

THE UNIVERSITY OF MICHIGAN
REGENTS COMMUNICATION
ITEM FOR INFORMATION

Received by the Regents
February 15, 2007

Subject: Litigation

February 2007

I. NEW CASES

There were no new cases this month.

II. RESOLUTIONS

1. Barbara Griewahn v The Regents of the University of Michigan. Michigan Court of Claims. (Judge Paula J.M. Manderfield) (Filed March 1, 2006)

Plaintiff is a former employee of the University. She claims that she was wrongfully denied benefits under the University's long-term disability policy and seeks LTD benefits, attorney fees, costs and interest. Settlement was reached between the parties and the case is concluded.

2. Jennifer Gratz and Patrick Hamacher v Lee Bollinger, James J. Duderstadt, The University of Michigan, and the University of Michigan College of Literature, Arts and Sciences. U.S. District Court, Eastern District of Michigan. (Judge Patrick J. Duggan) (Filed October 14, 1997) U.S. Court of Appeals, Sixth Circuit.

Plaintiffs filed this class action lawsuit alleging that the University unlawfully discriminated against them and similarly situated individuals when it used race as a factor in making decisions regarding admission to the University of Michigan's undergraduate programs. They seek damages and an offer to Mr. Hamacher of admission as a transfer student. In addition, Plaintiffs ask the court to find that the University violated their rights to nondiscriminatory treatment under the Fourteenth Amendment of the U.S. Constitution and to enjoin the University from continuing those alleged discriminatory practices. The University filed its Answer on December 3, 1997. A motion to intervene was filed by high school students of color and their parents, Citizens for Affirmative Action's Preservation (CAAP), the NAACP Legal Defense & Educational Fund, the American Civil Liberties Union Foundation, the ACLU Fund of Michigan, and the Mexican American Legal Defense & Educational Fund on February 5, 1998. Plaintiffs opposed the motion; the University defendants did not oppose it. The motion to intervene was denied by Judge Duggan.

Both sides filed motions for summary judgment. In addition, amicus briefs in support of defendants were filed by the U.S. Department of Justice; a group consisting of the American Association of Law Schools, the CIC and Wayne State University; a group of higher education organizations led by the American Council on Education and including the AAU and AAUP; and the State of Ohio. The Court of Appeals consolidated the intervenors' appeal with the appeal filed by the intervenors in the *Grutter v Bollinger*, et al. case; oral argument was heard on both cases on June 8, 1999. The intervenors

filed a motion to stay proceedings on plaintiffs' motion for summary judgment; the Court of Appeals granted the motion to stay as to both parties' motions for summary judgment. On August 10, 1999, the Sixth Circuit Court of Appeals reversed the trial court's order denying intervention and remanded for entry of an order permitting intervention by the intervenors. Trial was scheduled to begin in July/August, 2000.

Defendants filed a motion for Relief from Order Regarding Class Certification and Bifurcation in Light of Subsequent Authority, citing recent Supreme Court decisions that warrant the court to revisit its earlier decision; the motion was denied. The University filed an appeal to the Sixth Circuit Court of Appeals; the appeal was denied on September 26, 2000. Judge Duggan granted the Intervenor's request for extension of dates. Defendants and Plaintiffs filed renewed motions for summary judgment. Amicus briefs were filed by General Motors Corporation and by the Michigan Attorney General. Oral arguments on the motions for summary judgment were heard on November 16, 2000. On December 13, 2000, Judge Duggan issued his opinion, stating that diversity is a compelling governmental interest and that the University's current undergraduate admissions program meets the standards set by the Supreme Court in *Bakke*. He also ruled that the admissions programs in 1995-1998 were unconstitutional. Both plaintiff and defendants filed requests for interlocutory appeals of Judge Duggan's December 13, 2000 decision. On February 26, 2001, Judge Duggan issued his decision on the intervenors' motion for summary judgment. Judge Duggan dismissed the intervenors' claim that the University was justified in using race as a factor in admissions to remedy the present effects of past discrimination.

The Plaintiffs and the University filed appeals with the U.S. Court of Appeals. Plaintiff filed a motion for *en banc* review of the case; the Court of Appeals ruled that the motion would be held in abeyance until after the parties filed briefs, after which time the Court would make a determination as to whether the cases should be submitted to the three-judge panel for adjudication or referred to the *en banc* court. A number of amicus briefs were filed with the Court of Appeals, including General Motors Corporation, 33 of the world's largest companies, the United Auto Workers, the National Organization for Women Legal Defense Fund and the American Council on Education. The Court of Appeals scheduled oral argument for October 23, 2001. On October 16, 2001, the Court of Appeals granted the intervenors' motion for hearing *en banc*; oral argument was heard before all of the active Sixth Circuit judges on December 6, 2001. On October 1, 2002, plaintiff filed a Rule 11 petition for *writ of certiorari* (before judgment) with the U.S. Supreme Court, requesting that the Court bypass the Sixth Circuit Court of Appeals and review this case along with the law school case. On October 16, the Intervenor's filed a separate petition for *writ of certiorari* before judgment with the U.S. Supreme Court. The University filed its responses to those petitions on October 29, 2002. On December 2, 2002, the Supreme Court granted certiorari before judgment on the Constitutional issue only. CIR filed its brief on January 16, 2003. Also on that day, amicus briefs were filed in support of Petitioner and in support of neither party. The University filed its brief on February 18. In addition, 42 amicus briefs were filed in support of the University. The Intervenor's filed a motion for argument time during oral argument, which was denied by the Court. Oral argument was heard on April 1, 2003. On June 23, 2003, the Supreme Court issued its opinion. It held that diversity is a compelling interest justifying the use of race and ethnicity as one factor in undergraduate admissions. The Court also found that the University's current undergraduate admissions policy is not narrowly tailored to achieve diversity and remanded the case to the federal district court for further proceedings consistent with this opinion. Plaintiff filed a motion for attorneys' fees with the district court. Plaintiff also filed a motion for partial summary judgment on liability and a motion for class certification and partial summary judgment with respect to certain nominal and incidental damages claims. Defendants filed a

response to those motions as well as a motion for stay of briefing and a request for hearing on plaintiff's motions. On January 27, 2005, Judge Duggan issued his opinion, finding that the plaintiffs were prevailing parties in a limited sense but that they failed to achieve their primary objective, namely that any consideration of race violates the Constitution. He awarded approximately \$671,000 in attorneys' fees and costs to the plaintiffs.

On February 25, 2005, Plaintiffs filed a brief with the court, arguing that Defendants have the burden of proving that plaintiffs and the other class members would not have been admitted under a more narrowly tailored admissions process. They also argue that defendants may not carry this burden by applying a hypothetically-devised admissions process to the decisions that were made and that plaintiffs have standing to seek damages and additional relief. Following further briefing by both parties, Judge Duggan issued an Opinion on August 5, 2005. The judge agreed with the University's arguments that Plaintiffs must prove each element of standing to pursue their claims of prospective relief. Judge Duggan also opined that the burden of proof rests with the plaintiffs to prove that they were denied admission and that the University's unlawful conduct was a substantial or motivating factor in that rejection.

The parties reached a settlement on the remaining issues in this case and on January 31, 2007, Judge Duggan issued an Order approving the settlement and dismissing the case. This matter is concluded.

III. CASE UPDATES

3. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), et al. v Jennifer Granholm, Regents of the University of Michigan, Board of Trustees of Michigan State University, Board of Governors of Wayne State University and Trustees of any other public college or university, community college, or school district. United States District Court, Eastern Division of Michigan. (Judge David M. Lawson) (Filed November 8, 2006).

Plaintiffs, including BAMN, The Rainbow PUSH Coalition, a number of black high school students in Michigan, college and graduate school students in Michigan, the AFSCME labor organization, and others, assert that ballot Proposal 2 was placed on the Michigan ballot by racially-targeted voter fraud and violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and is preempted by Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972. They claim that state actors will be prohibited from utilizing policies to desegregate universities, employment and public contracting, thereby prohibiting state bodies from fulfilling federal mandates to desegregate. Plaintiffs also claim that public universities have a First Amendment right to determine their academic standards and to determine the criteria for admission to the university. Plaintiffs seek declaratory relief that Proposal 2 is preempted by the federal civil rights acts, violates the First Amendment of the U.S. Constitution and violates the Equal Protection Clause of the Fourteenth Amendment. On December 17, 2006, the plaintiffs filed an amended complaint, which sets forth their arguments in greater detail.

On December 11, 2006, the University of Michigan, along with Michigan State University and Wayne State University, sought a preliminary injunction precluding implementation of Proposal 2

to the Universities' admissions and financial aid policies through the end of the current admissions and financial aid cycles and otherwise seeking a declaration of rights and responsibilities under Proposal 2. The Attorney General then moved to intervene in the suit, and the Court granted the motion on December 14th. On December 18, 2006, the parties (the Attorney General, the Governor, the Universities, and the plaintiffs) stipulated their agreement to the Universities' requested injunctive relief through 12:01 am on July 1, 2007. On December 19th, the Court, pursuant to the stipulation of the parties, enjoined enforcement of Proposal 2 to the Universities' admissions and financial aid policies through the end of the current admissions and financial aid cycles or until further order of the Court, stated that this injunction would expire at 12:01 am on July 1, 2007 (unless vacated by the Court before that date), dismissed that portion of the Universities' claim seeking temporary injunctive relief with prejudice, and dismissed the remaining part of the Universities' claim without prejudice.

On December 22, two proposed intervenors to the suit, Eric Russell (an applicant to the University of Michigan Law School) and Toward a Fair Michigan ("TAFM") filed an appeal to the Sixth Circuit challenging the district court's failure to rule on their motion to intervene and its issuance of the injunction granting temporary relief to the three defendant Universities. Russell and TAFM asked the Sixth Circuit to stay the injunction pending review of the merits of their appeal, and also sought a writ of mandamus compelling the district court to lift its injunction. On December 29, a three-judge panel of the Sixth Circuit granted the requested stay of the district court's injunction pending the Sixth Circuit's review of the merits of the appeal and dismissed the request for a writ of mandamus as moot. In addition, on December 27, the district court granted Russell's motion to intervene in the underlying litigation, but denied TAFM's request to intervene, as well as all other pending motions seeking intervention (which had been filed by the City of Lansing, the Michigan Civil Rights Initiative, and the American Civil Rights Foundation.) BAMN filed a petition with the Supreme Court (via Justice Stevens, as Circuit Justice for the Sixth Circuit) for review of the Sixth Circuit's decision to stay the injunction pending appeal. Justice Stevens referred the matter to the entire Supreme Court, which denied BAMN's petition on January 19. Russell's appeal therefore remains pending before the Sixth Circuit. He has filed a motion to expedite the Sixth Circuit's review of the whole case, arguing that there is no need for development of a factual record before the district court (as Judge Lawson has ordered) because there is no set of facts under which BAMN could succeed on its legal theories. The Universities' response to this motion for expedited review is due February 5.

By January 31, all defendants filed their answer to BAMN's amended complaint. See also Russell, et al. v Brandon, et al., below.

4. Eric Russell, individually and on behalf of all similarly-situated persons, and Toward A Fair Michigan, a Michigan non-profit corporation v Brandon, Deitch, Maynard, McGowan, Fisher Newman, Richner, Taylor, White, Coleman, in their official capacities, The Regents of the University of Michigan and Jennifer Granholm, in her official capacity as Governor of Michigan. Washtenaw County Circuit Court. (Judge Melinda Morris) (Filed January 2, 2007).

Eric Russell, an applicant to the University of Michigan Law School, and Toward A Fair Michigan filed suit in state court as a putative class action, alleging that unless enjoined from doing so, the University of Michigan will violate the recently enacted amendment to the Michigan Constitution known as Proposal 2. The plaintiffs seek a declaratory judgment that Proposal 2 prohibits the

University of Michigan from considering race, sex, ethnicity, national origin, or color in its admissions and financial aid decisions and that there is no legal basis to excuse the University from complying immediately, as well as an injunction precluding the University from making any financial aid or admissions decisions, in whole or in part, based on consideration of an applicant's race, color, ethnicity, or national origin. On January 4, the plaintiffs filed a motion requesting a preliminary injunction barring all defendants from considering any of those factors in admissions or financial aid decisions of any public college or university; a hearing on that motion is scheduled for January 31. On January 5, the Attorney General Mike Cox filed a motion to intervene in the suit as a plaintiff.

On January 22, the University filed a motion to dismiss the case. The next day, the plaintiffs informed the University that they intended to withdraw their motion requesting a preliminary injunction. On January 30, the plaintiffs moved to dismiss their case against the Governor and the University. The dismissal was without prejudice, so the plaintiffs may bring suit again in future.

5. Mary C. Lee v University of Michigan-Dearborn and Robert L. Simpson. Michigan Court of Claims. (Judge James R. Giddings) (Filed March 13, 2006).

Plaintiff is a former student at the Dearborn campus who was expelled from campus for violations of the Code of Student Conduct. She claims that the University's hearing board and code appeals council decisions were improper, that the University has breached its contract with her as a student, and that Dr. Simpson's denial to reconvene the code appeals council violated her due process rights. She seeks a review of the University's expulsion decisions, money damages, costs and attorney's fees. The University filed a motion for summary disposition; the court has taken it under advisement.

6. Peter J. Hammer v Board of Regents of the University of Michigan. Michigan Court of Claims. (Judge James R. Giddings) (Served January 6, 2005).

Plaintiff is an Assistant Professor at the Law School. He alleges that he did not receive tenure because of his sexual orientation, claiming that he relied on the University's promises that he would not be discriminated against based upon his sexual orientation. Mr. Hammer seeks judgment in excess of \$25,000. The University filed a motion for summary disposition and a motion to dismiss, both of which were denied by Judge Giddings. The University filed an interlocutory appeal to the Michigan Court of Appeals. On January 25, 2007, the Court of Appeals vacated the orders of the Court of Claims and ordered Judge Giddings to reconsider the plaintiff's affidavits consistent with the court rules. The University will then be allowed to file a new motion for summary disposition which will be heard by Judge Giddings.

7. Mary Wilcox v Regents of the University of Michigan. Washtenaw County Circuit Court. (Judge Melinda Morris) (Filed December 23, 2005)

Plaintiff was employed as a Police Officer at the University of Michigan's Department of Public Safety. She claims that she was subjected to ongoing sexual harassment. Plaintiff alleges that she was passed over for open positions, suspended and subsequently forced to resign in retaliation for complaining of sexual harassment. The EEOC investigated Plaintiff's allegations and dismissed the complaint. Plaintiff seeks damages, attorney fees, costs, and interest. The University filed a motion for summary disposition which was denied by the court.

8. James McGovern v University of Michigan. Michigan Court of Claims. (Judge Joyce Draganchuk) (Filed August 21, 2006).

Plaintiff claims that he has been mis-classified as a non-resident for tuition purposes and that he was not afforded the opportunity to provide information to prove his resident status. He seeks classification as a resident for tuition purposes. The University filed a motion for summary disposition.

9. William Wilson v Board of Regents of the University of Michigan. Washtenaw County Circuit Court. (Judge David S. Swartz) (Filed November 16, 2006).

Plaintiff, a resident of the state of Maine, filed this complaint alleging violations of the Administrative Procedures Act, the Open Meetings Act and the Freedom of Information Act in relation to the renovation of Michigan Stadium. Mr. Wilson claims that he has requested certain records under the Freedom of Information Act and that the University has delayed, requested an up-front deposit, refused to release some of the documents, and engaged in a pattern of intentional bad faith. He seeks an immediate electronic search of the records and release of the documents to him. He also claims that he has requested a continuing subscription request of the Public Comments documents for six months into the future and the University has denied his request. Plaintiff seeks creation of a "Reading Room" on campus that would house all documents relating to the Stadium renovation. He also seeks costs, damages and an expedited hearing of his complaints. The University filed a motion for summary disposition.

10. Heidi Philipsen v Board of Regents of the University of Michigan. United States District Court, Eastern District of Michigan. (Judge Anna Diggs Taylor) (Served May 15, 2006).

Ms. Philipsen claims that she applied for and was offered a position in the School of Business. She claims that the offer was rescinded when the hiring department learned that she has small children and inquired about working a flexible schedule. Plaintiff alleges gender discrimination under Title VII of the Civil Rights Act of 1964 and the Elliott Larsen Civil Rights Act. She seeks damages, lost wages, costs and attorney's fees. The University filed a motion for summary judgment.

11. Lisa Fraiberg v Board of Regents of the University of Michigan. United States District Court, Eastern District of Michigan. (Judge Lawrence P. Zatkoff) (Filed July 19, 2006); Washtenaw County Circuit Court (Judge Donald E. Shelton) (Filed September 7, 2006); Michigan Court of Claims (Judge Beverley Nettles-Nickerson) (Filed September 8, 2006).

Plaintiff was employed in the Food Services Division of University Housing until her termination in April 2006. She claims that she was discriminated against because of her disabilities. She also claims that the University violated the Family Medical Leave Act and subsequently discriminated against her for having taken FMLA leave. Finally, Plaintiff alleges that she was terminated in violation of the Michigan Whistleblower's Protection Act. She seeks reinstatement, attorney's fees, costs and damages. Plaintiff also filed her claims in the Washtenaw County Circuit Court and the Michigan Court of Claims, alleging violations of the Michigan Persons with Disabilities Civil Rights Act

and the Michigan Whistleblower's Protection Act. Plaintiff stipulated to a dismissal of his Federal Court action.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Marvin Krislov", written over a horizontal line.

Marvin Krislov
Vice President and General Counsel

February 2007