RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

By: Robert M. Vercruysse

I. UNITED STATES SUPREME COURT

A. Equal Pay Act Statute of Limitations

Ledbetter v. Goodyear Tire & Rubber, 127 S.Ct. 2162 (2007). A female retiree sued her former employer for violations of Title VII and the Equal Pay Act, alleging that sex discrimination-based poor performance evaluations she had received earlier in her tenure with her employer had resulted in lower pay than her male colleagues through the end of her career. The Supreme Court held that discrete discriminatory acts triggering the time limit for filing an Equal Employment Opportunity Commission (EEOC) charge could only be discriminatory pay decisions, not the issuance of paychecks that were lower because of the discriminatory acts.

Ledbetter made no claim that intentionally discriminatory conduct occurred during the charging period or that discriminatory decisions occurring before that period were not communicated to her. The court rejected her argument that Goodyear's nondiscriminatory conduct in issuing paychecks to her during the charging period gave present effect to discriminatory conduct outside of that period.

B. FELA Standards

Norfolk S. Ry. Co. v. Sorrell, U.S. 127 S. Ct. 799 (2007). Sorrell brought a Federal Employers' Liability Act (FELA) action against his employer, Norfolk Southern Railway Corporation, after he was injured in a truck accident involving another employee. Norfolk argued that the jury should receive an instruction that if Sorrell's negligence "contributed in whole or in part" to his injury – the same contributory negligence standard applied to the railroad – then the verdict must be reduced accordingly. Sorrell argued that the proper standard for employee contributory negligence under FELA was whether his actions "directly contributed" to his injuries, a different standard than that applied to the railroad. The trial court gave the instruction requested by Sorrell. The jury returned a verdict in favor of Sorrell, without indicating Sorrell's percentage of fault.

Norfolk appealed the decision, and the Missouri Court of Appeals affirmed. The Missouri Supreme Court denied review, and Norfolk petitioned for United States Supreme Court review. The basis of Norfolk's appeal is that the contributory negligence instruction given to the jury, which was based on Missouri state law, conflicted with FELA's contributory negligence standard, and thereby defeated federal substantive rights.

In an opinion written by Chief Justice Roberts, in which Justices Stevens, Scalia, Kenned, Souter, Thomas, Breyer and Alito joined, the Court held that the trial court erred by giving the jury instruction requested by Sorrell. The jury instruction should have applied the same causation standard to both a railroad's and an employee's contributory negligence. The Court recognized that while states do have some flexibility in instructing a jury about the appropriate causation standards for railroad and employee negligence, the instruction still must apply the same standard to both parties. The Court vacated the opinion of the lower court and remanded the case back to the Missouri Court of Appeals to determine whether the error was harmless or if a new trial was warranted.

C. Public Sector Labor Unions

Davenport v. Washington Education Association, 127 S. Ct. 2732 (2007). The Supreme Court rebuffed a constitutional challenge to an unusual state restriction on labor unions' use of public employees' agency fees – but not before the state changed the law.

At issued was a Washington State law that required unions to secure a nonmember's affirmative consent before using his or her agency fees for election-related purposes. The Court reversed the Washington Supreme Court's decision that the restriction, as applied to public-sector unions, violated the First Amendment.

The National Labor Relations Act (NLRA) leaves it to the states to govern labor relations with their own employees. Many states permit unions to act as the exclusive collective bargaining agent of designated units of public employees and, as the NLRA does in non-"right to work" states, allows unions to collect "agency fees" from employees who choose not to join the union.

In a series of cases, the Court has held that the First Amendment is implicated when states require represented public employees to pay agency fees as a condition of employment and that, to accommodate those concerns, unions are constitutionally prohibited from using fees paid by objecting nonmembers for purposes that are not "germane" to collective bargaining. The Court has also established a variety of procedural safeguards to ensure that unions honor the rights of objecting nonmembers. *See, e.g., Teachers v. Hudson*, 475 U.S. 292 (1986).

While the State of Washington generally authorized public-sector unions to collect agency fees in amounts equivalent to dues, a voter initiative – section 760 – required unions to secure affirmative authorization from nonmembers before using their fees for election-related purposes.

Starting with *Machinists v. Street*, 367 U.S. 740 (1961), the Supreme Court has repeatedly asserted that when a nonmember pays fees to a union, "dissent [over financially supporting the union's activities] is not to be presumed – it must affirmatively be made known to the union by the dissenting employee." With the approval of the courts, unions have long understood *Street* to allow them to use agency fees for any purpose, unless a fee payer objects. Indeed, the Supreme Court of Washington read the admonition that "dissent is not to be with a union's statutory entitlement does not imply that the legislatures (or voters) themselves cannot limit the scope of that entitlement."

D. Title VII Numerosity Is Not Jurisdictional

Arbaugh v Y&H Corp, 126 S Ct 1235 (2006). The 15-employee numerosity requirement is a substantive element of a Title VII claim, not a question of subject matter jurisdiction. Accordingly, the issue could not be raised defensively after the close of trial.

II. MICHIGAN SUPREME COURT

A. Whistleblower Elements

Brown v. Mayor of Detroit, 478 Mich. 589 (2007). A police officer and a deputy chief of the police department's professional accountability bureau brought an action against the mayor and City of Detroit, alleging slander and violation of Michigan's Whistleblowers' Protection Act (WPA).

The Circuit Court, Wayne County, granted the city's motion for summary disposition of the slander claims, denied the mayor's motion for summary disposition of the slander claims, denied both defendants' motions for summary disposition of the WPA claims, and granted the officer's motion for partial summary disposition of the WPA claim, leaving only the issue of damages. The Court of Appeals issued a published opinion in which it reversed the circuit court's denial of the mayor's motion for summary disposition of the slander claims and reversed the circuit court's grant of partial summary disposition to the police officer on his WPA claim.

The Mayor and the City of Detroit appealed the Michigan Supreme Court, arguing that an employee of a public body must report to an outside agency or higher authority to be protected by the WPA. The Michigan Supreme Court held that the WPA does not require that an employee of a public body must report violations or suspected violations to an outside agency or higher authority to receive the protections of the WPA. The court further held that the WPA does not limit its protection to those employees who are acting outside of their job duties when reporting violations or suspected violations.

B. Disability Act – Public Accommodation

Haynes v. Oakwood Healthcare, 477 Mich 29 (2007). Plaintiff Gregory Haynes, a physician, claimed hospital's denial of staffing privileges violated Michigan's Civil Rights Act. The Michigan Supreme Court, reversing its prior holding, held that the physician stated a cause of action because the Civil Rights Act forbids unlawful discrimination against any individual in a place of public accommodation, *not* just members of the public. The Supreme Court found that the statute prohibits unlawful discrimination against any individual's full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation. This case reversed 15-years of precedent and shows how the Supreme Court can change the rules of employment law. The court overruled a 1992 Michigan Supreme Court case, Kassab v. Michigan Basic Prop Ins. Ass'n, which had held that the Civil Rights Act public accommodation provision "did not extend beyond services ... made available to the public." Accordingly, Haynes would not have been successful in his lawsuit had he brought it 15 years ago.

C. Elliott-Larsen Claim Accrual

Joliet v Pitoniak, 475 Mich 30 (2006). Summary disposition should have been granted for the employer because, although the plaintiff "suffered damage" in the form of lost employment and diminished overtime within the 3-year limitations period, the "wrongs on which her claims were based" – *i.e.,* allegedly harassing conduct, alleged misrepresentations and the allegedly discriminatory hiring of a younger man – occurred outside the limitations period.

"The issue before us is whether plaintiff's claims for violations of the Civil Rights Act, breach of contract, and misrepresentation accrue on the dates that the alleged discriminatory acts or misrepresentations occur or on the plaintiff's last day of work. Following our decision in *Magee v DaimlerChrysler Corp*, 472 Mich 108 (2005), we hold that a claim of discrimination accrues when the adverse *discriminatory* acts occur. Thus, if a plaintiff's complaint does not make out a claim of *discriminatory discharge*, a claim of constructive discharge for a separation from employment occurring after the alleged discriminatory acts cannot serve to extend the period of limitations for discriminatory acts committed before the termination. Because *Jacobson v Parda Federal Credit Union*, 457 Mich 318 (1998), held that allegations of constructive discharge could operate to extend the applicable period of limitations for discriminatory acts falling outside the period of limitations, and is inconsistent with *Magee, supra*, it is overruled.

III. SIXTH CIRCUIT COURT OF APPEALS AND EASTERN DISTRICT OF MICHIGAN

A. Age Discrimination

EEOC v Jefferson County Sheriff's Dept, 467 F3d 571 (CA 6, 2006). A divided *en banc* court held that the employer's retirement plan facially violated the ADEA by 1) disqualifying retirement-eligible employees over age 55 from receiving duty-disability retirement benefits, and 2) giving younger employees who become disabled before standard retirement age credit for years they did not work. Each component allowed younger employees under certain circumstances to have greater disability retirement benefits than older employees with identical final or average salaries. "We further hold that when an employment policy or benefit plan … is facially discriminatory, a plaintiff challenging that policy does not need additional proof of discriminatory animus in order to establish a *prima facie* disparate-treatment claim."

Bender v Hecht's Dept' Stores, 455 F3d 612 (CA 6, 2006). The plaintiffs' age case was properly dismissed on summary judgment, even thought four of the six manager positions eliminated in the Nashville area were held by protected-age employees. There was no sound reason to honor the plaintiffs' request to limit the statistical analysis of the nationwide RIF to just one city. In determining whether the plaintiffs were singled out because of age, it made more sense to focus on all employees within the relevant decisionmaker's region. The regional analysis resulted in only a slight reduction in the overall age of the managerial workforce, which was not statically significant enough to counter the "most obvious explanations" for the position eliminations – *i.e.,* low sales.

The fact that the employer knew it would open another store in the area approximately 15 months after the RIF did not help the plaintiffs because "[a] company is not obligated to retain an employee otherwise subject to a workforce reduction because it expects to have an opening in the not-too-distant, but not immediate, future."

Summary judgment was also proper with respect to one plaintiff's claim that he should have been transferred to an open position. The employer's explanation that the chosen candidate was more qualified was not pretextual because there was only "scant" evidence of age discrimination, and the plaintiff's qualifications were not significantly better than the chosen candidate. In so holding, the court reiterated its view that a plaintiff need not show he or she is "vastly – or even clearly" more qualified than the chosen candidate. "Whether qualifications evidence will be sufficient to raise a question of fact as to pretext will depend on whether a plaintiff presents other evidence of discrimination. In the case in which a plaintiff does provide other probative evidence of discrimination, that evidence, taken together with evidence that the plaintiff was as qualified as or better qualified than the successful applicant, might well result in the plaintiff's claim

surviving summary judgment. On the other hand, in the case in which there is little or no other probative evidence of discrimination, to survive summary judgment the rejected applicant's qualifications must be so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former. In negative terms, evidence that a rejected applicant was a qualified or marginally more qualified than the successful candidate is insufficient, in and of itself, to raise a genuine issue of fact that the employer's proffered legitimate, non-discriminatory rational was pretextual."

Browning v Department of Army, 436 F3d 692 (CA 6, 2006). Summary judgment dismissal was proper because "subjectivity, without more, does not establish pretext" and the "decision to weigh administrative/managerial experience more heavily than the job description suggested is simply not sufficient to demonstrate pretext." Moreover, "[w]hether Browning agrees with Cortney's scoring method, or whether he believes that he was more qualified for the position that Rhodes ultimately filled, is irrelevant to the age-discrimination inquiry – what matters is Courtney's perception of Browning's qualifications."

Johnson v Atlas Copco Tools & Assembly Sys, Inc, 2006 WL 2946723 (ED Mich). Evidence that the employer's overseas parent company tracked age-related employee data and set "average age" goals for its divisions could not sustain the plaintiff's age discrimination claim. The parent company stopped the contested practices once it concluded that they violated U.S. law, and there was no evidence that the individuals who collected age data and set age goals were involved in or influenced the adverse employment action. Nor was there evidence that the decisionmaker consulted or considered this, or any other age related data in deciding to terminate the plaintiff.

Greenfield v Sears, Roebuck and Co, 97 FEP Cases 1551 (ED Mich, 2006). Judge Borman granted the employer's motion *in limine* to exclude the following statements, allegedly made by the plaintiff's district manager: 1) "age is always one of those factors to be considered in making promotional decisions;" 2) that a co-worker's age prevented him from obtaining a favorable job; 3) the plaintiff "had limited potential because of [his] age;" and 4) the plaintiff should not apply for manager job because of his age and limited potential. Though not vague, ambiguous or isolated, the statements were made by a non-decisionmaker who retired six months before the adverse employment decision and were not related to the decisionmaking process. The statements were therefore irrelevant and significantly more prejudicial than probative under controlling Michigan and Sixth Circuit precedent. "Although discriminatory statements may reflect a cumulative managerial attitude that has influenced the decisionmaking process at Defendant, Plaintiff does not provide evidence of other manager's discriminatory statements to support that a corporate bias existed. The comments … have no bearing on whether discrimination played a part in the Plaintiff's demotion, and allowing these remarks may mislead the jury as to its importance."

Mickey v Zeidler Tool & Die Co, 2006 WL 1662883 (ED Mich). Judge Edmunds ruled that plaintiff was not "replaced" by a younger employee who assumed plaintiff's job title, but not his principal duties. Plaintiff's principal duties were assumed by two older employees. Plaintiff was therefore unable to sustain a *prima facie* case.

Grzybowski v DaimlerChrysler Services North America, LLC, 2006 WL 1374050 (ED Mich). Judge Duggan ruled that the plaintiff could not avoid the employer's RIF defense, or the higher *prima facie* burden associated therewith, by challenging the "economic necessity" of the downsizing. The law does not require employers to be on "economic shoals" before implementing a RIF. A workforce reduction occurs when "business considerations" cause an employer to eliminate one or more positions.

Keesecker v Midland County Educational Service Agency, 2006 WL 680864 (ED Mich). Judge Lawson ruled that the following statements, made to the plaintiff by the employer's superintendent, did not constitute direct evidence of age discrimination: "You're old enough. You could retire," "You should be ready to retire. Why aren't you retiring? You should go" and "I don't want you here, I'd fire you if I could." "The evidence cited by the plaintiff established at most that the defendant's superintendent did not want the plaintiff in the district's employ, and he encouraged her to retire because she was eligible to do so. … There was no way short of drawing an inference that a fact finder could 'connect the [job] action to the discriminatory intent' supposedly expressed by the repeated references to retirement eligibility."

B. Disability

EEOC v Watkins Motor Lines, Inc, 463 F3d 436 (CA 6, 2006). In affirming summary judgment for the employer, the Sixth Circuit rejected the EEOC's contention that "morbid obesity" which is not related to any physiological cause constitutes an impairment under the ADA. "We decline to extend ADA protection to all 'abnormal' (whatever that term may mean) physical characteristics. To do so 'would make the central purpose of the statutes, to protect the disabled, incidental to the operation of the regarded as prong, which would become a catch-all cause of action for discrimination based on appearance, size and any number of other things far removed from the reasons the statutes were passed.' Thus, consistent with the EEOC's own definition, we hold that to constitute an ADA impairment, a person's obesity, even morbid obesity, must be the result of a physiological condition."

Todd v City of Cincinnati, 436 F3d 635 (CA 6, 2006). The plaintiff, a former police officer who had been granted a disability pension due to a back injury, proffered "direct evidence" that the decisionmakers chose not to hire him as a firearms instructor because they regarded him as having an impairment.

Specifically, one decisionmaker allegedly asked the plaintiff questions during the interview process which reflected some doubt as to whether he could do the job with a back injury. Another decisionmaker 1) stated during his deposition that he seriously questioned whether the plaintiff could "physically do the demanding work" required and doubted the plaintiff's representation he could do the work because, "how can you go out [on disability pension] with a back injury and still – then come back now and say you can pick something up that was, you know, fairly heavy," 2) responded affirmatively to the question whether the plaintiff and another applicant who had a hand injury might be limited in their ability to do the expected job, and 3) answered affirmatively to the question whether officers might have given less respect the other rejected applicant because of his hand impairment. "All of this evidence offered by the plaintiff raises an issue of material fact as to whether St. Ventre and Captain Jones 'regarded the plaintiff as disabled,' and did not believe he should be hired because he was already receiving a disability pension from the city."

Crook v Fitness USA Corp, 17 AD Cases 1422 (ED Mich. 2006). The employer's response to an MDCR "Statement of Concern," which claimed that "there clearly is no reasonable accommodation possible" because the plaintiff said she could not focus on her work due to the voices in her head, could sustain a finding that the plaintiff was "regarded" as disabled. This held true even though the plaintiff medically controlled her schizophrenia and, hence, was not actually disabled under the ADA. Summary judgment was proper, however, because the plaintiff did not request an accommodation while employed and could not perform the essential functions of her job.

McCarty v Adrian Steel Co, 2006 WL 212036 (ED Mich 2006). The diabetic plaintiff proffered triable FMLA-retaliation and "perceived as" disability discrimination claims with evidence that his employer was biased against employees with "expensive medical conditions." The plaintiff was fired just two months after taking FMLA leave, and only a few hours after he responded to a human resource representative's inquiry about his health by stating that he may need further kidney testing and treatment. Moreover, the plaintiff alleged that the employer's president said during a meeting that he would find ways to terminate employees who cost the company money because of their high medical expenses and/or abuse of the insurance system.

Torok v Gibraltar Veterinary Hospital, Inc., 442 F Supp 2d 438 (ED Mich. 2006) The plaintiff failed to show that she was disabled or regarded as such, despite: "her inability to sit, lie on her left side, or garden for prolonged periods; her difficulty in driving; her inability to go camping, go on amusement park rides, or take her yearly canoe trip; her avoidance of carrying laundry up or down stairs; her decreased sexual relations with her husband; and her general difficulty in doing tasks that once were effortless" due to complications stemming from a spinal fracture. Judge Rosen ruled that "[m]ost of the activities described in Plaintiff, such as camping, canoeing, and gardening, cannot be characterized as

'of central importance to most people's daily lives.' Moreover, most of the limitations that Plaintiff has cited are fairly modest in degree – her inability to participate in certain activities for prolonged periods, for example – and thus do not meet the requirement that an impairment altogether 'prevents or severely restricts' an individual's engagement in the identified activities." Her boss' statement that he had "hired someone with a disability" does not support a "regarded as" claim because the plaintiff produced no evidence to establish that her boss knew about the difficulties the plaintiff experienced with non-work activities, and produced no evidence that management regarded her as "prevent[ed] or severely restrict[ed] … from doing activities that are of central importance to most people's daily lives."

Kronner v McDowell & Associates, 17 AD Cases 1133 (ED Mich, 2005). Judge Edmunds ruled that the need to "study very, very, very hard to do anything" does not constitute a substantial limitation on the major life activity of learning. "[M]any people have to study very hard to learn new skills … it is the rare person who is talented enough to pick up new skills without difficulty." Regardless, the plaintiff described herself as a "very intelligent person," has a history of educational and professional achievement, and was able to acquire the skills needed to perform her job. Judge Edmunds also ruled that the "inconvenience" associated with the plaintiff's need to "sleep too much" does not qualify as a substantial limitation under the ADA.

Poole v Valley Industries, 2006 WL 2925308 (ED Mich). Although plaintiff's medical problems contributed to his absenteeism, the employer satisfied its duty to accommodate by not penalizing him for absences or tardiness that were accompanied by a doctor's note. Accordingly, the employer could lawfully terminate the plaintiff for accumulating too many unexcused absences.

C. Sex Harassment

Henderson v Walled Lake Consolidated Schools, 469 F3d 479 (CA 6 2006). Female high school student could not premise her Michigan Civil Rights Act-based *quid pro quo* sexual harassment claim on allegations that her soccer coach threatened to physically harm her if she disclosed the sexual relationship he was having with another student. Even though they related to a sexual relationship involving another student, the actual communications directed to the plaintiff – threats to physically harm her if she told anyone about an affair he was having with another student – were not of a "sexual nature" with the meaning of the Michigan Civil Rights Act. "Notwithstanding evidence of Crawford's sexually harassing conduct toward *other* team members, plaintiff simply has failed to demonstrate that *she* was subjected to conduct or communication of a sexual nature. This failure to adduce any evidence supporting an essential element is fatal to her *quid pro quo* claims under the Michigan Elliott-Larsen Civil Rights Act." Cases addressing *quid pro quo* claims under Title VII are inapposite because Michigan courts require the "sexual nature" element, and Michigan does

not recognize *29 CFR §1604.11(g)*, which "obviates any requirement that the complained-of sexually harassing conduct be directed at the claimant to be actionable by him or her as a form of sex discrimination under Title VII."

The plaintiff's hostile environment claims also failed. No student complained about alleged harassment, the school was not on constructive notice, the district responded promptly to allegations that the coach was having sex with a student, and misconduct involving the coach and another student "can hardly support a reasonable finding that Clark and other school officials should therefore have known that *another* team member, Teresa Henderson, was the victim of a hostile environment."

Powell-Lee v HCR Manor Care, 2005 WL 3502187 (ED Mich). Judge Duggan ruled on summary judgment that the plaintiff could not sustain a hostile environment sexual harassment claim with evidence that, over a seven-month period, a co-worker stared at her, followed her, said he was attached to her, said he liked watching her in a particular position and, once, exposed himself to her. Only the exposure incident could be characterized as "sufficiently severe to constitute sexual harassment," and the employer reasonably responded to that incident by immediately suspending, investigating and then terminating the perpetrator. The incident was not "*quid pro quo"* harassment because the perpetrator had no supervisory authority over the plaintiff, and was not in a position to offer the plaintiff tangible job benefits in exchange for sexual favors.

Judge Duggan also dismissed the plaintiff's retaliation claim because the only evidence of retaliatory motive – a statement after the plaintiff called the police that the plaintiff "would be disciplined, leading up to, but not excluding termination for involving a third party" – came from a person with no apparent role in the alleged decision to terminate the plaintiff's employment.

D. Race/National Origin Discrimination

Rodriguez v. FedEx Freight*,* 487 F.3d 1001 (6th Cir. 2007). Jose Rodriguez filed suit alleging race discrimination and retaliation in violation of Michigan's Elliott-Larsen Civil Rights Act. He claimed that he was denied a promotion because he is Hispanic-American. He introduced evidence that a supervisor said Rodriguez was not selected for a promotion because of Rodriguez's "language" and "how he speaks" and stated that Rodriguez was difficult to understand. The supervisor also allegedly said that he "would not allow Rodriguez to become a supervisor at FedEx because of Rodriguez's Hispanic speech pattern and accent." Rodriguez claimed that he complained to various FedEx managers about this discrimination, but that no corrective action was taken.

The court began its analysis by noting that, although Rodriguez sued for race discrimination, his allegations were more in the nature of national origin discrimination. The court determined that Rodriguez's evidence – the comments

by the supervisor -- was "direct" evidence, rather than circumstantial evidence. The court noted that "accent and national origin are inextricably intertwined and that the Equal Employment Opportunity Commission recognizes linguistic discrimination as national origin discrimination." The court further noted that previous cases had held that discrimination based on manner of speaking can be national origin discrimination. Because he presented direct evidence of discrimination, Rodriguez was not required to prove the four things required when proving a case through circumstantial evidence. The court therefore reversed the trial court's dismissal of the Rodriguez failure to promote claim, and sent it back to the trial court for further proceedings.

As for Rodriguez's retaliation claim, the court held that the trial court had properly dismissed it. Rodriquez contended that FedEx retaliated against him by not promoting him because of his first alleged complaint of discrimination. The court held that the fact that FedEx continued to not promote him was insufficient in itself to raise of an interference of intent to retaliate.

Jordan v City of Cleveland, 464 F3d 584 (CA 6 2006). Evidence that the African-American plaintiff was subjected to racially offensive jokes, graffiti, teasing and name-calling, and was also assigned additional duties, segregated shifts and denied opportunities to earn extra pay, sustained the jury's verdict that he sustained actionable racial and retaliatory harassment.

Wright v Murray Guard, Inc, 455 F3d 702 (CA 6, 2006). Summary judgment was properly granted for the employer on the plaintiff's race and sex discrimination claims. "At most, [plaintiff] has presented evidence as to why the allegations of sexual harassment made against him might not be credible, but he has presented no evidence that [defendant] did not honestly believe they were true or that [defendant] relied on unlawful motives in terminating [plaintiff]."

Amini v Oberlin College, 440 F3d 350 (CA 6, 2006). African-American plaintiff's §1981 action was properly dismissed on summary judgment, despite evidence that 1) the college had never hired a black or Mid-Eastern faculty member; 2) the search committee chair did not recall reviewing an application from anyone who was not a "European White;" and 3) the college hired a "non-white" candidate only after the plaintiff filed an EEOC charge. The allegations could not constitute direct evidence because "the racial makeup of the Oberlin faculty does not lead ineluctably to the conclusion that the college considered race when eliminating the plaintiff from consideration" and "hiring activity occurring around the time of the plaintiff's EEOC filing does not show that the college rejected the plaintiff's application because of his Mid-Eastern race." The plaintiff's circumstantial case failed because, *inter alia*, discriminatory intent cannot be inferred from the fact that the successful candidate had graduated from Oberlin.

Campbell v Avis Rent a Car Sys, Inc, 2006 WL 2865169 (ED Mich). Judge Cohn ruled that the following allegations could sustain the Muslim plaintiff's religious harassment claim: 1) a co-worker told another employee that the plaintiff "used to wear braids in her hair and now she's a Muslim, blah, blah, blah;" 2) co-workers stared at the plaintiff after her religious conversion and increased the frequency of their attempts to interrupt or preempt radio transmissions during which the plaintiff requested bathroom or prayer breaks; 3) a co-worker once said it was "stupid" to "go down five times and pray;" 4) a team leader told a co-worker that the company should not hire Muslims, that the plaintiff was a symbol of 9/11 to customers, and that the plaintiff should stay at home and have a husband provide for her; and 5) co-worker interruptions of the plaintiff's radio transmissions and requests for breaks grew worse while management was investigating the plaintiff's complaint about the team leader's alleged comments. Management could be liable for this alleged harassment because supervisors responded to the plaintiff's complaints about items 1 and 3 only by telling the plaintiff to ignore the offending co-workers, and because management failed to do anything about the alleged harassment during its 45-day investigation into item 4.

Jennings v Autozone, Inc. 2006 WL 198400 (ED Mich 2006). The African-American plaintiff alleged that the person investigating the cash shortage for which he was blamed and discharged said, "you people get hard up when you cant [sic] afford to pay your bills" and he was "sick of you people." Judge Friedman ruled that the comments were not direct evidence of race discrimination. The plaintiff failed to explain how the "you people" statements were racially offensive. "Moreover, there are many possible interpretations of the alleged comments. Seng could have been referring to *people who steal* from Defendant. Or, Seng could have been using investigative techniques designed to elicit the truth and aid in his investigation. Furthermore, and most importantly, the Sixth Circuit has found that 'offhand comments, and isolated incidents do not amount to direct evidence of discrimination under Title VII.'"

Burke-Johnson v Principi, 2006 WL 13146 (ED Mich). The plaintiff's supervisor's opinion that the decisionmaker is racist cannot constitute "direct evidence" of race discrimination. Comments must come from the decision makers themselves to be direct evidence. Co-worker opinions concerning the alleged racial motivations of the decision makers can help show pretext in a circumstantial case, but "Plaintiff is incorrect in asserting that this circumstance alone automatically precludes a grant of summary judgment. If that were true, any time multiple plaintiffs joined in a discrimination suit against an employer, summary judgment would be precluded. Regardless of the paucity of the plaintiffs' evidence, their combined opinion that the employer had engaged in discrimination would be sufficient to block a motion for summary judgment. This is clearly not the case." Judge Zatkoff added that: "The fact that an employer does not like a particular employee does not constitute direct evidence of racial discrimination."

Banks v Dow Chemical Co, 2006 WL 148763 (ED Mich, 2006). The plaintiff – devout Christian who openly practiced her faith, installed a "spiritual" screen saver on her computer, wore a cross necklace and religious t-shirts at work, and periodically reprimanded co-workers for inappropriate conduct such as directing profanity at their husbands – could not sustain a religious discrimination claim simply by showing that she was told 1) to "tone it down" with respect to religious references at work, and 2) that an "extraordinary exhibition of religious beliefs" might offend or create a hostile work environment for some workers. There was no evidence that either the comments or the conduct that prompted them led to disciplinary action; no evidence that the plaintiff continued her allegedly offensive conduct after being spoken to; no evidence that the plaintiff said that her religion compelled her to witness her faith in the workplace; no evidence that the plaintiff asked the employer to accommodate her religious beliefs; and no evidence of pretext.

Elgabi v. Toledo Area Regional Transit Authority, 228 Fed. Appx. 537 (CA 6 2007). Ihab Elgabi, who is of Egyptian national origin, applied for a bus driver position with the Toledo Area Regional Transit Authority (TARTA). On his application, he stated that he hadn't been cited for any moving violations and hadn't been convicted in a court of law. He was hired on June 24, 2002 as a part-time driver. TARTA later got information that Elgabi had been arrested for a domestic relations crime in Oregon. TARTA terminated him based on the falsification of his employment application.

Following Elgabi's termination, a local television station investigated the criminal records of TARTA's drivers. It advised TARTA that 18 of its drivers had committed criminal and traffic offenses. Based on the authority's own investigation, it learned that 18 employees had significant traffic violations. Two of the drivers had committed offenses while working for TARTA and therefore hadn't falsified their applications. The authority said it couldn't discharge the remaining 16 employees who falsified traffic violation information on their applications because of the adverse effect such a drastic measure would have on both bus service and labor-management relations. So it decided to limit the terminations to employees who failed to disclose criminal convictions. TARTA's investigation revealed that four of the 18 drivers hadn't completely disclosed their criminal histories, and they were fired.

Elgabi filed suit against TARTA, alleging that he was discriminated against based on his national origin in violation of Title VII of the Civil Rights Act of 1964. The district court dismissed the case. On appeal, Elgabi was required to show that he was similarly situated to the individuals with whom he compared himself in all relevant aspects of employment. Elgabi claimed he was similarly situated to two groups of drivers.

The first group included the two drivers (Steven Traudt and Paul Waites) who lied about past criminal conducted on their applications. Unlike Elgabi, who was a probationary employee when he was terminated, Traudt and Waites were members of the union. They were terminated and then reinstated to their positions by an arbitrator after filing grievances. Although the court found that Traudt and Waites were similarly situated to Elgabi based on the seriousness of their misconduct, circumstances existed that distinguished TARTA's dissimilar treatment of them.

Elgabi also compared himself to a group of four drivers who failed to disclose moving violations on their applications. The court determined that he "clearly" wasn't similarly situated to those four employees. It reasoned that they only failed to disclose traffic violations, whereas Elgabi failed to disclose traffic violations and a criminal conviction for violent conduct. In the court's view, TARTA reasonably determined his failure to disclose information was more troubling than his comparators' lapses.

E. Pregnancy

Asmo v Keane, Inc, 471 F3d 588 (CA 6, 2006). The fact that the plaintiff was discharged approximately two months after her employer learned she was pregnant was, by itself, sufficient to establish the causal nexus element of her *prima facie* case. Moreover, in granting summary judgment for the employer, the "district court erred in holding that Asmo needed to present evidence beyond a nexus between her pregnancy and the adverse employment decision to satisfy the *Barnes* additional-evidence" requirement in a RIF case. The temporal proximity, when combined with other record evidence, also helped establish pretext.

"The most significant evidence showing pretext" was the fact that the plaintiff's supervisor 1) said nothing when the plaintiff announced she was pregnant with twins and 2) did not attempt to determine whether she might have any special needs. "The supervisor's initial silence is suspect" because news of a person's pregnancy is "usually met with congratulatory words." Moreover, even though the plaintiff's job involved significant travel, plaintiff's supervisor "did not talk with plaintiff about how she planned to deal with the impending arrival of her twins and/or what the company could do to help accommodate her." "Given the combination of plaintiff's job being particularly demanding of time due to travel and her announcement of not just a pregnancy, but a pregnancy of twins, the supervisor's silence could be interpreted as discriminatory animus."

Reeves v Swift Transportation Co, Inc, 446 F3d 637 (CA 6, 2006). Employer's use of a "pregnancy-blind" policy of granting light-duty only to employees who were injured on the job is inadequate, by itself, to sustain the plaintiff's disparate treatment pregnancy discrimination claim. "Swift's light-duty policy … makes this determination on the nonpregnancy-related basis of whether there has been a work-related injury or condition." Accordingly, summary judgment dismissal

was proper because the plaintiff proffered no Rule 56 evidence to show that the employer's application of the policy was a pretext for pregnancy discrimination.

F. Equal Pay Act

Beck-Wilson v Principi, 441 F3d 353 (CA 6, 2006). The district court erroneously dismissed on summary judgment an Equal Pay Act claim brought by a group of female "nurse practitioners" who claimed that, despite similar duties, they were paid less than predominately male "physician assistants." Evidence that the employer advertised for either type of employee when attempting to fill openings, combined with allegations that the jobs were interchangeable and involved similar work, suggested that the positions were "fungible." The court rejected the employer's attempt to build comparative qualifications into the analysis at the *prima facie* stage "[b]ecause the comparison at the *prima facie* stage is of the jobs and not the employees, 'only the skills and qualifications actually needed to perform the jobs are considered.'" This was particularly true where evidence showed that some of the nurse practitioners had more education.

The court then ruled that the defendant failed to establish, as a matter of law, that the pay disparity was justified by the fact that the higher paid physician assistants had greater time in grade. "The VA's contention that position-specific experience (rather than all relevant nursing or medical experience) justifies paying PAs more despite undisputed testimony that their work is fungible with the work of NPs and that PAs do not fulfill any job responsibilities that NPs cannot perform raises a genuine issue of material fact that a jury should decide."

Ambrose v Summit Polymers, Inc, 172 Fed Appx 103 (CA 6, 2006). The plaintiff proffered a *prima facie* EPA claim, but summary judgment was proper because the salaries were established by 1) "market conditions" at the time of hire, and 2) a gender-neutral, post-hire merit system.

G. Sex Stereotyping

Vickers v Fairfield Medical Center, 453 F3d 757 (CA 6, 2006). The district court properly dismissed a hostile environment sexual harassment claim, which the male plaintiff based on allegations that co-workers taunted him because they thought he was gay. "[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII," and the plaintiff cannot pursue a "same sex" harassment claim because he does not allege either that the harassers acted out of sexual desire or that the workplace was filled with hostility toward men.

H. Retaliation

EEOC v SunDance Rehabilitation Corp, 466 F3d 490 (CA 6, 2006). The employer did not violate the anti-retaliation provisions of various anti-discrimination laws by conditioning severance pay on a promise not to invoke

EEOC proceedings. Although the charge-filing bank, and hence the provision permitting the employer to recoup severance if the employee subsequently files a charge, "may be unenforceable, … its inclusion in the Separation Agreement does not make SunDance's offering that Agreement in and of itself *retaliatory.*" The employer's decision not to pay the plaintiff's severance because she refused to sign the agreement could not sustain a *prima facie* case of retaliation. There was no adverse employment action because plaintiff was not otherwise owed severance. Nor was there evidence to show that severance was denied because the plaintiff expressed opposition to a human resource representative, as opposed to her refusal to sign the Agreement.

Hanna v EI du Pont de Nemours and Co**,** 2006 WL 1677183 (ED Mich). Judge Steeh ruled that the plaintiff could sustain a retaliation claim, even though the decisionmaker was unaware of the plaintiff's protected activity, because the target of plaintiff's internal race discrimination complaint participated on the "Investigation Team" that recommended discharge. The employer's claim that plaintiff's proposed comparators were not "similarly situated" was belied by the fact that the employer's own Peer Review Panel referenced those individuals while evaluating the plaintiff's internal appeal.

I. Employer Liability

Starnes v JLQ Automotive Services Co, 442 FSupp2d 416 (ED Mich, 2006). Judge Duggan ruled that the following three allegations presented a material dispute regarding whether the defendant "exercised reasonable care to prevent … sexually harassing behavior." First, defendant maintained no formal, written anti-harassment policy and provided no specifics regarding its alleged oral policy. Case law establishes that large employers cannot reasonably think that informal precautions against hostile environment harassment will be effective in far-flung locations. Second, "Plaintiff's awareness of Defendant's 'open door' policy does not demonstrate that Defendant took any measures to prevent sexual harassment per se." Third, a reasonable jury could conclude that defendant's anti-harassment policy is ineffective, where the employer decided to transfer the plaintiff before investigating her complaint and did not discipline the perpetrator. "Such a response hardly encourages other victims to report sexual harassment in the workplace."

J. Reverse Discrimination/Affirmative Action

Grizell v City of Columbus Division of Police, 461 F3d 711 (CA 6, 2006). Deputy chief's alleged statement to the African-American police chief, which suggested that using the expiring 1999 eligibility list instead of the new 2001 eligibility list provided an opportunity to "diversify" the sergeant ranks because three African-American officers would get promotions if the 1999 list were used, was not direct evidence of "reverse" race discrimination. "Even if we assume that Thatcher compared the eligibility lists and recommended that Jackson use the

1999 list because of the presence of African-American candidates on that list, finding that Jackson based his decision on the racial composition of the 1999 list still requires the inference that Jackson agreed with Thatcher's reasoning and acted on it. Because this inference is required, the fact that Thatcher discussed the three African-American candidates on the 1999 list with Jackson does not constitute direct evidence of discrimination."

Although plaintiffs were not ranked highly enough on the 1999 list to be eligible for promotion, the plaintiffs sustained their *prima facie* requirement to show they were qualified for the position by 1) establishing that they would have been eligible for promotion if the 2001 list were used, and 2) alleging that the police chief purposefully manipulated the promotional process in order to use the expiring 1999 list and ensure the promotion of three African-American officers. Summary judgment dismissal was proper, however, because the plaintiffs failed to show that the employer's explanation – compliance with applicable civil service rules – was pretextual. There was no evidence that the police chief knew the racial composition of the 2001 list; the openings in the sergeant ranks were created before the 1999 list expired; and there was no support for the allegation that past practice was to delay promotions when the active eligibility list was nearing expiration.

Dunn v United States Postal Serv, 2006 WL 2419928 (ED Mich). Judge Lawson ruled that, absent evidence of bad faith, the plaintiff could not sustain a "reverse" discrimination claim by showing that his employer promoted a minority candidate in settlement of a discrimination claim. Judge Lawson therefore affirmed a magistrate's recommendation that reasoned, in part: "To allow a settlement such as this to be considered an independent act of discrimination would 'spark new rounds of litigation, settlement of claims would be discouraged,' and an employer would face suit by one group of employees if it fails to correct discrimination, while facing suit by another group of employees if it does correct the past discrimination."

K. First Amendment

Scarbrough v Morgan County Board of Education, 470 F3d 250 (CA 6 2006). The district court erroneously dismissed a First Amendment retaliation claim filed by a school superintendent who was discharged for announcing his intention to speak at a convention sponsored by a church which has a predominately homosexual congregation. The board contended that the speech would hinder working relationships because neither the board members nor the community condoned homosexuality. "[T]his line of argument reveals that the detrimental impact on the work environment results directly from Scarbrough's intended speech and his religious beliefs. It would contravene the intent of the First Amendment to permit the Board effectively to terminate Scarbrough for his speech and religious beliefs in this way."

Roberts v Ward, 468 F3d 963 (CA 6, 2006). District court correctly dismissed the plaintiffs' claim that their public employer violated the First Amendment when it discharged them for disobeying a dress code that required them to tuck in their uniform shirts. The plaintiffs did not claim that they were untucking their shirts to express their opinion on some political question, and their claim that they kept their shirts untucked to protect the employer's dress code "does not make wearing untucked shirts a matter of public concern, rather than a personal statement about a condition of their employment…"

Miller v Administrative Office of the Courts, 448 F3d 887, *reh'g and reh'g en banc denied* (CA 6, 2006). Jury-pool administrator's email complaint about reduced funding for a new juror-orientation video did not constitute speech on a matter of public concern. "We agree with the district court that '[t]o constitutionalize this speech into a matter of public concern would both cheapen the First Amendment and turn almost every e-mail about government office operations into [a] constitutional case[].'"

Silberstein v City of Dayton, 440 F3d 306, *reh'g and reh'g en banc denied* (CA 6, 2006). The plaintiff – an assistant examiner tasked with duties such as evaluating job retention statistics, authoring a report on the practical implementation of diversity rules, researching possible testing or training methods, proofreading tests and preparing portions of annual reports – was "a policymaking employee" "commenting upon matters of policy" when she criticized the employer's implementation of a diversity plan. The city was therefore entitled to a presumption that its interests outweighed the plaintiff's First Amendment rights, and the district court should have granted summary judgment in its favor.

L. Family and Medical Leave Act

Killian v Yorozu Automotive Tennessee, Inc, 454 F3d 549 (CA 6, 2006). The employer violated the FMLA by terminating the plaintiff for failing to comply with an invalid policy, which required employees wishing to extend their authorized FMLA leave period to provide medical recertification before the original leave period expired. The plaintiff satisfied the FMLA by informing her employer before her leave expired that she needed more FMLA leave time. Even if she had not done so, the employer's recourse would have been to delay her request for continued leave, not to deny it altogether. Moreover, contrary to the employer's policy, applicable regulations require employers to give employees 15 days to satisfy their requests for medical certification. The employer therefore had no legal basis for terminating her just six days after the plaintiff requested the continuation of her FMLA leave.

Cobb v Contract Transport, Inc, 452 F3d 543 (CA 6, 2006). The district court erroneously dismissed the plaintiff's FMLA entitlement claim on summary judgment on the basis that the defendant, which hired the plaintiff after underbidding the plaintiff's long-term employer for a contract with the Post

Office, had not employed the plaintiff for 12 months. The labor law "successor in interest" concept applies to FMLA cases, but unlike in traditional labor law does not require a merger or transfer of assets. "The nine factors listed in [*EEOC v*] *MacMillan* [*Bloedel Containers, Inc*. 503 F2d 1086 (CA 6, 1971)] and subsequently adopted in *29 C.F.R. ' 825.107*, are not in themselves the test for successor liability. Instead, the nine factors are simply factors courts have considered when applying the three prong balancing approach." In the case at bar, the federal policy weighed in favor of holding that the employer was a successor in interest for the purpose of providing the plaintiff with FMLA leave because: "Plaintiff has carried US mail on the exact same route, with the exact same relay stops, for the past three years. In reality, it is as if one works for the [postal service] and not for one particular trucking company. Only the management, not the job has changed." Moreover, "declining to apply successor liability to companies competing for government contracts circumvents implementation of the FMLA. The USPS accepts new bids on contracts every two years. If a new company is not required to grant truck drivers FMLA leave, regardless of how long the driver has been on the route, the new companies will have lower FMLA costs and correspondingly be at an advantage in the bidding process.

Edgar v JAC Products, Inc, 443 F3d 501 (CA 6, 2006). Although it was not clear at the time of termination that the plaintiff would not have been able to return to work in 12 weeks, her FMLA interference claim was properly dismissed on summary judgment given her actual inability to return to work within 12 weeks.

There are two types of actions under the FMLA. One is the "entitlement theory," where "the issue is simply whether the employer provided its employee with the entitlement set forth in the FMLA." The employer's intent is not relevant in such a case. The other is a retaliation claim, where the plaintiff claims that her employer discriminated or retaliated against her for exercising FMLA right. The relationship between the two theories is: "(1) in entitlement cases, *Cehrs* [*v Northeast Ohio Alzheimer's Research Center*, 155 F3d 775 (CA 6, 1998)], and the DOL regulation [*29 CFR §825.214(b)*] provide a defense to liability, regardless of whether the medical evidence revealing the employee's inability to return to work is available before or after the termination decision; (2) in retaliation cases where the medical information known to the employer prior to the termination decision shows that the employee could not return within 12 weeks, *Cehrs* and the DOL regulation can be invoked by employers as a legitimate, nondiscriminatory reason for discharging the employee, i.e., to rebut the employee's *prima facie* case of discrimination; and (3) in retaliation cases where the employer learns of the employee's inability to return to work only after the termination decision, *Cehrs* and the DOL regulation will not provide a defense to liability, but may limit the relief to which the employee is entitled in accordance with the after-acquired-evidence rule articulated in *McKennon v Nashville Banner Publishing Co*, 513 US 352 (1995)." Because plaintiff brought

her claim under the "entitlement theory," the first rule applies and her claim was properly dismissed.

The plaintiff also argued that the discharge exacerbated her condition, which prevented her from returning within the 12-week period. The court rejected this argument, because "the exacerbation theory is not a valid theory of liability under the FMLA and does not alter the analytical framework of deciding entitlement and retaliation claims thereunder." The court reasoned that 20 CFR ' 825.214(b) was not concerned about how a serious health condition occurred, but whether the conditions prevented the employee from performing an essential function of her job at the end of the leave period.

Bordeau v Saginaw Control & Engineering, Inc, 446 F Supp 2d 766 (ED Mich, 2006). Former purchasing manager could not recover the lost earning capacity damages sustained while working the non-comparable manual labor position into which his employer placed him upon return from approved FMLA leave. The FMLA authorizes recovery for "wages, salary [and] employment benefits" resulting "directly" from a violation. It does not authorize "consequential damages." A back injury sustained while working non-comparable work that carried the same pay and benefits "does not amount to wage loss or actual monetary loss 'by reason of' or 'as a direct result of' the alleged FMLA violation." It is possible, however, for the plaintiff to develop a record to sustain "front pay" damages, based on income plaintiff would have earned from the employer absent the allegedly illegal assignment.

Gabanska v E & E Manufacturing Co, 2006 WL 1522030 (ED Mich). Judge Cohn ruled that 21-day temporal proximity created a *prima facie* FMLA retaliation case, but was insufficient to prove pretext. Summary judgment granted because plaintiff failed to show that anyone harbored animus against her for taking leave. The plaintiff's attempt to "poke holes" in the motivation for and conclusions reached by the investigation that resulted in her discharge (which found that plaintiff violated company policy by working while on leave and falsely claiming she could not work) do not prove the employer did not relay on the investigation.

Martinelli v CVS/Pharmacy, 2006 WL 1452093 (ED Mich). Judge Duggan ruled that the plaintiff could not sustain her FMLA interference or retaliation claims simply by showing that she was terminated shortly after completing her authorized FMLA leave. She was permitted to return to her position after taking leave, and was therefore given her substantive RMLA rights. Because "an employee who requests leave or is on leave has no greater rights than an employee who remains at work," she was not immune from being discharged for the major policy violation she committed the day before taking leave.

M. Arbitration

Family Resources, Inc. v. Service Employees Int'l Union, Local 517M, 475 F.3d 746 (CA 6 2007). Local 517 of the Service Employees International Union represents some of Michigan Family Resources' (MFR) employees. A dispute arose between the union and MFR over the interpretation of the CBA. The details of the dispute aren't important. What's important is the Sixth Circuit's decision about the finality of an arbitrator's resolution of such disputes.

The arbitrator issued a 10-page opinion resolving the dispute in favor of the union. MFR then filed a complaint in federal district court invoking Section 301 of the Labor Management Relations Act and seeking to have the arbitrator's decision overturned. The court granted MFR's request, holding that "the Arbitrator's award does not draws its essence from the [CBA] because the Arbitrator considered evidence to aid in construing the [CBA] when, in fact, no construction was necessary." The court also concluded that the arbitrator "went beyond the express terms of the [CBA] by imposing additional requirements upon the parties and considering past practices, which are specifically disclaimed by the [CBA's] waiver provision."

A Sixth Circuit panel originally affirmed using a four-part test previously adopted by the Sixth Circuit for determining whether to enforce an arbitrator's decision. However, on en banc review the Court of Appeals, citing recent U.S. Supreme Court decisions, overruled the test as no longer appropriate. Under the Sixth Circuit's new standard, a reviewing court now will ask only whether the arbitrator (1) acted outside his authority by resolving a dispute not committed to arbitration, (2) committed fraud, had a conflict of interest, or otherwise acted dishonestly in issuing the award, or (3) was "arguably construing or applying the contract" in resolving any legal or factual disputes in the case. As long as the arbitrator doesn't commit any of those transgressions, the courts won't second-guess him "even though the arbitrator made serious, improvident or silly errors in resolving the merits of the dispute." Under the new standard, reviewing court's consideration of the merits of a dispute will be "the rare exception, not the rule." In most cases, the arbitrator decision will be upheld as long as he "appeared to be engaged in interpretation and if there is doubt [the courts] will presume that the arbitrator was doing just that."

N. Statutory/Jurisdictional Preconditions

Young v Oakland County, 18 AD Cases 1049 (ED Mich, 2006). Where the plaintiff did not file an EEOC charge within the 300-day limitations period, "[n]either Defendants' adherence to [its original decision to deny the plaintiff's accommodation request] nor the ongoing effects of it [including the plaintiff's eventual discharge] were sufficient to preserve Plaintiff's claim" through the "continuing violations" doctrine. "Despite his many requests for relief – and Defendants' many denials – well into the statutory period, Plaintiff's entire

argument centers around one decision that was made more than three hundred days before he filed his EEOC change."

Williamson v Lear Corp, 2005 WL 3555920 (ED Mich), *aff'd* 183 Fed Appx 497 (CA 6 2006). The plaintiff could not "cancel" his first EEOC charge, which had alleged age and disability discrimination, by filing a virtually identical charge at a later date. The plaintiff was therefore bound to file his age and disability discrimination suit within 90 days after receiving the first right-to-sue letter. Judge Duggan reasoned that "the statute's ninety day filing requirement would be rendered meaningless if a plaintiff could – as Williamson asserts – avoid the deadline simply by re-filing his or her claims in a later charge.

IV. MICHIGAN COURT OF APPEALS

A. Same-sex Domestic Partner Benefits

National Pride at Work, Inc. v. Governor of Michigan, 274 Mich App 147 (2007). On November 2, 2004, Michigan voters approved a proposal, which amended the state constitution by adding article 1, section 25 (marriage amendment or amendment). That section provides: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." The amendment took effect on December 18, 2004. Subsequently, National Pride at Work, Inc., and employees of seven different public employers filed a lawsuit against the Governor, the Attorney General and the City of Kalamazoo, asking the court to hold that the constitutional amendment does not prohibit public employers from providing health benefits to employees' same-sex domestic partners. The trial court granted Plaintiffs summary judgment holding that the amendment does not prohibit public employers from entering into contractual agreements with their employees to provide domestic partner benefits or voluntarily providing domestic partner benefits as a matter of policy." The Attorney General appealed to the Court of Appeals.

The Court of Appeals held that by officially recognizing a same-sex union through the vehicle of a domestic partnership agreement, public employers give same-sex domestic couples similar status to that of married couples. By recognizing a domestic partnership agreement for the purpose of providing benefits, the state plan and the plans of the University of Michigan, Michigan State University and the City of Kalamazoo, run directly afoul of the plain language of the amendment. The court also rejected arguments that that amendment violates the equal protection clause of the Michigan Constitution.

Importantly, this case did not address benefits that private employers provide, and no one has even suggested stretching the marriage amendment to reach private

employers. So, if you are a private employer this case should not affect your policies or benefit plans. In addition, the Michigan Supreme Court has granted the plaintiffs leave to appeal. Thus, this is not the final decision on this matter.

B. Disability

Buck v Thomas M Cooley Law School, 272 Mich App 93 (2006). The lower court erred in refusing to grant summary disposition to the defendant law school on a student's claim that the school violated the PWDCRA by 1) not recognizing or diagnosing her disability, and 2) failing to fully grant the plaintiff's requested accommodation. "[T]here is nothing in the PWDCRA that requires an educational institution to provide an opinion on why a student is having academic difficulties, or to diagnose any conditions a student may have." Moreover, "[b]ecause the PWDCRA does not impose a duty on defendant to properly diagnose an alleged learning disability …" the district court erred in concluding that the law school should have referred the plaintiff to a psychologist after she complained that she was "slow" and nervous. "Before plaintiff provided documentation of a disability and requested an accommodation, defendant had no statutory duty to act on behalf of plaintiff …"

The law school did not unreasonably refuse to grant one of the two accommodations the plaintiff eventually requested. The law school granted the thrust of the requested accommodation by giving the plaintiff double time to take exams. "[I]t was not unreasonable for defendant to refuse to waive its settled policy for dropping courses where the recommendation regarding plaintiff's course load was [based on a suggestion that the plaintiff suffered from "high levels of 'distress, anxiety, and pressure'" and] unrelated to what was diagnosed as her primary deficiency."

C. Sex Harassment

Elezovic v Bennett, 2007 Mich App Lexis 115 (2007). In ***Elezovic v Ford Motor Co***, 472 Mich 408 (2005), the Court held that an agent who sexually harasses an employee in the workplace can be held individually liable under the Elliot-Larsen Civil Rights Act. On remand, the lower court granted summary disposition to the individual defendant finding that he was not an agent of Ford because his employer had not authorized him to sexually harass the plaintiff. The Court of Appeals reversed holding, "In summary, under the CRA, an 'employer' includes an agent of the employing entity. 'Agents' are persons to whom the employing agency delegates supervisory power and authority over subordinates. An agent can be held directly and individually liable if he engaged in discriminatory behavior in violation of the CRA while acting in his capacity as the victim's employer."

D. Whistleblower Act

Lewandowski v Nuclear Management Co, LLC, 272 Mich App 120 (2006). The plaintiff's whistleblower claim was properly dismissed on summary disposition because the Nuclear Regulatory Commission, the entity to which the plaintiff allegedly reported regulatory violations, was not a "public body" under the Michigan statute. The WPA prohibits retaliation against employees who file reports with state or local agencies. "Given the clearly state and local context to construe references to "commission," "agency" and "law enforcement agency" to include federal agencies or commissions. However, under the Act a public body is also defined as a "law enforcement agency," which the Court held includes federal law enforcement agencies.

The trial court did not err in denying the plaintiff's motion to amend to include a public policy discharge claim. Such a claim would be preempted by the federal Atomic Energy Act, which prohibits retaliation against employees who report alleged misconduct to the Nuclear Regulatory Commission.

Ernsting v Ave Maria College, 274 Mich App 506 (2007). The plaintiff's whistleblower claim was *improperly* dismissed because employee engaged in protected activity by reporting violations to the Department of Education. Importantly, although the employee did not file a report with a state or local agency, the Michigan Court of Appeals defined law enforcement agency expansively to include the United States Department of Education. Thus, although the plaintiff had not reported a suspected violation to a traditional law enforcement agency, for example one with arrest powers, the employee's report to the Department of Education was considered protected under the Act.

V. NATIONAL LABOR RELATIONS BOARD

Oakwood Healthcare, Inc, 348 NLRB No. 37 (2006). In this case, the union sought to have 12 Oakwood Healthcare charge nurses included in the bargaining unit of nurses. RNs at the hospital serve as charge nurses. Charge nurses are responsible for overseeing their patient care units, and they assign other RNs, licensed practical nurses (LPNs), nursing assistants, technicians, and paramedics to patients on their shifts. Charge nurses also monitor the patients in the unit, meet with doctors and the patients' family members, and follow up on unusual incidents. Charge nurses may also take on their own patient load, but those who do assume patient loads will sometimes, but not always, take less than a full complement of patients.

The National Labor Relations Act, Section 2(11) defines "supervisor" as any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the

exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Under this definition, individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" and "responsibly to direct") listed in Section 2(11); (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and (3) their authority is held "in the interest of the employer."

The NLRB held that "assign" involves designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment. In the health care setting, the term "assign" encompasses the charge nurses' responsibility to assign nurses and aides to particular patients.

The NLRB held that "responsibility to direct" means that the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

Addressing independent judgment, the NLRB held that professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11). Thus, for example, a registered nurse who makes the "professional judgment" that a catheter needs to be changed may be performing a supervisory function when he/she responsibly directs a nursing assistant in the performance of that work. Whether the registered nurse is a 2(11) supervisor will depend on whether his or her responsible direction is performed with the degree of discretion required to reflect independent judgment. However, judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.

Applying these principles, the NLRB held that the Oakwood charge nurses were supervisors as defined by the NLRA and could not be included in the collective bargaining unit of nurses.