

THE UNIVERSITY OF MICHIGAN
REGENTS COMMUNICATION
ITEM FOR INFORMATION

Received by the Regents
November 19, 2009

Subject: Litigation

November 2009

NEW CASES

There are no new cases this month.

RESOLUTIONS

Paul Eilers v University of Michigan. Michigan Court of Claims. (Judge Joyce A. Draganchuk)
(Filed May 23, 2008).

Plaintiff alleges that, while seeking medical treatment at the Livonia Center for Specialty Care, he slipped and fell on some liquid on the floor, causing a broken hip and other serious injuries. Plaintiff claims that the University was negligent and seeks damages, interest, court costs and attorney fees. On March 18, 2009, Judge Draganchuk ruled that plaintiff failed to file a proper, timely notice as required by statute and the case was dismissed. Plaintiff filed a claim of appeal to the Michigan Court of Appeals. Completely unrelated to the lawsuit allegations, Plaintiff died prior to any briefing on this appeal. After further study by the representatives of the Estate of Paul Eilers, on mutual stipulation of the parties, an order dismissing the appeal was entered on October 20 2009. This concludes this case.

CASE UPDATES

Linda Martinson v Lee K. Roosevelt, Joanne Motino Bailey, Kathy Dunnuck. Washtenaw County Circuit Court. (Judge Melinda Morris) (Filed October 31, 2008). AND Linda Martinson v Jodi Danhof, Sarah Choinard, Erin Flatley and Catherine Scott. Washtenaw County Circuit Court. (Judge Melinda Morris) (Filed November 7, 2008). AND Linda Martinson v Sarah Soroosh Vandergoot. Washtenaw County Circuit Court. (Judge Melinda Morris) (Filed November 9, 2008). AND Linda Martinson v Regents of the University of Michigan, Carol Loveland-Cherry, Judith Lynch-Sauer and Bonnie Hagerty. United States District Court, Eastern District of Michigan. (Judge Paul D. Borman) (Served October 5, 2009).

Plaintiff was enrolled in the School of Nursing. She claims that her classmates (the named defendants in the State court action) made defamatory statements to third parties regarding Plaintiff, and that School of Nursing administrators relied upon those false statements to support her

expulsion from the program. Ms. Martinson's claims include defamation and intentional infliction of emotional distress against each of the defendants. She seeks damages in excess of \$25,000 plus costs and interest. Plaintiff filed a fourth lawsuit in the US District Court, naming the Regents as well as administrators at the School of Nursing. Her allegations include violations of Plaintiff's due process rights. Plaintiff seeks declaratory judgment stating that her expulsion from the School of Nursing is null and void; she also seeks damages, interest, costs and attorney fees. By stipulation of the parties, the three State court cases were dismissed without prejudice; the case will proceed in Federal Court.

Ruth Braun v Board of Regents of the University of Michigan. Michigan Court of Claims. (Judge Beverley Nettles-Nickerson) (Served April 28, 2008); **Ruth Braun v University of Michigan Board of Regents.** Washtenaw County Circuit Court. (Judge Melinda Morris) (Filed October 2008).

Ms. Braun was employed by the University in the Office of Undergraduate Admissions. She claims that she was terminated from her position because she reported suspected violations of labor practices within the office. Plaintiff seeks damages, interest, costs and attorney's fees. The University filed a motion to dismiss for lack of subject matter jurisdiction, which was granted by the judge on July 23, 2008. Plaintiff re-filed her case in the Washtenaw County Circuit Court. The University filed a motion for summary disposition, which was denied by Judge Morris.

Robert McGee v Regents of the University of Michigan. Washtenaw County Circuit Court. (Judge Archie C. Brown) (Filed May 16, 2008).

Plaintiff was a graduate student in Nuclear Engineering and Radiological Sciences, with a 25% appointment as a Graduate Student Research Assistant to work in a laboratory in the area of neutron radiography. Plaintiff claims that he observed a number of practices in the lab that did not meet OSEH standards and reported them to the University's Radiation Safety Services office, to OSEH and to the Michigan Department of Environmental Quality. Plaintiff claims that his subsequent termination was retaliation against him for reporting suspected violations of laws. He seeks compensation for his losses, interest, costs and attorneys fees. The University filed a motion for summary disposition, which was denied. Trial is scheduled to begin on November 9, 2009.

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 (collectively, "BAMN Plaintiffs"), assert that Proposal 2, which prohibits preferential treatment on the basis of race, gender, national origin, and ethnicity in public education, public employment, and public contracting, 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. Plaintiffs claim that state actors will be prohibited from using policies to desegregate state universities, public 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 and that Proposal 2 violates this right by prohibiting public universities from considering race in their admissions policies. 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. By January 31, 2007, all defendants filed their answer to BAMN's amended complaint.

A second case (*Chase Cantrell, et al. v Jennifer Granholm and Michael Cox*), filed on November 19, 2006 by students, prospective students, and faculty at the University of Michigan (collectively, "Cantrell Plaintiffs") brought suit against Governor Granholm – but *not* any state universities – contending that Proposal 2 violates the Equal Protection Clause of the Fourteenth Amendment. On January 5, 2007, with the agreement of all parties, the district court ordered the actions by the BAMN Plaintiffs and the Cantrell Plaintiffs (collectively, "Plaintiffs") be consolidated for all purposes.

Before consolidation of the cases, 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 then-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, and the Court entered the requested injunction the following day. On December 22, 2006, however, two proposed intervenors to the suit, Eric Russell (an applicant to the University of Michigan Law School and to the Wayne State University 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. While Russell and TAFM's motion was pending before the Sixth Circuit, on December 27th, 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.) On December 29, 2006, 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. 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, 2007. Russell's appeal therefore remained pending before the Sixth Circuit, although it ultimately became mooted as the end date for the original stipulated injunction approached.

Because Russell was offered admission to Wayne State University Law School, and denied admission to University of Michigan Law School, under Proposal 2-compliant policies, the Cantrell Plaintiffs filed a motion to dismiss Eric Russell from the litigation. The district court denied that motion in March 2007, but left open the possibility that the matter could be reconsidered when

dispositive motions were heard following the close of discovery in September 2007. In April 2007, BAMN filed a second amended complaint, which the parties again answered. In May 2007, BAMN and the Cantrell Plaintiffs filed motions for class certification. Throughout this time period, the parties pursued discovery, largely from the three defendant Universities, and deposed several officials at each institution. In Fall 2007, Russell filed a motion to compel additional discovery, related to academic performance data, Bar passage rates, and USMLE results, from the defendant Universities, which the Universities opposed.

The Court did not permit dispositive motions to be filed until late Fall 2007. In October 2007, the three defendant Universities filed a motion seeking dismissal from the case because they were not necessary parties and because BAMN had no standing to raise First Amendment academic freedom claims against the Universities. The Cantrell Plaintiffs filed a motion again seeking dismissal of Eric Russell from the case, as well as a motion seeking summary judgment on their claims against Proposal 2. The Attorney General filed a motion seeking summary judgment upholding Proposal 2 as constitutional. The BAMN plaintiffs argued that a trial was necessary to determine the constitutionality of Proposal 2. On February 1, 2008, Jennifer Gratz, who had been the plaintiff in the Supreme Court lawsuit challenging the University of Michigan's undergraduate admissions policies and who served as executive director of the group that sponsored Proposal 2, filed a motion to intervene in the suit. Ultimately, the Court heard these various motions in February 2008.

On March 18, 2008, the Court issued a decision upholding Proposal 2 and dismissing the BAMN and Cantrell suits. The Court found that all plaintiffs (except the labor unions and a Proposal 2 petition circulator) generally had standing to bring their claims, but found that those plaintiffs had not shown that Proposal 2 was unconstitutional under any of their theories. The Court therefore granted summary judgment to the Attorney General, who had argued that Proposal 2 was constitutional. The Court granted the Universities' motion to dismiss BAMN's claim that Proposal 2 violated First Amendment principles of academic freedom, agreeing that that right is for the Universities to assert (or not), but otherwise denied the Universities' motion to be dismissed from the case. According to the Court, the Universities were proper parties to the action because the allegations regarding them stemmed from the same basic facts as those asserted in the case generally and because university action would be required to obtain the relief sought by the plaintiffs. On March 19th, BAMN filed an appeal to the Sixth Circuit to challenge the Court's ruling upholding Proposal 2.

The Court also, in a separate opinion also issued on March 18, 2008, found that Eric Russell (the law school applicant who had intervened in the case) no longer had a unique interest and dismissed him from the litigation. The Court likewise denied Jennifer Gratz's belated motion to intervene in the case. Finally, because the Court had granted summary judgment to the Attorney General, upholding Prop 2 against the plaintiffs' challenges, the Court denied the various pending discovery motions (such as those filed by Russell seeking additional discovery from the defendant Universities) and class certification motions as moot. On March 20th, both Eric Russell and Jennifer Gratz appealed the Court's rulings to the Sixth Circuit.

The University defendants cross-appealed the Court's denial of their motion to be dismissed from the case. The Cantrell plaintiffs filed a motion before the district court for reconsideration; the district court denied the motion. Eric Russell also filed a motion in the district court seeking attorneys' fees from the University; that motion is still pending before the district court.

As noted above, BAMN had filed an appeal to the Sixth Circuit to challenge the court's ruling upholding Proposal 2. The University defendants cross-appealed the court's denial of their motion to be dismissed from the case. Both Eric Russell and Jennifer Gratz appealed the court's rulings to the Sixth Circuit, but Jennifer Gratz later filed a motion to withdraw as an appellant, which motion was granted on March 23, 2009. The parties have filed their substantive briefs before the Sixth Circuit, and the court has set oral argument on the appeals for November 17, 2009.

Certain of the proposed intervenors (the Michigan Civil Rights Initiative Committee and the American Civil Rights Foundation) have petitioned the U.S. Supreme Court for review of the Sixth Circuit's denial of their motions to intervene. The Supreme Court asked the parties to the case for their views, and the University Defendants filed a brief opposing the petition.

Respectfully submitted,



Suellyn Scarnecchia
Vice President and General Counsel

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