

**VANOVERBEKE  
MICHAUD &  
TIMMONY, P.C.**

ATTORNEYS AND COUNSELORS

MICHAEL J. VANOVERBEKE  
THOMAS C. MICHAUD  
JACK TIMMONY  
MICHAEL E. MOCO  
KARI L. TAURIAINEN  
ERIC A. LADASZ

79 ALFRED STREET  
DETROIT, MICHIGAN 48201  
TEL: 313-578-1200  
FAX: 313-578-1201  
WWW.VMTLAW.COM

## **M A P E R S**

### **RECENT LEGAL ISSUES AND DECISIONS**

#### **SPRING 2005 CONFERENCE**

This summary is presented to provide a general reference to recent legal decisions regarding Michigan public employee retirement systems:

#### **DISABILITY**

##### **Galuszka v State Employees' Retirement System**

*Court of Appeals - Decided November 23, 2004. 265 Mich. App. 34*

The Court of Appeals upheld the decision of the State Employees' Retirement Board to deny plaintiff's duty disability benefits and held that the circuit court was limited to determining whether the Board's decision was contrary to law, supported by competent, material and substantial evidence on the whole record, arbitrary or capricious, or otherwise affected by a substantial and material error of law.

##### **Zarka v State Employees' Retirement System**

*Court of Appeals - Decided December 30, 2003. 2003 Mich. App. LEXIS 3442*

The Court reversed the decision of the trial court, thereby upholding the decision of the Retirement System to deny the plaintiff's application for duty disability retirement benefits because his condition preexisted his employment and he could not satisfy the proximate cause element for disability retirement.

##### **Police Officers Association of Michigan, et al. v City of Ypsilanti, et al.**

*Court of Appeals - Decided March 15, 2005. 2005 Mich. App. LEXIS 692*

The Court upheld the decision of the Board of Trustees, which denied plaintiff's duty disability benefits, and found that the trial court properly awarded sanctions and attorney fees against the plaintiff.

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

*Court of Appeals - Decided March 17, 2005. 2005 Mich. App. LEXIS 736*

The Court held that the proper standard to review a Retirement Board's decision regarding duty disability benefits is "whether substantial evidence supported the Board's decision".

**Jackson-Rabon v State Employees' Retirement Board**

*Court of Appeals - Decided February 15, 2005. 2005 Mich. App. LEXIS 363*

The Court held that the Retirement Board's determination was supported by competent, material and substantial evidence where the plaintiff did not prove her condition was either work-related or permanent and where the physician concluded that alternative medications and other treatments existed that may be more successful than the plaintiff's current treatment thereby preventing the plaintiff from showing that her disability was permanent.

**Vanzandt v State Employees Retirement System**

*Court of Appeals - Decided March 31, 2005. 2005 Mich. App. LEXIS 857*

The Court held that the trial court erred when it replaced the Board's reasonable views on a disability retirement application with the trial court's own views regarding the weight and relevance of the evidence, and the credibility of the physicians.

**Caffie v State Employees Retirement Board**

*Court of Appeals - Decided February 15, 2005. 2005 Mich. App. LEXIS 335*

The Court held that a circuit court, in reviewing the decision of a Retirement Board regarding the denial of non-duty disability benefits, may not substitute the Board's assessment of witness credibility with its own judgement.

**Peden v City of Detroit**

*Michigan Supreme Court - Decided June 11, 2004. 470 Mich. 195*

The Court held that the City did not violate the Americans with Disabilities Act or the Michigan Persons with Disabilities Civil Rights Act when it forced the plaintiff police officer into a disability retirement after determining that his permanent heart condition prevented him from performing some of the activities on the city's essential functions list.

**RETIREE MEDICAL**

**Mcoy, et al. v Meridian Automotive Systems**

*6<sup>th</sup> Circuit U.S. Court of Appeals - Decided November 19, 2004. 390 F.3d 417*

The Court upheld the preliminary injunction issued by the federal district court preventing the employer from terminating retiree medical coverage because of the potential for serious irreparable harm in the absence of the injunction, and because the retirees established a likelihood of success on the merits.

**Stokan v Huron County**

*Court of Appeals - Decided July 8, 2004. 2004 Mich. App. LEXIS 1890; Michigan Supreme Court - March 10, 2005, Application for Leave to Appeal granted; oral argument to be scheduled.*

The Court held that the County's resolution granting additional retiree health care benefits to current employees applied to those individuals who were employees on the date the resolution was adopted. Since the resolution did not specify that the employee had to be at least age 55 at retirement, Plaintiff who was an employee at the date of enactment and who retired from county service at age 48, was entitled to the retiree health care benefits when he attained age 55.

## ADMINISTRATION

### **Ferguson v City of Lincoln Park, et al.**

*Court of Appeals - Decided October 12, 2004. 264 Mich. App. 93*

The Court held that the Board of Trustees properly calculated plaintiff's retirement benefit when it used the member's average compensation for the ranks held by the member during his five years of service immediately preceding the effective date of his disability retirement.

### **Ernst, et al. v Roberts, et al.**

*6<sup>th</sup> Circuit U.S. Court of Appeals - Decided August 12, 2004. 379 F.3d 373; Request for rehearing granted, supplemental briefs due January 10, 2005 and February 17, 2005.*

The Court held that the district court erred in dismissing the claims of several Michigan judges who alleged that the Michigan Judges Retirement Act violated the Equal Protection Clauses of the U.S. and Michigan Constitutions and other provisions of state law. The Court subsequently decided to rehear this case, a decision is pending.

### **Caprathe v Michigan Judges' Retirement Board**

*Court of Appeals - Decided April 29, 2004. 2004 Mich. App. LEXIS 1114*

Where the plaintiff-judge desired to transfer 6 months of service as a county public defender, pursuant to the Reciprocal Retirement Act, the failure of the Retirement Board to have a policy in place required the court to direct that the Board establish a general implementing policy and to then decide the plaintiff's petition.

### **Board of Trustees of the City of Flint Employees' Retirement System v City of Flint**

*Court of Appeals - Decided February 24, 2005. 2005 Mich. App. LEXIS 506*

The Court held that the Board of Trustees had the right under the Public Employee Retirement System Investment Act to independently retain private legal counsel to represent the retirement system "where necessary for the conduct of the affairs of the retirement system".

### **In re: Tomlin**

*United States Bankruptcy Court, Eastern District of Michigan - Decided October 8, 2004. 315 B.R. 439*

The Court held that the Employee Retirement Income Security Act (ERISA) does not pre-empt the Michigan exemption statute, MCL Sect. 600.6023(k)(1), which allows a bankruptcy debtor to exempt an IRA from "levy and sale under any execution". The Court further stated that ERISA's savings clause which states that ERISA can not amend or supercede federal law applies because bankruptcy law is federal law and state exemption laws play a significant role in enforcing and implementing that bankruptcy law.

### **Flint Professional Firefighters Union Local 352 v City of Flint, et al.**

*Court of Appeals - Decided June 17, 2004. 2004 Mich. App. LEXIS 1631; Michigan Supreme Court - Decided February 28, 2005. 472 Mich 866; Application for Leave to Appeal denied.*

The Court held that the plaintiff presented sufficient evidence to support its argument that a past practice existed allowing the use of 27 pay dates in at least one year that is included in an employee's calculation of final average compensation for retirement purposes. Thus, when the City amended the Retirement Ordinance to clarify the ordinance provisions regarding final average compensation it made an improper unilateral modification of the parties' collective bargaining agreement.

**McIsaac v Warren General Employees Retirement System**

*Court of Appeals - Decided February 8, 2005. 2005 Mich. App. LEXIS 275*

A retiree who alleged that the Retirement System did not properly account for an arbitrator's lump sum back pay award in the calculation of his retirement benefit was not required to exhaust administrative remedies prior to filing a lawsuit in circuit court.

**DOMESTIC RELATIONS**

**Ellis v Ellis**

*Court of Appeals - Decided February 10, 2005. 2005 Mich. App. LEXIS 331*

Where the participant presented evidence that he contemplated liquidating his retirement accounts, the trial court properly valued the retirement accounts at their after-tax value, rather than at their present-stated value, for purposes of valuing marital assets.

**FREEDOM OF INFORMATION ACT**

**Ritzer v Lockport-Fabius-Park Township Fire Department**

*Court of Appeals - Decided February 8, 2005. 2005 Mich. App. LEXIS 302*

Where plaintiff requested access to and disclosure of the defendant's computer hard drives, pursuant to the Freedom of Information Act (FOIA), the court found that the computers would likely contain both exempt and non-exempt information and to effectively separate the information, the defendant would have to create a new disk or tape. Therefore, as FOIA does not require a public body to create a new public record, paper copies were sufficient.

**Haley v Nunda Township**

*Court of Appeals - Decided January 18, 2005. 2005 Mich. App. LEXIS 76*

The Court held that pursuant to the Freedom of Information Act, "a public body may impose a flat fee, payable in advance, for a subscription to a copy of minutes from the meetings of the public body." The Court also stated that a person is not obligated to use the subscription option and may instead make individual FOIA requests after each set of minutes is created.

**Basham v Board of Trustees of the Policemen and Firemen Retirement System of the City of Detroit**

*Court of Appeals - Decided July 15, 2004. Unpublished.*

Where the plaintiff sued the Retirement System, pursuant to the Freedom of Information Act, to obtain information regarding an investment, the Court held that the Retirement System must disclose a video prospectus because it is information about a public offering of stock, however, all other financial and proprietary documents at issue were to be reviewed by the trial court to determine if they had previously been disclosed. Only those financial and proprietary documents previously disclosed must be provided under FOIA.

**Local Area Watch v City of Grand Rapids**

*Court of Appeals - Decided May 20, 2004. 262 Mich. App. 136; Michigan Supreme Court - Decided January 27, 2005. 472 Mich. 852; Application for Leave to Appeal denied.*

The Court held that "judicial review is not available [under the Freedom of Information Act (FOIA)] to determine whether a public body had the authority under the [Open Meetings Act] to go into closed session and thereby exempt minutes of that meeting from disclosure under FOIA . . . ."

## ATTORNEY GENERAL OPINIONS

### **Office of the Attorney General of the State of Michigan**

*Opinion No. 7167 - Decided December 29, 2004. 2004 Mich. AG LEXIS 12*

The Attorney General opined that the State Employees' Retirement System has no legal basis upon which to suspend the defined benefit retirement benefits of a retirant who has a bona fide termination of employment, subsequently returns to state employment, and becomes a qualified participant in the defined contribution plan pursuant to section 12(3)(f) of the State Employees' Retirement Act.

### **Office of the Attorney General of the State of Michigan**

*Opinion No. 7172 - Decided March 17, 2005. 2005 Mich. AG LEXIS 5*

The Attorney General opined that the five business days within which a public body must respond to a request for a public record under Section 5 of the Freedom of Information Act (FOIA) means five consecutive week days, other than Saturdays, Sundays, or legal holidays, and not five consecutive days on which the particular public body receiving the request is open for business.

## LEGISLATION

### **Social Security Number Privacy Act**

*Act 454 of 2004, MCL 445.81 et seq.; effective March 1, 2005*

Effective March 1, 2005, no person, governmental agency, or other legal entity may: (1) publicly display; (2) use as a primary account number; (3) visibly print on a license, permit or identification; (4) require an individual to use or transmit over the internet or computer system; or (5) include in any document mailed to an individual (if visible from outside the packaging), more than four sequential digits of an individual's Social Security number. Some exceptions include: where authorized or required by state or federal law, rule, regulation or court order or pursuant to legal discovery or process, or where used during a criminal investigation or prosecution. In some instances the effective date may be delayed until January 1, 2006. The Act also states that if person or entity obtains social security numbers in the ordinary course of business, that person or entity must create a privacy policy regarding social security numbers. A person or entity who knowingly violates this Act may be convicted of a misdemeanor and may be sued in a civil action.

---

*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.*