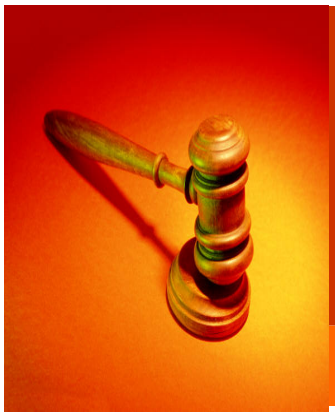


Labor and Employment Law Reporter

Newsletter for the clients of The Williams Firm, P.C.

November, 2006

CIVIL RIGHTS INITIATIVE PASSED

On November 7, 2006, Michigan voters passed the Michigan Civil Rights Initiative Proposal 2006-02. As it relates to employment in the public sector, the Michigan Constitution will be amended effective forty-five (45) days after the election date to prohibit public employers from giving ***preferential treatment*** to applicants based on minority status or gender. It will not, however, prevent a public employer from having an affirmative action program which encourages equal opportunity and/or attempts to increase the diversity of applicants without providing preferences. Likewise, if a public employer receives federal funds, any affirmative action that the employer is required to take to comply with the acceptance of those funds will not be affected by this constitutional amendment.

This Volume Includes …

MORBID OBESITY NOT COVERED UNDER THE ADA

In *Equal Employment Opportunity Commission ("EEOC")* v *Watkins Motor Lines, Inc.*, _____ F.3d. _____ (CA6, 2006), the Sixth Circuit Court of Appeals upheld the dismissal of a morbidly obese employee's discrimination claim. An employee of Watkins Motor Lines worked as a driver/dock worker which required him to climb, kneel, bend, stoop, balance, reach, and lift. When hired, the employee weighed approximately 345 pounds. For the next five (5) years, the employee's weight ranged between 340 and 450 pounds.

The employee ultimately took a leave of absence due to a knee injury, which caused him to have limited range of motion. Also, his obesity caused him to be short of breath after only a few steps. A doctor concluded that even though the employee met the Department of Transportation standards for truck drivers he could not safely perform all the requirements of his job, insofar as 65% of his time was spent performing dock work. The employee was placed on a "safety hold" since he did not have the required return to work note from the physician. Ultimately, the employee was discharged as he was unable to return to work within the 180 days allowed by the safety hold.

The employee believed he was discharged because of his weight and went to the EEOC. The EEOC filed an action on his behalf alleging the employer violated the Americans with Disabilities Act ("ADA"). On motion, the District Court granted the employer's motion to dismiss, finding that *non-physiologically* caused obesity is not an "impairment" under the ADA. The employee appealed.

Under the ADA, employers are prohibited from discriminating against any qualified individual with a disability. A disability is defined as a physical or mental impairment that "substantially limits one or more major life activities." Individuals who do not actually have a substantially limiting impairment are also covered by the ADA, if the employer "regards" them as being disabled.

The Sixth Circuit Court of Appeals agreed with the trial court that non-physiological morbid obesity is not an impairment under the ADA. Following the United States Supreme Court decision of *Sutton* v *United Airlines*, 527 U.S. 471 (1999), if a physical characteristic is not an ADA impairment, an employer is permitted to prefer one physical characteristic over another. The EEOC attempted to convince the Court, unsuccessfully, that morbid obesity is in and of itself a physiological condition, regardless of the cause. The court disagreed. Since the employee failed to show that he suffered from an ADA-covered impairment, the Court did not even need to address whether the employer perceived the employee as being substantially limited in his major life activities.

Although non-physiological morbid obesity is not covered by the ADA, the same is not true under the Michigan Persons with Disabilities Civil Rights Act. The Michigan civil rights statute merely states that one cannot be discriminated against based on weight. It does not contain the same caveat as the ADA - that the disability must be of a physiological origin. Consequently, while the federal legislation is somewhat less stringent, we remind Michigan clients not to make employment decisions as to employees (or applicants for employment) based on their weight.

PERSONS WITH DISABILITIES CIVIL RIGHTS ACT CLAIM BASED ON "MISDIAGNOSIS" THEORY FAILS

Plaintiff Nahzy Buck ("Plaintiff") was born in Iran, but moved to Michigan whereupon she was admitted to Defendant Thomas M. Cooley Law School. From the beginning, Plaintiff worried that she was "slow" and would be unable to succeed in law school. After receiving poor grades in her first term, she contacted the law school's Academic Resource Center ("ARC"), which concluded that her difficulties stemmed from "issues with her English" rather than a learning disability. ARC suggested that she seek a second opinion. Plaintiff consulted a doctor recommended by ARC, who found that Plaintiff suffered from two learning disabilities. The doctor recommended that Plaintiff (1) be given more time to take examinations, (2) seek counseling to deal with her anxiety, and (3) consider taking a lighter course load to reduce her anxiety.

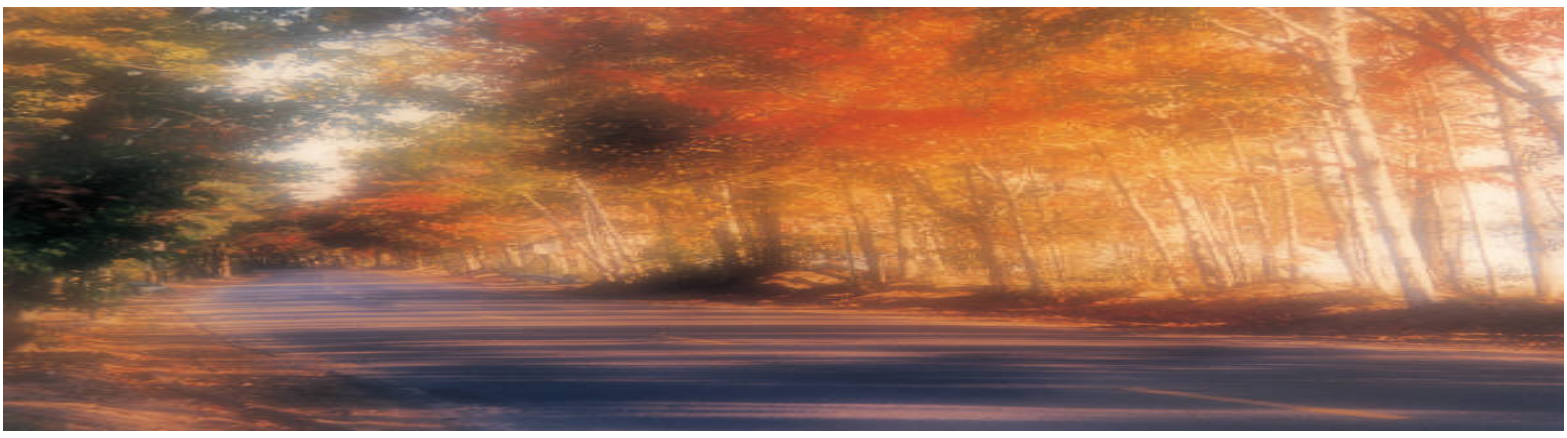
Plaintiff took the doctor's recommendations to Defendant and requested that she be given additional time to take tests and to drop one of her classes. Defendant honored Plaintiff's request for additional test taking time but denied her request to drop a class, because the normal time to withdraw from classes during a term had passed.

Despite the accommodation, Plaintiff performed poorly for a third consecutive term and was expelled from the law school. She brought suit under Michigan Persons with Disabilities Civil Rights Act ("PWDCRA"), MCL 37.1101 *et seq*, alleging that Defendant violated her rights by (1) misdiagnosing her learning disability as "issues with her English" and (2) failing to grant her request to drop a class. *Buck* v *Cooley Law Sch*, 2006 Mich App LEXIS 1970 (unpublished). Defendant moved for dismissal of the claim and appealed the trial court's denial of the motion.

The Michigan Court of Appeals found that "the PWDCRA imposes no duty on an educational institution to diagnose a plaintiff's potential disabilities." Until Plaintiff requested an accommodation, Defendant had ***no statutory duty*** to do anything on her behalf. Because there was no duty to act, Defendant's alleged failure to properly diagnose Plaintiff's learning disability did not even implicate, let alone violate, the PWDCRA.

The Court also found that Defendant did not violate the PWDCRA by refusing to grant Plaintiff's request to drop a class. The PWDCRA only requires covered entities to make reasonable accommodations. A reasonable denial of a request does not violate the PWDCRA. Defendant properly accommodated her disability by giving her additional time to take tests, which related "to the crux of Plaintiff's learning disability."

Although *Buck* arises in the educational setting, its reasoning should apply generally to employment situations. The *Buck* court's reasoning means that employers are under no duty to "guess" whether an employee suffers from a disability for which accommodation is needed and that the employer's reasonable conclusion that an employee suffers no disability does not violate the PWDCRA, unless the employee has engaged the Act's protections by requesting an accommodation.



MICHIGAN SUPREME COURT LIMITS EMPLOYER LIABILITY FOR EMPLOYEE'S ACTS OUTSIDE THE SCOPE OF EMPLOYMENT

The Michigan Supreme Court clarified the bounds of the doctrine of *respondeat superior* (sometimes referred to as vicarious liability) involving employers. In *Zsigo* v *Hurley Medical Center*, 475 Mich 215 (2006), the Court refused to broaden the *respondeat superior* doctrine to include liability for acts of employees which are outside the scope of their authority.

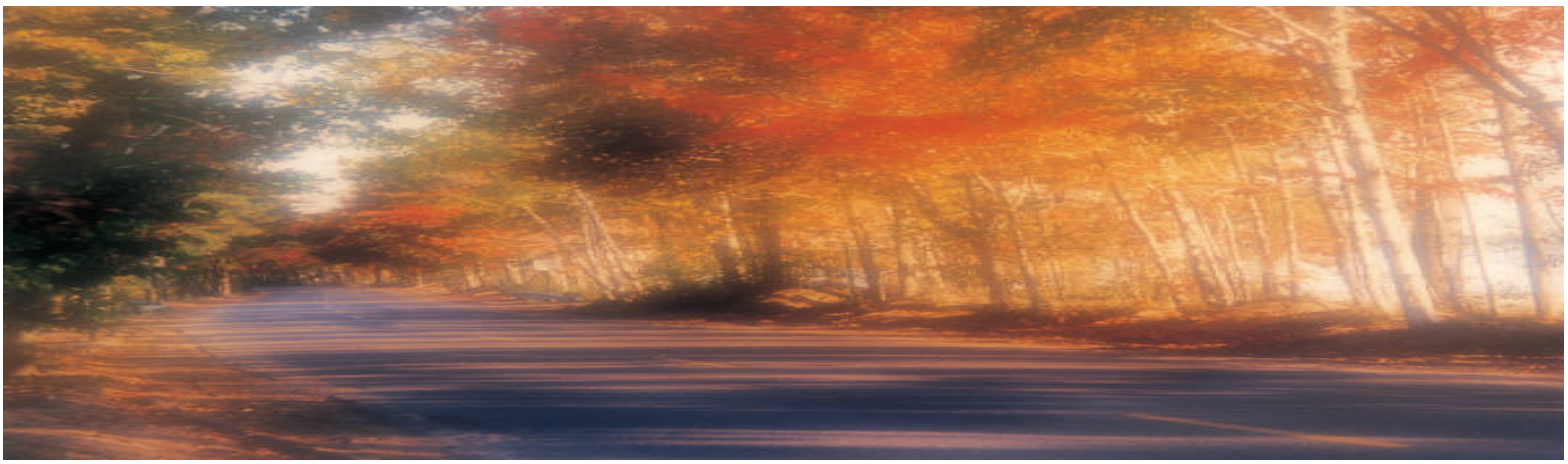
Marian Zsigo was a patient of Hurley Medical Center ("HMC") suffering from a manic depressive episode. While in restraints, she enticed a male nurse's aide to engage in sexual activity, purportedly so he would release her. She remained at HMC and several days later complained that she had been sexually assaulted. HMC consistently argued that that employee's misconduct, if it actually occurred, was outside the scope of his authority and, as such, HMC could not be liable under *respondeat superior*.

Generally, under the doctrine of *respondeat superior*, an employer is not liable for an employee's intentional or reckless acts that are beyond the scope of his/her authority or beyond the scope of the employer's business. One exception to that rule provides that an employer will be held liable if the employee was aided in accomplishing his acts by the existence of the employment relationship. The trial court refused to dismiss the lawsuit on HMC's motion, believing there was an issue of fact whether the employee was aided in accomplishing his acts by the existence of his employment relationship. The case went to trial and a jury awarded Zsigo 1.25 million dollars. The Court of Appeals reversed the verdict but did not expressly decide whether the "aided and accomplishment" exception to *respondeat superior* is valid in Michigan. Zsigo then appealed to the Michigan Supreme Court.

The Supreme Court recognized that some courts have, in passing, referred to the "aided by agency relationship" as an exception to *respondent superior*. It, however, has never affirmatively adopted that exception. It then unequivocally went on to say that it was expressly declining to adopt it now. The Michigan Supreme Court agreed with the Court of Appeals that employers cannot be held liable for acts of employees outside the scope of their authority, merely because they may have in some fashion been aided by the fact of the employment relationship. The effects of this decision will be beneficial for employers faced with such arguments in the future.

CAPPING INSURANCE DOES NOT VIOLATE THE TEACHERS' TENURE ACT

The Michigan Court of Appeals, in a published opinion, ruled that a school district's decision to cap its payments of health insurance premiums for teachers did not result in teachers being "demoted" under the Teachers Tenure Act. *Ranata* v *Eaton Rapids Public Schools*, Mich App 258900 (06/06/06).



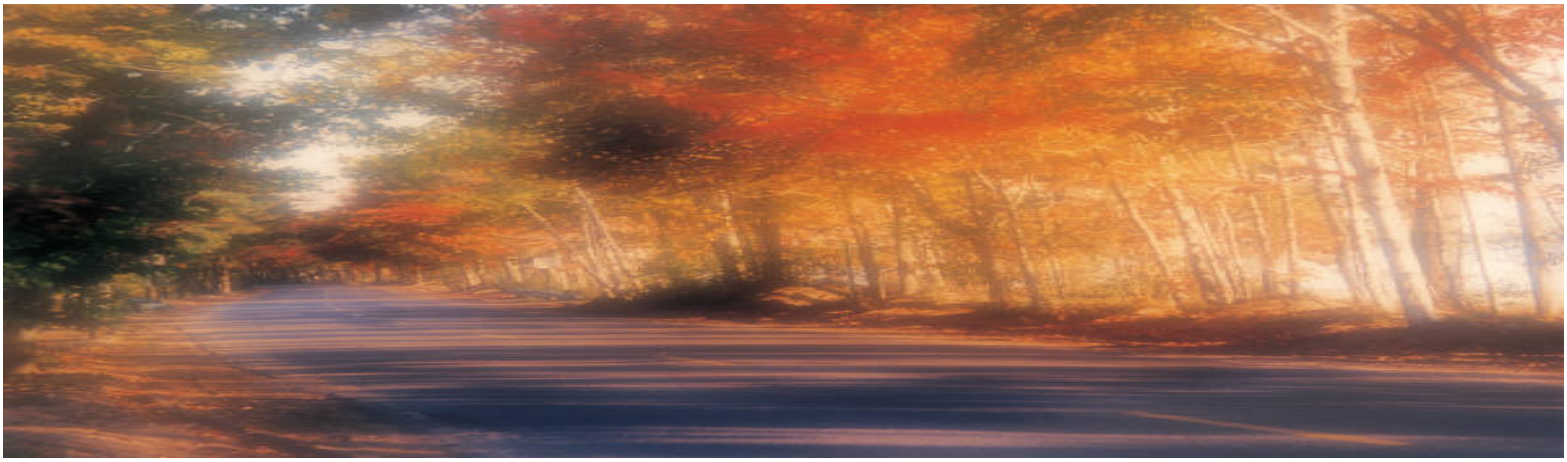
Following a breakdown in collective bargaining between the Eaton Rapids Board of Education and its teachers on the issue of payment of health insurance premiums, the parties reached an impasse. As a result, the Board implemented its last best bargaining proposal to cap its obligations to pay health care premiums at current levels. Insurance premiums subsequently increased to exceed the capped amount, so the teachers were expected to bear the excess premium costs. Under previous collective bargaining agreements, the School District paid the teachers' insurance premiums in full.

Under the Teachers' Tenure Act ("TTA"), tenure rights are implicated if a teacher is demoted. "Demote" means to reduce compensation for a particular school year by more than an amount equivalent to three (3) days compensation or to transfer to a position carrying a lower salary. The teachers argued that their tenure rights were violated because the School District refused to pay the full increase of health insurance premiums in future years. The Court of Appeals held that the refusal to make payments in excess of the capped amount was not a "reduction" in the teachers compensation, because the amounts actually paid by the District did not decrease. Although the teachers were accustomed to having their insurance premiums paid in full (regardless of the amount), the failure to satisfy an employee's reasonable expectation based on prior conduct does not amount to a demotion. As long as the school board continues to pay insurance premiums in an amount equal to or greater than the previous year, a demotion has not taken place and tenure rights are not violated.

Although this case has particular implications for teachers and boards of education, the decision may actually have broader significance. It suggests that, perhaps in other areas of collective bargaining, an employer may permissibly reach impasse on the issue of insurance premiums and unilaterally implement a last best offer to cap premium increases over then existing levels. In other words, bargaining to impasse and refusing to pay other insurance premiums in excess of those that currently exist may not violate other Michigan laws governing collective bargaining.

LIMITS ON VETERANS PREFERENCE ACT CLARIFIED

In *Carter* v *City Attorney for Ann Arbor*, Mich App 258282 (06/27/06) the Michigan Court of Appeals addressed the parameters of the Veterans Preference Act ("VPA"). James Carter applied for one (1) of two (2) assistant city attorney positions following his service in the military. Although Carter had credentials that met the minimum requirements of the posted job description, the city attorney hired two other applicants for the positions. Carter filed a complaint asking the court to compel the city attorney to employ him as an assistant city attorney. In essence, Carter claimed that because he was a veteran and qualified for the position, the VPA entitled him to a preference in the selection process for assistant city attorney.



Both the trial court and the Michigan Court of Appeals disagreed. The VPA does not compel the hiring of a veteran simply because he/she meets the bare minimum job requirements to be eligible for consideration. Even under the VPA, employers may exercise discretion when determining the qualifications of applicants and "does not preclude a public employer from hiring a non-veteran applicant if the employer reasonably believes that the non-veteran applicant is substantially better qualified than the veteran." In other words, the degree of preference given to veterans is relative, not absolute, and does not arise until that veteran establishes that he/she possesses comparable qualifications in relation to the other applicants.

In *Carter*, the city attorney determined that the office required one attorney with labor experience and one with experience in zoning and planning. Although Carter met the minimum requirements of the assistant city attorney position, he did not have experience in either of those areas. The applicants that were hired demonstrated extensive experience in the respective areas. Since Carter did not have qualifications comparable to those of the successful applicants, he was not entitled to veterans preference.

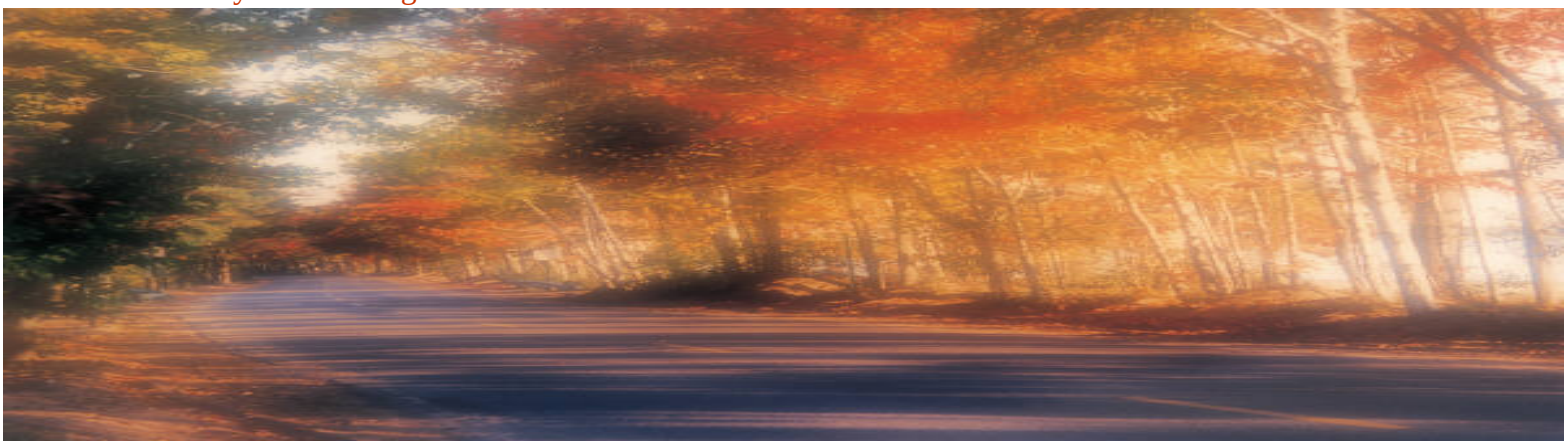
The Court explained that the purpose of the VPA is not to place veterans in better positions than other applicants simply because they are veterans. Instead, it establishes a preference in the selection process among candidates with comparable qualification.

In light of the current deployment of the United States' Armed Forces, we expect employers will have an increasingly greater need to be familiar with the VPA. This statutory scheme is a minefield to those unfamiliar with it. We strongly recommend that, should VPA issues arise, legal counsel be contacted.

SEVERANCE AGREEMENTS DO NOT CONSTITUTE RETALIATION UNDER CIVIL RIGHTS LAWS

On October 24, 2006, the United States Court of Appeals for the Sixth Circuit (which covers Michigan) held that separation agreements offered to employees do not constitute *per se* retaliation under various anti-retaliation statutes. *EEOC* v *SunDance Rehabilitation Corp.*, _____F 3d _____ (10/24/06).

Elizabeth Salsbury, a speech and language pathologist employed by SunDance, was notified by letter on February 26, 1999, that the company was compelled to reduce its workforce and that Ms. Salsbury's position would be terminated March 1, 1999. Affected employees were informed that they would receive 80 hours worth of severance pay after they signed a separation agreement containing a release and covenant not to sue. Salsbury believed that she had been denied a promotion and laid off due to gender and wanted to file a charge of sex discrimination with the Equal Employment Opportunity Commission ("EEOC"), so she attempted to strike the portion of the separation agreement which would have required her to release any such claims. That modification was not allowed by SunDance. Accordingly, she refused to sign the agreement, did not receive severance pay, and ultimately filed a charge with the EEOC.



On cross motions for summary judgment, the District Court concluded that the separation agreement which conditioned severance pay on an agreement not to file charges with the EEOC constituted facial retaliation in violation of the various statutes. Accordingly, the court entered an order permanently enjoining SunDance and its officers and successors from such activity.

The Court of Appeals disagreed and reversed the decision of the District Court. In short, waivers of potential claims under ADEA, EPA, and Title VII had been upheld where the waivers had been executed voluntarily and intelligently. The offering of the separation agreement was not offered as a "preemptive strike," as argued by the EEOC; rather, it was an offer of something above and beyond the ordinary conditions of employment. The employees at SunDance were not deprived of anything by the offering of the separation agreement. Those who chose to accept it were better off by receiving a benefit and those who rejected it obviously did not give up any rights. Accordingly, simply offering a separation agreement is not *per se* discriminatory or retaliatory. As such, the EEOC's argument was rejected.

This decision certainly helps employers, but is relatively narrow. It simply ruled that the offer of a separation agreement does not amount to retaliation. In this case, however, the employer did not try to enforce the separation agreement and, thus, the question of its enforceability was not addressed. As a binding decision over Michigan federal courts, this certainly should make employers feel even more comfortable knowing that merely offering a separation agreement does not automatically violate any anti-retaliation provisions in various civil rights statutes.

LABOR AND EMPLOYMENT LAW REPORTER

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