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## M A P E R S

### RECENT LEGAL ISSUES AND DECISIONS

#### SPRING 2008 CONFERENCE

This summary is presented to provide a general reference to recent legal decisions of interest to Michigan public retirement and healthcare plans.

#### ADMINISTRATION

**Atkins v. Michigan Public School Employees' Retirement System**

*Michigan Court of Appeals - Decided: April 22, 2008*

The Michigan Court of Appeals determined that the Pension Board's denial of retirement benefits under the Plan's "60 with 5" option was not based on substantial, competent, and material evidence. Therefore, the Court found that a correction of the individual's termination date was warranted and the individual was eligible for retirement benefits.

**Mona Shores Board of Education, et al. v. Mona Shores Teachers Education Association**

*Michigan Supreme Court Order - Decided: March 28, 2008*

The Michigan Supreme Court found that the School Board had standing to seek declaratory relief concerning the validity of early retirement provisions of a collective bargaining agreement. However, a party cannot seek relief from the courts until it has first exhausted all of its remedies under the collective bargaining agreement.

**Noe, et al. v. PolyOne Corporation**

*6<sup>th</sup> US Circuit Court of Appeals - Decided: March 19, 2008*

The US Court of Appeals held that language in the former employees' collective bargaining agreements was sufficient to meet vesting standards for retiree health benefits. Accordingly, the benefits extended to current retirees and beneficiaries could not be unilaterally altered or terminated by the employer. The Court concluded that because the relevant contract language tied eligibility for retiree health benefits to eligibility for a pension, this indicated an intent to vest the health benefits.

**Rutherford, et al. v. City of Flint, et al.**

*Michigan Court of Appeals - Decided: September 20, 2007*

The City's decision to recalculate retirees' retirement benefits did not violate their constitutional rights under Article 9, Section 24 of the Michigan Constitution. The Court held that the Retirement Ordinance did not provide for the inclusion of biweekly pay periods that exceeded a 365 day pay period, and therefore it was not an accrued financial benefit, nor was the recalculation a violation of the retirees' due process rights.

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**DISABILITY**

**Bennett v. Kemper National Services, Inc., et al.**

*6<sup>th</sup> US Circuit Court of Appeals - Decided January 23, 2008*

The US Court of Appeals found that the ERISA plan's decision to deny an employee long-term disability benefits was arbitrary and capricious because the Plan administrator assisted the employee in obtaining Social Security Administration (SSA) disability benefits (which allowed a reduction in the Plan's benefit), but then subsequently failed to explain why the employee did not qualify for Plan benefits (which was contrary to the SSA's findings and based simply on a "file only" review of the disability application).

**Gerow v. City of Saginaw**

*Michigan Court of Appeals - Decided: January 24, 2008*

Where the Pension Board sought reimbursement of overpaid non-duty disability benefits (\$142,000), the Court dismissed the retiree's claims of discrimination and retaliation under the Michigan Persons with Disabilities Civil Rights Act. Further, the retiree's belief that the Pension Board would not seek reimbursement of overpaid benefits because it had not done so in the past was not sufficient to prove the prejudice required for a laches or estoppel claim.

**Kirchner v. G.E. Group Life Assurance Co.**

*U.S. District Court, Western District of Michigan - Decided: January 2, 2008*

The Court held that the ERISA plan's denial of long-term disability benefits was not arbitrary or in bad faith where the Plan relied upon the opinions of two physicians who determined that the employee was capable of returning to a sedentary job with primarily administrative responsibilities.

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**DOMESTIC RELATIONS**

**Dziuban v. Board of Trustees of the City of Saginaw Police and Fire Retirement System, et al.**

*U.S. District Court E.D. Michigan - Decided: January 18, 2008*      *2008 U.S. Dist. LEXIS 3887*

Where the former spouse of a retiree filed claims against the Retirement System for violation of the Michigan Constitution, breach of contract, tortious interference with economic expectancy, and breach of fiduciary duty for an alleged erroneous calculation of benefits under an EDRO, the Court dismissed the claims against the Retirement System on the basis of quasi-judicial immunity and that the former spouse failed to state a claim.

**Gavin v. Gavin**

*Michigan Court of Appeals - Decided: January 17, 2008*

The Court held that a public school employee's retirement healthcare benefit was not an asset of the marital estate subject to valuation and division on the basis that the benefit was not currently available or in existence, was conditioned on retirement, and was optional to the retiree. Therefore, the Court concluded that the retirement healthcare benefit lacked the certainty of availability to be divided under the judgment of divorce.

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**INVESTMENT**

**LaRue v. DeWolff, Boberg & Associates, Inc., et al.**

*United States Supreme Court - Decided: February 20, 2008*

Where a participant in a defined contribution plan alleged that the Plan's administrator failed to follow the participant's investment direction thereby depleting his interest in the Plan by approximately \$150,000, the Supreme Court held that while § 502(a)(2) of ERISA does not provide a remedy for injuries to an individual plan participant (as distinct from injuries to the plan as a whole), it does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account. The Court reasoned that in the case of defined contribution plans, fiduciary misconduct need not threaten the entire plan's solvency to reduce benefits below the amount that participants would otherwise receive. Whether a fiduciary breach diminishes defined contribution plan assets payable to all participants or only to particular individuals, it creates the kind of harms that were meant to be protected by § 409 of ERISA.

**Attorney General Opinion No. 7204**

*Mike Cox, Attorney General - Decided: September 7, 2007*

A public corporation that elects to invest funds in certificates of deposit may only place such funds in financial institutions that maintain a principal office or a branch office located in Michigan. As the Certificate of Deposit Account Registry Service program ("CDARS") is currently structured in such a way that a participating investor must consent to the placement of its deposits with financial institutions that do not maintain a principal office or a branch office located in Michigan, a Michigan public corporation may not participate in the CDARS program.

**MERS v. Charter Township of Delta**

*Michigan Supreme Court Order - Decided: June 1, 2007*

The Michigan Supreme Court found that vacant properties held by the Municipal Employees Retirement System of Michigan (MERS) were exempt from ad valorem taxation because the land was used to serve a public purpose. The Supreme Court emphasized that MERS was statutorily required to hold and invest assets under the Municipal Employees Retirement Act and that the acquisition of the land in question carried out the retirement system's public purpose by diversifying the portfolio.

## FREEDOM OF INFORMATION ACT/OPEN MEETINGS ACT

### **Bukowski, et al. v. City of Detroit**

*Michigan Supreme Court - Decided: June 6, 2007*

The Michigan Supreme Court held that the “frank communication” exemption of the Michigan Freedom of Information Act (FOIA), exempts communications and notes that were preliminary to an agency’s determination of policy or action at the time they are created. The Court reasoned that the timing of the request has nothing to do with whether the communications remain exempt from disclosure, and that all non-factual material prepared prior to or in preparation of a final agency determination of policy or action remain subject to exemption from disclosure, regardless of whether the determination has been made or not at the time of the FOIA request.

### **Omdahl v. West Iron County Board of Education, et al.**

*Michigan Supreme Court - Decided: June 27, 2007*

The Michigan Supreme Court held that a person who represents himself/herself in a legal action cannot recover actual attorney fees under the Open Meetings Act even if the individual is a licensed attorney. The phrase “actual attorney fees” requires an agency relationship between an attorney and a client, who must have separate identities.

### **Simpson v. Washtenaw County Clerk, et al.**

*Michigan Court of Appeals - Decided: July 24, 2007*

The Court of Appeals held that the Plaintiff’s claims of excessive costs by the County for producing documents requested under the FOIA was mere speculation and not supported by sufficient evidence to support a permanent injunction. Plaintiff’s additional attempt at recovering costs and fees pursuant to a successful FOIA claim were unfounded based on the fact that he was unsuccessful in all but one of his claims. Under the FOIA, attorney fees and costs must be awarded only when a party prevails completely.

*THE FOREGOING SUMMARIES ARE PRESENTED FOR GENERAL INFORMATION PURPOSES ONLY AND ARE NOT TO BE CONSIDERED LEGAL ADVICE. PLEASE REFER TO THE TEXT OF THE FULL OPINION OR CONTACT VANOVERBEKE, MICHAUD & TIMMONY, P.C., AT THE ABOVE ADDRESS IF YOU HAVE ANY QUESTIONS OR COMMENTS CONCERNING THIS MATERIAL.*