THE UNIVERSITY OF MICHIGAN
REGENTS COMMUNICATION
ITEM FOR INFORMATION

Received by the Regents
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Subject: Litigation **January 2007**

I. NEW CASES

1. Janice M. Gerard v Regents of the University of Michigan. Michigan Court of Claims. (Judge Paula J. Manderfield) (Filed November 3, 2006).

Plaintiff is a former employee of the University's Dental School. She claims that, while at work in the Dental Clinic, she was exposed to black mold in the air handlers, causing her to develop serious health conditions. She alleges that the University forced her to return to work before it was medically advisable and that she was forced to resign. Ms. Gerard claims that this constituted a constructive discharge. She seeks judgment in excess of $25,000, plus costs, interest and attorney's fees.

2. 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. Also on January 4, the University received word that Attorney General Mike Cox intends to file a motion to intervene in the suit as a plaintiff.

II. RESOLUTIONS

3. Curtis J. Granderson v University of Michigan. U.S. District Court, Eastern District of Michigan. (Judge Lawrence Zatkoff) (Served June 15, 2004).

Plaintiff is a former University employee in the AFSCME bargaining unit. His complaint alleges that he was treated differently than white employees, harassed, disciplined, and eventually discharged for

alleged misconduct. He claims race and disability discrimination, and seeks damages, interest, costs, and attorney's fees. The University filed a motion to dismiss, which was granted by the court on June 20, 2005. Plaintiff filed an untimely appeal to the Sixth Circuit Court of Appeals. On December 12, 2006, the Court of Appeals affirmed the trial court's dismissal of the case.

4. Anita Stubbs v The University of Michigan. Washtenaw County Circuit Court. (Judge Melinda Morris) (Filed September 12, 2005). Michigan Court of Claims. (Judge Joyce Draganchuk) (Filed December 27, 2005).

Plaintiff is a former employee of the University. She claims that she had been off work on sick leave and that, when she was cleared by her physician to return to work, she was terminated. She alleges that she was terminated because of her condition and seeks damages, costs and attorney's fees. Plaintiff filed a companion case in the Michigan Court of Claims. The University filed a motion for summary disposition, which was granted, and the case is dismissed.

5. In the Matter of the estate of Chan Wai Jun, alias Chan Wai Chan alias Jennifer Marie Wai Jun Chan, the deceased, Between Benedict Cho Hung Woo and League Maria Limited v Esther Chiu, John Chao, St. Columban Foreign Mission Society, the Regions [sic] of the University of Michigan, and Secretary for Justice. In the High Court of the Hong Kong Special Administrative Region, Court of First Instance. (Filed August 31, 1999).

Plaintiffs are executor and sole beneficiary, respectively, of a will purportedly executed by the deceased in 1996. They seek to have that will pronounced the last will and testament of the deceased. A will dated 1994 has been brought forward by the defendants (who are co-executors and beneficiaries, respectively) who challenge the validity of the 1996 will. On December 21, 2006, the Court approved the Deed of Settlement of this Estate, pronounced the validity of the 1996 Will, and ordered that the administration of the estate be carried out in accordance with the terms of the Deed of Settlement. Distribution of the proceeds should begin shortly.

III. CASE UPDATES

6. Sandra Fernandez v Board of Regents of the University of Michigan. Washtenaw County Circuit Court. (Judge Timothy Connors) (Filed March 17, 2005).

This complaint was filed by a former medical school student. She claims that, while in medical school, she was diagnosed with a medical condition that required her to request accommodations for test taking, which the University provided. Ultimately, however, Ms. Fernandez was dismissed from medical school because of failing grades. She alleges that the University failed to properly accommodate her. She also claims that she was treated differently because of her national origin, which claims she later withdrew voluntarily. Plaintiff seeks judgment against the University, damages, reinstatement, costs, interest and attorney fees. The University filed a motion for

summary disposition, which was granted by the court on December 7, 2006 and the case was dismissed. Plaintiff filed a claim of appeal to the Michigan Court of Appeals.

7. 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.) *See also Russell, et al. v Brandon, et al., elsewhere in this Report.*

8. John Nicklas v Todd Koelling, M.D., Elizabeth Nabel M.D., Dan Cutler, John Doe and Richard Roe. Washtenaw County Circuit Court. (Judge Davis S. Swartz) (Filed March 20, 1998); John Nicklas v Kim Eagle, Elizabeth Nabel, David Humes, Robert Cody, and Keith Aaronson. United States District Court, Eastern District of Michigan. (Judge Bernard Friedman) (Filed June 2, 1999).

Plaintiff is an associate professor at the Medical School. He claims that the defendants, who are also faculty members, made false and defamatory statements against him, causing him to be denied a promotion and suffering injury to his good name and reputation. He seeks damages in excess of $25,000. The University filed a motion for partial summary disposition. Plaintiff filed a lawsuit in federal court, alleging retaliation by his supervisors and co-workers because of the Washtenaw County Circuit Court case. His federal suit claims that he has been subject to disparate and untoward working conditions. He has filed a motion for preliminary injunction and seeks an emergency evidentiary hearing of his claims that his research and clinical work are being jeopardized and in danger of suffering irreparable injury, loss and damage. Defendants filed a motion to dismiss in the federal court action, which was granted and the case was dismissed; plaintiff filed an appeal to the U.S. Court of Appeals. On August 22, 2002, the Court of Appeals affirmed the trial court's dismissal of plaintiff's complaint; plaintiff's petition for rehearing was denied. Plaintiff filed a petition for certiorari to the U.S. Supreme Court on January 2, 2003. In the state court case, the University filed motions for summary disposition on a number of grounds, all of which were denied without prejudice. When defendants filed for leave to appeal to the Michigan Court of Appeals, plaintiff argued that the motions were not decided by the court but merely deferred until trial. Defendants filed a motion for decision on the previously-filed motions for summary disposition, which was heard by Judge Swartz on March 19, 2003. The judge dismissed Plaintiff's claims against Drs. Eagle, Nabel and Cutler. The only count remaining is Dr. Nicklas' complaint against Dr. Koelling. Defendants filed a motion for rehearing which was granted. Following the hearing, the judge ruled that Dr. Nabel and Cutler remain dismissed and Dr. Koelling remains in the case. The court reversed its ruling by which Dr. Eagle had been dismissed. Defendants Eagle and Koelling filed claims of appeal to the Michigan Court of Appeals. A firm trial date of August 18 was set by the court. The University filed a motion on behalf of Defendants Koelling and Eagle, requesting a stay of proceedings and adjournment of the trial date, pending a decision in the appeal. Oral argument in the Court of Appeals was heard on November 3, 2004. The Court of Appeals issued its opinion on December 9, 2004, denying the University's appeal that the trial court improperly denied the University's motion for summary disposition on grounds of governmental immunity. The University filed an application for leave to appeal to the Michigan Supreme Court. Trial has been cancelled pending action by the Supreme Court. The Michigan Supreme Court denied the University's application for leave to appeal. Trial on the defamation and interference claims against Drs. Koelling and Eagle began on November 6, 2006; on November 15, the jury found in favor of the defendants on all claims. Plaintiff filed a Motion for New Trial on December 18, arguing judicial error.

9. Repligen Corporation and the Regents of the University of Michigan v Bristol-Myers Squibb. United States Federal Court for the Eastern District of Texas. (Filed January 6, 2006).

Repligen and the University filed suit against Bristol-Myers Squibb ("BMS") for infringement of a University patent, as the result of BMS' sales of its Orencia product for the treatment of rheumatoid arthritis. The University and the Navy [co-owner] exclusively licensed their rights in this and other patents, which relate to methods of treating various diseases including arthritis and other autoimmune diseases, to Repligen in 1992. The licenses permit Repligen to enforce the patents. BMS has filed an amended Answer and Counterclaims, claiming non-infringement, invalidity, and unenforceability, as is typical for a patent lawsuit. On December 21, 2006, Repligen and the University filed an Amended Complaint to address procedural issues and an Amended Answer to respond to additional defenses raised by BMS. The additional defenses center on an alleged breach of a research contract by Michigan, but counsel believe the defense is not well founded. Discovery in the lawsuit is proceeding and a trial is not expected until spring of 2008.

Respectfully submitted,

Marvin Krislov
Vice President and General Counsel

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