

THE UNIVERSITY OF MICHIGAN
REGENTS COMMUNICATION
ITEM FOR INFORMATION

EXH	MOTION
	SECOND
	ACTION APPROVED BY THE REGENTS
NOTE: SEP 15 2005	

Subject: Litigation

September 2005

I. NEW CASES

1. Health, Education and Research Associates, Inc. v Centerbrook Architects and Planners and The Regents of the University of Michigan. St. Louis County Circuit Court, State of Missouri. (Served July 27, 2005).

This is a breach of contract case. Plaintiff (HERA) claims that it contracted with Centerbrook to provide laboratory design services for the UM School of Public Health. HERA claims that it has completed the work but has failed to receive the agreed-upon fee, due and owing by Centerbrook. Plaintiff also claims unjust enrichment by the University. Plaintiff seeks \$42,915 plus costs and interest.

II. RESOLUTIONS

2. Vickie Nolan v University of Michigan, Institute for Social Research, David Featherman, and Derek Moss. Washtenaw County Circuit Court. (Judge Melinda Morris) (Filed April 6, 2004).

Plaintiff worked as an Office Assistant in the duplicating unit of the Institute for Social Research until her discharge in January 2004. She claims that she was disciplined and ultimately discharged in retaliation for having filed a complaint with Michigan OSHA claiming excessive noise in that unit. Plaintiff claims that these actions were in violation of the Michigan Whistleblowers' Protection Act. She seeks reinstatement, lost wages, damages, costs and attorneys' fees. Settlement was reached between the parties and the case is dismissed.

3. Marcellus Scott, Benjamin Linton, Isaac White and Lemark Woods v Board of Regents of the University of Michigan. Washtenaw County Circuit Court. (Judge Donald Shelton) (Filed July 13, 2004).

Plaintiffs are former employees of the Materiel Services Department at the University Hospitals. They claim that their supervisor, a female, sexually harassed them and, when they objected to her behavior she discharged them. Plaintiffs allege that the discharges were in violation of the Elliott-Larsen Civil Rights Act and seek damages, costs, interest and attorney's fees. The parties engaged in voluntary non-binding facilitation which resulted in settlement of the lawsuit. The case was dismissed by the court on July 12, 2005.

4. June Balog v Regents of the University of Michigan. Michigan Court of Claims. (Judge Paula J.M. Manderfield) (Filed November 5, 2003).

Plaintiff was a University employee who claims that she was permanently disabled in 2002. She applied for long term disability benefits and was denied. She claims that the University's denial of those benefits is a breach of the employment contract and seeks judgment, costs, interest and attorney's fees. Settlement was reached between the parties.

5. Marguerite Bird v University of Michigan. United States District Court, Eastern District of Michigan. (Judge Denise Page Hood) (Served March 1, 2004).

Plaintiff, a former University employee, claims that her termination in November 2002 was based on her age, while a younger employee took over her duties and responsibilities. She claims this termination is in violation of the Elliott Larsen Civil Rights Act and the Age Discrimination in Employment Act. Plaintiff also claims breach of contract, and seeks damages in excess of \$75,000, lost wages, interest, costs and attorney's fees. On motion, the court dismissed all claims other than the Age Discrimination in Employment Act claims; Plaintiff subsequently stipulated to dismissal of that one remaining aspect of the claim and the case is concluded.

III. CASE UPDATES

6. Catherine Wilkerson v University of Michigan. Washtenaw County Circuit Court. (Judge Timothy Connors) (Filed December 19, 2003).

Plaintiff was employed as a physician at the University and worked as an emergency room physician in the emergency care unit at Hurley Hospital. She claims that, after she had raised concerns about women's health issues at the hospital and assisted another female staff member with her claim of sexual harassment, she was retaliated against by her supervisor. Plaintiff alleges that her job was ultimately eliminated in retaliation for complaining about gender discrimination and that alleged promises of another job were not forthcoming. She seeks damages, attorney fees, costs and interest. The University filed a motion for summary disposition, which was denied by the court.

7. Crystal Byrd v University of Michigan. Michigan Court of Claims. (Judge James R. Giddings) (Filed January 19, 2004).

Plaintiff, a former University employee, claims that she was denied long term disability benefits. She seeks long term disability benefits, attorney fees, costs and interest. The University filed a motion for summary disposition, which was denied by the court.

8. 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 Intervenor 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 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.

Respectfully submitted,



Marvin Krislov
Vice President and General Counsel

September 2005