroHealth had "clearly satisfied" its obligation by contacting Dr. Wloszek to authenticate the certificate, and by permitting Novak to submit three additional medical certification forms.[500]

Novak also argued that, if MetroHealth had not been satisfied with the medical certifications she submitted, it should have obtained a second opinion before denying her leave request.[501] The court rejected this argument also holding that, while the Act permits an employer to request such a second medical opinion, it does not require an employer to do so.[502] The FMLA provision on second opinions is "merely permissive."[503]

The Sixth Circuit also found that Novak had failed to show that her daughter's postpartum depression entitled Novak to leave under the FMLA.[504] While the Act permits an employee to take leave to care for a child with a serious health condition, the Act only authorizes such leave to care for an adult child if the child suffers from a serious health condition *and* is incapable of self care because of a mental or physical disability.[505] The court noted that a disability under the FMLA requires a "physical or mental impairment that substantially limits one or more of the major life activities of the individual," as those terms hve been defined under the Americans with Disabilities Act (ADA).[506] After considering the applicable ADA regulations, the court found that the ADA specifically excludes from the definition of disability "temporary, non-chronic impairments of a short duration, with little or no long term or permanent impact."[507] Because Novak's daughter's postpartum

498. *Id.* at 579.
499. *Id.*
500. *Id.*
501. *Id.* at 579.
502. *Id.* at 579-80.
503. *Novak*, 503 F.3d. at 580.
504. *Id.* at 581.
505. *Id.* at 581 (citing 29 U.S.C. § 2611(12)(B) (1993)). It is also worth noting that the FMLA does not entitle an employee to leave in order to care for a grandchild.
506. *Id.* at 581 (citing 29 C.F.R.§ 825.113(c)(2)).
507. *Novak*, 503 F.3d. at 582 (citing 29 C.F.R. pt. 1630, App § 1630.2(j)).

condition was not severe and lasted only one or two weeks, Novak's leave request to care for her adult daughter was not FMLA-protected.[508]

Novak argued that the court should follow the First Circuit Court of Appeals' decision in *Navarro v. Pfizer Corp.*,[509] which held that ADA guidelines cannot be applied to the FMLA because to do so would be inconsistent with the purposes of the FMLA.[510] The court in *Novak* declined to address *Navarro's* "invalidation of the EEOC's interpretive guidance" but went on to state that, if it were to adopt the First Circuit's decision, its decision would remain the same because Novak had failed to present sufficient evidence to allow a jury to find that her daughter's condition was sufficiently severe or long-lasting to constitute a disability under any reading of the FMLA.[511]

The court thus affirmed summary judgment in favor of MetroHealth on Novak's FMLA allegations and returned the suit to the trial court with instructions to remand Novak's state law claims to the Ohio court.[512]

E. Interference Claims

In *Wysong v. Dow Chemical Co.*,[513] the Sixth Circuit further defined the fifth element of an FMLA interference claim—that the employee was denied FMLA benefits to which he was entitled—concluding that evidence that the employer unlawfully used FMLA leave against the employee satisfies this element.[514]

Kimberly Wysong was employed by Dow Chemical Company as an operating technician.[515] Her position required physical exertion and presented the risk of serious injury if all safety precautions were not followed.[516] In 2002, Wysong took 783.5 hours of paid medical leave related to chronic neck and groin pain, a hernia operation, mononucleosis, a hysterectomy, and care for an ill child.[517] Dow paid Wysong for all of this leave time.[518] In early 2003, though, Wysong was informed through a "Letter of Concern" that she had exhausted all of her paid medical leave and would have to use unpaid leave or vacation time

508. *Id.* at 582.
509. 261 F.3d 90 (1st Cir. 2001).
510. *Novak*, 503 F.3d at 582.
511. *Id.*
512. *Id.* at 583.
513. 503 F.3d 441 (6th Cir. 2007).
514. *See generally id.* at 445-50.
515. *Id.* at 443-44.
516. *Id.* at 444.
517. *Id.*
518. *Id.*

in the future.[519] Wysong also was required to obtain the approval of her Production Leader prior to any further absences, including planned medical procedures.[520] Soon after, Wysong received a "Last Chance Letter," indicating that she had reported to work late without prior notification and Dow would terminate her employment for any future issues.[521]

Several months later, Wysong told Dow's plant nurse that her neck had been bothering her, but did not request any time off from work.[522] She was referred to Dow's occupational health physician, who placed Wysong on work restrictions to not lift, push, pull, or tug anything over five pounds.[523] According to the company physician, the restrictions were based on his concern that Wysong was currently having "neck trouble" and that she had missed a lot of work in the past that "may" have been due to a previous neck problem.[524] Wysong's supervisor determined that he had no work for her that would comport with the doctor's restrictions and sent her home.[525] Wysong then received a letter advising her that "her request" for FMLA leave had been approved but that she only had three more days of FMLA leave available.[526] Wysong told a human resources employee that she had not requested any leave, let alone FMLA leave.[527] Human resources reissued the letter, without the "request" language, but still stating that Dow had placed Wysong on FMLA leave.[528]

In order to return to work, Wysong was required to pass a functional capacity exam (FCE) to determine if she could physically perform her job duties.[529] As part of the exam, the company physician reviewed her medical records and found a comment by one of her treating physicians that Wysong might be exhibiting "drug-seeking behavior."[530] The company physician took this to mean that Wysong was "drug dependent." Without consulting any of Wysong's treating physicians, the company doctor decided that Wysong could not take the functional capacity exam unless she stopped taking all pain medication for two

519. *Wysong*, 503 F.3d at 444.
520. *Id.*
521. *Id.*
522. *Id.*
523. *Id.*
524. *Id.*
525. *Wysong*, 503 F.3d at 444.
526. *Id.*
527. *Id.*
528. *Id.*
529. *Id.* at 445.
530. *Id.*

weeks.[531] On the advice of one of her physicians, Wysong did not stop taking her pain medication.[532] Without the functional capacity exam, Dow refused to permit Wysong to return to work and placed her on unpaid leave "pending a release to work without restrictions."[533] Dow then terminated Wysong, based on its policy of terminating employees who are "on a medical leave of absence status for a continuous period of six months."[534]

Wysong sued Dow, alleging, among other claims, violations of the FMLA.[535] The district court granted summary judgment for Dow, holding that Wysong's complaint only stated a retaliation claim under the FMLA (for which Wysong had failed to establish a prima facie case). The court refused to consider Wysong's FMLA interference claim.[536] Wysong appealed to the Sixth Circuit Court of Appeals, claiming that the district court had erred in failing to analyze her FMLA claim under the interference theory.[537]

The Sixth Circuit reversed, holding that "a defendant looking at Wysong's complaint would be on sufficient notice that she was broadly alleging violations under 29 U.S.C § 2615 and that her FMLA claim could encompass either the interference theory, the retaliation theory, or both theories."[538]

The Sixth Circuit then analyzed Wysong's interference claim. The issue for the court involved element five of the interference theory, as established in *Cavin v. Honda Manufacturing*[539]—whether the employer denied FMLA benefits to which the employee was entitled.[540] Relying on a district court decision in *Bradley v. Mary Rutan Hospital*,[541] Wysong argued for an alternative fifth element—that Dow "somehow used the leave against her in an unlawful manner, as provided in either

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531. *Wysong*, 503 F.3d at 445.

532. *Id.*

533. *Id.*

534. *Id.*

535. *Id.* Wysong also alleged violations of Ohio's anti-discrimination statute and wrongful discharge. The Sixth Circuit also reversed the district court's dismissal of these claims and remanded the case to the district court for further proceedings. *Id.* at 443.

536. *Wysong*, 503 F.3d at 446.

537. *Id.*

538. *Id.* at 446.

539. 346 F.3d 713, 719 (6th Cir. 2003). The first four elements are that: (1) he is an "eligible employee," (2) the defendant is an "employer," (3) the employee was entitled to leave under the FMLA, and (4) the employee gave the employer notice of his intention to take leave. *Id.*

540. *Id. See also* discussion *supra* note 535.

541. 322 F. Supp. 2d 926, 940 (S.D. Ohio 2004).

the statute or regulations."[542] The Sixth Circuit concluded that the *Bradley* court's interpretation of the fifth element did not conflict with *Cavin* and, in fact, added "depth" to the fifth element as set forth in *Cavin*.[543]

In reaching this conclusion, the court observed that employers are forbidden from relying on an employee's FMLA leave as a negative factor in employment actions such as hiring, promotions, or discipline.[544] The court reaffirmed its earlier decisions in *Brenneman v. MedCentral Health System*[545] and *Pharakhone v. Nissan North America, Inc.*,[546] ruling that the negative factor analysis is applicable in analyzing an interference claim.[547] Therefore, the court held that "if an employer takes an employment action based, in whole or in part, on the fact that the employee took FMLA-protected leave, the employer has denied the employee a benefit to which he is entitled."[548]

Wysong argued that she was eventually terminated because she had taken FMLA leave in 2002 and that the chain of events leading to her termination began with the work restrictions imposed upon her by Dow's physician based in part on his knowledge that she had taken significant leave in 2002.[549] In turn, those work restrictions prevented her from working, which led to the requirement that Wysong submit to a FCE. Wysong could not undergo the FCE, though, because she could not discontinue her pain medications.[550] Because Wysong did not take the FCE, she was deemed to have failed to report to work and therefore was terminated.[551]

Dow argued that its company physician could validly consider Wysong's previous absences as long as he did not "*solely*" base his restrictions on her 2002 leave time.[552] The court rejected this argument because "employers cannot use the taking of FMLA leave as *a negative factor* in employment actions."[553] The court held that it was enough that the company physician relied partly on Wysong's 2002 leave time.[554]

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542. *Wysong*, 503 F.3d at 447 (citing *Bradley*, 332 F. Supp. 2d at 940).
543. *Id.* at 447.
544. *Id.* (citing 29 C.F.R. § 825.220(c)).
545. 366 F.3d 412, 422 (6th Cir. 2004).
546. 324 F.3d 405, 408 (6th Cir. 2003).
547. *Wysong*, 503 F.3d at 447.
548. *Id.*
549. *Id.* at 447-48.
550. *Id.*
551. *Id.*
552. *Id.* at 448 (emphasis in original).
553. *Wysong*, 503 F.3d at 448 (citing 29 C.F.R. 825.220(c) (emphasis in original)).
554. *Id.*

Although Dow argued that nothing in the FMLA, its regulations, and case law state that an employer can *never* consider FMLA leave for any purpose, even if to protect an employee from injury, the court held that Dow based this argument on the false premise that its doctor knew that Wysong missed work in 2002 based on a neck condition.[555] The company physician admitted, however, that he had no idea why Wysong had missed work in 2002.[556] In fact, Wysong's 2002 absences proved to be unrelated to her neck condition.[557] Therefore, the court found Dow's argument to be without merit.[558]

The court concluded that there was adequate causation as the "the initial issuance of the severe restrictions [made in violation of the FMLA] set in motion an unbroken chain of events culminating in her termination" and thus Dow had in fact used Wysong's 2002 leave against her, unlawfully.[559] Wysong thus satisfied the fifth element of interference claim.

The court also considered Wysong's involuntary-leave theory, under which she argued that Dow violated her FMLA rights when it forced her to take her last three days of FMLA leave when she did not need to do so.[560] Involuntary-leave claims arise when employees are forced to take FMLA leave without a qualifying serious health condition.[561] The "claim ripens" only when the employee seeks FMLA leave at a later date and is denied as a result of the previous, involuntary leave.[562] Wysong failed to establish such a claim, however, because she did not allege any later denial of FMLA leave based on an exhaustion of available FMLA leave.[563] Thus, the Sixth Circuit affirmed the district court's dismissal of the involuntary-leave claim, albeit based on a different rationale.[564]

IX. CONCLUSION

This *Survey* period, again, was marked by the absence of high-profile pronouncements from the Michigan Supreme Court on employment and labor law matters. Two decisions of the Court of Appeals—adopting the ministerial exception to civil rights claims and recognizing that the

555. *Id.*
556. *Id.*
557. *Id.*
558. *Id.* at 449.
559. *Wysong*, 503 F.3d at 449.
560. *Id.* at 448-49.
561. *Id.* at 449.
562. *Id.*
563. *Id.* at 449-50.
564. *Id.* at 450.

ELCRA extends to same sex harassment claims—did change the legal landscape, however. Further changes may be on the horizon, in light of the recent election of a new Michigan Supreme Court Justice, which could lead to the creation of a new, less-business centered majority. During the past decade, the Supreme Court majority reversed course (and cases) in many areas, including employment law, as exemplified by its abrogation of the continuing violations exception to limitations periods in *Garg v. Macomb County Community Mental Health Services*.[565] More reversals may now be in store if the new majority seeks to unwind its decisions of the last ten years—but for that, we will have to wait for next year's *Survey*.

565. 472 Mich. 263, 696 N.W.2d 646 (2005).