

THE UNIVERSITY OF MICHIGAN  
REGENTS COMMUNICATION  
ITEM FOR INFORMATION

Received by the Regents  
April 17, 2008

Subject: Litigation

April 2008

I. NEW CASES

1. Sandra Jackson v Regents of the University of Michigan. United States District Court, Eastern District of Michigan. (Judge Nancy G. Edmunds) (Filed March 4, 2008).

Plaintiff worked as an administrative assistant in the Emergency Medicine Department and was assigned to work with the ER physicians at Hurley Medical Center in Flint. She claims that, following her return from an FMLA leave of absence, she was wrongfully accused of misconduct and falsification of payroll records and her employment was terminated. Ms. Jackson claims that she was retaliated against for taking the FMLA leave. She seeks damages, costs, interest and attorney's fees.

2. Lora Kalkman v Augustine Agho and University of Michigan. Genesee County Circuit Court. (Judge Richard B. Yuille) (Filed March 24, 2008).

Plaintiff was employed at the School of Health Professions and Studies on the Flint Campus. She alleges that she reported violations of rules, regulations and laws and subsequently was harassed, discriminated against and ultimately discharged. Plaintiff claims that she was engaged in protected activities under the Whistleblower Protection Act and that she has suffered damages in excess of \$25,000. She seeks damages, interest, costs and attorney fees.

II. RESOLUTIONS

3. Paul Eilers v University of Michigan. Wayne County Circuit Court. (Judge Cynthia Diane Stephens) (Served January 8, 2008).

Plaintiff was at the Livonia Center for Specialty Care for a kidney dialysis treatment when he slipped and fell at the Center, breaking a hip and suffering other injuries. He claims that the University was negligent and that as a result of that negligence he sustained serious injuries. He seeks damages in excess of \$25,000, interest, costs and attorney fees. Plaintiff voluntarily dismissed his complaint, after the University advised him that only the Court of Claims has jurisdiction. It is not known if Plaintiff will re-file in the Court of Claims.

4. Michigan Paralyzed Veterans of America v University of Michigan. United States District Court, Eastern District of Michigan. (Judge Sean F. Cox) (Filed April 17, 2007).

Plaintiff ("MPVA") claims that the University is discriminating against MPVA, its members and others similarly situated by denying them equal access to seating at the Michigan Stadium, in violation of the Americans with Disabilities Act. Plaintiff seeks an injunction (1) restraining the University from receiving federal funding, (2) restraining the University from proceeding with any further construction at the Stadium and (3) requiring the University to provide individuals with disabilities full and equal access to the Stadium. The United States Department of Justice filed a motion to intervene in the lawsuit. The parties stipulated to that intervention and to a week-long inspection of the Stadium by the DOJ; that inspection began on November 27, 2007. Settlement was reached between the parties and, on March 10, 2008, a Consent Decree of that agreement was signed by Judge Cox.

### III. CASE UPDATES

5. 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 are currently considering whether to cross-appeal the Court's denial of their motion to be dismissed from the case. Such an appeal would need to be filed by April 17, 2008.

6. Mary C. Lee v University of Michigan-Dearborn and Robert L. Simpson. Michigan Court of Claims. (Judge James R. Giddings) (Filed March 13, 2006); removed to United States District Court, Western District of Michigan (Judge Hugh W. Brenneman, Jr.) (April 27, 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 case was removed to federal court and the University filed a motion for summary judgment. On September 28, 2007, Judge Brenneman ruled favorably on the University's motion in part, dismissing plaintiff's claims except for the breach of contract claim which was remanded to the Michigan Court of Claims. Plaintiff filed a notice of appeal to the Sixth Circuit Court of Appeals on

the dismissal of her constitutional claims and her claim under the Michigan Administrative Procedures Act. On March 7, 2008 Judge Giddings granted the University's motion for summary disposition on plaintiff's breach of contract claim. We are waiting to hear whether plaintiff's appeal of her federal claims to the Sixth Circuit will be scheduled for oral argument or whether the court will issue a ruling on the briefs.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Gloria Hage', with a long horizontal line extending to the right.

Gloria Hage  
Interim Vice President and General Counsel

April 2008