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## M A P E R S

### RECENT LEGAL ISSUES AND DECISIONS

#### SPRING 2009 CONFERENCE

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

#### ADMINISTRATION

**Bandeen v. Public School Employees Retirement Board**

*Michigan Court of Appeals - Decided February 24, 2009*

*2009 Mich. App. LEXIS 376*

The Court agreed with the Public School Retirement Board's denial of the plaintiff's application to purchase maternity/child-rearing service credit for the period of time from when she stopped substitute teaching to when she began teaching full-time again on the grounds that a "day-to-day" substitute teacher could not be classified as having a temporary absence with the intent to return because there was no guaranteed position upon return to employment.

**Cole, et al. v. ArvinMeritor, Inc., et al.**

*6<sup>th</sup> Circuit Court of Appeals - Decided December 16, 2008*

*Case No. 06-2224*

The Court found that language in the applicable collective bargaining agreements ("CBAs") that stated that health care benefits shall be provided at the time of retirement and "shall be continued thereafter" was an unambiguous, enforceable contractual promise of lifetime retiree health care benefits. In considering the duration of retiree health care benefits under an ERISA plan, the Court noted that benefits under such plans only vest if the parties so intended when they executed the applicable CBAs.

**McKnight, et al. v. General Motors Corp.**

*6<sup>th</sup> Circuit Court of Appeals - Decided December 4, 2008*

*550 F. 3d 519*

The Court determined that retired employees do not have standing under Title I of the Americans with Disabilities Act ("ADA") to challenge a reduction in their pension benefits due to their receipt of Social Security Disability Insurance Benefits. The Court reasoned that because the plaintiffs had no desire to return to their employment, they lacked standing to sue under the plain language of the ADA. Furthermore, even if the plaintiffs had standing to sue, the Court found that there was no discrimination because all employees of the company were offered the same pension plan regardless of their current or future disability status.

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

*Michigan Court of Appeals - Decided August 5, 2008*

*2008 Mich. App. LEXIS 1599*

The Court held that the provisions of a collective bargaining agreement (“CBA”) between the parties were unlawful under the Age Discrimination in Employment Act (“ADEA”). The provisions of the CBA, which provided for an early retirement incentive, treated teachers who retire at a younger age more favorably than those who retire at an older age, based not on years of service or some other nondiscriminatory factor, but solely on their age at retirement. As a result, the Court enjoined enforcement of the unlawful provision.

**Pelikan v. Public School Employees Retirement System**

*Michigan Court of Appeals - Decided February 12, 2009*

*2009 Mich. App. LEXIS 309*

The Court agreed with the State Employees’ Retirement Board’s denial of non-duty disability retirement benefits based on the plaintiff’s failure to file exceptions to the Board’s proposed decision. The Court held that a party seeking judicial review of the Board’s decision under the Administrative Procedures Act must file exceptions to the decision to preserve an issue for appeal. Failure to file exceptions constitutes a waiver of any objections.

**Shaw, et al. v. City of Ecorse**

*Michigan Court of Appeals - Decided March 19, 2009*

*2009 Mich App LEXIS 585*

The Court upheld the jury’s award of \$1,750,000.00 in past and future non-economic damages for the emotional damage the plaintiff suffered as a result of the City Council’s wrongful removal from his position as Police Chief and refusal to pay retirement benefits as requested by the plaintiff. Additionally, the Court upheld the jury’s award of pension benefits, which allowed the plaintiff to transfer from the City Charter Plan to the Municipal Employees’ Retirement System (“MERS”) Plan after his termination. The Court held that the meaning of the term “employees” under the applicable collective bargaining agreement was ambiguous and ambiguities are to be construed against the drafter of the contract.

**Slee v. Public School Employees Retirement System**

*Michigan Court of Appeals - Decided September 16, 2008*

*2008 Mich. App. LEXIS 1843*

The Court held that the reimbursement of plaintiff’s FICA taxes as well as payments made by the plaintiff’s school district to cover the costs of purchasing service credit did not qualify as compensation for purposes of calculating retirement benefits. Such payments were characterized under plaintiff’s contract with the school district as “fringe benefits.” Fringe benefits are expressly excluded from the statutory definition of compensation under the Public School Employees Retirement Act, and the Retirement Board’s refusal to include the payments as compensation was correct.

**United States v. Miller**

*U.S. Dist. Court W.D. Michigan - Decided November 6, 2008*

*588 F. Supp. 2d 789*

The Court ruled that ERISA does not preclude the federal government from garnishing the pension benefits of a convicted criminal in order to satisfy an obligation of restitution to the victims of the criminal act(s). Congress created an exception to the anti-alienation provision of ERISA with the enactment of the Mandatory Victims Rights Act.

The Court determined that the defendant's denial of pension benefits to the plaintiff based upon plan language in effect at the date of the participant's termination from employment was correct. The participant was not vested because she had not completed ten (10) years of service after attaining the age of twenty-two (22) as required by the language of the plan. However, the Court did award the plaintiff damages based on the plan administrator's failure to provide copies of several plan documents in a timely manner.

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## **DISABILITY**

**Baker v. State Employees' Retirement Board/Department of Management and Budget**

*Michigan Court of Appeals - Decided September 30, 2008*

*2008 Mich. App. LEXIS 1917*

The Court of appeals determined that statements made by the plaintiff subsequent to his application for a duty disability retirement were relevant and material to the determination of whether his disability was duty related, and should have been considered by the trial Court upon motion by the defendant. Additionally, the Court held that to establish duty disability causation under the State Employees Retirement Act, an applicant need not produce objective or independent corroborating evidence. Rather, causation that is based upon the applicant's own testimony and medical records based on the applicant's self-reported history are sufficient to establish duty disability causation.

**Johnson v. State Employees' Retirement Board**

*Michigan Court of Appeals - Decided February 3, 2009*

*2009 Mich. App. LEXIS 247*

A Court's review of a retirement board's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law. The Retirement Board denied plaintiff's application for a duty disability retirement based on the opinions of two medical examiners that the plaintiff's condition was not permanent. The Court determined that the defendant Retirement Board's determination regarding the plaintiff's application for duty disability retirement was entitled to due deference on appeal, and was based on competent, material, and substantial evidence on the whole record. Therefore, the Court upheld the Board's determination to deny the application for a disability retirement.

**Kentucky Retirement Systems, et al. v. Equal Employment Opportunity Commission**

*Supreme Court of the United States - Decided June 19, 2008*

*128 S. Ct. 2361*

The Court found that Kentucky's retirement plan does not discriminate against employees who become disabled after becoming eligible for a normal retirement based on age. The Court reasoned that Kentucky's disability retirement policy does not create treatment differences that are motivated by age, but rather, the differential treatment is based on pension status. The Court expressed the rule as: "Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate treatment claim under the ADEA, must adduce sufficient evidence to show that the differential treatment was 'actually motivated' by age, not pension status."

**Shaheen v. Michigan Public School Employees Retirement Board**

*Michigan Court of Appeals - Decided December 2, 2008*

*2008 Mich. App. LEXIS 2397*

The Court agreed with the Retirement Board's determination that Long-term disability payments were not a form of compensation under the Public School Employees Retirement Act for which employees are entitled to receive service credit. The Court and the Board concluded that because Long-term disability payments were not specifically included in the statute or otherwise authorized by the Board, they could not constitute compensation for the purpose of awarding service credit.

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**DOMESTIC RELATIONS**

**Trustees of the Operating Engineers Local 324 Pension Fund v. Davis**

*U.S. Dist. Court W.D. of Michigan - Decided February 5, 2009*

*Case No. 1:08-cv-418*

A former spouse is liable to a retirement plan for death benefits that were distributed upon the former spouse's misrepresentation that she was the wife of the plan participant. The Court relied on the "plan documents rule" in holding that in the event a plan participant is not married at the time of his death, the benefits are to be distributed to the participant's designated beneficiary, not the former spouse.

**Weaks v. City of Lincoln Park**

*Michigan Court of Appeals - Decided February 10, 2009*

*2009 Mich. App. LEXIS 285*

The Court held that where an Eligible Domestic Relations Order ("EDRO") does not provide for assignment of health benefits, a plan administrator is not authorized to distribute that benefit to an alternate payee. Granting such benefits would violate the EDRO Act by expanding the terms of the EDRO as agreed upon by the parties, and also because benefits subject to assignment under the EDRO Act do not include health care benefits.

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**INVESTMENT**

**In re Ford Motor Company ERISA Litigation**

*U.S. Dist. Court E.D. Michigan - Decided December 22, 2008*

*590 F. Supp. 2d 883*

The Court held that the plaintiffs, who were participants in Employee Stock Ownership Plans, could overcome the presumption of prudence by an employer who invested the plan entirely in its own stock by demonstrating that holding the stock had become so risky that no prudent fiduciary would invest any plan assets in it, taking into account not only the stock's price in the market but also the risk tolerance of plan participants.

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## FREEDOM OF INFORMATION ACT/OPEN MEETINGS ACT

### **Michigan Attorney General Opinion No. 7227**

*Mike Cox, Attorney General - Decided March 19, 2009*

A provision in the by-laws that allowed City members to vote by proxy violates the Michigan Open Meetings Act because proxy voting fails to make the important deliberative aspects of the absent board member's decision-making process open to the public when rendering a decision that effectuates public policy. An absent board member who submits a proxy vote would not be part of the quorum present to vote on any motion. Furthermore, an absent member would not be present at the open meeting to participate in decisions on which a member of a board may be held accountable to the public.

### **Michigan Federation of Teachers, et al. v. University of Michigan**

*Michigan Supreme Court - Decided July 16, 2008* 481 Mich. 657

The Court held that employees' home addresses and telephone numbers are exempt from disclosure under FOIA's privacy exemption. The Court reasoned that home addresses and telephone numbers meet both prongs of FOIA's privacy exemption because the information is "of a personal nature" and its disclosure would constitute a "clearly unwarranted invasion of an individual's privacy." The Court expanded its previous definition of "information of a personal nature" to include information of an embarrassing, intimate, private, or confidential nature and concluded that home addresses and telephone numbers fell within that definition.

### **Schellenberg, et al. v. Bingham Township**

*Michigan Court of Appeals - Decided May 29, 2008* 2008 Mich. App. LEXIS 1114

The Court determined that the minutes of a closed session held by the Township Board were exempt from disclosure under the Michigan Freedom of Information Act. Records or information relating to a civil action in which the requesting party and the public body are parties are exempt from disclosure under the FOIA. Although the Township failed to specify this exemption in its written denial, a public body does not waive an exemption as a defense by failing to list the exemption in its written denial of the FOIA request.

### **Charter Township of Ypsilanti, et al. v. Washtenaw County**

*Michigan Court of Appeals - Decided February 10, 2009* 2009 Mich. App. LEXIS 292

The Court found that an award of costs and attorney fees under the Open Meetings Act is not proper where the party seeking the award does not successfully obtain relief in the action. Because the plaintiffs did not receive the relief they sought, they could not obtain attorney fees, regardless of whether the defendant, as a consequence of the action, reenacted the meeting in which the alleged violation occurred.

*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.*