Case Digests

Employment Law—Sexual Harassment Investigation

In *Crawford v Metropolitan Gov't of Nashville & Davidson County*, _US_, 129 S Ct 846 (2009), respondent Metropolitan Government of Nashville and Davidson County investigated rumors of sexual harassment by the Metro School District's employee relations director. When a Metro human resources officer asked petitioner, a 30-year Metro employee, whether she had witnessed "inappropriate behavior" on the part of the director, petitioner described several instances of sexually harassing behavior that had been directed at her personally. Two other employees also reported being sexually harassed by the director. Although respondent took no action against the director, it did fire petitioner and the two other accusers soon after finishing the investigation, saying in petitioner's case that it was for embezzlement. Petitioner claimed that Metro was retaliating for her report of the director's behavior and filed a charge of a Title VII violation with the Equal Employment Opportunity Commission (EEOC), followed by this suit in federal district court.

The Title VII antiretaliation provision has two clauses, making it an unlawful employment practice for an employer to discriminate against any of its employees (1) because the employee opposed any unlawful employment practice under Title VII, or (2) because the employee has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII. 42 USC 2000e-3(a). The first is known as the "opposition clause," the other as the "participation clause," and petitioner accused Metro of violating both. The U.S. Supreme Court held that an employee who merely answers questions during an employer's internal investigation of harassment is protected against retaliation under the opposition prong. The court stated that there is "no reason to doubt that a person can 'oppose' by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question." 2009 US LEXIS 870 at *11. Because petitioner's conduct was covered by the opposition clause, the Supreme Court did not reach her argument that the participation clause had been violated as well.

Limited Partnerships—Conflict of Laws

Atlantic XXXI LLC v Art Midwest LP, 281 Mich App 733, _ NW2d _ (2008), arose out of a commercial real estate transaction involving multiple related entities. Defendant ART Midwest, LP (the Limited Partnership), is a limited partnership organized under the laws of the state of Texas while defendant American Realty Trust, Inc (defendant), is a limited partner in that partnership. The Limited Partnership is the sole member of a limited liability company, ART Concord East, LLC (the LLC). The LLC, which was not a party to this action, purchased an apartment complex and, in doing so, assumed responsibility for a multi-million dollar loan owed to plaintiff. As part of the transaction, the Limited Partnership guaranteed payment of the debt. The loan later went into default and the Limited Partnership failed to pay under the guarantee. This failure led to this action, which included a claim against defendant in which plaintiff alleged that defendant was a mere alter ego of the limited partnership and, therefore, should be held liable for the debt. The primary issue was whether a claim of alter ego or piercing the veil required the showing of a fraud or wrong. Defendant also argued that, because plaintiff sought to impose liability on a limited partner of a partnership formed under Texas law, Texas law controlled and would not impose liability in this case. The trial court rejected the application of Texas law, but did hold that Michigan law required a showing of fraud or other wrongdoing and granted summary disposition in favor of defendant on this claim.

The court of appeals declined to address the issue raised by plaintiff, whether the trial court erred in holding that Michigan law requires the showing of a fraud or wrong and that no such showing was made in this case. Instead, the court agreed with defendant that this matter must be resolved under Texas law, not Michigan law. A claim seeking to impose liability on a limited partner of a limited partnership organized under foreign law must be resolved by applying the law of the jurisdiction under which the partnership is organized. MCL 449.1901 provides in pertinent part that "the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners." The court declined to resolve the issue whether Texas law favors defendant's position because the trial court did not rule on the substantive application of Texas law to this issue.

Motor Fuels Tax—Refunds

In *AutoAlliance Int'l, Inc v Department of Treasury*, No 282096, 2009 Mich App LEXIS 377 (Mich Ct App Feb 24, 2009), taxpayer is a joint venture between auto manufacturers. During the 2002-2003 tax period, taxpayer assembled automobiles at a manufacturing facility and purchased gasoline and diesel fuel in bulk quantities, paying the Michigan motor fuel tax on the fuel purchases. After purchasing the fuel, the vendor would deliver it to the manufacturing facility and place it in underground storage tanks. Taxpayer then placed 3.2 gallons amount of gasoline in the fuel tank of each newly assembled vehicle during the time period in issue to power the vehicles during the final testing and quality control procedures that occurred after assembly. The 3.2 gallon amount was selected to ensure that the cars did not run out of gas during the testing. Taxpayer claimed refunds related to motor fuel placed in vehicles destined for out-of- state dealers; it did not seek a refund on motor fuel placed in new vehicles sold to Michi-

gan dealers. In November 2007, the Court of Claims issued its opinion and order denying taxpayer a refund, ruling that the taxpayer failed to present evidence concerning the actual amount of fuel used for a non-taxable purpose.

To establish the right to a refund of the tax paid on motor fuel under MCL 207.1033 or 207.1039, the taxpayer must establish that it is an "end user" of motor fuel and that it "used" the motor fuel at issue for "nonhighway purposes." In this case, the undisputed facts showed that the joint venture placed the fuel into newly manufactured vehicles to facilitate its final testing and quality control measures and, hence, was an end user of the motor fuel. With regard to the motor fuel at issue, the undisputed facts also showed that the joint venture employed the full 3.2 gallons placed in each vehicle for its own purposes and that no amount of the 3.2 gallons placed in the vehicles shipped out of state was used or could be used to operate the vehicles on Michigan's public roads or highways, which established that its use was "for nonhighway purposes." Consequently, the court of claims erred when it concluded that the joint venture could not claim a refund for the full amount of the 3.2 gallons of fuel placed in the vehicles it shipped out of state.

Securities—Disclosure Obligations

In *J&R Mktg. v GMC*, 549 F3d 384 (6th Cir 2009), plaintiffs, purchasers of bonds registered by a financial subsidiary of defendant (GMAC) in September 2003, brought suit under Sections 11 and 12(a)(2) of the Securities Act of 1933 against GMAC and its control persons, including General Motors, which at the time wholly-owned GMAC. Plaintiffs alleged that GMAC had breached its disclosure obligations as well as made material misstatements in its registration statements and prospectuses for multiple offerings of bonds registered in 2003 and 2004. The defendants moved to dismiss the plaintiffs' complaint for failure to state a claim. The district court granted the defendants' motion, finding that plaintiffs lacked statutory standing to bring claims regarding offerings other than the one in which they had purchased. The district court also found that the plaintiffs had no claim regarding a duty to disclose because Item 303, the regulatory authority relied on by plaintiffs, did not give rise to a duty to disclose the information the plaintiffs sought because the information was not "firm specific" to GMAC. In addition, the district court found that there was no material omission because the affirmative statements made by GMAC were not rendered misleading by the absence of the information cited by plaintiffs. Finally, the district court held that most of GMAC's statements were not false, and the ones that were arguably false were not material to bond investors.

The Sixth Circuit found that the named plaintiffs' own claims were without merit because the offering materials did not have material omissions because (1) Item 303 only imposes a duty to make forward-looking projections regarding known information, and plaintiffs pleaded only that the information was "knowable"; and (2) GMAC's affirmative statements were not rendered misleading by the absence of the information described by plaintiffs. The Sixth Circuit also ruled that the offering materials for the offering in which plaintiffs' purchased did not include material misstatements, because the affirmative statements made by GMAC were in fact true. Since the named plaintiffs' individual claims could not succeed on the merits, the Sixth Circuit affirmed the district court's judgment dismissing plaintiffs' complaint.

Single Business Tax—Recapture of Capital Acquisition Deduction

In *Manske v Department of Treasury*, No 281988, 2009 Mich App LEXIS 301 (Mich Ct App Feb 17, 2009), the parties disputed the proper application of the former Single Business Tax (SBT) to a gain on real property transferred in lieu of foreclosure and whether a previous panel of the court of appeals impliedly ruled that the Department of Treasury could not offset a refund for tax improperly collected on the gain from a casual property transfer by the amount of the unused capital acquisition deduction (CAD) granted for the same property. The court of appeals in this decision ruled that the court of claims erred when it concluded that it had to deny the Department's request for an offset under the law-of-the-case doctrine. Under this doctrine, the court of claims had to treat the transfer as a casual transaction, but it could still appropriately consider the proper treatment of the CAD recapture provisions. Therefore, the court of claims was not bound to hold that the CAD recapture provisions of the SBT did not apply to a property that was ultimately transferred under a casual transaction.

As to whether there had to be an adjustment to in the SBT adjusted taxable base to include depreciation recapture under MCL 208.9(4), under MCL 208.23 a taxpayer was allowed a full deduction for the cost of an asset in the year of acquisition. After taking this deduction in the first year, the taxpayer was expected to make an adjustment to its tax base in subsequent years to reflect the depreciation for that year. If the property was transferred before it was fully depreciated, the unused portion of the CAD was required to be "recaptured." MCL 208.23b. Nothing within the provisions of MCL 208.23b(a) suggests that the adjustments for CAD recapture do not apply to transfers that qualify as a casual transaction, and the court of appeals refused to read such an exception into the statute. While it was argued that the taxpayer did not experience a CAD triggering event, because it did not receive proceeds from the disposition of the property and did not receive a benefit from giving the deed in lieu of foreclosure, it clearly received a benefit since it was liable for a debt of $12,964,083 on a property with an adjusted basis of $8,251,603. By avoiding foreclosure, the taxpayer reduced its overall liability and saved the expenses associated with foreclosure. Thus, despite the fact that the taxpayer lost its sole asset and went out of business, it still received some benefit from the transfer.

Use Tax—Purchase of Partial Interest in Airplane

In *Fisher & Co, Inc v Department of Treasury*, Nos 280476, 280498 (Mich Ct App January 29, 2009), plaintiff, a Michigan corporation, purchased a "25% undivided interest" in a small turbofan jet airplane. That partial interest was formally considered to be a tenant-in-common ownership interest, along with several other part owners; plaintiff was designated as the "buyer." Each part owner, including plaintiff, was entitled to share in the airplane's depreciation, gain, loss, deduction, or other tax benefit that might arise therefrom. The seller's sister company maintained the airplane and coordinated its use by plaintiff and by the other part owners, and the owner's agreement precluded plaintiff from placing any lien on the airplane without approval by the maintenance entity. The airplane was specifically identified and never entered Michigan. However, part of the benefit to plaintiff was the use of other airplanes in the sister company's fleet, consistent with plaintiff's rights under the operative documents that made up the transaction. Plaintiff did utilize that benefit for transportation in Michigan. In a dispute over the applicability of Michigan's Use Tax to this purchase, the trial court held that the nature of the transaction constituted a purchase of tangible personal property rather than services, but also held that plaintiff was entitled to a refund of three percent.

The court of appeals ruled that plaintiff's purchase of a partial interest in an airplane that included right to use other airplanes in a fleet was in effect a time share in tangible personal property. Even though plaintiff's aircraft never entered Michigan, Michigan use tax applied because plaintiff's use of other fleet airplanes in Michigan was pursuant to its contract to share ownership rights of its own airplane. Plaintiff was entitled to credit only for sales tax actually paid, which in South Carolina was capped at $1,500.