

Case Digests

Employment Law—Negligence Liability for Sexual Assault

In *Brown v Brown*, 478 Mich 545 (2007), the plaintiff was a security guard who had been assigned by her employer to provide security for a steel plant on the night shift. A foreman at the steel company routinely made crude, sexually explicit comments to the plaintiff when they interacted at the defendant's facility. The plaintiff complained about these comments to one of the steel company's plant managers on at least three occasions. The foreman later raped the plaintiff while she was making her nightly rounds. The foreman had no prior criminal record, no history of violent behavior, and no history indicating that he harbored a propensity to commit rape. The trial court granted the defendant's summary disposition motion, ruling that there was no genuine issue of material fact concerning whether the steel company was liable for the unforeseen criminal acts of its foreman. The plaintiff appealed to the court of appeals, challenging the dismissal of her negligence claim. In deciding what it labeled a case of first impression, the court of appeals reversed the trial court's order and held that the plaintiff had presented a genuine issue of material fact that the defendant knew or should have known of the foreman's criminal sexual propensities and, therefore, was liable under a negligence theory.

The supreme court reversed, holding that where an employee has no prior criminal record or history of violent behavior indicating a propensity to rape, an employer is not liable solely on the basis of the employee's lewd comments for a rape perpetrated by that employee if those comments failed to convey an unmistakable, particularized threat of rape. An employer can assume that its employees will obey criminal laws, and it cannot reasonably anticipate that an employee's lewd, tasteless comments are an inevitable prelude to rape if those comments did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a specific victim. Comments of a sexual nature do not inexorably lead to criminal sexual conduct any more than angry comments inexorably result in a violent criminal assault.

Single Business Tax Act—Assessment After Failure to File Tax Returns

In *Tyson Foods, Inc v Department of Treasury*, No 272929, 2007 Mich App LEXIS 2230 (Mich Ct App September 20, 2007), the plaintiff, a Delaware corporation, which has its main office in Arkansas and conducts business in Michigan, did not submit single business tax returns for the tax years 1989 through 1996. In 1998, the department issued an intent to assess and first final assessment for single business taxes for these years, plus penalties and interest. The plaintiff paid the entire amount of taxes, penalties, and

interest assessed in the first final assessment for the tax years 1989 through 1996, but it never filed the requested returns for those years. However, the plaintiff did file single business tax returns for the 1997 and 1998 tax years. The department then began the process of auditing the plaintiff, which revealed that the plaintiff's single business tax liability for 1989 through September 1996 greatly exceeded the amount assessed in the first final assessment and paid by the plaintiff. Based on information gleaned from the audit, the defendant issued the plaintiff a second intent to assess on May 17, 2001, for the tax deficiency for the years at issue, plus penalties and interest, in an amount totaling more than \$6,000,000. On June 20, 2005, the department issued the plaintiff a second final assessment for the tax years 1989 through 1996, which assessed a \$6,316,393.77 tax deficiency against the plaintiff. The plaintiff paid the entire amount under protest but later filed a complaint in the court of claims, seeking a refund of the taxes, interest, and penalties paid under protest, plus interest.

The court of appeals ruled that various provisions of the Revenue Act provide statutory authority for the department to issue a second single business tax assessment to a taxpayer because the taxpayer failed to file tax returns for the tax years at issue. Moreover, the plaintiff's payment of the amounts assessed by the department in the first assessments did not satisfy the plaintiff's single business tax liability for the years in question.

Contracts—Personal Guaranty; Michigan Builder's Trust Fund Act

In *Livonia Bldg Materials Co v Harrison Constr Co*, Nos 269045, 271021 (Mich Ct App released as unpublished July 26, 2007; approved for publication August 30, 2007), the plaintiff supplied building materials to contractors for use in the construction of commercial and retail buildings. The Harrison group, which included three entities, was a longtime customer of the plaintiff. The Harrison group went out of business in September 2003 when it terminated operations and surrendered its assets to a secured creditor. When it ceased operations, the Harrison group had unpaid bills to many creditors, including the plaintiff. The plaintiff filed a complaint against Harrison Construction and the Harrison group's president and treasurer/ chief financial officer in November 2003. The complaint alleged violations of the Michigan Builder's Trust Fund Act (MBTFA), MCL 570.151, et seq., as well as guaranty claims against the president and treasurer, alleging that they had individually guaranteed the Harrison group's obligations to the plaintiff. Although the jury reached verdicts against the individual defendants for violations of the MBTFA, the trial court granted the defendants' motion for JNOV asserting that the plaintiff had failed to present a prima facie case under the MBFTA because it did not demonstrate that the defendants had intent to defraud. The trial court also dismissed the guaranty claims against the individual defendants.

The court of appeals noted that the difficulties posed by a downturn in the economy or poor business acumen do not excuse the MBTFA's obligations with regard to accounting practices and ordering of payments. Although the defendants may not have acted with bad faith and were simply trying to keep their ongoing concern afloat by paying the most urgent outstanding balances, the MBTFA's requirements had to be followed, requiring the defendants to pay the plaintiff when monies came in on those particular projects. Moreover, the appropriation of any monies paid to a contractor for building operations before payment of the protected parties (in this case, the material man), is evidence of intent to defraud. MCL 570.153. Thus, evidence was presented from which the jury could reasonably conclude that the individuals violated the MBTFA and the trial court erred when it granted JNOV in their favor. With respect to the personal guaranty claims, the court noted the "nearly universal practice" that an individual officer or shareholder is only liable for the corporation's obligations if that person signs individually, and this is indicated where the person signs twice, once as an officer and once as an individual. Because the defendant signed only once, with the title of president under his signature, the court held that there was no personal guarantee of the corporation's debts. Finally, where the plaintiff alleged that the treasurer of a corporation had personally guaranteed the entity's debts in consideration of the plaintiff's extension of favorable credit terms to the entity, the document was void under MCL 566.132(1)(b). It was conceded that the signature on the document was not that of the treasurer, there was no direct evidence that he had authorized the execution of a personal guarantee on his behalf, and the identity of the person who signed his name was unknown.

Noncompetition agreement—Enforceability

In *Coates v Bastian Bros, Inc*, No 266046, 2007 Mich App LEXIS 2444 (Aug 30, 2007), the plaintiff and her employer entered into an employment contract (an agreement prohibiting firing of the plaintiff without just cause), with the plaintiff being employed as general manager. The contract contained both a noncompete clause imposed on the plaintiff, and a right of first refusal in the plaintiff's favor, under which the plaintiff would be given an opportunity to purchase the employer's stock if the employer sold it. In October 2002, the employer discharged the plaintiff and the plaintiff then accepted a position with a competitor. The defendants brought an action for breach of the noncompete clause while the plaintiff counterclaimed for breach of the just-cause and first refusal provisions. The jury found that: (1) the plaintiff breached the noncompete clause; and (2) the employer breached (a) the right of first refusal provision, (b) the just-cause provision, and (c) its obligation to pay the plaintiff bonuses.

On appeal, the court of appeals ruled that the trial court erred in denying the defendants' motion for partial

directed verdict on the right of first refusal clause because the undisputed facts indicated that the right of first refusal did not accrue because the employer redeemed its stock instead of selling it. The court found that the noncompete clause was enforceable as a matter of law because of its limited time (one year), modest geographical reach (1990 miles), and the length of the plaintiff's employment (22 years). The court also rejected the plaintiff's argument that the defendant was barred from enforcing the noncompete clause (owing to the jury's finding that the employer first breached the contract when it fired the plaintiff without cause) because the plaintiff's argument was unpreserved and, alternatively, was inconsistent with the plain terms of the noncompete clause.

Noncompetition Agreement—Arbitration

In *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, No 273173, 2007 Mich App LEXIS 1287 (May 15, 2007), the plaintiffs worked at the defendant accounting and business advising firm's Gaylord office and, as a condition of employment, each signed a "Practice Staff - Relationship Agreement" that contained both a client solicitation clause and an arbitration clause. The plaintiffs were informed that the defendant had decided to close its Gaylord office and were offered the chance to move to its Traverse City office, but they decided to remain in Gaylord, terminated their employment with the defendant, and opened their own office. Several of the defendant's Gaylord clients hired the plaintiffs to provide accounting and tax services. When the defendant learned or suspected that the plaintiffs were providing services to its former clients, it initiated arbitration proceedings against the plaintiffs for violation of the client solicitation clause contained in the agreement. The plaintiffs filed suit, seeking, among other things, a declaration that the agreement was unreasonable and unenforceable. The trial court granted summary disposition in favor of the defendants.

The court of appeals ruled that the trial court did not err in finding that the language in the parties' agreement providing for enforcement by "any court having jurisdiction" was sufficient to meet the requirements set forth in MCL 600.5001(2) for a statutory arbitration. The court of appeals rejected the plaintiff's arguments (1) that a client solicitation clause was a noncompete agreement that violated the Michigan Antitrust Reform Act (MARA) and (2) that, because the act provides for exclusive jurisdiction over violations of the MARA to the circuit court, the trial court erred in referring this issue to arbitration. Finally, the trial court did not err in summarily dismissing the plaintiffs' frustration-of-purpose claim.

Professional Service Corporation Act—Incorporation under Correct Statute

In *Miller v Allstate Ins Co (On Remand)*, 275 Mich App 649, 739 NW2d 675 (2007), the supreme court had vacated an earlier court of appeals decision (272 Mich App 284, 726 NW2d

54 (2007)) and remanded for a determination of whether a physical therapy provider was properly incorporated under the Business Corporation Act (BCA) as opposed to the Professional Service Corporation Act (PSCA) and, if so, for a reconsideration of whether the physical therapy was lawfully rendered under MCL 500.3157. 477 Mich 1062, 728 NW2d 458 (2007). Finding that the list of professional services in section 2(c) of the PSCA is not exclusive, the court of appeals ruled that a corporation must form as a professional service corporation if it is providing a personal service to the public that requires a license. The court of appeals concluded that the provider was improperly incorporated under the BCA because a provider of physical therapy services must be incorporated under the PSCA. It then adopted its prior analysis that this provider was entitled to payment because treatment was rendered by licensed physical therapists, and the corporate defect had nothing to do with that treatment.

Employment Law—Accent or Speech as Evidence of National Origin Discrimination

In *Gold v Fedex Freight East, Inc (In re Rodriguez)*, 487 F3d 1001 (6th Cir 2007), the plaintiff applied and was twice interviewed for at least one supervisor position. A customer service manager testified that he found the plaintiff to be qualified for the position and claimed that he would have hired him but for a human resource manager's stated concern that the plaintiff's accent and speech pattern would adversely impact his ability to rise through the company ranks. Another witness seconded the human resource manager's concern about the plaintiff's language and way of speaking. After the plaintiff resigned from his employment, citing its "refus[al] to address [his] numerous complaints of being discriminated against because of [his] race as an Hispanic-American," he filed suit in Michigan state court, alleging racial discrimination and retaliation in violation of the Elliott-Larsen Civil Rights Act. The defendant removed the case to federal court on the basis of the parties' diversity of citizenship and moved for summary judgment. The plaintiff then filed for bankruptcy, and the district court referred the defendant's summary judgment motion to the bankruptcy court, which granted it. The district court affirmed the bankruptcy court's judgment.

The Sixth Circuit stated that earlier decisions suggested that the evidence concerning the plaintiff's accent and speech was direct evidence of discrimination, since accents and national origin are intertwined. In direct evidence cases, once a plaintiff shows that the prohibited classification played a motivating part in the employment decision, the burden of both production and persuasion shifts to the employer to prove that it would have terminated the employee even if it had not been motivated by impermissible discrimination. The question whether the defendant met its burden by showing that it would have refused to promote the plaintiff even absent a discriminatory motive, based on its argument that the plaintiff failed to complete a lead-

ership apprentice course combined with the defendant's claimed policy against promoting drivers directly into supervisory positions, was for the district court to make in the first instance. The Sixth Circuit vacated summary judgment on this issue and remanded the claim to the district court. However, the Sixth Circuit affirmed summary judgment for the defendant on the plaintiff's hostile-environment, constructive-discharge, and retaliation claims.