

THE UNIVERSITY OF MICHIGAN
REGENTS COMMUNICATION
ITEM FOR INFORMATION

EXH	MOTION
	SECOND
	APPROVED BY THE REGENTS
NOTE:	FEB 17 2005

Subject: Litigation

February 2005

I. NEW CASES

1. Elizabeth Wilson v University of Michigan. Washtenaw County Circuit Court. (Judge Donald E. Shelton) (Served January 4, 2005).

Plaintiff worked as a web designer in the Media Union until her discharge in May 2003. She claims that she was harassed and discriminated against because of her gender and, when she filed an internal grievance against her supervisor, he discharged her. She seeks damages, back wages, lost benefits, costs, and attorney's fees.

2. Cindy Wells v University of Michigan. Washtenaw County Circuit Court. (Judge Donald E. Shelton) (Served January 13, 2005).

Plaintiff, a former employee at the University Medical Center, claims that she was discharged by the University in retaliation for having filed a complaint with the Michigan Occupational Safety & Health Administration about alleged violations of HIPAA by the University. She seeks damages in excess of \$25,000, reinstatement, attorney fees, costs and interest.

II. RESOLUTIONS

3. Jessica Stratton v City of Flint and Drs. Weber and Greenfield, et al. Genesee County Circuit Court. (Judge Geoffrey Neithercut) (Received January 14, 2002)

Plaintiff states that she was injured in an automobile accident on November 27, 2000 and was subsequently transported to Hurley Hospital. At the scene of the accident and during her transport, she was filmed by a reporter employed by WJRT television station. She claims that the defendants, including the University of Michigan physicians who were working in the emergency room of Hurley Hospital, owed her a duty to protect her privacy, including her medical information and treatment, all of which was made public in a television broadcast. Plaintiff claims that, as a result of these actions, she has suffered severe emotional distress, inability to sleep, and humiliation. She seeks damages, costs and attorney's fees. Plaintiff filed a second case against the University, claiming medical malpractice. That count had already been dismissed in the original case and the University has filed a motion to dismiss the second case. Judge Neithercut dismissed all defendants on summary disposition. Plaintiff filed an appeal and defendants cross-appealed the Judge's decision not to dismiss one of the physicians on the basis of governmental immunity. On January 6, 2005, the Michigan Court of Appeals upheld the trial court's dismissal and it is anticipated that this case is concluded.

4. Regents v Champion Coach and Cummins Michigan. Michigan Court of Claims (Judge William Collette) (Filed April 18, 2002); Factory Mutual Insurance Company, as subrogee of the Regents of the University of Michigan v Champion Motor Coach v Spartan Motors. Washtenaw County Circuit Court. (Judge Donald Shelton)

In August 1997, the University purchased two identical buses from Champion Products. On August 12, 2000, one bus caught fire, was destroyed and caused severe damage to the maintenance building and its contents; total loss exceeded \$2 million. A design defect in the bus appears to be the likely cause of the fire and an investigation revealed additional aspects of the buses that made them unfit goods. The University's insurer filed a subrogation lawsuit for the damages in Washtenaw County Circuit Court. The case filed in the Court of Claims by the University seeks reimbursement for the purchase price of the second bus. Settlement was reached between the parties and the case is dismissed.

5. Mary Thomas v Regents of the University of Michigan and Ellis Parking Services. Genesee County Circuit Court. (Judge Richard B. Yuille) (Filed June 2, 2000). Michigan Court of Claims.

Plaintiff claims that she was in a parking structure on the Flint Campus when she tripped over a speed bump, fell and fractured her arm. She claims that the University was negligent because it failed to adequately mark the speed bump or warn pedestrians. She seeks damages, costs and attorney's fees. Plaintiff amended her complaint to include Ellis Parking Services as a defendant. Plaintiff has agreed to dismiss the University from the Genesee County action and has re-filed her charges against the University in the Michigan Court of Claims. The University will be defended and indemnified by Liberty Mutual insurance company. Defendants filed a motion for summary disposition, which was denied. Settlement was reached between the parties, payment was made by Liberty Mutual, and the case is dismissed.

6. Kile Sayer v Andrew Zimmer. Washtenaw County Circuit Court. (Judge Melinda Morris) (Served March 6, 2003). Kile Sayer v University of Michigan. Michigan Court of Claims (Judge William Collette) (Served November 6, 2003)

The plaintiff alleges that our employee, Andrew Zimmer, while driving a University vehicle, rear-ended the vehicle driven by Sayer. No traffic tickets were issued to Zimmer. Sayer claims that he suffered severe injuries to his shoulder and seeks damages in excess of \$25,000. A companion case against the University was filed in the Court of Claims. Settlement was reached between the parties and the case is dismissed.

7. Peri Weingrad v Magdalene Lampert and Regents of the University of Michigan. Washtenaw County Circuit Court. (Judge Timothy P. Connors) (Filed October 15, 2001).

Plaintiff is a graduate student, working on her dissertation in the School of Education. She claims that she was working with Professor Lampert on a research project for a number of years and that Dr. Lampert has refused to continue working with her any longer, allegedly affecting Weingrad's ability to complete her Ph.D. dissertation. Plaintiff claims that Dr. Lampert refuses to work with her as a result of a complaint Weingrad made alleging sexual harassment against another faculty

member. Her claims include a violation of Elliott Larsen Civil Rights Act, various due process and other constitutional allegations, breach of contract, among others. She seeks access to the research conducted by Dr. Lampert and \$5 million in damages. Defendants filed a motion for summary disposition, which was granted by Judge Connors and the case was dismissed. Plaintiff filed a claim of appeal to the Michigan Court of Appeals. Oral argument was heard on January 4, 2005; on January 13, the Court of Appeals affirmed the trial court's ruling in favor of the University.

8. Melissa Marema v University of Michigan. Washtenaw County Circuit Court. (Judge Timothy P. Connors) (Filed August 2, 2004).

Plaintiff was an employee at the University in the History of Art Department. She alleges that she was harassed by her supervisor and, as a result, she became disabled for a period of time. Plaintiff filed a Workers' Compensation claim which was denied by the University. Plaintiff seeks damages, costs, interest and attorney fees. The University filed a motion to dismiss which was granted, without prejudice on January 26, 2005.

9. Lone Star Steakhouse & Saloon of Michigan, Inc. v Board of Regents of the University of Michigan. Michigan Court of Claims. (Judge Paula Manderfield) (Served August 12, 2004); consolidated with Householder v Lone Star, Washtenaw County Circuit Court (Judge Donald Shelton); and Johnson v Lone Star Steakhouse v University of Michigan. Wayne County Circuit Court (Judge William Giovan) and Michigan Court of Claims (Judge Joyce A. Draganchuk).

Plaintiff has been sued by two individuals in separate cases who claim that they contracted Hepatitis A as a result of eating food that had been contaminated by a restaurant employee at a Lone Star Steakhouse. Lone Star claims that it was the negligence of the University of Michigan, when UM failed to report an occurrence of Hepatitis A of a Lone Star employee to appropriate state health authorities, that caused the injuries to the individuals. Plaintiff seeks judgment in the amount that it is judged responsible for in the *Householder* and *Johnson* lawsuits. The University filed a motion to dismiss before Judge Whelton in the *Householder* case. The motion was argued on February 2, 2005 and the motion was granted.

III. CASE UPDATES

10. 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 intervenors' 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

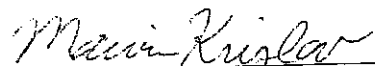
with the law school case. On October 16, the Intervenors filed a separate petition for *writ of certiorari* before judgment with the U.S. Supreme Court. The University filed its responses to those petitions on October 29, 2002. On December 2, 2002, the Supreme Court granted certiorari before judgment 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 Intervenors 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.

11. 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. The case is now set to go to trial on August 15, 2005.

Respectfully submitted,



Marvin Krislov
Vice President and General Counsel

February 2005