STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BECKIE FRANCIS,

Plaintiff,

Case No. 2013-137089-PZ
Hon. Martha Anderson

-v-

OAKLAND UNIVERSITY,

Defendant.

Gordon, Laughbuaum & Prescott
By: Deborah L. Gordon (P27058)
33 Bloomfield Hills Pkwy., Ste. 200
Bloomfield Hills, MI 48304
(248) 258-2500
dgordon@deborahgordonlaw.com
Attorneys for Plaintiff

Butzel Long, a professional corporation
By: Robert A. Boonin (P38172)
301 E. Liberty Street, Ste. 500
Ann Arbor, MI 48104
(734) 213-3601
boonin@butzel.com
Attorneys for Defendant

DEFENDANT OAKLAND UNIVERSITY'S BRIEF IN RESPONSE TO PLAINTIFF'S EMERGENCY REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF TO COMPEL DEFENDANT'S COMPLIANCE WITH THE BULLARD-PLAWECKI EMPLOYEE RIGHT TO KNOW ACT AND REQUEST FOR EMERGENCY HEARING

I. INTRODUCTION

The Michigan Court Rules have procedures dictating how a party brings a matter before a court. A plaintiff first must file a Complaint to bring a civil action. MCR 2.101. The Complaint is then served upon the defendant. MCR 2.102. The defendant is typically permitted 21 days to answer or otherwise respond to the Complaint. MCR 2.108.

In the case of a true emergency, the Court rules permit a party who has filed a Complaint to seek a Temporary Restraining Order without providing otherwise proper notice to an adverse party. MCR 3.310(B). A party who has filed a Complaint can also seek

temporary injunctive relief upon the filing of a motion. MCR 3.310(A). If the Court so orders, a defendant is not necessarily entitled to the standard 21-day advanced notice of hearing on a motion for injunctive relief. MCR 3.310(A)(3).

As elementary as this all may sound, it bears reviewing because Plaintiff has not followed any of these rules in bringing before this Court her Emergency Request for Injunctive and Declaratory Relief to Compel Defendant's Compliance with the Bullard-Plawecki Employee Right to Know Act and Request for Emergency Hearing ("Emergency Request"). Plaintiff seemingly finds her situation so desperate that she cannot be bound by the Court rules. She cannot be bothered with filing a Complaint, or demonstrating how she will be irreparably harmed if the Court does not grant her immediate injunctive relief. And while she claims that bypassing the Court Rules altogether is permitted under the Act, nowhere in the Act does it relieve Plaintiff of the obligation to file a Complaint or rob from Oakland the opportunity to respond to the Complaint, assert affirmative defenses, and conduct discovery. *See* MCLA 423.511.

Plaintiff pleads to this Court that she has no idea why Oakland terminated her employment as head coach of the women's basketball team and states that she is "left to theorize as to the cause of her for-cause termination" (Emergency Request, ¶38), that Oakland "launched the internal report . . . surreptitiously" (Plaintiff's Brief in Support of Motion, p. 11), and that she must have immediate and unfettered access to all documents regarding Oakland's investigation into her conduct (and that of others) so that she can decide whether to bring a lawsuit. Plaintiff's desperation is feigned. Plaintiff participated in two meetings totaling more than two (2) hours where Oakland explained to her why it was suspending her, listened to her responses and explanations, and then terminated her employment. After the

meeting where Oakland suspended her, Plaintiff even sent a several page rebuttal to the reasons given for her suspension and review, which were duly considered along with her responses and explanations. (Exhibit 1)[1] She also sent countless tweets demonstrating a total disregard of her direct supervisor's reasonable instruction that she keep her religious proselytizing separate from her activities as Oakland's basketball coach. (*See e.g.,* Exhibit 2) Plaintiff knows very well why Oakland terminated her employment. As further evidence of this fact, the last version of the report provided to Plaintiff by Oakland included (un-redacted) the following information:

- (Under the heading "Synopsis") All interviewees/witnesses . . . categorize the allegations as forms of mental and emotional abuse.

- (Under the heading "Generally") (Francis) expects automatic compliance with her instructions and/or expectations; . . . insulting and demeaning to assistant coaches in presence of SAs (student athletes); assumes her priorities/positions are so important that others should defer without question and gets irritated when questioned; any difference of opinion is perceived to be a disagreement, and any disagreement is viewed as proof of disloyalty, and disloyalty is not tolerated.

- (Under the heading "Nutrition") Obsessed with nutrition and body fat. Francis controls how much they (student athletes) eat, when and what they eat.

- (Under the heading "Separation of Church and State) . . . "pray to play" . . . religious discrimination . . . AD (Athletic Director) advised, investigated and told Francis to cease and desist, but Twitter "tweets" from "BeckieFrancis@CoachBeckieOU" from March 1, 2013 through June 2, 2013 routinely intersperse information about OU WBB (Women's Basketball), WBB recruiting, OU generally, biblical quotes and references to Lent, Good Friday, Easter Sunday and the Sabbath.

- (Under the heading "Francis") Francis posits that she is OU's best and most caring coach most concerned with the wellbeing of her players and denies any nutritional mistreatment of players.

Exhibit 3

[1]Redactions have been made to Plaintiff's email consistent with the confidentiality requirements of The Family Educational Rights and Privacy Act, 20 USC 1232g, (FERPA) and in the interest of the privacy issues of other individuals.

Plaintiff also feigns desperation alleging that she is being maligned by Oakland and must have court intervention to protect her reputation. Oakland has not maligned Plaintiff. In fact, the Detroit Free Press has conducted in-depth investigations into the termination of Plaintiff's employment and it stresses -- almost in frustration -- that Oakland will not comment about the situation (Exhibit 4), to wit:

- "Athletic Director Tracy Huth accepted an interview with the Free Press but would not comment on the situation."
- Newly-appointed women's basketball coach "declined comment" about Plaintiff's termination. *Id.*
- "Top OU officials have kept all other details as a closely guarded secret. Multiple other staff members have told the Free Press that under no circumstances were they to speak publicly about [plaintiff]."

Calling a matter an "emergency" does not necessarily mean that it is a true "emergency." Indeed, no emergency exists here. While Plaintiff did sign an Employee Agreement in which she agreed to a six-month statute of limitations for bringing claims against Oakland, the undersigned proposed a tolling agreement prior to Plaintiff filing this Emergency Request, but Plaintiff's counsel rejected that proposal outright. The parties have since been directed by this Court to agree to a tolling agreement, the length of which will be determined by this Court. Thus, any alleged emergency that Plaintiff has orchestrated certainly does not justify emergency Court intervention.

In addition, and this cannot be overemphasized, this is solely a claim under the Bullard-Plawecki Employee Right-to-Know Act (the "Act"). The Act provides no timeline for an employer to respond to a request by an employee to review a personnel record. *See Scuderi v Monumental Life Insurance* Company, 344 F Supp 2d 584, 603 (ED Mich 2004). Indeed, courts have held that employer response times of up to three months are acceptable.

Id. Plaintiff, however, asks this Court to impose a timeline not required by the law. As shown below, Oakland has been trying to accommodate Plaintiff, but in a manner consistent with its other legal rights and obligations. The fact that this process may be taking longer than Plaintiff prefers does not render this matter an "emergency" before this Court. *Muskovitz v Lubbers*, 182 Mich App 489, 499 (1990) ("plaintiff's underlying reasons for wanting copies of the contents of her employment file are immaterial" under the Bullard-Plawecki Act). The process was continuing on an appropriate path and did not need emergency Court intervention.

Finally, while Plaintiff may feel put out by not getting the keys to the proverbial candy store, Oakland has to be mindful of its legal obligation to keep records related to students confidential and to the chilling effect releasing an un-redacted version of its investigatory report would have on the welfare of its student athletes. As is required by NCAA guidelines, Oakland has an appointed Faculty Athletic Representative, in this case, Robert Stewart, Associate Dean of the College of Arts and Sciences. One of Stewart's duties is to conduct an end-of-season student athlete survey. (Exhibit 5, Affidavit of Robert Stewart) Stewart assures the student athletes that their responses to the survey are confidential, knowing that confidentiality is "essential to accomplishing the goals of the Surveys, to wit, open and honest assessments of their experiences as student athletes at the University without fear of reprisal and embarrassment." (*Id.*, ¶5) If Oakland were to accede to Plaintiff's demands, as baseless in law as those demands are, it would violate student privacy laws and jeopardize the critical and justifiable task of ensuring student athletes that they are free and encouraged to bring any concerns about their student experience to Oakland. The importance of that task cannot be over emphasized.

Plaintiff's Emergency Request for injunctive and declaratory relief raises serious matters, and briefing and further review on those matters should be allowed. Plaintiff has, in essence, filed a dispositive motion giving Oakland no opportunity to answer a Complaint or assert its numerous affirmative defenses. Such a short period of time to respond is not appropriate under the Court Rules, for at least one very important reason in that it does not permit the Court to have all of the facts and law before it prior to the hearing. For these reasons, and as detailed more below, Oakland asks this Court to deny the relief requested and to either dismiss this matter entirely or permit it to proceed in its ordinary course.

II. FACTUAL BACKGROUND

Plaintiff claims that Oakland violated the Act by not producing to her an un-redacted 11-page report prepared by Oakland's Office of Legal Affairs on June 10, 2013, and supplemented in July 2013, regarding matters pertaining to Oakland's Women's Basketball Program (the "program"). That report was prepared for Oakland's Board of Trustees. The report covers various issues relating to the program, including concerns regarding Plaintiff (the Head Coach) and other employees involved with the program. The underlying issues related to concerns raised by current and former student athletes on the women's basketball team.

A. Oakland Suspended Plaintiff, Advising Her of Its Basis for Doing So and the Substance of Complaints from Student Athletes.

At least in part due to concerns raised by student athletes, on May 30, 2013 Oakland placed Plaintiff on an unpaid suspension pending further investigation and review. At that time, Plaintiff met with Oakland officials for nearly two (2) hours during which time Oakland informed her of the reasons for the suspension and nature of the concerns raised by the student athletes.

In response to the allegations shared with her during that meeting, later that day Plaintiff submitted a multi-page written rebuttal to the allegations. (*See*, Exhibit 1) This email belies any claim by Plaintiff that she did not know the reasons for her suspension or termination. Indeed, she addresses in her email, point-by-point, the reasons given to her by Oakland.

B. Oakland Investigated the Complaints about the Women's Basketball Program.

As Oakland told Plaintiff it would, it conducted its investigation as to not only Plaintiff, but also as to others involved in the women's basketball program. On June 10th, Oakland's Office of Legal Affairs completed its review of the matter and made numerous recommendations to the Board of Trustees as to how the concerns should be addressed by Oakland with respect to the program as-a-whole, to Plaintiff, and to other Oakland employees and processes. The report was provided to the Board of Trustees.

C. Oakland Terminated Plaintiff's Employment, Advising Her of Its Basis for Doing So.

On June 12, 2013, Oakland again met with Plaintiff. At that meeting it informed Plaintiff that it was converting her suspension to a termination with cause, and explained to her the reasons for that decision.

D. Plaintiff Requested a Copy of Her Personnel File.

Shortly after her termination, Plaintiff asked that Oakland send her a copy of her personnel file. She did not ask to first review her file as required under the Act. Almost immediately after her request, on June 20, 2013, Oakland provided Plaintiff with a complete copy of her personnel file. A few weeks later, Plaintiff made a similar request, and on July 2nd Oakland immediately provided Plaintiff with another complete copy of her personnel file,

as well as various media requests that had been made for her file since her termination. Those requests are not considered part of Plaintiff's personnel record under the Act, and Oakland provided those additional records of media requests as a courtesy to Plaintiff.

The Office of Legal Affairs' report was not included in either the June or July productions to Plaintiff because it is not part of Plaintiff's personnel record as defined by the Act. Nevertheless, because Plaintiff had specifically requested a copy, parts of that report were shared with her; other parts were redacted for the reasons described in this Response, including without limitation, because they entailed matters directly related to students and other employees of Oakland; and some parts were redacted on the basis of attorney-client privilege.

Plaintiff has contested the scope of the redactions, and Oakland has been open to reviewing those concerns. Despite these efforts to reach an agreement, Plaintiff filed this Emergency Request.

E. The Emergency Request Is Not Based on the Actual Facts or Timeline of Events.

Plaintiff takes liberties in her Emergency Request to support her quest for extraordinary relief. She omits facts which are directly relevant to the relief sought. For instance, Plaintiff fails to advise this Court that:

- Contrary to the allegation in paragraph 23 of the Emergency Request, Plaintiff did not request a complete copy of her personnel record on September 16, 2013. On that date, by email at 5:06 p.m., Plaintiff made a request for only the report.

- Given that the report was not a personnel record, and given the specificity of Plaintiff's request, Oakland considered the request as one under the Freedom of Information Act. Under FOIA, Oakland had five business days to respond, with the right to extend the period to respond by another 10 business days. Thus, Oakland could have delayed its response to October 7, 2013. Despite this right, it responded the next business day, September 18, 2013. In that

response it denied the request for a copy of the report under FOIA for three reasons including attorney/client privilege, advisory information, and student protected information under the federal Family and Educational Privacy Rights Act ("FERPA").

- On September 23, 2013, Plaintiff's counsel sent a letter to Oakland advising it that Plaintiff's September 16th request was not intended to be one under the FOIA, but rather one under the Act.

- There is no statutory requirement for when an employer must respond to a request under the Act. Despite the fact that Oakland never considered the report to be a personnel record subject to production under the Act, it responded on October 2, 2013 with the redacted report, as attached to Plaintiff's Emergency Request as Exhibit E, including an explanation of the redactions. On October 3, 2013, Plaintiff's counsel objected to the breadth of the redactions, but contrary to her allegations in Paragraph 32 of the Emergency Request, she did not provide any of what she contends to be case law authority for her objections until October 23, 2013.

- After considering Plaintiff's contentions further, but without agreeing to their merit, on October 25, 2013, Oakland provided another copy of the report, but with fewer redactions. A copy of that production was not provided to the Court by Plaintiff, but is attached hereto as Exhibit 3.

- Along with that revised production, Defendant provided Plaintiff with a detailed, line-by-line log of the redactions. The Act in no respect requires the creation of such a log. A copy of that log also was not shared with the Court by Plaintiff, and so a copy is attached hereto as Exhibit 6.

- In addition, at the conclusion of that production, Oakland advised: "If you still believe the redacted investigative report as revised is inadequate, we will consider un-redacting more information subject to a confidentiality agreement with terms and conditions acceptable to the parties." (*See* Exhibit H of the Emergency Request)

- In response, on October 29, 2013, Plaintiff's counsel sent an e-mail to Oakland with complaints about the log and the remaining redactions. She did indicate that she would be willing to explore a confidentiality agreement. For the first time, she also threatened legal action.

- The next day, counsel for Oakland wrote to Plaintiff's counsel stating that Oakland would further review her concerns, but that the issues are complex and require close examination. Due to counsel's commitment to be out of state for most of the following week, she was advised that Oakland's response would likely not be provided until after that week. (Exhibit 7)

- Plaintiff's counsel responded with a rejection of any willingness to await Oakland's response and that she would be filing a lawsuit the next day. (Exhibit 8)

- Oakland's counsel immediately contacted Plaintiff's counsel indicating that her demand that Oakland respond in less than 48 hours was unreasonable in light of the complexity of the issues, particularly the student's statutory privacy rights. Further, counsel discussed the reason for Plaintiff's articulated urgency, being the contractual limitation period in Plaintiff's Employee Agreement. In that context, the issue of a tolling agreement was raised, but that was flatly rejected by Plaintiff's counsel.

- Plaintiff responded to Oakland's efforts to resolve the issue of the report with this Emergency Request.

There is no legal basis for granting Plaintiff's Emergency Request. Plaintiff's remedy for challenging Oakland's response to her request for her personnel file is to file a Complaint alleging a cause of action under the Act. However, because Plaintiff has brought this matter so urgently before this Court, Oakland will, without waiving any objections, provide this Court with the legal justification for the actions it has taken with regard to the report.

III. ARGUMENT

At issue in this matter is what part of the report, if any, is subject to disclosure under the Act. Under the law, not every document which relates to an employee is a "personnel record." Rather, the Act limits the definition of a "personnel record" to "a record kept by the employer that identifies the employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action." MCLA 423.501(2)(c). Importantly, some documents which may otherwise fall within this definition are still excluded from production under the Act. MCLA 423.501(2)(c)(i)-(viii).

A. Even if the Report Were Part of Plaintiff's Personnel Record, the Redactions Oakland Made Were Appropriate and Required by Law.

The report at issue details an investigation that was not just regarding Plaintiff, but also concerned the program and conduct of other employees. The allegations triggering the investigation--particularly the allegations relating to Plaintiff--were asserted by students about Plaintiff's treatment of them as students. And, the report contains the conclusions, impressions and recommendations of legal counsel. In sum, the report does not fit squarely, if at all, within the Act's definition of a personnel record concerning Plaintiff.

In an effort to be cooperative, Oakland took pains to, in good faith, redact the report such that only material that might be considered a personnel record of Plaintiff's was being produced. As to the information redacted, Oakland provided Plaintiff with a line-by-line redaction log indicating Oakland's basis for each redaction. Those redactions fall within six categories discussed below; each category of redaction has a sound legal basis. Importantly, more than one reason for redaction may apply to any particular redaction.

1. Student Privacy Exemption under Federal Law

The analysis of this issue is straight forward. The Family Educational Rights and Privacy Act, 20 USC 1232g, ("FERPA") is a federal statute which conditions an educational institution's receipt of federal funds (including federal student aid) on compliance with FERPA's requirements aimed at protecting student privacy interests. FERPA requires educational institutions that receive federal funds, such as Oakland, to keep "Education

Records" confidential or lose their entitlement to federal funds.[2]

The Act respects the protections of FERPA by exempting from the definition of a personnel record: "Records maintained by an educational institution which are directly related to a student and are considered to be *education records* under [FERPA]." MCLA 423.501(2)(c)(vii), (Emphasis added). FERPA defines an "education record" as one that is "directly related to a student" and "maintained by an education agency or institution . . . ." 20 USC 1232g(a)(4)(A). A record is directly related to a student even when a student is referred to in another record, such as a personnel record of a staff member.

As recently held the appellate court in *Rhea v Board of Trustees of Santa Fe College*, 109 So3d 851 (Fla App 2013) (denying professor's claim to un-redact the name of student who sent an email complaining about professor's classroom behavior and teaching style) (Exhibit 9), information in a report may be directly related to both a teacher and a student, and in such case, the student information is subject to the disclosure limitations under FERPA. "If the record contains information directly related to a student, then it is irrelevant under the plain language in FERPA that the record may also contain information directly related to a teacher or another person." *Id.* at 858.

Here, the report is obviously maintained by Oakland and the sections of the report redacted by Oakland on FERPA grounds relate directly to students, therefore, those sections of the report fall squarely within FERPA's definition of an "Education Record" and cannot be deemed a personnel record of Plaintiff under the plain language of the Act. While Plaintiff

[2] Under FERPA "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records" without the consent of the student except in limited circumstances, including if compelled by subpoena or court order provided the student is given prior notice. 20 USC 1232g(2)

claims that Oakland could simply redact student names and directly identifying information, under the circumstances, the report would still be directly related to students because it would contain students' Personally Identifiable Information. FERPA makes it clear that under some circumstances simply redacting names or other direct identifiers will not adequately protect the student's identity and requires that more be done.

Under FERPA the term "Personally Identifiable Information" includes, but is not limited to:

> (a) The student's name;
> (b) The name of the student's parent or other family members;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number, student number, or biometric record;
> (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
> *(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or*
> (g) *Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.*"

34 CFR 99.3, (Emphasis added).

Many of the sections of the report redacted by Oakland on FERPA grounds were based on the fact that Plaintiff knows the identity of the students to whom those sections relate. Such redactions are wholly appropriate under the circumstances.

This very scenario was analyzed In *Press-Citizen Company, Inc v University of Iowa,* 817 NW2d 480 (Iowa Sup Ct 2012) (Exhibit 10), where plaintiff newspaper sought documents under the Iowa open records act from the defendant university related to an alleged sexual assault committed by two students. The Iowa open records act permitted the university to exempt from disclosure documents which could not be disclosed under FERPA.

The names of the alleged offenders had already been reported by numerous media outlets, therefore, the university refused to produce the documents, even in redacted form, because the plaintiff would still be able to identify the students to whom the documents related.

Relying upon the FERPA definition set forth above, the Supreme Court of Iowa held that "consistent with current DOE regulations, we conclude that educational records may be withheld in their entirety where the requester would otherwise know the identity of the referenced student or students even with redactions." *Id.* at 492.

Here, the sections of the report redacted by Oakland on FERPA grounds were redacted based on Oakland's reasonable belief that Plaintiff would know the identity of the student to whom the information relates. Said sections consist primarily of statements by students regarding things done to them by Plaintiff; hence, if Plaintiff were permitted to see those statements, she would undoubtedly know the identity of the student making the statement. Hence, that information is directly related to the students, and disclosure would be a violation of the student's privacy rights under FERPA.

Further, even if the education records within the report could be disclosed to Plaintiff in a manner that would not allow her to identify the specific students to whom they relate, it would provide her a means to identify them due to the small number, or "cell," of students at issue. Plaintiff would know that the information relates to one or more of only twelve (12) students (the number of students on the women's basketball team at the relevant time).

FERPA addresses this "small cell size" issue in part (f) of the definition of "Personally Identifiable Information," which part was also discussed in *Press-Citizen* wherein the court referenced the United States Department of Education's Letter in 2006 to a Texas school

district regarding the disclosure of Education Records to the Texas Office of Attorney General, which states in relevant part:

> Occasionally, a student's identity may be "easily traceable," even after removal or redaction of direct identifiers and other nominally identifying information from student-level records. This may be the case, for example, with a highly publicized disciplinary action, or one that involved a well-known student, where the student could be easily identified in the community even after the record has been "scrubbed" of identifying data. In these circumstances, FERPA does not allow release of the education record in any form without consent because the irreducible presence of "personal characteristics" or "other information" make the student's identity "easily traceable". . . .
>
> [I]nstitutions themselves are clearly in the best position to analyze and evaluate this requirement based on their own data, and under FERPA the burden is on the agency or institution not to release either aggregated or de-identified ("redacted") student level data if it believes that personal identity is easily traceable based on the specific circumstances under consideration. This Office has advised elsewhere that an educational agency or institution should use generally accepted statistical principles and methods to address the problem of small cell sizes and otherwise ensure that statistical or de-identified information from education records is reported in a manner that fully prevents the identification of students.

(Exhibit 11)

Therefore, in addition to the fact that Plaintiff would know the identity of the students to whom the redacted information relates, Oakland's redaction of such information is also proper due to the "small cell size" at issue. By way of example, if the report stated that eight (8) students said "X", one would only have to discover the identity of the four (4) who did not say "X" to be able to conclusively establish the identity of the eight (8) students who said "X". For this additional reason, the information redacted by Oakland on FERPA grounds is directly related to students, and disclosure would be impermissible under FERPA.

2. Personal Information Regarding Others

The Act also specifically excludes from a personnel record "[i]nformation of a personal nature about a person other than the employee if disclosure of that information would constitute a clearly unwarranted invasion of the other person's privacy." MCLA 423.501(2)(c)(iv). As discussed above, Oakland's investigation involved, not only Plaintiff, but the program as a whole. Hence, the report addresses not only serious issues involving Plaintiff, but facts and circumstances about other Oakland employees involved in the program. Plaintiff is not entitled under the Act to see that personal information regarding other Oakland employees. Consequently, Oakland appropriately relied upon this exemption in redacting information in the report pertaining to other employees' personal information.

3. Planning Information

The Act does not include within the definition of "personnel record" "[m]aterials relating to the employer's staff planning with respect to more than 1 employee, including salary increases, management bonus plans, promotions, and job assignments." MCLA 423.501(2)(c)(ii). Oakland could have relied on this exemption for not producing the entire report, which pertains to the performance and possible discipline of many employees with respect to the women's basketball program. *Michigan Professional Employees Society v Department of Natural Resources*, 192 Mich App 483 (1992); *Muskovitz,* 182 Mich App at 497.

Oakland therefore redacted the sections of the report that discussed other employees' conduct and its ramifications with respect to the program. Everything beginning with line 230 on page 7 of the report relates to findings and directions as to *other* employees and processes and in no way regards a personnel action taken with respect to Plaintiff.

Accordingly, to the extent the investigation regarded individuals other than Plaintiff and recommendations about the program, the report is not Plaintiff's "personnel record" under the Act and Oakland was not obligated to produce it.

4. Employee References

The Act excludes from the definition of a personnel record "employee references supplied to an employer if the identity of the person making the reference would be disclosed." MCLA 423.501(2)(c)(i). Among the redactions Oakland made to the report are answers given to Oakland in response to requests made regarding Plaintiff's performance. Plaintiff's counsel contends that only names can be redacted, not the substance of the responses. However, redactions of more than just the names of these individuals are justified because releasing the substance of the response would cause the identity of the source to be disclosed. *Id. See also Muskovitz,* 182 Mich App at 498-499 (1990) (peer review reports are not personnel records if the identity of the reviewer would be known; a peer review system "is necessarily dependent on the maintenance of strict confidentiality without which meaningful participation of the faculty would be chilled."). Nonetheless, in all instances where this exemption was asserted in the log, only the names of those providing the reference statements were redacted, i.e., not the substance.

5. Not a Personnel Record since Not Used in Connection with Plaintiff's Employment.

The final category under the Act that Oakland used to support the redactions relates to items which were not used in connection with Plaintiff's employment. That is, although the information was in the report, it regarded other employees and the conduct of those employees. That information was not used as a basis for Plaintiff's suspension or termination. Moreover, some of that information was not added to the report until after Plaintiff's

termination (as demarked in red ink on the original report). As such, these items are not among Plaintiff's "personnel records," and thus it was proper for Oakland to exclude them from its production of her personnel record. MCLA 423.501(2)(c).

6. Attorney/Client Privilege

This basis for redaction was asserted on few occasions, but those occasions are clearly privileged communications where legal counsel is providing the client (Oakland's Board of Trustees) with impressions as to facts and risks, and recommendations with respect to those impressions.

B. Plaintiff Has Failed to State a Claim under the Act, and Has Failed to State a Claim for Attorneys Fees or Liquidated Damages.

In order to bring a claim under the Act, certain prerequisites exist. One is that the employee must ask to review his or her employment record under the Act. Merely seeking a copy does not suffice since there is no obligation to provide a copy until after the review is held. MCLA 423.503 and 423.504. See *Betzold v Saginaw Coop Hosp.,* 2005 Mich App LEXIS 418, at *13-*14 (Feb. 15, 2005) (unpublished) (Exhibit 12). See also *Sobieski v Takata Seat Belts, Inc,* 2006 Mich App LEXIS, at *18-*19 (August 8, 2006) (unpublished), *lv denied,* 477 Mich 985 (2007) (Exhibit 13). Nowhere in Plaintiff's Emergency Request does she allege that she asked for such a review. Accordingly, her claim is fatally flawed, and this matter must be dismissed.

Further, Plaintiff has failed to state a claim for fees or liquidated damages under Section 11 of the Act, MCLA 423.511. That section allows for a court to award reasonable attorney fees plus $200 if the court finds that the employer committed a "willful and knowing violation" of the Act. *Id.* As the record shows, Oakland has been trying to comply with Act. There is no disregard for the Act, but rather a sincere effort to adhere to its obligations and

rights under the Act, especially the statutory rights of its students. Under any analysis, such efforts cannot constitute a willful and knowing violation of the Act.

C. There Is No Basis for Addressing Plaintiff's Request on an Emergency Basis. This Case Should Proceed in the Normal Course.

Plaintiff seeks expedited consideration of her claim in light of the time remaining on the limitations period for claims she may wish to bring relating to her termination. Such secondary considerations or considerations pertaining to other potential claims is irrelevant to a court's determination of an employer's compliance with its obligations under the Act. In fact, Plaintiff's attempt in this regard was specifically rejected by the Court in *Muskovitz*, 182 Mich App at 499. The Court in *Muskovitz* held:

> In this [Bullard-Plawecki Employee Right to Know Act] case, we are concerned only with the scope of the plaintiff's right of discovery pursuant to the Employee Right to Know Act. Within the context of that statute, plaintiff's underlying reasons for wanting copies of the contents of her employment file are immaterial.

Id.

Under typical circumstances, Plaintiff would be required to file her request for declaratory action 28 days prior to any hearing on that request. MCR 2.116. Even if this Court did not deem Plaintiff's Emergency Request to be dispositive in nature (but it most certainly is, as Plaintiff is asking this Court to rule on the merits of her claim under the Act), Plaintiff would have been required to file her request seven days prior to any hearing. MCR 2.119.

Plaintiff is foregoing the requirements of both MCR 2.116 and MCR 2.119, claiming that she is entitled to an "Emergency Hearing" for injunctive relief under MCR 3.310. MCR 3.310 provides that a "motion for preliminary injunction must be filed and noticed for hearing

in compliance with the rules governing other motions unless the court orders otherwise on a showing of good cause." MCR 3.310. This Court has not ordered that Plaintiff is permitted to forego the requirements of either MCR 2.116 or 2.119 in noticing her Emergency Request for hearing. Moreover, Plaintiff has not demonstrated good cause as to why she should be excused from abiding by the Court Rules.

Plaintiff has also failed to follow Michigan law in filing her Emergency Request. Under Michigan law, issuance of an injunction involves application of a four factor analysis:

> The strength of the applicant's demonstration that the applicant is likely to prevail on the merits;
>
> Demonstration that the applicant will suffer irreparable injury if a preliminary injunction is not granted;
>
> Whether harm to the applicant in the absence of the stay outweighs harm to the opposing party if the stay is granted; and
>
> Harm to the public interest if an injunction issues.

MSEA v Department of Mental Health, 421 Mich 152, 157-158 (1984). Plaintiff has not addressed a single one of these factors in arguing to this Court that she is entitled to emergency and expedited relief.

Similarly, Plaintiff has failed to establish why she is entitled to declaratory relief. Declaratory actions are "civil in nature and result in a binding adjudication of the rights and status of litigants . . . [that] is conclusive in a subsequent action between the parties as to the matters declared. . . . . Declaratory relief serves important purposes: . . . Its purpose is to enable parties, in appropriate circumstances of actual controversy, to obtain an adjudication of their rights before actual injury occurs, to settle matters before they ripen into violations of law or a breach of contractual duty, to avoid a multiplicity of actions by affording a remedy

for declaring in one expedient action the rights and obligation of all litigants." *Lansing Sch Educ Ass'n v Lansing Sch Dist Bd of Educ*, 293 Mich App 506, 515-516 (2011).

Before Plaintiff can bring a declaratory action, she has to show that an actual controversy exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Atwater Entm't Assocs v Doss*, 2010 Mich App LEXIS 736 (Apr 22, 2010) (Exhibit 14). There is no actual controversy here. There is no deadline for responding to requests made under the Act and it is incredibly premature for Plaintiff to invoke court action to preserve her legal rights.

Plaintiff is quick to run to this Court seeking expedited emergency declaratory and injunctive relief, but is lax to provide any legal or procedural basis for her entitlement to such relief. This Emergency Request should be denied.

IV. CONCLUSION

Based on the foregoing, Oakland asks this Court to deny the relief requested by Plaintiff and to dismiss this matter in its entirety, or in the alternative, permit Oakland at least 21 days to respond to Plaintiff's claim per the Court Rules.

Respectfully submitted,

BUTZEL LONG, a professional corporation

By: /s/ Robert A. Boonin
Robert A. Boonin (P38172)
Suite 500
301 E. Liberty Street
Ann Arbor, Michigan 48104
(734) 995-3110
boonin@butzel.com
Attorneys for Defendant Oakland University

Dated: November 8, 2013

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2013, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the attorneys of record.

BUTZEL LONG, a professional corporation

By: /s/ Robert A. Boonin
Robert A. Boonin (P38172)
Suite 500
301 E. Liberty Street
Ann Arbor, Michigan 48104
(734) 995-3110
boonin@butzel.com
Attorneys for Defendant Oakland University

EXHIBIT LIST

Exhibit	Description
1	May 30, 2013 Email from Plaintiff
2	Tweets from Plaintiff
3	General Counsel Report with Redactions
4	Detroit Free Press Article, July 21, 2013
5	Affidavit of Robert Stewart
6	Log of Redactions to Office of Legal Affairs Report
7	October 30, 2013 email to Plaintiff Counsel
8	October 30, 2013 email from Plaintiff Counsel
9	*Rhea v Board of Trustees of Santa Fe College*
10	*Press-Citizen Company, Inc v University of Iowa*
11	US Department of Education Letter re: Disclosure of Education Records
12	*Betzold v Saginaw Coop Hosps*
13	*Sobieski v Takata Seat Belts, Inc*
14	*Atwater Entm't Assocs v Doss*

EXHIBIT 1

From: Beckie Francis <francis@oakland.edu>
Sent: Thursday, May 30, 2013 9:27 PM
To: Victor Zambardi
Subject: Fwd:

Vic, here are some FACTS.

1. I have no written nutrition policy – My staff and I encourage healthy eating practices

2. We do not encourage candy – it produces severe sugar crashes and can impact performance

3. Our training table is not restricted- buffet style at high end hotels. Numerous training tables.

4. I do have a nutritional counselor speak to my players, it is not me [redacted]

5. Counseling is made available to my players as needed.

6. I incorporate a comprehensive "wellness" component to my program. Some examples of student-athlete development in our life skills program include nutrition presentations, alcohol education by Dr. Jack Wilson, self-defense class to prevent sexual assault and rape (RAD is Rape Aggression Defense run by our OUPD). We also do etiquette classes (by Joy James) and other leadership development. [redacted] I have the most robust wellness component than any other sport.

In addition:

1. I am aware of the rates of eating disorders for females, in particular for female athletes, it is a national problem.

2. I am also aware of the scientific literature that correlates psychiatric disorders and eating disorders (anxiety, depression).

3. I try to lead by example, it is possible that my personal eating habits are watched closely by players.

4. [redacted] was intensely involved in supervising this area.

5. If there was ever an issue with the team's eating practices, I wish the players would have come to me. No player in the history of the program has ever brought this up as a problem directly to me.

Summary: I feel like this is a witchhunt by [redacted] I have high standards and expectations, not all student-athletes can perform to those standards. I do what I can to make sure they all have a soft landing somewhere. I do not anticipate that the AD would be supportive of me when receiving a call and/or visit by [redacted] I warned my AD that this might happen. I was told [redacted] that [redacted] called [redacted] to warn us that [redacted] coaches in [redacted] program and she was very concerned by what she was hearing. [redacted] told [redacted] was calling the newspapers to try to stir things up about me. We all believe it is because [redacted] It got ugly when [redacted] out of the blue. Everyone was shocked. [redacted] Those were her words exactly. [redacted] asked to talk to Tracy. Robby Stewart conducted exit interviews [redacted] such as with [redacted] and [redacted] and now here we are. I was shocked with the accusations. We supply so much food at our training tables (Royal Park hotel with the men's bbll team) and on the road when playing away games it is almost a ridiculous claim. [redacted] has all the menus. Concerning some of the athletic department members - I went to [redacted] expressing my concern that [redacted] offered bowls of candy bars and the "Grads and Champions" Event. [redacted] advised me to go talk to other coaches to see if it bothered them. I went to [redacted] and the [redacted] was in there at the time I asked [redacted] about the candy bowls. He said it didn't bother really bother him. I could tell [redacted] was opposed to my question by her body language. [redacted] is the one who set up the individual nutritional consultations with [redacted] so I suggested we should too. [redacted] has only been [redacted] replaced [redacted] has never traveled with our team that I can remember nor has [redacted] attended a training table. [redacted] told me [redacted] approached [redacted] questioning the candy bowls (I did not direct [redacted] to do this, [redacted] did it on [redacted] own). I feel this summary addresses the 3 prongs you mentioned in the meeting today.

Some articles:

Objective; The authors seek to clarify, from both an epidemiologic and genetic perspective, the major risk factors for bulimia nervosa and to understand the relationship between narrowly defined bulimia and bulimia-like syndromes. Method: Personal structured psychiatric interviews were conducted with 2,163 female twins from a population-based register. Psychiatric disorders were assessed using DSM-III-R criteria. Results: Lifetime prevalence and risk for narrowly de-fined bulimia were 2.8% and 4.2%, respectively. Including bulimia-like syndromes increased these estimates to 5.7% and 8.0%, respectively. Risk factors for bulimia included 1) birth after 1960, 2) low paternal care, 3) a history of wide weight fluctuation, dieting, or frequent exercise,

4) a slim ideal body image, 5) low self-esteem, 6) an external locus of control, and 7) high levels of neuroticism. Significant comorbidity was found between bulimia and anorexia nervosa, alco holism, panic disorder, generalized anxiety disorder, phobia, and major depression. Proband wise concordance for narrowly defined bulimia was 22.9% in monozygotic and 8.7% in dizygotic twins. The best-fitting model indicated that familial aggregation was due solely to genetic factors with a heritability of liability of 55%. A multiple threshold model indicated that narrowly

defined bulimia nervosa and bulimia-like syndromes representeddifferent levels of severity on the same continuum of liability. Conclusions: The liability to fully syndromalbulimia nervosa, which affects around one in 25 women at some point in their lives, is substantially influencedby both epidemiologic and genetic risk factors. The same factors that influence the risk for narrowly definedbulimia also influence the risk for less severe bulimia-like syndromes.

(Am J Psychiatry 1991; 148:1627-1637)

Sports Medicine Journal

Eating disorders can lead to death. The prevalence of subclinical and eating disorders is high among female athletes, and the prevalence of eating disorders is higher among female athletes than nonathletes. Athletes competing in sports where leanness or a specific bodyweight is considered important are more prone to develop eating disorders than athletes competing in sports where these factors are considered less important. It appears necessary to examine true eating disorders, the subclinical disorders and the range of behaviours and attitudes associated with eating disturbances in athletes, to learn how these clinical and subclinical disorders are related. Because of methodological weaknesses in the existing studies, including deficient description of the populations studied and the methods of data collection, the best instrument or interview method is not known. Therefore, more research on athletes and eating disorders is needed. Suggestions of the possible sport specific risk factors associated with the development of eating disorders in athletes exist, but large scale longitudinal studies are needed to learn more about risk factors and the aetiology of eating disorders in athletes at different competitive levels and within different sports. Further studies are required on the short and long term effects of eating disorders on athletes' health and athletic performance.

Santa Clara Wellness Center Female Athletes & Bulimia

Female athletes who have bulimia nervosa are similar to female non-athletes with that disorder, but there are some important additional factors at work also.

Food restriction sets the scene for the next binge

Many bulimics eat nothing, or very little, all day, and then, after making themselves hungry, they binge at night. The non-athlete restricts to control weight. The bulimic athlete does too, but she also may insist that if she eats during the day she will feel heavy and be slow at workouts, practices, and competitions.

Uncomfortable emotions trigger binges too

Hunger is a primary binge trigger, but so are uncomfortable emotional states. Bulimic athletes may binge and vomit before they compete to reduce high anxiety levels. No one likes to lose, but everyone does from time to time. Bulimic athletes may comfort themselves after defeat, or try to ease depression, by indulging in binge food, which is usually high-fat and in other circumstances forbidden.

Team meals are difficult

Eating with other people, especially one's teammates, is hard for the athlete with bulimia. She may be able to eat only a small amount of food before she loses control and binges. At the training table she may do one of two things: (1) avoid eating by making excuses or leaving early, or (2) eating and then leaving to continue a full-fledged binge followed by purging.
The social stress is considerable. The athlete worries about being discovered in a binge, and she anticipates

with dread being confronted about her strange food habits and meager diet. She may worry more about being discovered in her bulimia than about how well she will compete in the next event.

Purging means more problems for the athlete

Vomiting and laxative abuse carry with them a sense of shame and fear of discovery. Hiding the products of purging becomes a problem in communal restrooms, especially on team trips. The bulimic athlete may spend many hours planning how to make time and find the privacy to obtain binge food, gobble it, and then vomit or process the cramps and diarrhea generated by laxatives.

I would like to reiterate that we always had very generous portions at our training tables and hotel meals. We also had plenty of Peanut Butter and Jelly sandwiches, power bars, fruit and other snacks for our bus rides, plane rides etc. Extra food was in an assistant coach/managers hotel room if they ever got hungry. Our athletic trainer Matt Herrema also offered pre-game fueling (gel, goo), a mid game gatorade, snack at half time and post game fueling. An assistant coach or trainer would have extra food in a hotel room (Peanut butter and Jelly sandwiches, fruit, power bars, crackers and other snacks) which the players are welcome to any time of the day or night. We also supplied snacks on long bus rides and flights.

Thank you.
Beckie

EXHIBIT 2

Tweets

1.  **Beckie Francis @CoachBeckieOU** 11h

   "I command you- Be strong & courageous. Do not be afraid or discouraged. For The Lord is with you wherever you go." Joshua 1:9

   Expand

   - **Reply**
   - **Retweet**
   - **Favorite**
   -

2.  **Beckie Francis @CoachBeckieOU** 16h

   It's a beautiful Pure Michigan day

   Expand

3.  **Beckie Francis @CoachBeckieOU** 2 Jun

   ...And by his wounds we are healed". Isaiah 53:5

   Expand

4.  **Beckie Francis @CoachBeckieOU** 2 Jun

   He was pierced 4 our transgressions, he was crushed 4 our iniquities; the punishment that brought us peace was upon him ...

   Expand

5.  **The A21 Campaign @TheA21Campaign** 2 Jun

   A21 partners with local law enforcement, ministries, shelters, and safe houses across the globe. We can't do it alone! http://a21.cta.gs/02t

Retweeted by **Beckie Francis**

Expand

6.  **Beckie Francis @CoachBeckieOU** 31 May

"Those who hope in the Lord will renew their strength. They will soar on wings like eagles; they will run & not grow weary..." Isaiah 40:31

Expand

7.  **Beckie Francis @CoachBeckieOU** 31 May

"@saddiwashington: But the Lord is faithful, who shall stablish you, and keep you from evil. http://bible.us/1/2th.3.3.kjv " ....He will strengthen

View summary

8.  **Beckie Francis @CoachBeckieOU** 31 May

"God resists the proud, but gives grace to the humble. Humble yourselves therefore under the mighty hand of God..." 1 Peter 5:5,6

Expand

9.  **Erin Merryn @ErinMerryn** 30 May

@Oprah NY Assembly wont vote on #ERINSLAW. Senate passed! 8 states have passed. 13 more intro. MEDIA help! http://youtu.be/WcsnCqGhUf8

Retweeted by **Beckie Francis**

View media

10.  **Beckie Francis @CoachBeckieOU** 30 May

Trust in the Lord & do good. Dwell in the land & enjoy safe pasture. Delight ur self in the Lord & He will give u the desires of your heart.

Expand

11.  **Joshua Bobek @joshuabobek** 26 May

@CoachBeckieOU Love the roller coaster! Was just there yesterday!

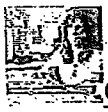
Retweeted by **Beckie Francis**

View conversation

12.  **Beckie Francis @CoachBeckieOU** 28 May

Every1 who competes in games does strict training, do it 2 get crown does not last; but we do it 2 get crown will last forever 1 Cor 9:24

Expand

13.  **Oakland County Moms @OaklandCtyMoms** 26 May

Oakland County Memorial Day Events - Parades - Ceremonies http://oaklandcountymoms.com/events/local-activities/2684-oakland-county-memorial-day-events-parades-ceremonies …

Retweeted by **Beckie Francis**

Expand

14.  **Beckie Francis @CoachBeckieOU** 26 May

Stony Creek park in MI- mountain biking heaven **#tryrollercoastertrail**

Expand

15.  **Beckie Francis @CoachBeckieOU** 25 May

Fall 2014 - Oakland U opens 3 new facilities- engineering design center, 540 student apartment complex & a new tennis/track complex

Expand

16.  **Beckie Francis @CoachBeckieOU** 25 May

Hey **@gracechick14** have you read inspiring books by **@KarenKingsbury**- a great vacation read **#plusbookonUSConstitution** pic.twitter.com/WvAXazUuBl

View photo

17.  **Beckie Francis @CoachBeckieOU** 24 May

Reading good books soothes the soul **#sharpenthesaw**

Expand

18.  **Beckie Francis @CoachBeckieOU** 24 May

"Be sure you know the condition of your flocks, give careful attention to your herd" Proverbs 27:23

Expand

19.  **Beckie Francis @CoachBeckieOU** 23 May

Here is a great video to thank our family, friends, and fans for supporting Oakland basketball! http://www.youtube.com/watch?v=GPteW_bQGik ...

View media

20.  **Beckie Francis @CoachBeckieOU** 22 May

Prioritize family, education, health, and faith. The result = happiness & peace

Expand

EXHIBIT 3

Updated through July 31, 2013

Francis Board of Trustees Executive Summary

Date: June 10, 2013/July 31, 2013

To: Oakland University Board of Trustees

From: Vice President for Legal Affairs and General Counsel, and Director of Inclusion and Intercultural Initiatives

Re: Internal Investigation of Beckie Francis

I. Interviewees/Witnesses:

- By FAR (Associate Dean CAS and Licensed Psychologist)
  - 14: [redacted]
- By SWA (Assistant AD for Student Services)
  - 2: [redacted]
- By OLA (VP Legal Affairs/General Counsel and Director of III)
  - 9: [redacted] WBB Head Coach (Francis); [redacted]
- Impressions: [redacted]
- [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

II. Documentation Reviewed:

1. Michigan Department of Licensing and Regulatory Affairs Filing Endorsement for Athetica Edge LLC (Francis LLC) (May 1, 2003)
2. [redacted]
3. Select Personnel Documents of [redacted]
4. Email between [redacted] and Francis [redacted]
5. Francis Employment Agreement (dated April 11, 2012)
6. [redacted]
7. [redacted]
8. [redacted]
9. Beckie Francis Performance Evaluation "Successful: Performance meets job requirements" (dated May 16, 2012)
10. OU Services Agreement with [redacted]
11. [redacted]
12. [redacted]
13. Copy of Francis' Twitter "tweets" (March 1, 2013 to June 2, 2013)
14. Email chain [redacted]
15. Written statement (email) from Francis to VPLA/GC, dated May 30, 2013
16. [redacted]
17. Documentation from FAR (Associate Dean CAS and Licensed Psychologist)
    - A. [redacted]
    - B. [redacted]
    - C. [redacted]

D. [redacted]

E. [redacted]

F. [redacted]

G. [redacted]

H. [redacted]

I. [redacted]

[redacted]

Francis (WBB Head Coach)

Synopsis. All interviewees/witnesses, [redacted] categorize the allegations as forms of mental and emotional abuse; Francis is a "master manipulator". Traces of the issues/behaviors described have always been present but increased notably during the last two WBB seasons and is now intolerable. SA and whistleblower reports began in last two months.

[redacted] All staff fear for their jobs [redacted]

Generally. Francis believes she is "special" and requires excessive and constant attention; has a sense of entitlement [redacted] expects automatic compliance with her instructions and/or expectations; exploits personal relationships to achieve her own ends; lacks empathy and is unwilling to recognize or identify with the feelings or needs of others; routinely devalues and minimizes the contributions of others; expects special privileges; insulting and demeaning to assistant coaches in presence of SAs; assumes her priorities/positions are so important that others should defer without question and gets irritated when questioned; any difference of opinion is perceived to be a

disagreement, and any disagreement is viewed as proof of disloyalty, and disloyalty is not tolerated; those that disagree with Francis are Satan, "Satan is after me and I cannot let Satan win", are evil and conspiring against her (has described [redacted] as Satan); [redacted]

WBB has highest turnover in players (leave before graduation) and staff of any OU athletic program (questioned by [redacted], "what's going on?").

[redacted]

Nutrition. Obsessed with nutrition and body fat; [redacted] Francis wants a small, light and lean team; [redacted]

[redacted] stated [redacted] did not think SAs got enough to eat, they do not get enough calories; [redacted] Francis controls how much they eat, when and what they eat; [redacted] has "never seen such fear with kids, she eats by herself at night and then throws-up", "the fear and phobia are through the roof"; [redacted]

[redacted]

[redacted]

[redacted]

Separation of Church and State. [redacted] "pray-to-play"; [redacted] religious discrimination; AD advised, investigated and told Francis to cease and desist, [redacted] but Twitter "tweets" from *Beckie Francis @CoachBeckieOU* from March 1, 2013 through June 2, 2013 routinely intersperse information about OU WBB, WBB recruiting, OU generally, biblical quotes and references to Lent, Good Friday, Easter Sunday and the Sabbath.

[redacted]

[redacted]

Francis [redacted] Francis posits she is OU's best and most caring coach most concerned with the wellbeing of her players and denies any nutritional mistreatment of players. [redacted] Francis states [redacted] developed much of the current nutritional plan and still assists in its implementation today. [redacted]

Current Status. Suspended without pay pending investigation effective Thursday May 30, 2013.

Employment terminated for cause on June 12, 2013

Recommendation for Francis. Convert suspension to termination of at-will employment immediately (but for-cause and deny separation benefits).

III. [redacted]

Generally. [redacted]

[redacted]

Recommendation for [redacted]

[redacted]

IV. [redacted]

Generally. [redacted]

[redacted]

Recommendation for [redacted]

[redacted]

V. [redacted]

Generally. [redacted]

[redacted]

[redacted]

[redacted]

Recommendation for [redacted]

[redacted]

VI. [redacted]

Generally. [redacted]

[redacted]

Recommendation for [redacted]

[redacted]

VII. Other Individuals

Recommendation for Other Individuals. [redacted]

[redacted]

VIII. Other Operations

Recommendation for Other Operations. [redacted]

[redacted]

EXHIBIT 4

Players say ex-Oakland women's basketball coach Beckie Francis fixated on weight, pushed Christianity, used intimidation

By Mick McCabe and Mark Snyder
Detroit Free Press Sports Writers
9:07 a.m., July 21, 2013

Stacey Farrell was a wide-eyed incoming freshman at Oakland University in the summer of 2007.
An all-state guard from St. Clair High, Farrell couldn't hide her enthusiasm over the prospects of playing for Beckie Francis, a basketball coach whose players won on the court and excelled in the classroom.

But for Farrell all that began to change the summer day the freshmen were summoned to Francis' office and handed a sheet of paper with team and personal goals and expectations.

Francis — fired last month under a cloud of mystery — began talking about her church and invited them to attend services with her. Then she returned to the subject of how her program operated.
According to Farrell, Francis said: "We don't fraternize with the men's team. By the way, are you guys virgins? You guys are virgins, right? You haven't had sex, right?"

The players were stunned.

"We didn't say anything," Farrell said. "We were all pretty much dumbfounded at that point. You're 18 years old, some of the girls were 17 at the time."

Farrell later learned from older players that Francis' remarks were a recurring message aimed at OU freshmen - and the start of what players say was an obsession by the coach to control their lives on and off the court.

The older players' advice if anyone asks, you are a virgin. You are Christian. You do not drink. You do not smoke. You do not *talk* to guys. You sit in your dorm room and study.

And, above all, you also watch what you eat.

Farrell recounted Francis' summer goals-and-expectations meeting in an interview with the Free Press. Five former players and three others familiar with the program described similar meetings Francis held in subsequent years.

Since Francis' firing — after 13 seasons, a record 65 games over .500 and two NCAA tournament appearances — Oakland University officials have shed little light on the reasons for her dismissal. The school released a statement at the time that said an Investigation had begun in April after concerns about her conduct and behavior and that she had been terminated with cause in June.

Francis and then-OU president Gary Russi — also Francis' husband — have declined multiple requests for comment, Athletic director Tracy Huth accepted an interview with the Free Press but would not comment on the situation.

Farrell was among 15 former players and others close to the OU program who in interviews with the Free Press were critical of Francis. A common thread was that the players — some of whom spent four years in the program and some who left early — felt powerless because their couch was married to the school president and she could not be challenged by anyone in the athletic department.

Three former players offered detailed, on-the-record accounts of their experiences; the others requested anonymity when providing similar accounts because they feared criticizing OU would jeopardize their employment or playing status depending on their situations.

Those interviewed told the Free Press that Francis:

- Fixated on their weights, to a point that photos were taken of players in their sports bras and Spandex to chart body changes and that some players developed eating issues.
- Pushed her religious beliefs, insisting players attend church services on trips and showing Christian-based videos on bus rides.
- Engaged in intimidation and emotional abuse, "head games" far beyond common motivational methods used by coaches.

"Mental abuse is definitely the two words that describe my three years there," said Farrell, who chose not to play as a senior in 2010-11 and was among a large number of players to leave Francis' program early.

Karli Harris, who transferred in 2010 after one season, said Francis' behavior bordered on harassment. Harris said Francis focused her attention on a player's weight, her grade-point average, her social life and whether she attended church services with her.

"It was every day," Harris said. "It was so stupid. Looking back, it had nothing to do with basketball. The focus on basketball was 8% of her energy, the rest is wasted on other stupid, trivial things.

"It was just head games, constant head games."

Jenna Bachrouche, who transferred in 2012 after two seasons, said she felt emotionally abused by Francis and was forced to endure religious intimidation from Francis. Bachrouche is Muslim. She also sad Francis constantly criticized her weight, although Bachrouche appeared to be anything but overweight.

"Honestly, it was exhausting; it was stressful," Bachrouche said. "I tried to avoid as much conversation with her as possible. I know it was the same for a lot of other girls. I got stressed out just thinking about talking to her or going to practice or having something to do with basketball. My academics suffered.

To have someone make you feel so insecure about yourself, for someone to have that kind of power over you, is really, really overwhelming. Looking back on it now, it was just insane."

'My nature to stay positive'

Beckie Francis' downfall at OU came in stunning fashion.

In October, she received national acclaim for revealing to a Detroit-based Associated Press reporter that she had been sexually abused by her father, now deceased, between the ages of 4 and 13. In the winter, she testified before the Michigan House Education Committee and later lobbied representatives in support of Erin's Law, bipartisan legislation allowing schools to educate students about sexual abuse.

In April, at the women's Final Four In New Orleans, Francis received the Pat Summitt Most Courageous Award, given by the U.S. Basketball Writers Association, for demonstrating "extraordinary courage while facing adversity in life."

On May 1, she hired a new assistant. On May 8, she basked in OU's move to the Horizon League, a step up in prestige, at a news conference in downtown Detroit.

Behind the scenes, though, OU had started an investigation of Francis' program, after end-of-the-season interviews with players and their standard anonymous online evaluations of their coach and her program were cause for concern.

Over the years, Francis had received raves in her annual reviews, according to documents obtained by the Free Press under the Freedom of Information Act. Francis, 48 also received healthy yearly salary increases as she compiled a 227-162 record (.584) and her players performed well in the classroom. Bumps in the road came in 2002-05, when she took a three-year sabbatical from coaching for health reasons, and in 2011-12 and 2012-13, when her teams lost more games than they won.

Since Francis was rehired for the 2005-06 season, her reviews were written by Huth, who is overseen by Russi. On her reviews in 2008-11 under the supervisor's overall rating. Huth wrote: "Outstanding. Performance consistently far exceeds job requirements." In 2007, Huth wrote: "Represented the women's program, athletics department and university at all times in the highest regard."

Francis' focus on academics was reflected in the NCAA's Academic Progress Rates. Her teams ranked among the highest in the country, with a perfect 1,000 score in four of five years from 2007-08 to 2011-12. The 2012-13 team had the 11th-highest grade-point average among Division I teams at 3.503, according to rankings released Thursday by the Women's Basketball Coaches Association. OU has been in the top 25 seven of the last eight years.

Her revised contract, as with the other OU coaches, had a structure that included a 15% bonus for a near-perfect or high Academic Progress Rates (991-1,000). Academic incentives were

higher than on-the-court incentives: a regular-season league championship earned a 5% bonus and a postseason league tournament title a 10% bonus.

Francis, after three seasons at Stony Brook, started in 1997 with a $50,000 salary as OU was making the transition to NCAA Division I from Division II. This past season, in which the Golden Grizzlies went 9-20, she made $126,381. She would have made an additional $10,000 next season.
But on May 30, after what OU termed "an internal review," Francis was suspended without pay pending further review by the school's general counsel.

On June 12 she was fired at 10 a.m., but it wasn't announced until eight hours later. That came two hours after another surprise — the school posted on its website that Russi would retire, effective Aug. 1, a date later accelerated to July 1. He turned 67 in April.

No explanation for Francis' firing was listed on the school's personnel action form that documented the contract termination.

The school issued a statement about Francis that said in part: "Indications of conduct and behavior of the women's basketball head coach, that if true could be malfeasance and materially adversely affect the orderly or efficient operation of the women's basketball program, came to the attention of an Oakland University administrator in April."

Francis' most recent contract described termination with cause to include: "conduct or behavior... or materially detracts from the reputation, image or respect of the program... violation of established university rules."

The day of her firing, she tweeted. "Looking forward to next phase of life. Gary & I have talked about retiring for a while now-it's time for both of us. Wish Oakland the best."

Nine days later, she Issued a statement to several media outlets (but not the Free Press): "Instead of focusing on my views with respect to recent events regarding my employment it has always been in my nature to stay positive. I have greatly enjoyed coaching the student-athletes over the years at Oakland University. I have challenged myself personally, professionally and spiritually, and I am looking forward to the future."

The exact connection between Russi's retirement and Francis' firing — they were married in 1999 — remains unclear. Board of Trustees members have deflected questions to board chairman Michael Kramer, who has repeatedly declined to comment on Russi's announcement.

Russi's contract, obtained under the Freedom of Information Act, includes a condition that if Russi resigns, both he and the board will refrain from any comments or actions that "might directly or indirectly undermine or disparage the board, individual board members, Dr Russi, the university... in any manner.... It would reflect negatively on the reputation or image of the university or Dr. Russi."

'She was fixated on what I ate'

According to former players. Francis was overly concerned about the weight of her players. This past season, four OU players battled eating disorder symptoms developed since they joined the basketball program, according to four people with knowledge of the situation.

"She was fixated on my weight, she was fixated on what I ate,' said Bachrouche, who played two seasons before transferring to Western Michigan in 2012."I would have to have my teammates sneak me snacks on the road. She would subtly tell me, but most of the times it was through the captains. She would tell the captains to tell me to cut down on my eating because I was eating too much at meals."

Coaches in the women's game traditionally approach weight issues entirely different than the coaches of men's teams. For four years Michigan State men's coach Tom Izzo, for instance, spoke publicly about center Derrick Nix and his battle with weight. That would be shocking to happen in the women's game, where eating disorders are more prevalent and the topic is treated with sensitivity.

The Free Press interviewed an expert in the field, Paula Turocy, department chairwoman at Duquesne's School of Health Science who helped write the National Athletic Trainers' Association's position statement on weight loss and maintenance practices in sports and exercise. Turocy was told of the accusations but not told the identity of the coach or school.

Turocy started with a question: "What training did the coach have in nutrition and weight management?"

Then she added: "With athletic trainers, there's really no need for coaches to get intimately involved with an athlete's weight. That's what we're trained to do."

She was stunned that a team could have so many players with eating disorder symptoms.

"I've been an athletic trainer for almost 30 years now," she said "and I can tell you I don't think I've had four in any sport, including gymnastics, ever."

Farrell, who graduated in three years, remembered teammates talking to Bachrouche about her eating habits even though she thought Bachrouche was not overweight.

"They would say stuff to her about how much milk she was drinking and this, that and the other, and it was because it was coming from the coach," Farrell said. "Milk! Who would think that you can only have so much 2% milk when you're burning off probably 2,000 calories in basketball?"

Turocy said trying to control a player's caloric intake could backfire on the coach.

"Not only could that impair her performance, which then kind or repeats that cycle of: 'You're having poor performance, I'm going to get on you about your weight,' but it could also make her

more susceptible to things like stress fractures, other injuries because you don't have all the nutrients you need," Turocy said. "Then, third of all, if you don't get enough calories what happens is your metabolism starts to slow down and then it's even harder to lose the extra weight, so it's a three-strikes-and-you're-out kind of thing."

OU players were disgusted last summer when they were asked by an assistant coach, under orders from Francis, to take off their shirts and pose for pictures flexing their muscles, front and back, wearing only their sports bras and Spandex. This was done so there could be before-and-after photos to show body changes, according to three people with knowledge of the situation.

They also said they felt uncomfortable when Francis participated in regular-season practice sessions because of what they termed her obsession with weight. At Colgate in the mid-1980s, Francis had been a four-year starter and three-time captain.

"She would pass the ball around or try to guard us and she would always touch your stomach or always feel for your stomach," said a former player who asked not to be identified. "After a while she'd be like, 'Oh, let me feel your six-pack.'"

Eventually, players realized there was a direct correlation between weight and playing time.

"It was a really sickening environment because if you weren't skinny you'd be called out," said a former player who asked not to be identified. "If you weren't skinny, you wouldn't play. If you weren't skinny, it was automatically assumed you were drinking, you weren't taking care of your body when, in reality, you needed to get thicker, you were gaining muscle."

Turocy said it could be dangerous for a coach to determine the proper weight of players.

"Just to create numbers out of the top of your head or to give people weight goals without having scientifically determined what is their safe weight goals is not very good health practice," she said. "The second part of it is coaches need to worry about their sport if you're spending all that time worrying about your athlete's weight, it takes away from what their real responsibilities are."

The Free Press asked Michigan State women's coach Suzy Merchant how she handled weight issues with her players. Merchant, a head coach for three seasons at Saginaw Valley State, nine seasons at Eastern Michigan and six seasons at MSU, said she never spoke specifically about a player's weight.

That's not something that I've ever had conversations about," she said. "I don't know what our kids weigh. I always talk about a level of fitness and a commitment to being an athlete. We let our strength and conditioning coach and our athletic trainer work with any kids that may need a little extra. And we also have a full-time nutritionist on staff."

A Division I assistant coach, who asked not to be identified because it could jeopardize employment, saw Bachrouche. a 6-foot forward, play at North Farmington and at OU and never thought her weight needed monitoring.

"She was not someone you looked at and said: 'If she ever got in shape, she'd be a pretty good player,'" the coach said. "She looked solid and strong. She did not look fat."

Bachrouche said Francis challenged her to a weight-losing contest before her sophomore season. She also said the constant attention about her weight took a psychological toll.

"It's still something I'm kind of trying to work through now," she said. "Literally, anyone who knows me will tell you I'm a health nut. I eat so healthy. I was raised on organic food and Mediterranean food, so it's healthy, healthy, healthy."

Carrie Banner Aprik is the nutritionist OU's athletic department uses as a contract employee, but she didn't want to address the issues with the basketball program when contacted by the Free Press.

"I don't feel comfortable commenting," Banner Aprik said, "because I didn't have much interaction with the team while I've been there."

Matt Herrema was an OU athletic trainer in 2010-13 and among the teams he primarily worked with was women's basketball. He declined comment and is now a trainer at Davenport University, an NAIA school in Grand Rapids.

'No one was immune'

During Francis' 13 seasons at Oakland, 36 players of the at least 170 listed on rosters left the program early. In the last two years, seven players left, an alarming number for any college program with a roster size around 15. By comparison, the OU men's basketball program had 18 players leave over the last 13 seasons under coach Greg Kampe.

According to Free Press interviews, no one in the athletic department challenged anything Francis did because she was thought to have the ultimate job security: Her husband was Russi, the school president since 1995. As a result, upperclassmen regularly would explain to freshmen that no one was permitted to question Francis on anything or there would be consequences.

Francis' rule about not fraternizing with the men's basketball team runs counter to what is common in other schools, where players from the men's and women's programs often root for one another and socialize, even date. At Michigan and Michigan State, officials said there was not a policy about fraternization among student-athletes.

Players also said in Free Press interviews that after receiving the "virgin talk" as freshmen, it was net emphasized on a regular basis, although it was mentioned.

Players said overall that Francis' off-the-court control was "suffocating" and that she ruled by "intimidation."

"With me it was because I had a social life outside of basketball," Farrell said. "She couldn't understand how I could perform in practice, perform in the games, have a 3.7 GPA for almost my entire career at Oakland and still be able to go out with friends, and I had a part-time job at the Palace the entire time I was in college."

Farrell was disturbed during her Freshman year when she learned of Francis' comments when teammates' names appeared on a campus police report.

"She had a conversation with the captains and said: 'You know, I'm just really disappointed because out of all my freshmen, I just thought it would be Stacey's name that was going to be on that (report),'" Farrell said. "She was always looking for reasons to pin me as the bad seed." Their problems escalated in 2010 after Oakland lost an afternoon game to Oral Roberts, 91-87. Farrell had played two minutes.

"After the game, hours passed, and I guess Coach Beckie was watching film and she gave me a call about 10 o'clock at night and told me the reason why we lost the game was because I didn't cheer loud enough when my teammate made a free throw," Farrell said. "I was sitting on the bench at the time and she was watching film and she must have zoomed in on me and I didn't stand up to clap on that made free throw and that was the reason we lost the game."

Farrell said she received an e-mail from Fronds the next day that she had been suspended and could not come to practice or be around the team.

Like other former players contacted by the Free Press, Farrell said Francis' methods tainted her college days. In her final season, she played in 29 of 30 games, averaging 11.3 minutes, 2.6 points, 1.9 assists and 1.9 rebounds.

"I'm tearing up right now because It still bothers me." she said. "If you're going to go play college basketball, you had to have some kind of stellar career prior to that. You go in and you go from being the best player on your high school team or AAU team to the one of the worst players on your college team, you still expect to love basketball when you're done."

"I can honestly say she changed a lot of her players' outlook on the game because I went from loving it to not even wanting to play my last year in college."

After graduating, Farrell obtained a master's in sports administration from Canisius. She is a premium sales executive for Olympia Entertainment.

Intimidation at OU apparently came in many forms and was not limited to players. Players said assistant coaches were restricted from voicing their opinion if they challenged Francis.

An example of Francis' control: An assistant coach brought an Infant son on a 2010 road trip to South Dakota State. With the team in a study session, the baby was sleeping in a carrier when the assistant was sent by Francis to run a short errand, according to a person with knowledge of the situation who was present on the road trip. The person said that while the assistant was gone, the

baby began to cry and Francis picked up the carrier, placed it in the hallway and returned to the room. The baby was left alone in the hallway for about 10 minutes until the assistant returned.

No one in the room questioned Francis' actions, not even the assistant coach, who is no longer with the program. Two others confirmed the account

On her Twitter account @Coach_Beckie, Francis states her bio as: "Loves God. Child abuse advocate. Coach."

Current assistant coaches declined to comment for this story and current players say they have been ordered not to talk about Francis with the media.

Harris, a 5-4 guard tram Fishers, Ind. decided after one season that she could not handle playing for Francis. As a freshman, she played in 28 of 30 games, averaging 6.0 minutes and 0.9 points. She transferred In 2010 to Davenport, where she became an All-America as a senior and led the Panthers to the NAIA Division II championship game this past season

"I went through the same stuff everybody else who went there went through," Harris said. "Every single person, whether they played 40 minutes or two minutes, went through something with her. No one was immune."

Harris said she drew the ire of Francis because she told a joke to a teammate. She said she was chewed out by the coach that night — her birthday — and Francis "made me cry pretty hard there."

"She told me I laughed too much," Harris said. "I was the team clown because I made a joke in the hallway one time. She kept me after dinner."

'If you're not a devout Christian'

Francis used "Pray to Play" as a team motto. Several former players told the Free Press that they were bothered by how she continually referenced her Christian faith and pushed the Fellowship of Christian Athletes. They said she wanted players to attend church services on trips, and she showed Christian-based videos on bus rides.

While many coaches use Twitter to tout their program, Francis' tweets often had religious overtones. Eleven of her 14 tweets between May 30 and June 9 — the last ones before she was fired — were faith based or referenced Bible verses.

Bachrouche, whose mother is Christian and father is Muslim, as are she and her two siblings, thought Francis might be trying to convert her to Christianity.

"It felt like it, I know that much," she said. "If it felt like it, that was probably what she was trying to do."
Bachrouche described a day in October 2011 when Francis told the team it would watch film. Bachrouche said Francis pulled her aside to say: "Jenna, we're going to be watching my

testimony in church. I think it would be really, really, really good for you if you came in and watched it. But you don't have to, but I think it would be a really, really, really good idea if you did."

Bachrouche said she felt pressured to say yes and to be with her teammates.

Bachrouche also said Francis "encouraged" her to attend Christian church services with her and Francis would not speak to her when she refused. Bachrouche said Francis made her attend a Christmas party at her home at which Bible verses were read.

"I just want people to be aware of what she did and has been doing and just to educate people that things like this do happen at the collegiate level," Bachrouche said. "I know the NCAA has never, ever, ever had a case with religious discrimination or anything like this."

After the Free Press reported June 26 that Bachrouche said she was emotionally abused and forced to endure religious intimidation from Francis, Oakland issued this statement:

"At the conclusion of the 2011-12 season, a women's basketball student-athlete requested a transfer release from Oakland University. OU granted her release and also supported her request for a waiver so that she could play immediately at another NCAA institution. At that time, she raised issues of non-secular conduct and behavior on the part of the women's basketball head coach. The athletics department, under the auspices and at the direction of the general counsel. immediately commenced an internal review that resulted in appropriate corrective action being taken.

"Since that time, the university received no reports of continued non-secular conduct or behavior."
Farrell said Francis made a regular habit of pushing her Christian beliefs.

"I was raised in a Catholic home," Farrell said. "I just would never pressure my views on other people. Like in the Jenna (Bachrouche) story, things that were said to be optional, we all knew they were not optional."

Harris said she felt the religious pressure.

If you're not a devout Christian that goes to FCA and goes to church every week and wants to pray constantly," Harris said, "you're not going to play if you're different in any way."

'I cried tears of happiness'

Oakland University has tried quickly to move past the events of June 12, when at 10 a.m., it fired Beckie Francis, its longtime basketball coach; when at 4 p.m. it posted a release on the school website announcing the retirement of its longtime president and her husband, Gary Russi; and when at 6 p.m. Francis' dismissal was announced in a news release.

The Board of Trustees immediately appointed an interim president, Betty J. Youngblood, the school's associate vice president for outreach. At its next meeting June 28, which Russi did not attend, Youngblood was sworn in. A national search will be conducted for a permanent replacement Russi, who did not have an end date in his contract, had a base salary of $350,000 and made $437,500 in total compensation.

Athletic director Tracy Huth appointed an interim coach, Jeff Tungate, a 1993 OU graduate and the associate head coach of the men's team for seven seasons. On Tuesday, at the OU Fan Post at the O'rena, Huth announced the interim tag had been removed for Tungate, who will have a multiyear contract. His 20 years in college coaching include five as the head coach at Lincoln Memorial, an NCAA Division II school in Tennessee, and one year as a women's assistant at Oakland Community College. He also was an assistant coach of the girls team at Clarkston High, his alma mater.

Tungate declined to discuss Francis' departure, preferring to talk about how he considered his new job a big break for his career and how quickly his new players had shown they wanted to play for him.

"I told the team that we're moving forward, and this is the way I'm going to do things," Tungate said. "We kind of laid out the plan and the vision for what we want to do and accomplish and how we're going to go about it."

Russi and Francis continue to decline interview requests. Since June 12, Francis, a frequent Twitter user, has posted only two tweets, on July 4 and July 12: "Love July 4th holiday. Great chance to find my biking trails. #stonycreektoughtobeat and "Pure Michigan! Can't beat this weather, #bestincountry."

The biggest unanswered questions remain the relationship between Francis' firing and Russi's retirement announcement on the same day and why players on the 2012-13 team, in essence, broke a code of silence through anonymous evaluations and postseason interviews that were critical of Francis and her program. Former players told the Free Press that they felt powerless because of Francis' ties with Russi and that their complaints stayed among themselves. Once the code was broken this year, OU started an internal review and then further review by the school's general counsel.

Top OU officials have kept all other details as a closely guarded secret. Multiple other staff members have told the Free Press that under no circumstances were they to speak publicly about Francis or Russi.

"The problem was she was the wife of the president," said a former player who asked not to be identified. "It was so frustrating because you couldn't run to anyone. Tracy (Huth) couldn't do anything; the assistant coaches couldn't do anything because at the end of the day. their boss went home to her."

Jenna Bachrouche, meanwhile, prepares for her first season on the court: at Western Michigan and hopes to contribute much more than the 4.0 minutes, 1.3 points and 1.0 rebounds from her

sophomore season at OU. She had to sit out last season after transferring but nonetheless said "this place is like heaven. I Just love it."

Stacey Farrell, now 24, will continue touting the virtues of the Tigers and Red Wings in her sales position with Olympia Entertainment.

Karli Harris, out of basketball eligibility at Davenport, will continue as a nursing student and join the soccer team next month.

The three women and the other former players interviewed by the Free Press were pleased that Francis had been fired.

"I cried tears of happiness when I found out she got fired because I was so, so happy for those girls that they don't have to go through that — or the girls coming in," Bachrouche said. "The future basketball players don't have to go through that."

Free Press staff *writer David Jesse contributed to this report. Contact Mick McCabe: 313-223-4744* ormmccabe@freepress.com. *Follow him on Twitter ©mickmccabe1. Contact Mark Snyder:* msnyder@freepress.com. *Follow him on Twitter @mark_snyder.*

EXHIBIT 5

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BECKIE FRANCIS,

Plaintiff,

-v-

OAKLAND UNIVERSITY,

Defendant

Case No.: 2013-137089-PZ
Hon. Martha D. Anderson

DEBORAH GORDON LAW
Gordon, Laughbaum & Prescott
Deborah L. Gordon (P27058)
Attorneys for Plaintiff
33 Bloomfield Parkway, Suite 220
Bloomfield Hills, Michigan 48304
(248) 258-2500
dgordon@deborahgordonlaw.com

BUTZEL LONG, a professional corporation
Robert A. Boonin (P38172)
Attorneys for Defendant
Suite 500
301 E. Liberty Street
Ann Arbor, Michigan 48104
(734) 995-3119
boonin@butzel.com

AFFIDAVIT OF ROBERT STEWART

Robert Stewart, being first duly sworn, deposes and states as follows:

1. I have personal knowledge regarding the facts set forth in this Affidavit and, if called to testify regarding the same, could do so competently.

2. I am employed by Oakland University ("University") as Associate Dean of the College of Arts and Sciences.

3. I also serve as the University's Faculty Athletic Representative, and, in that capacity I administer end-of-season surveys and exit surveys ("Surveys") to student athletes at the University. The Surveys are designed to assist the University in administering and governing its athletic programs by soliciting information and student athlete opinions on topics which include, but are not limited to, academic support services, travel, facilities, and coaching.

4. As part of the Survey administration process, I discuss the confidential nature of the Surveys with the student athletes. I inform them that their individual Survey responses will be kept confidential and their identity will not be disclosed to any outside party.

5. I believe that the assurance of confidentiality is essential to accomplishing the goal of the Surveys, to wit, open and honest assessments of their experiences as student athletes at the University without fear of reprisal or embarrassment.

6. While I do not reference the Family Educational Rights and Privacy Act (FERPA) when explaining the confidential nature of the Surveys to the student athletes, it is my belief that FERPA is the tool the University would use to protect the Survey responses from disclosure to outside parties.

7. Without the assurance of confidentiality, the value of the Surveys would be diluted, as student athletes may not be as forthcoming with information and/or opinions critical of the University or its personnel.

Robert Stewart

Robert Stewart 11/8/2013

EXHIBIT 6

Redaction Log

Updated through July 31, 2013
Francis Board of Trustees Executive Summary

Date: **June 10, 2013/July 31, 2013**

To: **Oakland University Board of Trustees**

From: **Vice President for Legal Affairs and General Counsel, and Director of Inclusion and Intercultural Initiatives**

Re: **Internal Investigation of Beckie Francis**

The bases identified herein for each line redaction do not limit the applicability of other bases that may be applicable or appropriate.

Basis Key:

A. Protected by the attorney-client privilege and/or as attorney work product;
B. Identifies employee references, MCL 423.501(c)(i);
C. Relates to University staff planning with respect to more than 1 employee, MCL 423.501(c)(ii); (relates solely to employees other than Francis.)
D. Is of a personal nature about persons other than Ms. Francis, the disclosure of which would constitute a clearly unwarranted invasion of those other persons' privacy, MCL 423.501(c)(iv);
E. Constitutes education records under the Family Educational Rights and Privacy Act, MCL 423.501(c)(vii);
F. Does not meet the definition of a personnel record, MCL 423.501; (not used in connection with Francis' June 12, 2013 termination of employment).

I. Interviewees/Witnesses:

Lines 14-15:	B, D and E
Line 17:	B
Lines 19-23:	A and B
Lines 24-27:	A
Lines 29-49:	A, C and F

II. Documentation Reviewed:

Lines 54-55:	C
Lines 56-58:	C
Line 59:	C, D and E
Lines 61-62:	C
Line 63:	C
Lines 64-65:	C
Lines 68-69:	A and C

Line 70:	C
Lines 71-72:	C
Line 74:	B and C
Line 76:	A
Lines 78-86:	D and E
Lines 87-100:	A, C and F

Francis (WBB Head Coach)

Synopsis

Lines 102-103:	A and C
Lines 109:	D and C
Lines 109-111:	C

Generally

Lines 114-117	C and D
Lines 126:	D
Lines 127-137:	D and E
Line 139:	D
Lines 141-144:	A, C and F

Nutrition

Lines 145-150:	D and E
Line 151-152:	C, D and E
Lines 153-168:	D and E
Line 169:	B, C, D and E
Line 170:	B and C
Line 171:	D and E
Line 172:	B and C
Line 174-177:	D and E
Lines 178-179:	A, C and F
Lines 180-192:	A, C and F

Separation of Church and State

Line 193:	D and E
Lines 194-195:	C, D and E
Lines 196-197:	D and E
Line 199:	D and E
Lines 204-214:	A, C and F

Francis/Other Employee #1

Line 215:	C
Line 217:	A and C
Lines 219-221:	C

III. Other Employee #2

Line 228:	C
Lines 230-248:	C
Lines 250-257:	A, C and F
Lines 259-260:	C
Line 262:	A, C and F

IV. Other Employee #3

Line 264:	C
Lines 266-275:	C
Lines 277-283:	A, C and F
Lines 284-286:	C
Lines 287-288:	A, C and F
Lines 290-291:	A, C and F

V. Other Employee #1

Lines 293-294:	C
Lines 296-307:	C
Lines 308-325:	A, C and F
Lines 326-329:	A, C and F
Lines 330-331:	C
Lines 332-333:	A, C and F
Lines 335-337:	A, C and F

VI. Other Employee #4

Line 339:	C
Lines 341-349:	C
Lines 351-374:	A, C and F
Lines 376-377:	C
Line 379:	A, C and F

VII. Other Individuals

Lines 382-384:	C
Lines 385-387:	A, C and F

VIII. Other Operations

Lines 390-391:	A and C
Lines 392-396:	A, C and F
Lines 398-406:	A, C and F
Lines 408-409:	A, C and F
Lines 411-412:	A, C and F
Lines 414-415:	A, C and F

Included Documentation

Document 15: D and E

End of Redaction Log

EXHIBIT 7

From: Boonin, Robert [mailto:boonin@butzel.com]
Sent: Wednesday, October 30, 2013 3:22 PM
To: Deborah Gordon
Cc: Victor Zambardi
Subject: Oakland University: Becky Francis

Dear Deb,

I'm writing with respect to your most recent correspondence to Victor Zambardi regarding your request under the Bullard-Plawecki Employee Right to Know Act for a copy of the report relating to Ms. Francis's termination of employment from Oakland University. I have been retained to help Oakland further evaluate the issues raised in your memo and to provide Oakland with input as to its response. I am sure you understand that Oakland is comfortable with its position, to date, but it is willing to continue to give your concerns serious consideration. As you likely appreciate, some of the issues are complex.

In sum, Oakland wishes to respond in a manner properly balancing its various legal obligations and rights with those of your client. I anticipate that a response will be forthcoming in the near future, but please know that I will be out of state (speaking at the ABA Conference) for most of next week. I trust that this will not be an issue, particularly since the Act's charge is to provide your client with only periodic access to her file at reasonable intervals.

Regards,

Rob

Robert A. Boonin

BUTZEL LONG

BUTZEL LONG A PROFESSIONAL CORPORATION
301 East Liberty Street, Suite 500 I Ann Arbor, MI 48104
Direct: 734 213 3601 I Fax: 734 995 1777 I Cell: 734 395 1455 I www.butzel.com I boonin@butzel.com

EXHIBIT 8

From: Deborah Gordon [mailto:dgordon@deborahgordonlaw.com]
Sent: Wednesday, October 30, 2013 4:33 PM
To: Boonin, Robert
Cc: Laurie Edel
Subject: RE: Oakland University: Becky Francis

Hi Rob-
I'm glad you're involved.

Unfortunately, I am unable to wait any longer. I have been attempting to receive Ms. Francis's file, including the basis for her just cause termination, since Sept. 23. I do not feel the legal department at OU has acted in good faith. Not sure if you have seen all of the correspondence but I have received zero response to any of my legal analysis supporting our request and OU has not complied with the most rudimentary requirements of creating a privilege log. Public documents were withheld as being protected until last week. And the fact that OU has already dragged this out for 5 weeks is not encouraging.

In any event, the OU created statute of limitations runs in November so I have no more time to see what OU comes up with. We plan to file something in Court tomorrow. Feel free to call if you would like to discuss.

Deb

Deborah Gordon
33 Bloomfield Hills Parkway
Suite 220
Bloomfield Hills, MI 48304
248.258.2500
248.866.1003 (cell)
248.258.7881 (facsimile)
dgordon@deborahgordonlaw.com
www.deborahgordonlaw

EXHIBIT 9

109 So.3d 851, 291 Ed. Law Rep. 521, 38 Fla. L. Weekly D600
(Cite as: 109 So.3d 851)

H

District Court of Appeal of Florida,
First District.
Darnell RHEA, Appellant,
v.
The DISTRICT BOARD OF TRUSTEES OF SANTA FE COLLEGE, Florida, Appellee.

No. 1D11–3049.
March 13, 2013.

Background: Professor brought action against college for writ of mandamus to compel college to reveal the name of a student who sent an e-mail complaining about the professor's classroom behavior and teaching style, and for declaration of his rights under the college's rule regarding student complaints. The Circuit Court, Alachua County, Victor L. Hulslander, J., dismissed with prejudice. Professor appealed.

Holdings: The District Court of Appeal, Ray, J., held that:
(1) e-mail qualified as "education record" exempt from disclosure under public records law, and
(2) declaratory relief was not appropriate.

Affirmed.

West Headnotes

[1] Mandamus 250 ⇐1

250 Mandamus
250I Nature and Grounds in General
250k1 k. Nature and scope of remedy in general. Most Cited Cases

Petitioner for writ of mandamus must establish that he has a clear legal right to the performance of a clear legal duty by a public officer and that he has no other legal remedies available to him.

[2] Mandamus 250 ⇐12

250 Mandamus
250I Nature and Grounds in General
250k12 k. Nature of acts to be commanded. Most Cited Cases

For purposes of mandamus relief, a duty or act is ministerial when no room exists for the exercise of discretion and the law directs the required performance.

[3] Appeal and Error 30 ⇐893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

Under public records law, where purely legal issues of whether a document is a public record and subject to disclosure are involved, Court of Appeals has de novo review.

[4] Records 326 ⇐30

326 Records
326II Public Access
326II(A) In General
326k30 k. Access to records or files in general. Most Cited Cases

Under the Sunshine Amendment to the Florida Constitution, a citizen's access to public records is a fundamental constitutional right. West's F.S.A. Const. Art. 1, § 24(a).

[5] Records 326 ⇐54

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k54 k. In general. Most Cited

Cases

The physical format of an alleged public record is irrelevant; electronic communications, such as e-mail, are covered by the public records law just like communications on paper. West's F.S.A. § 119.01(2)(a).

[6] Records 326 ⚿54

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k54 k. In general. Most Cited Cases

Student's unredacted e-mail complaining about college professor's inappropriate classroom behavior, his humiliating remarks to the students, and his unorthodox teaching methodologies related directly to the student and, therefore, qualified as an "education record" exempt from disclosure to professor under the public records law, even though the professor was the primary subject of the e-mail, where the e-mail described the student's personal impressions of the classroom educational atmosphere in the context of the professor's teaching and methodology; the student's knowledge of, and connection to, the information conveyed in the e-mail was not merely peripheral or tangential. West's F.S.A. §§ 1002.225(1), 1006.52(2).

[7] Declaratory Judgment 118A ⚿210

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak210 k. Education. Most Cited Cases

College professor seeking declaratory relief that college violated its own rules relating to student complaints failed to make a prima facie showing that any present, justiciable question existed regarding his rights and that a good-faith, actual, present, and practical need for a declaration existed, where professor was no longer employed by the college and the complaining student was no longer enrolled there. West's F.S.A. § 86.011.

[8] Declaratory Judgment 118A ⚿7

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(A) In General
118Ak7 k. Necessity, utility and propriety. Most Cited Cases

Declaratory Judgment 118A ⚿312.1

118A Declaratory Judgment
118AIII Proceedings
118AIII(D) Pleading
118Ak312 Complaint, Petition or Bill
118Ak312.1 k. In general. Most Cited Cases

Allegations in petition for declaratory relief must show some useful purpose will be served by the relief sought.

[9] Declaratory Judgment 118A ⚿65

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(D) Actual or Justiciable Controversy
118Ak65 k. Moot, abstract or hypothetical questions. Most Cited Cases

Because declaratory relief generally is not appropriate where the alleged controversy is moot, a trial court must ensure that the controversy between the parties is definite and concrete.

***852** Darnell Rhea, pro se, Appellant.

Lisa J. Augspurger and Maria Dawson Torsney, of Bush & Augspurger, P.A., Orlando; Sylvia H. Walbolt, of Carlton Fields, P.A., Tampa; Christine Davis Graves, of Carlton Fields, P.A., Tallahassee, for Appellee.

Andy Bardos and Allen Winsor, of GrayRobinson, P.A., Tallahassee, for Florida Atlantic University, et al., Amici Curiae.

109 So.3d 851, 291 Ed. Law Rep. 521, 38 Fla. L. Weekly D600
(Cite as: 109 So.3d 851)

***853** ON APPELLEE'S MOTION FOR REHEARING, REHEARING EN BANC, AND CERTIFICATION OF A QUESTION OF GREAT PUBLIC IMPORTANCE

PER CURIAM.

The District Board of Trustees of Santa Fe College, Florida (the College), Appellee, has moved for rehearing, rehearing en banc, and certification of a question of great public importance. We grant the motion for rehearing to affirm the trial court's dismissal of Count One; the motions for rehearing en banc and certification are denied. We withdraw our prior opinion and substitute the following opinion in its place.

Darnell Rhea appeals an order dismissing his second amended complaint, with prejudice, in his lawsuit against the College. Rhea's pleading comprised a petition for writ of mandamus alleging a violation of Florida's public records laws (Count One) and a petition for declaratory judgment alleging a violation of a college rule (Count Two). Concluding, as the trial court did, that Rhea has not stated a cause of action in either count, we affirm the dismissal order.

I. *Pleadings and Procedural History*

The second amended complaint alleged two claims. Count One, titled "Petition for Writ of Mandamus Violation of the Public Records Act," alleged that from August to December 2009, Rhea was an adjunct associate professor under the supervision of the Chairman of the Academic Foundations Department (the Chair) at the College, a state college created and operated under chapter 1001, Florida Statutes. On September 28, 2009, Rhea asked the Chair for a complete copy of a certain e-mail received in the normal course of the Chair's employment with the College. Rhea had previously received a copy of the e-mail with the name of the student author redacted. The Chair refused to comply with Rhea's repeated requests to disclose the author's name, on the ground that the student's identity is protected from disclosure under the protection provided for education records in the Family Educational Rights & Privacy Act (FERPA), 20 U.S.C. section 1232g (2009). The student gave no written consent to disclosure of his or her name. Count One alleged the e-mail, including the student's name, is a public record and, by refusing to disclose the complete, unredacted public record to Rhea, the College violated the law.

The e-mail in question complains of Rhea's inappropriate classroom behavior, his humiliating remarks to the students, and his unorthodox teaching methodologies. Rhea denied all of the negative e-mail allegations. He alleged, however, that he was effectively prevented from defending himself by demonstrating that the unnamed student was not in a position to comment fairly and accurately on his teaching methods and classroom conduct. Rhea asserted that neither the Florida statutes nor FERPA protects from disclosure the name of a student who writes an e-mail like the one in question. Rhea argued that pursuant to FERPA, a student's complaint about the teaching methods and classroom behavior of a public, postsecondary school employee who is not a student at the school is not an education record because it relates only tangentially, not directly, to the student. It is, instead, solely a teacher record and thus is not protected from disclosure under FERPA.

Count One alleged further that as a result of the Chair's unlawful refusal to give Rhea the unredacted e-mail, the College did not rehire Rhea, and he suffered damages. Count One requested a jury trial, damages, and attorney's fees and costs. This count also asserted Rhea's ***854** right to a writ of mandamus requiring the College to give him the complete record of all complaints from any student that Rhea's supervisors at the College have received.

Count Two is titled "Petition for Declaratory Judgment Violation of Agency Rules." Rhea alleged that while the College is authorized to make rules that have the force of law, it has a corresponding duty to abide by its own rules. He sought a declaration of his rights under the College's rule 7.36 of the "Student Complaint Procedure: Students and

Administration," which sets out procedures for students who wish to register a complaint against any employee of the College. The second count alleged that Rhea had a right under rule 7.36 to discuss any complaint from a student and to seek resolution of the complaint, before Rhea's supervisor heard of or saw the student's concern or complaint. The pleading asserted that the College had violated rule 7.36 and its duty to follow its own rules, as a result of which Rhea was not rehired and suffered personal harm. In addition to the request for declaratory relief, Count Two requested a jury trial, damages, and attorney's fees and costs.

The College moved to dismiss both counts of the second amended complaint with prejudice and to strike Rhea's claims for attorney's fees and damages. After a hearing on the motions to dismiss and to strike, the trial court concluded, on Count One, that state and federal law do not require the College to provide Rhea with an unredacted copy of the e-mail. According to the court, the College is bound by state and federal law proscribing the College's disclosure of an unredacted copy containing the student author's name. On Count Two, the court found no justiciable issue as to the existence of any right Rhea may have under rule 7.36, nor did the court find a bona-fide, actual, and present need for a declaration. Because the second amended complaint represented Rhea's third attempt to file a legally sufficient claim, and it was deemed inadequate, the trial court exercised its discretion to dismiss the latest pleading with prejudice. *Boca Burger, Inc. v. Forum,* 912 So.2d 561, 567 (Fla.2005). In light of the dismissal with prejudice, the court ruled the motions to strike were moot. This appeal followed.

II. *Analysis*

A motion to dismiss raises a question of law as to whether the facts alleged in the complaint are sufficient to state a cause of action. *Meyers v. City of Jacksonville,* 754 So.2d 198, 202 (Fla. 1st DCA 2000). In considering the legal sufficiency of a complaint, the trial court's view is limited to the four corners of the complaint, the factual allegations of which are to be accepted as true. *Connolly v. Sebeco, Inc.,* 89 So.2d 482, 484 (Fla.1956). In doing so, the trial court must resolve all reasonable conclusions or inferences in favor of the plaintiff, as the non-moving party. *Weaver v. Leon Cnty. Classroom Teachers Ass'n,* 680 So.2d 478, 481 (Fla. 1st DCA 1996). It is well established that dismissal of a complaint with prejudice is a very severe sanction, to be invoked only when the pleader has failed to state a cause of action and it is conclusively shown the complaint cannot be amended in such a way as to state a claim. *Meyers,* 754 So.2d at 202. The standard of review for an order dismissing a complaint for failure to state a cause of action is de novo. *Hernandez v. Tallahassee Med. Ctr., Inc.,* 896 So.2d 839, 841 (Fla. 1st DCA 2005); *Landrum v. John Doe Pit Digger,* 696 So.2d 926, 928 (Fla. 2d DCA 1997) (stating that the district court's review of the trial court's dismissal order is limited to determining whether the complaint stated a cause of action).

***855** A. Count One: "Petition for Writ of Mandamus Violation of the Public Records Act"

[1][2] To be entitled to a writ of mandamus, Rhea must establish that "he has a clear legal right to the performance of a clear legal duty by a public officer and that he has no other legal remedies available to him." *Hatten v. State,* 561 So.2d 562, 563 (Fla.1990); *see Plymel v. Moore,* 770 So.2d 242, 246 (Fla. 1st DCA 2000). Mandamus has been described as "a remedy to command performance of a ministerial act that the person deprived has a right to demand, or a remedy where public officials or agencies may be coerced to perform ministerial duties that they have a clear legal duty to perform." *Town of Manalapan v. Rechler,* 674 So.2d 789, 790 (Fla. 4th DCA 1996). For purposes of mandamus relief, a duty or act is ministerial when no room exists for the exercise of discretion and the law directs the required performance. *Shea v. Cochran,* 680 So.2d 628, 629 (Fla. 4th DCA 1996). Applied to the instant case, the law of mandamus required the trial court to determine whether Rhea alleged sufficient facts to state a claim that he has a clear legal right

to the unredacted copy of the e-mail and that the College has a clear legal duty to provide it to him.

[3] On the question of whether Count One states a cause of action, we look first to Florida public records law. Where purely legal issues of whether a document is a public record and subject to disclosure are involved, we have de novo review. *State v. City of Clearwater,* 863 So.2d 149, 151 (Fla.2003); *Media Gen. Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit,* 840 So.2d 1008, 1013 (Fla.2003).

[4] A citizen's access to public records is a fundamental constitutional right in Florida. Article I, section 24(a) of the Florida Constitution (the "Sunshine Amendment") grants [e]very person ... the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf." This "self-executing" right to open records is enforced through the Public Records Law, chapter 119 of the Florida Statutes. It is the duty of each agency [FN1] to provide access to such records. § 119.01(1), Fla. Stat. (2009).

> FN1. Appellee, which is part of the state system of community colleges established and governed by chapter 1001, Part III, Florida Statutes (2009), is a state agency. § 119.011(2), Fla. Stat. (2009) (defining agency as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law ... and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency").

[5][6] The Florida Supreme Court has construed the definition of public records to encompass all materials made or received by an agency, in connection with official business, which are used to "perpetuate, communicate or formalize knowledge of some type." *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.,* 379 So.2d 633, 640 (Fla.1980) . The physical format of the record is irrelevant; electronic communications, such as e-mail, are covered just like communications on paper. *See* § 119.01(2)(a), Fla. Stat. (2009) ("[a]utomation of public records must not erode the right of access to those records"); *Nat'l Collegiate Athletic Ass'n v. Associated Press,* 18 So.3d 1201, 1207 (Fla. 1st DCA 2009) (observing that "public records law is not limited to paper documents but that it applies, as well, to documents that exist only in digital form"). Because Rhea alleged that the e-mail at issue is a communication***856** that was sent to, and received by, the College in connection with the transaction of its official business, he has sufficiently pled that it is a Florida public record subject to disclosure in the absence of a statutory exemption.

An exemption to Florida's Public Records Law exists for a student's "education records." This exemption provides that "[a] public postsecondary educational institution may not release a student's education records without the written consent of the student to any individual ..., except in accordance with and as permitted by the FERPA." § 1006.52(2), Fla. Stat. (2009). The Legislature has adopted FERPA's definition of "education records." § 1002.225(1), Fla. Stat. (2009). Thus, it was incumbent upon the trial court to look to FERPA, 20 U.S.C. section 1232g, to determine whether Rhea stated a cause of action that the unredacted e-mail must be disclosed, i.e., that the College must reveal the student's name.

FERPA protects "education records" (and personally identifiable information contained therein) from improper disclosure.[FN2] Such records generally include "those records, files, documents, and other materials which ... (i) contain information *directly related to a student* and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A)(i)-(ii) (emphasis added).

"Education records" do not include,

> FN2. FERPA, commonly known as the "Buckley Amendment," does not prohibit disclosure of education records. Rather, it provides for the withholding of federal funds from educational institutions that have a policy or practice of permitting the release of such records. 20 U.S.C. § 1232g(b)(1).

> in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose.
> 20 U.S.C. § 1232g(a)(4)(B)(iii).

Rhea contends that the e-mail at issue does not directly relate to its student author, and for this reason is not an "education record" within the meaning of FERPA. For support, Rhea relies on *Ellis v. Cleveland Municipal School District,* 309 F.Supp.2d 1019 (N.D.Ohio 2004), and other cases adopting its rationale. The *Ellis* line of cases differentiates records that contain information "directly related to a student," on the one hand, from records that are directly related to a teacher or other school employee and are only peripherally or tangentially related to a student, on the other. According to these federal authorities, the former are "education records" by definition; the latter are not. *See, e.g., Ellis,* 309 F.Supp.2d at 1022–23.

The issue in *Ellis* was whether FERPA covered incident reports related to physical altercations between substitute teachers and students, student and employee witness statements related to these incidents, and information related to subsequent discipline, if any, imposed on the teachers. *Id.* at 1021. Addressing "teacher discipline information," the court explained:

> In her document requests, plaintiff seeks records involving allegations of physical altercations engaged in by substitute teachers as well as student and employee witness statements related to those altercations.... Such records do not implicate FERPA because they do not contain information "directly related to a student." *While these *857 records clearly involve students as alleged victims and witnesses, the records themselves are directly related to the activities and behaviors of the teachers themselves and are therefore not governed by FERPA.*

Id. at 1022–23 (internal citations and quotation marks omitted) (emphasis added). *Ellis* stands for the proposition that "FERPA applies to the disclosure of student records, not teacher records." *Id.* at 1022.

The federal district court in *Wallace v. Cranbrook Educational Community,* No. 05–73446, 2006 WL 2796135 (E.D.Mich. Sept. 27, 2006), drew a similar distinction between employee records and student records in its review of a magistrate judge's order compelling discovery. Cranbrook Educational Community (Cranbrook), relying primarily on students' statements alleging inappropriate employee behavior, terminated Wallace's employment as a school maintenance person and equipment mover. 2006 WL 2796135 at *1. After Wallace filed a complaint alleging improper termination, Cranbrook provided him with copies of the students' statements, with their names and addresses redacted. *Id.* Wallace moved to compel disclosure of the students' identities, and a magistrate judge ordered the relief Wallace sought. *Id.* Cranbrook objected to the magistrate judge's disclosure order, citing FERPA and other confidentiality and privacy concerns. *Id.*

Relying on *Ellis,* the *Wallace* court concluded that the student statements did not "directly relate to students" and were therefore not "education records" under FERPA. *Id.* at *4. The court noted that the statements were not education records for the additional reason that they related to Wallace in his capacity as an employee and thus qualified as an

exception pursuant to 20 U.S.C. section 1232g(a)(4)(B)(iii). Because the records were not education records, the court found "no reason to redact the statements as they are not protected from disclosure by FERPA." 2006 WL 2796135 at *6. Accordingly, the district court judge affirmed the disclosure order. *Id.* at *5–6, *8.

Like the courts in *Ellis* and *Wallace,* we believe the plain language of FERPA supports the distinction between information that is directly related to a student and that which is related to a student only tangentially or indirectly. By including the qualifier "directly" before "related," Congress excluded by inference any information relating only indirectly to a student from the purview of the information covered under the "education records" definition. *See Gay v. Singletary,* 700 So.2d 1220, 1221 (Fla.1997) (explaining doctrine of *inclusio unius est exclusio alterius*); *Smith v. State,* 982 So.2d 69, 70 & n. 1 (Fla. 1st DCA 2008) (noting that the express inclusion of one thing in a statute implies the exclusion of its opposite).

The scope of the words "directly related" is still, however, quite broad. *See United States v. Miami Univ.,* 294 F.3d 797, 812 (6th Cir.2001). Information is directly related to a student if it has a close connection to that student. *See Merriam–Webster's Collegiate Dictionary* 353–54 (11th ed. 2004) (defining "direct" in relevant part as "characterized by close, logical, causal, or consequential relationship"; defining "directly" as "in a direct manner"). Because "directly related" encompasses far more information than might be accorded privacy in most other contexts, Rhea's invitation to limit its scope is compelling. Further, *Ellis* lends support for this position. But to the extent that *Ellis* converts the "directly related" inquiry into a "primarily related" test, we disagree with its approach, despite its ***858** acceptance by other courts.[FN3] A plain-language interpretation of FERPA requires us to depart from the *Ellis* reasoning as applied to the factual allegations of this case.[FN4]

FN3. *See, e.g., Briggs v. Bd. of Trs. Columbus State Cmty. Coll.,* No. 2:08–CV–644, 2009 WL 2047899, at *5 (S.D.Ohio July 8, 2009) (concluding that student complaints about a professor did not directly relate to students and thus were not "education records"); *Wallace v. Cranbrook Educ. Cmty.,* No. 05–73446, 2006 WL 2796135, at **3–6 (E.D.Mich. Sept. 27, 2006) (holding that "student statements provided in relation to an investigation into a school employee's alleged misconduct" are not directly related to the students); *Hampton Bays Union Free Sch. Dist. v. Pub. Emp't Relations Bd.,* 62 A.D.3d 1066, 878 N.Y.S.2d 485, 488–89 (N.Y.App.Div.2009) (affirming a ruling that documentation relating to a probationary teacher's early termination based on misconduct was subject to disclosure and was not an education record protected from release under FERPA).

FN4. Although this Court relied on the *Ellis* court's distinction between directly and tangentially related information to require the disclosure of certain documents in *National Collegiate Athletic Association v. Associated Press,* 18 So.3d 1201, 1210–11 (Fla. 1st DCA 2009), we expressly limited our holding to the disclosure of versions of the documents with the students' names redacted.

According to the allegations in Rhea's complaint, the unredacted e-mail he seeks to obtain identifies the student and the student's enrollment in his class. Further, the e-mail describes that student's personal impressions of the classroom educational atmosphere in the context of Rhea's teaching and methodology. The student's knowledge of, and connection to, the information conveyed in the e-mail is not merely peripheral or tangential. As a member of the class, the student claimed to have experienced the treatment described in the e-mail, and the e-mail is the student's own words. Although Rhea

may be the primary subject of the e-mail, the e-mail also directly relates to its student author.

We reject any suggestion advanced by Rhea that a record cannot relate directly both to a student and to a teacher. If a record contains information directly related to a student, then it is irrelevant under the plain language in FERPA that the record may also contain information directly related to a teacher or another person.[FN5] While FERPA makes clear that certain employee records are not included within the definition of "education record," to be removed from the ambit of the "education record" definition, those employee records must relate *exclusively* to the employee in his or her capacity as an employee. 20 U.S.C. § 1232g(a)(4)(B)(iii). The allegations in Rhea's complaint do not support the application of this narrow language.

> FN5. Rhea did not assert any due-process right to know the student author's identity in the context of a college formal disciplinary proceeding. The narrow issue presented by Rhea on appeal in this count is whether the e-mail contains information "directly related" to a student, triggering FERPA protections and exempting this record from Florida's chapter 119 requirements. We express no opinion as to whether the requirements of due process could, in some instances, supersede FERPA.

In dismissing Count One with prejudice, the trial court concluded that, having been given several opportunities to amend his pleading, Rhea failed to state a claim that the unredacted e-mail is not directly related to a student for purposes of FERPA. Because the plain, unambiguous language of section 1232g(a)(4)(A)(i) compels the trial court's ruling, we affirm the dismissal with prejudice.[FN6]

> FN6. Given that the trial court's dismissal order addressed only Rhea's request for disclosure of "the e-mail in question" and the court did not rule on the broader request for disclosure of any other student complaints made about Rhea, we confine our discussion to the redacted student e-mail addressed in the trial court. *Miller v. Miller,* 709 So.2d 644, 645 (Fla. 2d DCA 1998).

***859** B. Count Two: "Petition for Declaratory Relief Violation of Agency Rules"

[7] Rhea's second count sought declaratory relief. Circuit courts have jurisdiction "to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed." § 86.011, Fla. Stat. (2009). As the party seeking a declaration of rights, Rhea has the burden to demonstrate entitlement. *Groover v. Adiv Holding Co.,* 202 So.2d 103, 104 (Fla. 3d DCA 1967).

To be entitled to a declaratory judgment, Rhea must demonstrate that (1) a good-faith dispute exists between the parties; (2) he presently has a justiciable question concerning the existence or nonexistence of a right or status, or some fact on which such right or status may depend; (3) he is in doubt regarding his right or status under the College's rule 7.36; and (4) a bona-fide, actual, present, and practical need for the declaration exists. *May v. Holley,* 59 So.2d 636, 639 (Fla.1952); *State Farm Mut. Auto. Ins. Co. v. Wallace,* 209 So.2d 719, 721 (Fla. 2d DCA 1968). The sufficiency of Rhea's allegations depends not on whether the pleading demonstrates he will succeed in getting a declaration of rights under his assertions, but on whether the law even entitles him to a declaration of rights. *Rosenhouse v.1950 Spring Term Grand Jury,* 56 So.2d 445, 448 (Fla.1952).

Rhea sought a declaration of his rights under the College's rule 7.36. For students who want to register a complaint against any employee of the College, the rule's procedures require the student, first, to "[s]tate the complaint to the College employee involved and attempt to resolve the problem." Only if the problem remains unresolved is the student to proceed to the next step, contacting the College employee's immediate supervisor or a

counselor for assistance. The rule also dictates the procedure the administration is required to take upon receipt of a complaint or concern.

Defending against Count Two, the College argued that the student's e-mail did not rise to the level of a complaint and never triggered the mandatory procedures in rule 7.36. Specifically, the College characterized the e-mail as an informal student comment or concern, rather than a filed, formal complaint.

[8][9] We need not determine what right Rhea may have had to a declaration under rule 7.36 when he discovered the student author of the e-mail had proceeded directly to the administration without attempting first to resolve the issues with Rhea. A petition for declaratory relief must show "some useful purpose will be served" by the relief sought. *Kendrick v. Everheart,* 390 So.2d 53, 59 (Fla.1980). Because declaratory relief generally is not appropriate where the alleged controversy is moot, *Ashe v. City of Boca Raton,* 133 So.2d 122, 124 (Fla. 2d DCA 1961), a trial court must ensure that the controversy between the parties is "definite and concrete." *Green Party of Alaska v. State, Div. of Elections,* 147 P.3d 728, 732–33 (Alaska 2006). Rhea is no longer an employee of the College, and the student author of the e-mail is no longer a student at the College. The trial court correctly ruled that Rhea failed to make a prima facie showing that any present, justiciable question exists regarding his rights and a good-faith, actual, present, and practical need for a declaration exists. Given Rhea's failure to state a cause of action in Count Two, the trial court properly dismissed the count with prejudice.

***860** We AFFIRM the dismissal of Counts One and Two with prejudice.

LEWIS, ROBERTS, and RAY, JJ., concur.

Fla.App. 1 Dist.,2013.
Rhea v. District Bd. of Trustees of Santa Fe College
109 So.3d 851, 291 Ed. Law Rep. 521, 38 Fla. L. Weekly D600

END OF DOCUMENT

EXHIBIT 10

817 N.W.2d 480, 282 Ed. Law Rep. 640, 40 Media L. Rep. 2057
(Cite as: 817 N.W.2d 480)

C

Supreme Court of Iowa.
PRESS–CITIZEN COMPANY, INC., Appellee,
v.
UNIVERSITY OF IOWA, Appellant.

No. 09–1612.
July 13, 2012.

Background: Newspaper publisher brought action against state university under Iowa Open Records Act (IORA), seeking disclosure of records relating to reports of sexual assaults at university from the date of a well-publicized alleged assault by two university football players on a female student-athlete to the present. Following an in camera review, the District Court, Johnson County, Douglas S. Russell, J., ordered university to disclose some documents without redaction and some documents with appropriate redaction to remove student-identifying information. University appealed.

Holdings: The Supreme Court, Mansfield, J., held that:
(1) provision of IORA, suspending operation of other IORA provisions if they would cause the denial of federal funds to a state agency, incorporates confidentiality obligations from Federal Educational Rights and Privacy Act (FERPA);
(2) amendment of definition of "personally identifiable information" in federal regulation adopted under FERPA applied retroactively in present action; and
(3) under FERPA, educational records may be withheld in their entirety as "personally identifiable information" where the requester would otherwise know the identity of the referenced student or students even with redactions.

Reversed in part and remanded.

West Headnotes

[1] Records 326 ⚿63

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k61 Proceedings for Disclosure
326k63 k. Judicial enforcement in general. Most Cited Cases
(Formerly 81k9.40 Colleges and Universities)
Supreme Court would review the district court's interpretations of the Iowa Open Records Act (IORA) and the Federal Educational Rights and Privacy Act (FERPA) for errors at law on state university's appeal from order requiring that it disclose certain records to newspaper publisher, and would review the district court's application of those statutes de novo. Family Educational Rights and Privacy Act of 1974, § 513(a), 20 U.S.C.A. § 1232g; I.C.A. § 22.1 et seq.

[2] Records 326 ⚿50

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k50 k. In general; freedom of information laws in general. Most Cited Cases
The Iowa Open Records Act (IORA) seeks to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act. I.C.A. § 22.1 et seq.

[3] Records 326 ⚿51

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k51 k. Agencies or custodians affected. Most Cited Cases
State university, as a state institution, was covered by the Iowa Open Records Act (IORA). I.C.A. §§ 22.1(3), 22.2(1).

[4] Records 326 ⚿51

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k51 k. Agencies or custodians affected. Most Cited Cases

State university was a "state agency" within meaning of provision in Iowa Open Records Act (IORA) that suspended the operation of other provisions of IORA if they would cause the denial of federal funds to a state agency, and was also a "state agency" within meaning of Iowa Administrative Procedure Act (IAPA). I.C.A. §§ 17A.2, 22.9.

[5] Records 326 ⚿31

326 Records
326II Public Access
326II(A) In General
326k31 k. Regulations limiting access; offenses. Most Cited Cases
(Formerly 81k9.40 Colleges and Universities)

"Judicial order" exception to confidentiality provisions of Federal Educational Rights and Privacy Act (FERPA) informs an educational institution when it may release educational records, but does not inform a court when it may enter an order. Family Educational Rights and Privacy Act of 1974, § 513(a), 20 U.S.C.A. § 1232g(b)(1), (b)(2)(B).

[6] Records 326 ⚿31

326 Records
326II Public Access
326II(A) In General
326k31 k. Regulations limiting access; offenses. Most Cited Cases

Provision of Iowa Open Records Act (IORA), suspending operation of other IORA provisions if they would cause the denial of federal funds to a state agency, incorporates confidentiality obligations from the Federal Educational Rights and Privacy Act (FERPA). Family Educational Rights and Privacy Act of 1974, § 513(a), 20 U.S.C.A. § 1232g ; I.C.A. § 22.9.

[7] Records 326 ⚿58

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k58 k. Personal privacy considerations in general; personnel matters. Most Cited Cases
(Formerly 81k9.40 Colleges and Universities)

Amendment of definition of "personally identifiable information" in federal regulation adopted under Federal Educational Rights and Privacy Act (FERPA), to include information requested by person who the educational institution reasonably believes knows identity of student to whom requested records relate, applied retroactively to newspaper's action against state university under Iowa Open Records Act (IORA) for disclosure of records relating to reports of sexual assaults involving students; conduct at issue was university's decision not to disclose document, which was still ongoing when regulation was modified, and intent of amendment was to clarify the law, not change it. Family Educational Rights and Privacy Act of 1974, § 513(a), 20 U.S.C.A. § 1232g(b)(1, 2); 34 C.F.R. § 99.3; I.C.A. §§ 22.2, 22.7, 22.9.

[8] Administrative Law and Procedure 15A ⚿433

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak428 Administrative Construction of Statutes
15Ak433 k. Permissible or reasonable construction. Most Cited Cases

(Formerly 361k219(2))

As long as the underlying statute is ambiguous, court is required to defer to any reasonable and permissible interpretation made by the agency that administers the statute.

[9] Records 326 ⚿31

326 Records
326II Public Access
326II(A) In General
326k31 k. Regulations limiting access; offenses. Most Cited Cases
(Formerly 81k9.40 Colleges and Universities)

Under Federal Educational Rights and Privacy Act (FERPA), educational records may be withheld in their entirety as "personally identifiable information" where the requester would otherwise know the identity of the referenced student or students even with redactions. Family Educational Rights and Privacy Act of 1974, § 513(a), 20 U.S.C.A. § 1232g(b)(1, 2); 34 C.F.R. § 99.3.

[10] Amicus Curiae 27 ⚿3

27 Amicus Curiae
27k3 k. Powers, functions, and proceedings. Most Cited Cases

Supreme Court would decline, on state university's appeal from order pursuant to Iowa Open Records Act (IORA) that required disclosure of certain records to newspaper publisher, to consider an argument raised by amici curiae that was not presented to the district court. I.C.A. § 22.1 et seq.

***481** Thomas J. Miller, Attorney General, and Diane M. Stahle and George A. Carroll, Assistant Attorneys General, for appellant.

Paul D. Burns and Joseph W. Younker of Bradley and Riley, PC, Iowa City, for appellee.

Michael A. Giudicessi of Faegre Baker Daniels LLP, Des Moines, and Mary Andreleita Walker of Faegre Baker Daniels LLP, Minneapolis, Minnesota, for amicus curiae The Freedom of Information Council, Des Moines Register & Tribune Company, Iowa Newspaper Association, The Reporters Committee for Freedom of the Press, Gazette Communications, Inc., and The Associated Press.

***482** MANSFIELD, Justice.

This case requires us to decide where disclosure ends and where confidentiality begins under the Iowa Open Records Act and the Federal Educational Rights and Privacy Act (FERPA). *See* 20 U.S.C. § 1232g (2006 and Supp.2010); Iowa Code §§ 22.2, .7, .9 (2007). In October 2007, two University of Iowa football players were accused of sexually assaulting another student in a campus dorm room. This incident led to a criminal investigation, criminal charges, and the conviction of one player on a charge of assault with intent to inflict serious injury and the other on a charge of simple assault. This incident also led to internal actions and responses by the University, external criticism of the University, and a special counsel investigation and report. Finally, this incident led to the present lawsuit.

The present litigation concerns Open Records Act requests that the Iowa City Press–Citizen served on the University after reports of the incident surfaced. Dissatisfied with the University's initial response to those requests, the Press–Citizen filed suit. The lawsuit resulted in more documents being produced and others being submitted for *in camera* review by the district court. The court then ordered additional documents produced, in some instances with redactions.

The University has appealed that order in part. It argues that FERPA prohibits the disclosure of the remaining documents, including even redacted versions of "education records" where the identity of the student is known to the recipient. The Press–Citizen counters that FERPA does not supersede any obligation to produce records under the Open Records Act, and in any event, the University has misinterpreted FERPA. For the reasons discussed herein, we ultimately agree with the University's arguments as to the meaning and force of FERPA, and therefore reverse the district court's

judgment in part.

I. Background Facts and Proceedings.

During the early morning hours of Sunday, October 14, 2007, a female student-athlete was allegedly sexually assaulted at the Hillcrest dormitory at the University of Iowa. Two University of Iowa football players who were accused of involvement were suspended and later dismissed from the team. A criminal investigation resulted in both men being charged. One ultimately pled guilty to assault with intent to inflict serious injury, and the other was convicted of simple misdemeanor assault following a jury trial. *See* Iowa Code §§ 708.1, 708.2(1), 708.2(6).

Numerous University officials were informed of the incident by Monday, October 15, 2007; however, the parents of the student-athlete believed their response was inadequate. Among other things, concerns were expressed that the University had shown a lack of understanding for the victim, had communicated poorly with her, and had allowed her to be subjected to retaliatory harassment from other students. In 2008, the University's Board of Regents engaged an outside law firm (the Stolar Partnership) to conduct a detailed investigation. Their report (the Stolar Report) criticized some aspects of the University's policies and performance.

Meanwhile, the incident received considerable publicity in the media. Articles appeared in which both football players were named. Beginning November 13, 2007, the Iowa City Press–Citizen served requests on the University under the Iowa Open Records Act. *See* Iowa Code § 22.2(1) (2011) ("Every person shall have the right to examine and copy a public ***483** record ..."). FN1 The requests sought, among other things, reports of attempted or actual sexual assaults; correspondence to or from various University officials relating to any such incidents; and e-mail, memos, and other records relating to any such incidents from October 1, 2007 to the present.

FN1. For the sake of convenience, we will refer hereafter to the 2011 Code version of chapter 22. During the pendency of this case, there have been no changes to that chapter that are material to our decision.

The University initially produced only eighteen pages of documents, claiming that any other responsive documents were protected from disclosure under Iowa Code section 22.7(1). *See id.* § 22.7(1) (protecting from disclosure "[p]ersonal information in records regarding a student ... maintained, created, collected or assembled by or for a school corporation or educational institution maintaining such records"). On January 4, 2008, the Press–Citizen filed a petition in district court seeking judicial enforcement of the Open Records Act. *See id.* § 22.10 (providing for civil enforcement of the Act).

Shortly after bringing suit, the Press–Citizen filed a motion to compel. The motion asked the district court to order the University to produce a *Vaughn* index of the documents it was withholding. FN2 It also urged that documents be produced in redacted form where necessary, without identifying individual students. The University resisted the motion to compel based on, among other things, FERPA. On August 7, 2008, the district court granted the Press–Citizen's motion to compel. The University thereafter released approximately 950 additional pages of documents to the Press–Citizen; prepared a *Vaughn* index for over 3000 pages of documents (including both the pages that had been released and over 2000 that were being withheld); and submitted those 3000 pages to the district court for *in camera* review.

FN2. In *Vaughn v. Rosen,* which arose under the Federal Freedom of Information Act, the D.C. Circuit ordered the government to produce a descriptive index of the documents it was withholding based on a claim they were exempt from production under the Act. 484 F.2d 820, 826–28 (D.C.Cir.1973). As the Press–Citizen pointed out, a similar index was prepared by the school district in *Des Moines Inde-*

pendent Community School District Public Records v. Des Moines Register & Tribune, Co., 487 N.W.2d 666, 668 (Iowa 1992). That case arose under Iowa's Open Records Act.

After conducting a painstaking *in camera* review, the district court entered another order on August 31, 2009. The order divided the University's documents into five categories:

Category 1: documents already released by the University without redaction;

Category 2: documents already released by the University with redactions;

Category 3: documents "not protected as confidential and ... subject to disclosure ... without redaction";

Category 4: documents "subject to disclosure ... with appropriate redactions made to remove student-identifying information including students' names, parents' names, addresses including E-mail addresses of students, dormitory and room numbers";

Category 5: "confidential documents not subject to disclosure under FERPA, Section 22.7 [of the Open Records Act], or attorney-client privilege rules."

The district court's August 31 order directed the University to disclose the Category 3 documents without redaction and the Category 4 documents with appropriate redactions within thirty days. On October 5, 2009, the district court entered a ***484** final judgment incorporating the provisions of its August 31 order, again directing the disclosure of the documents, and also awarding the Press–Citizen $30,500 in attorneys' fees pursuant to Iowa Code section 22.10(3)(*c*). The University sought and obtained a stay of the district court's order pending appeal. The University now argues to us that the district court erred in ordering the production of some of the Category 3 and all of the Category 4 documents.[FN3]

FN3. The University appeals the district court's order to the extent it requires it to produce the following Category 3 documents: 133, 140–43, 202–03, 756–60, 835, 1009, 1230, 1479, 1488–89, 1814, 1869–70, 1878, 1878–88, 1973, 1988–89, 1993–95, 2031, 2043–44, 2055, 2062, 2063, 2217, 2234, 2251–56. We shall refer to them hereafter as the "appealed Category 3 documents."

II. Standard of Review.

[1] We review the district court's interpretations of chapter 22 and FERPA for errors at law. *Rathmann v. Bd. of Dirs. of Davenport Cmty. Sch. Dist.*, 580 N.W.2d 773, 776 (Iowa 1998). We review the court's application of those statutes *de novo*. *Id.*

III. Analysis.

[2][3] **A. The Iowa Open Records Act.** Generally speaking, the Iowa Open Records Act (also known as the Examination of Public Records Act or the Iowa Freedom of Information Act) requires state and local entities to make their records available to the public. Iowa Code §§ 22.1(3), .2(1); *see also City of Riverdale v. Diercks*, 806 N.W.2d 643, 652 (Iowa 2011) (characterizing chapter 22 as "our state's freedom of information statute"). The Act seeks "to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act." *Iowa Civil Rights Comm'n v. City of Des Moines*, 313 N.W.2d 491, 495 (Iowa 1981). We have said the Act establishes "a presumption of openness and disclosure." *Gabrilson v. Flynn*, 554 N.W.2d 267, 271 (Iowa 1996). The University of Iowa, a state institution, is clearly covered by the Open Records Act; indeed, we have previously held that a private corporation commissioned by a state university to engage in fundraising for the university is covered by the Act. *Gannon v. Bd. of Regents*, 692 N.W.2d 31, 42–44 (Iowa 2005) (holding that the Iowa State University and its private foundation were subject

to the Open Records Act).

The Open Records Act is subject to a number of listed exemptions, both large and small. *See* Iowa Code § 22.7 (stating that "[t]he following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information" and listing sixty-four separate exceptions). Nonetheless, the University does not argue that any of those designated exceptions applies here. Its sole argument on appeal is that federal law, i.e., FERPA, requires the appealed Category 3 and the Category 4 documents to be kept confidential.

B. FERPA. Congress enacted the Family Educational Rights and Privacy Act or FERPA in 1974 "under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records." *Gonzaga Univ. v. Doe,* 536 U.S. 273, 278, 122 S.Ct. 2268, 2272–73, 153 L.Ed.2d 309, 318 (2002). "The Act directs the Secretary of Education to withhold federal funds from any public or private 'educational agency or institution' that fails to comply with these conditions." ***485***Id.* at 278, 122 S.Ct. at 2273, 153 L.Ed.2d at 318. The Act provides in part:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents to any individual, agency, or organization....

20 U.S.C. § 1232g(b)(1). It also provides:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records ... unless—
>
> (A) there is written consent from the student's parents ...

Id. § 1232g(b)(2).

The Department of Education (DOE) has adopted regulations to implement FERPA. *See* 34 C.F.R. § 99.3 (2009). In relevant part, they define "education records" as follows:

> (a) The term means those records that are:
>
> (1) Directly related to a student; and
>
> (2) Maintained by an educational agency or institution or by a party acting for the agency or institution.
>
> (b) The term does not include:
>
> (1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.
>
> (2) Records of the law enforcement unit of an educational agency or institution....
>
> (3) (i) Records relating to an individual who is employed by an educational agency or institution, that:
>
> (A) Are made and maintained in the normal course of business;
>
> (B) Relate exclusively to the individual in that individual's capacity as an employee; and
>
> (C) Are not available for use for any other purpose.
>
> *Id.*

The same regulations define "personally identifiable information" as follows:

> The term includes, but is not limited to—

(a) The student's name;

(b) The name of the student's parent or other family members;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

Id.

In light of these definitions, the University argues that the appealed Category 3 and the Category 4 documents cannot be produced at all. As it understands the law, "education records" with "personally identifiable information" cannot be released. Further, even if no student is ***486** actually identified in the document, either because his or her name and personal identifiers have been redacted or because the original document did not have that information, the regulations prohibit disclosure if the recipient would "know[ ] the identity of the student"—or "a reasonable person" would be able to "identify the student with reasonable certainty." *See id.* In short, the University contends that if the Press–Citizen or the student community would know the student being discussed in the education record, the record cannot be divulged—even in redacted form—under FERPA.

For purposes of this appeal, we assume that the appealed Category 3 and Category 4 documents are in fact "education records" under FERPA.[FN4] The Press–Citizen does not dispute that if these documents were produced, even in redacted form, it would be able to determine the students to whom the documents refer.[FN5] However, the Press–Citizen argues that FERPA is merely a funding statute that does not prohibit the disclosure of documents whose production is otherwise required by the Iowa Open Records Act. Alternatively, the Press–Citizen argues that FERPA does not allow the withholding of records, as opposed to their redaction. We now turn to these points of disagreement.

FN4. The Press–Citizen (in a footnote) and the amici curiae (at more length) argue that some of the records may be "law enforcement" records rather than education records. *See* 20 U.S.C. § 1232g(a)(4)(B) (stating that "[t]he term 'education records' does not include ... (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement"). This contention, however, was not raised below. Therefore, we may not consider it as part of the present appeal. *See DeVoss v. State,* 648 N.W.2d 56, 63 (Iowa 2002) (declining to consider a ground for upholding the district court's ruling that was not presented below). In any event, we lack a sufficient record to do so.

FN5. No one questions the thoroughness of the district court's *in camera* review and categorization of documents. The issues involved in the present appeal are simply legal ones.

C. The Interplay Between FERPA and the Open Records Act. The University argues that the

relationship between FERPA and the Open Records Act is a simple matter of federal supremacy. *See* U.S. Const. art. VI (providing that the laws of the United States "shall be the supreme Law of the Land"). Iowa law, according to the University, cannot authorize disclosure where federal law requires confidentiality. The Press–Citizen, on the other hand, maintains that FERPA is not a positive law at all, but simply a funding provision, which cannot override the express directives of the Open Records Act.

This debate has been played out in cases from other jurisdictions. Some courts have concluded that FERPA does not prohibit the disclosure of educational records. *See Bauer v. Kincaid,* 759 F.Supp. 575, 589 (W.D.Mo.1991) ("FERPA is not a law which prohibits disclosure of educational records. It is a provision which imposes a penalty for the disclosure of educational records."); *WFTV, Inc. v. Sch. Bd. of Seminole,* 874 So.2d 48, 57 (Fla.Dist.Ct.App.2004) (*"FERPA does not prohibit the* disclosure of any educational records. FERPA only operates to deprive an educational agency or institution of its eligibility for applicable federal funding based on their policies and practices regarding public access to educational records if they have any policies or practices that run afoul of the rights of access and disclosural privacy protected by FERPA."); *see also Kirwan v. The Diamondback,* 352 Md. 74, 721 A.2d 196, 206 (1998) ("Another alternative argument made by *The Diamondback* is that ***487** the federal Family Educational Rights and Privacy Act does not directly prohibit the disclosure of protected education records, that the only enforcement mechanism under the Act is the withholding of funds from institutions having 'a policy or practice of permitting the release of education records' ... [I]n light of our holding that the records are not education records within the meaning of the federal statute, we need not and do not reach this issue." (citation omitted)).

FERPA regulations allow for the possibility that an educational institution "cannot comply with the Act or this part due to a conflict with State or local law." *See* 34 C.F.R. § 99.61. One could argue that the mere recognition of this possibility in the regulations indicates that FERPA does not supersede state law.[FN6]

> FN6. In one case where a school district disclosed publicly what it was paying for a student's out-of-state special education services, arguing that South Dakota law required release of this information, the DOE advised the district that FERPA "does not act to preempt conflicting State laws." Letter from LeRoy S. Rooker, 20 IDELR 105, 106 (May 14, 1993). It also stated, however, that disclosure without consent "will violate FERPA and jeopardize [the district's] continued receipt of Federal education funds." In subsequent litigation over the same incident, a federal district court granted summary judgment to the school district, reasoning, "The school board cannot be liable for complying with a state law which was not clearly preempted by federal law." *Maynard v. Greater Hoyt Sch. Dist. No. 61–4,* 876 F.Supp. 1104, 1108 (D.S.D.1995). However, DOE's position in the *Maynard* matter must be considered together with its later position in *United States v. Miami University,* 294 F.3d 797 (6th Cir.2002) (discussed below). In *Miami University,* DOE took the position, successfully, that FERPA barred the release of education records whose disclosure would otherwise have been required by Ohio law. *Miami Univ.,* 294 F.3d at 811. Thus, from the *Miami University* case, one could infer that 34 C.F.R. § 99.61 simply serves as an enforcement mechanism.

On the other hand, other courts have given direct effect to FERPA's provisions, treating them as positive law with binding force on state authorities. *See Sherry v. Radnor Twp. Sch. Dist.,* 20 A.3d 515, 525 (Pa.Cmwth.Ct.2011) (finding that the release of

the requested reports "was precluded by FERPA"). In *United States v. Miami University,* 294 F.3d 797, 803 (6th Cir.2002), a federal court of appeals affirmed an injunction against the release of student disciplinary records covered by FERPA. The court reasoned that the remedies for FERPA violations were not limited to a cutoff of federal funding. *Miami Univ.,* 294 F.3d at 809–10. Rather, *once* funds are accepted, "the school is indeed prohibited from systematically releasing education records without consent." *Id.* at 809; *see also Rim of the World Unified Sch. Dist. v. Super. Ct.,* 104 Cal.App.4th 1393, 129 Cal.Rptr.2d 11, 15 (2002) (finding that FERPA preempts California law requiring the disclosure of student expulsion records); *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ.,* 787 N.E.2d 893, 904 (Ind.Ct.App.2003) (stating that "FERPA is a federal law which requires education records to be kept confidential").

In short, as one court has observed, "state and federal courts are sharply divided on this issue." *Caledonian–Record Publ'g Co. v. Vt. State Colls.,* 175 Vt. 438, 833 A.2d 1273, 1274–76 (2003) (citing cases).

We need not step into this controversy here, however, because we believe a provision of the Iowa Open Records Act already gives priority to FERPA. Section 22.9 of the Act provides:

> If it is determined that any provision of this chapter would cause the denial of funds, services or essential information ***488** from the United States government which would otherwise definitely be available to an agency of this state, such provision shall be suspended as to such agency, but only to the extent necessary to prevent denial of such funds, services, or essential information.
>
> An agency within the meaning of section 17A.2, subsection 1, shall adopt as a rule, in each situation where this section is believed applicable, its determination identifying those particular provisions of this chapter that must be waived in the circumstances to prevent the denial of federal funds, services, or information.

Otherwise stated, the first paragraph of section 22.9 suspends the operation of a provision of the Open Records Act if the provision would cause the denial of federal funds to a state agency. This paragraph, we believe, answers the Press–Citizen's argument that FERPA in and of itself is not a positive law. Section 22.9 gives it the effect of a positive law. If the University regularly released educational records pursuant to section 22.2(1) of the Open Records Act, it would be engaging in a "practice" of permitting the release of confidential education records, assuming the records contained "personally identifiable information." *See* 20 U.S.C. § 1232g(b)(1). The sanction for this would be a loss of federal funding. *See* 20 U.S.C. §§ 1232c, 1234c (authorizing the withholding of funds when a recipient "is failing to comply substantially with any requirement of law applicable to such funds"); *see also id.* § 1232g(f) (providing that "[t]he Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means").

The Press–Citizen responds that the University has not shown the disclosure of records would "definitely" cause it to lose funds as required by the first paragraph of section 22. This argument, we believe, misreads the statute. Section 22.9 requires that the federal funds be "definitely available." That they are. The University enjoys considerable federal support. *See* University of Iowa, General Education Fund, FY 2011–Use of New Revenues and Reallocations (2011), *available at* www. uiowa. edu/% 25fusbudg/ 2011_ final_ budget_ spread. pdf (disclosing total federal support of $258,999,082 for the University in fiscal year 2009). The statute does not have similar language requiring that the *loss* be definite.

The Press–Citizen urges, however, that a one-off production of records in this case would not amount to a "policy or practice." *See Gonzaga Univ.,* 536 U.S. at 288, 122 S.Ct. at 2278, 153 L.Ed.2d at 324 (noting that FERPA's nondisclosure provisions "speak only in terms of institutional policy and practice, not individual instances of disclosure" and "have an aggregate focus" (citation)); *see also Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144,* 45 F.Supp.2d 664, 674 (D.Minn.1999) (finding that "a solitary violation is insufficient to support a finding that the District has violated FERPA as a matter of policy or practice"). One problem with this argument, however, is that the production would not be accidental or inadvertent and would necessarily set some kind of precedent after having been authorized by the Iowa courts. A "policy or practice" to some extent would be established.[FN7]

> FN7. While the "policy or practice" must be of the "educational agency or institution," *see* 20 U.S.C. § 1232g(b), nothing in FERPA requires that it be a *voluntary* practice of the university, as opposed to one compelled by state law.

***489** [4] The larger problem with the Press–Citizen's position is that section 22.9 also operates on an aggregate basis. That section asks us to consider not whether a specific production of records in a particular case would result in a loss of funds, but whether a "provision"—e.g., section 22.2(1), the overall legal requirement that public records be made available—would cause such a loss. Hence, we need to focus on the provision itself, not just a one-time application of it, and determine whether *that provision* would lead to a loss of federal funding for the agency. In other words, section 22.9 requires us to consider whether section 22.2(1) , the basic open records "provision," applied consistently to education records at the University of Iowa, i.e., "an agency of this state," would "cause the denial of funds," and if so it "suspend[s]" that provision.[FN8]

> FN8. Again, Iowa Code section 22.9 does not ask whether a *specific disclosure* would result in loss of funding, but whether a *provision* of the Open Records Act as applied to a state agency would result in loss of funding.
>
> Neither party disputes that the University of Iowa is an agency within the meaning of Iowa Code sections 22.9 and 17A.2. *See, e.g., Papadakis v. Iowa State Univ. of Sci. & Tech.,* 574 N.W.2d 258, 260–61 (Iowa 1997) (finding that a university's termination of a faculty member's salary and benefits constituted "agency action" within the meaning of section 17A.2(2)).

Of course, at the end of the day the federal government might not try to defund the University of Iowa regardless of the circumstances. But we do not think section 22.9 requires Iowa courts to make predictions about policy decisions made in Washington D.C. That would be unworkable. *See* Iowa Code § 4.4(3) (setting forth a presumption that "[a] just and reasonable result is intended"). As we read the first paragraph of section 22.9, it requires us to withhold legal effect from a provision of the Open Records Act, such as section 22.2(1), if it appears that provision (not just an isolated application of the provision) would result in a loss of federal funding for a state agency.

[5] The Press–Citizen also relies on the second paragraph of section 22.9. It urges that the University has failed to adopt a "rule" as required by that paragraph and, in the absence of such a rule, the first paragraph has no effect.[FN9] When the Open Records Act was originally enacted in 1967, only the first paragraph of section 22.9 was included. *See* 1967 Iowa Acts ch. 106, § 11 (codified at Iowa § 68A.9 (1971), now Iowa Code § 22.9). The second paragraph was not added until 1984. *See* 1984 Iowa Acts ch. 1185, § 8 (codified at Iowa Code § 22.9 (1985)).

FN9. The University argues that Iowa Administrative Code rule 681—17.13(2)(*d*) is such a rule. It provides:

> The following records shall be kept confidential. Records are listed by category, according to the legal basis for withholding them from public inspection.
>
> ....
>
> *d.* Student records (Family Educational Rights and Privacy Act of 1974, as amended, 20 U.S.C. 1232g and Iowa Code section 22.7)

In light of our determination that adoption of a rule under the second paragraph of section 22.9 is not a prerequisite to the enforcement of the first paragraph of that section, we need not reach this argument.

[6] Our difficulty with this argument is that it treats two separate mechanisms as if they were one. The first paragraph of section 22.9 is written in the passive voice ("shall be suspended") and is directed at *everyone.* Thus, the first paragraph comes into effect whenever "it is determined," without confining itself to determinations by an *agency.* By contrast, the ***490** second paragraph is directed to *agencies* of this state, telling each of them to adopt by rule "in each situation where [section 22.9] is believed applicable, its determination identifying those particular provisions of this chapter that must be waived in the circumstances to prevent the denial of federal funds, services, or information." *See also* S.F. 2294 Explanation, 70th G.A., Reg. Sess. (Iowa 1984) ("Section 8 requires state agencies to adopt certain rules regarding conditions of federal funds."). There is no indication in any part of section 22.9 that if an agency should fail to discharge its duty under the second paragraph, or should discharge it incorrectly, the legislature intended the first paragraph to have no effect. After all, the first paragraph was a stand-alone provision with independent force for seventeen years before the second paragraph was enacted. In sum, we believe the 1984 amendment simply imposed a new obligation on state agencies, without altering the preexisting law. We therefore find that the Open Records Act incorporates confidentiality obligations from FERPA.

D. FERPA and "Personally Identifiable Information." Assuming FERPA applies, the next issue is whether its obligations can be met by redaction or whether it requires the withholding of entire records in some instances. The University argues that under the DOE's interpretation of "personally identifiable information," an educational record must be withheld if the recipient would know the student to whom the record refers, even with the redaction of personal information, such as the student's name. *See* 34 C.F.R. § 99.3 (defining personally identifiable information to include "[i]nformation requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates"). Given the notoriety of the October 14, 2007 incident, the University contends that no amount of redaction of personal information would prevent the newspaper from knowing the identity of various persons referenced in records relating to that incident.

The Press–Citizen responds that under the Open Records Act, access is a yes-or-no proposition. It cannot vary based upon the identity of the party making the request. *See, e.g., Ne. Council on Substance Abuse, Inc. v. Iowa Dep't of Pub. Health,* 513 N.W.2d 757, 761 (Iowa 1994) (rejecting a party's contention under the Open Records Act "that release of the applications should depend on the status of the party seeking them"). The flaw in this argument, however, is that the relevant legal standards in this case actually come from FERPA, incorporated into Iowa law through section 22.9.

[7] The Press–Citizen also maintains that the DOE regulation should not be followed, either because the relevant part of it did not become effective until this lawsuit was already pending or be-

cause it is contrary to prior caselaw. As noted by the Press–Citizen, current subparts (f) and (g) of the definition of "personally identifiable information" were only approved as a final rule by the DOE on December 9, 2008, and became effective January 9, 2009. *See* Family Educational Rights and Privacy, 73 Fed.Reg. 74,806, 74,806 (December 9, 2008) (codified at 34 C.F.R. pt. 99). This action was filed January 4, 2008. The district court rendered its decision on the Category 3 and Category 4 documents on August 31, 2009.

Yet under federal law, there exists a "principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." ***491***Bradley v. Sch. Bd. of Richmond,* 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476, 488 (1974). True, there is also the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 855, 110 S.Ct. 1570, 1586, 108 L.Ed.2d 842, 865 (1990) (Scalia, J., concurring). Thus, the United States Supreme Court has asked whether applying the change in law to a pending case "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 280, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229, 262 (1994); *see also Fernandez–Vargas v. Gonzales,* 548 U.S. 30, 37, 126 S.Ct. 2422, 2427–28, 165 L.Ed.2d 323, 334 (2006).

We think the modified definition of "personally identifiable information" easily passes the federal test for retroactivity. The relevant "conduct" here is the University's decision to withhold the appealed Category 3 and the Category 4 documents. That conduct continued after the lawsuit was filed. It was still ongoing even when the regulation was modified. There was no reliance such that there would be prejudice if we followed the new regulation.

Also, the previous definition of "personally identifiable information" was not all that different. It prohibited the disclosure of any "information that would make the students' identities easily traceable." 34 C.F.R. § 99.3(f) (2008). The DOE substituted the new language because the old language

> lacked specificity and clarity. We were also concerned that the "easily traceable" standard suggested that a fairly low standard applied in protecting education records, i.e., that information was considered personally identifiable only if it was easy to identify the student.
>
> 73 Fed.Reg. 74,806, 74,831 (December 9, 2008).

But the DOE had issued guidance under the earlier language that educational records could not be released if the recipient could determine the student to whom reference was being made:

> If, because of other records that have been released, or other publicly available information, the redaction of names, identification numbers, and dates and times of incidents is not sufficient to prevent the identification of a student involved in a disciplinary proceeding, including student victims and student witnesses, then FERPA prohibits an educational agency or institution from having a policy or practice of releasing the information.

See Letter to School District re: Disclosure of Education Records to Texas Office of Attorney General (April 6, 2006), *available at* www2.ed.gov /policy/ gen/ guid/ fpco/ ferpa/ library/ tx 040606. html. As DOE explained in its notice of proposed rulemaking for the amendment, "The proposed regulations are needed to establish this guidance in a definitive and legally binding interpretation...." Family Educational Rights and Privacy, 73 Fed.Reg. 15,574, 15,583 (March 24, 2008). Hence, the intent of the January 2009 amendment was to

clarify the law, not change it.

[8] The Press–Citizen also insists that it is not a legally permissible construction of the term "personally identifiable information" for the University to withhold entire documents, rather than redact them. We disagree. The statute forbids federal funding of institutions that have a policy or practice of releasing "education records (or personally identifiable information contained therein ...)" without parental permission. *See* 20 U.S.C. § 1232g(b)(1). ***492** This either-or language, as we read it, is at least subject to the interpretation that an entire record can be withheld where redaction would not be enough to protect the identity of a student. And as long as the underlying statute is ambiguous, we are required to defer to any reasonable and permissible interpretation made by the agency—here DOE. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 2781–82, 81 L.Ed.2d 694, 702–03 (1984); *Miami Univ.*, 294 F.3d at 814.

The Press–Citizen cites to a case where the Montana Supreme Court ordered release of student disciplinary records with the names redacted, even though the two students involved were known to the requesting newspaper. *Bd. of Trs., Cut Bank Pub. Schs. v. Cut Bank Pioneer Press,* 337 Mont. 229, 160 P.3d 482, 487 (2007). But that case was decided before the 2009 amendment to the FERPA regulations. In any event, the school district never made the specific argument, as far as we can tell, that FERPA prohibits release of an entire record where redaction would not be enough to avoid identification of the students involved. The Press–Citizen also cites to a passing observation of the Wisconsin Supreme Court that "once personally identifiable information is deleted, by definition, a record is no longer an education record since it is no longer directly related to a student." *Osborn v. Bd. of Regents of Univ. of Wis. Sys.*, 254 Wis.2d 266, 647 N.W.2d 158, 168 n. 11 (2002). That comment also was made before the 2009 amendment to the regulations, and that case likewise did not address the particular issue that is now before us.

[9] Thus, consistent with current DOE regulations, we conclude that educational records may be withheld in their entirety where the requester would otherwise know the identity of the referenced student or students even with redactions.

The Press–Citizen criticizes this position as a matter of policy. In its view: "The University's position boils down to a peculiar argument that FERPA applies on a sliding scale, saving its most vigorous application to records concerning crimes and alleged crimes that are the most notorious." This feature of FERPA, however, derives from earlier determinations by Congress and the DOE that preservation of student confidentiality should be an overarching goal of the statute. It is not our role to reexamine those decisions.

E. Additional Issues. The Press–Citizen points out that FERPA has an exception when education records are "furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution." *See* 20 U.S.C. § 1232g(b)(2)(B); *see also* 34 C.F.R. 99.31(a)(9)(i) (2009) (indicating that an education record may be disclosed "to comply with a judicial order or lawfully issued subpoena"). This exception has been applied in prior cases. *See, e.g., Ragusa v. Malverne Union Free Sch. Dist.*, 549 F.Supp.2d 288, 293–94 (E.D.N.Y.2008) (ordering the production of relevant education records in a discrimination case); *Catrone v. Miles,* 215 Ariz. 446, 160 P.3d 1204, 1210–12 (Ariz.Ct.App.2007) (holding that education records could be ordered to be produced in a medical malpractice case and noting "the protections afforded to educational records by statute do not prohibit, but rather permit, disclosure pursuant to court order"); *Gaumond v. Trinity Repertory Co.*, 909 A.2d 512, 518 (R.I.2006) (holding that FERPA does not bar the production of relevant education records pursuant to court order in a personal injury***493** case). But in those in-

stances, the records were relevant to litigation that did not involve the records themselves. *See Gaumond,* 909 A.2d at 518 (distinguishing prior cases where public disclosure was sought by newspapers and was not granted). It would make no sense to interpret the "judicial order" exception as authorizing disclosure whenever a party chose to bring a separate court action seeking access to education records. This would lead to a highly incongruous situation where FERPA would only have effect until the party requesting records chose to go to court, at which point FERPA would cease to have any effect at all.[FN10]

> FN10. Courts have rejected that viewpoint. *See Ragusa,* 549 F.Supp.2d at 292 (stating that the judicial order exception to FERPA does not end the inquiry and observing that " 'before approval is given, the party seeking disclosure is required to demonstrate a genuine need for the information that outweighs the privacy interests of the students' " (quoting *Rios v. Read,* 73 F.R.D. 589, 599 (E.D.N.Y.1977))); *see also Zaal v. State,* 326 Md. 54, 602 A.2d 1247, 1256 (1992) (commenting "[t]hat the statute exempts a local school system or educational institution which discloses 'personally identifiable information' in compliance with a judicial order from sanctions does not mean that a student's privacy or confidentiality interest in his or her education records is automatically overridden whenever a court order to review them is sought"). In short, the "judicial order" exception informs an educational institution when it may release educational records; it does not inform a court when it may enter an order.

The Press–Citizen also argues that the University has been inconsistent in its position. As the Press–Citizen points out, University officials, including the president, the athletic director, and the football coach have commented publicly on aspects of the University's response to the alleged sexual assault. In addition, the seventy-two-page Stolar Report that was commissioned by the Board of Regents contains a detailed narrative and critique of the University's response to the incident, replete with references to "Football Player # 1," "Football Player # 2," and "the Student–Athlete."

We are not persuaded that the University has been altogether consistent. At the same time, commentators have criticized FERPA for permitting institutions to behave inconsistently—revealing student information when it puts the university in a good light and withholding it when it does not. *See* Matthew R. Salzwedel & Jon Ericson, *Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics,* 2003 Wis. L.Rev. 1053, 1105–06 (2003) (commenting that universities "provide disclosure that is selective in application"). Regardless, the Press–Citizen does not attach any particular legal significance to the University's alleged inconsistency. It provides no legal authority in this section of its brief and, at oral argument, specifically disclaimed any waiver argument. *Cf. City of Riverdale,* 806 N.W.2d at 657 (finding a municipality had waived the exemption in section 22.7(50) of the Open Records Act). For these reasons, the Press–Citizen's inconsistency argument does not alter our conclusions as to what FERPA requires in this case.

[10] The amici curiae urge that it would violate federal and state constitutional provisions if access to public documents could depend upon the knowledge or identity of the requester. Although this argument is developed at some length in the brief of the amici, it was not raised below or by the Press–Citizen. We therefore decline to reach it. *See Mueller v. St. Ansgar State Bank,* 465 N.W.2d 659, 660 (Iowa 1991) (noting that "[u]nder Iowa law, the only issues reviewable are those presented by the parties"); *see also* ***494***Rants v. Vilsack,* 684 N.W.2d 193, 198–99 (Iowa 2004) (declining to reach an argument raised by amici curiae that was

not presented to the district court).

IV. Conclusion.

We reverse the judgment of the district court to the extent it orders the production of the appealed Category 3 documents and the Category 4 documents. The University has not challenged any other aspects of the district court's judgment, including its award of attorneys' fees to the Press–Citizen. Therefore, we affirm the remainder of the judgment.[FN11] We remand for further proceedings in accordance with this opinion.

> FN11. The Press–Citizen contends in its brief that the University has failed to produce even the Category 3 records that are not the subject of this appeal. Their production should occur, if it has not already taken place.

DISTRICT COURT JUDGMENT REVERSED IN PART AND REMANDED.

All justices concur except Appel, Wiggins, and Hecht, JJ., who dissent.

APPEL, Justice (dissenting).

I respectfully dissent.

The Federal Educational Rights and Privacy Act (FERPA) states that federal funds shall not be available "to any educational agency or institution which has a policy or practice" of releasing personally identifiable information without the written consent of parents. 20 U.S.C. § 1232g(b)(1) (2006). In my view, compliance with a judicial order pursuant to a generally applicable state public records statute does not amount to a policy or practice of *any educational agency or institution. See generally Maynard v. Greater Hoyt Sch. Dist. No. 61-4,* 876 F.Supp. 1104, 1108 (D.S.D.1995). The majority opinion repeatedly cites "policy or practice," while omitting the statutory requirement that the "policy or practice" must be one of the "educational agency or institution." In effect, the majority opinion amends the statute to strike the words "agency or institution."

In light of this explicit wording of FERPA and the Iowa Open Records Act, I would not rewrite either statute. While federal law plainly is supreme, I find no conflict between FERPA and the Iowa Public Records Act. As a result, I would require disclosure of the public records in this case.

WIGGINS and HECHT, JJ., join this dissent.

Iowa,2012.
Press-Citizen Co., Inc. v. University of Iowa
817 N.W.2d 480, 282 Ed. Law Rep. 640, 40 Media L. Rep. 2057

END OF DOCUMENT

EXHIBIT 11

April 6, 2006

[Letter to School District in Texas]

Dear [School District]:

This is in response to your letter, dated January 26, 2005, in which you seek guidance on a matter involving the Family Educational Rights and Privacy Act (FERPA) as it relates to a request for information from a student's education records under the Texas Public Information Act (PIA). (Tex. Gov't Code § 552.) Specifically, you have asked that we review a document that the [School District] (District) redacted in response to a PIA request from the [media]. The Texas Office of the Attorney General (OAG) asked that the District either provide an unredacted copy of the record to the OAG's Open Records Division or to this Office for review in order to ascertain whether the District had redacted too much information from the education record for release under the PIA. You also ask for guidance on whether FERPA would permit a school district to disclose education records in unredacted form to the OAG for the purpose of making a determination on a complaint filed under the PIA. This Office administers FERPA and is responsible for providing technical assistance to educational agencies and institutions to ensure compliance with the statute and regulations. 20 U.S.C. § 1232g; 34 CFR Part 99.

Specifically, the [media] requested, under the PIA, a report written by a student about an incident that occurred [at] an out-of-town athletic event. The District provided a copy of the report to the [media] in redacted form. The [media] filed a complaint with the OAG because it believes that the District redacted too much of the student's report. The OAG requested that you provide an unredacted copy of the student's report to its Open Records Division for review and so that it may make a determination in the complaint filed by the [media]. You refused to provide the OAG with a copy of the education records because you believe FERPA does not authorize you to do so. In a January 27, 2005, telephone conversation between this Office and the OAG, the OAG agreed to have this Office make a determination under FERPA regarding the redaction of the student report. By letter dated February 1, 2005, the OAG requested guidance from this Office regarding the matter you raise concerning the disclosure of education records to the OAG. We plan to address this issue separately in our response to the OAG and will provide you a copy of that response. Our immediate response to you will address the disclosure of personally identifiable information contained in students' education records pursuant to State open records requests.

As explained more fully below, this Office did not review the document submitted by the District to ascertain whether the District had redacted too much information. At least at the outset, this Office is not in a position to evaluate what information should be redacted and disclosed in response to an open records request because we do not have all the facts that a school would have to consider about a particular circumstance. For this reason, we have advised educational agencies and institutions that they are in the best position to analyze and evaluate whether a redacted document is "easily traceable" and, therefore, whether the information may be disclosed to a third party. If we were to get a complaint from a parent alleging that *too much* personally identifiable information was disclosed, we would then look at the specifics of the case and perhaps request access to all relevant information that the school relied on for redacting. However, we have no basis for reviewing whether too much information was redacted from an education record for purposes of a State open records law. Under FERPA, the right to inspect and review an education record belongs to the parent or eligible student; therefore, we have no basis for determining whether an educational agency or institution removed too much information from an education record that is to be disclosed to a third party.

An educational agency or institution subject to FERPA may not have a policy or practice of disclosing education records, or non-directory personally identifiable information from education records, without the prior written consent of the parent or eligible student except as provided by law. ("Eligible student" means a student who has reached 18 years of age or is attending a postsecondary institution at any age.) 20 U.S.C. § 1232g(b); 34 CFR Subpart D. "Education records" are defined as "those records, files, documents, and other materials which –

(i) contain information directly related to a student; and
(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(i) and (ii). See also 34 CFR § 99.3 "Education records." Excluded from the definition of "education records" are records of the law enforcement unit of an educational agency or institution, but only under the conditions described in § 99.8 of the FERPA regulations. See 20 U.S.C. § 1232g(a)(4)(i) and (ii) and 34 CFR § 99.3 "Education records."

"Disclosure" is defined in FERPA to mean transferring, releasing, or permitting access to "personally identifiable information contained in education records." 34 CFR § 99.3 ("Disclosure"). Therefore, an educational agency or institution may release education records without meeting the written consent requirements in § 99.30 if it has removed all "personally identifiable information" from the records. "Personally identifiable information" includes, but is not limited to, the following information:

(a) the student's name;
(b) the name of the student's parent or other family member;
(c) the address of the student or the student's family;

(d) a personal identifier, such as the student's social security number or student number;
(e) *a list of personal characteristics that would make the student's identity easily traceable*; or
(f) *other information that would make the student's identity easily traceable.*

34 CFR § 99.3, "Personally identifiable information." (Emphasis added.) That is, FERPA-protected information may not be released in any form that would make the student's identity easily traceable (unless there is written consent or a specific exception to the written consent requirement).

Occasionally, a student's identity may be "easily traceable," even after removal or redaction of direct identifiers and other nominally identifying information from student-level records. This may be the case, for example, with a highly publicized disciplinary action, or one that involved a well-known student, where the student could be easily identified in the community even after the record has been "scrubbed" of identifying data. In these circumstances, FERPA does not allow release of the education record in any form without consent because the irreducible presence of "personal characteristics" or "other information" make the student's identity "easily traceable."

A student's identity may also be "easily traceable" in the release of aggregated or statistical information derived from education records. See, for example, our September 25, 2003, letter to the Board of Regents of the University System of Georgia available at http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/georgialtr.html. The Board had asked about a newspaper's request for sensitive data about students in aggregate form categorized into specific groupings that the Board believed could be used to identify students, especially through multiple releases. This Office advised the Board of Regents that, in those circumstances, we had insufficient information to determine whether the disclosures would violate FERPA, that the institution itself had to make the determination whether a student's identity would be easily traceable and, if so, they could not disclose the information in that form. This decision was based on our recognition that, at least at the outset, agencies and institutions themselves are clearly in the best position to analyze and evaluate this requirement based on their own data, and under FERPA the burden is on the agency or institution not to release either aggregated or de-identified ("redacted") student level data if it believes that personal identity is easily traceable based on the specific circumstances under consideration. This Office has advised elsewhere that an educational agency or institution should use generally accepted statistical principles and methods to address the problem of small cell sizes and otherwise ensure that statistical or de-identified information from education records is reported in a manner that fully prevents the identification of students. If that cannot be done, the data must not be reported. See http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/nashville_tn2004.html.

Additionally, in a letter dated October 19, 2004, to Miami University (University) in Ohio, this Office advised that FERPA prohibits the disclosure of redacted or de-identified education records, without consent, even where an individual's identity is revealed only through **a series or**

combination of requests that are available to those in possession of the data. See http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/unofmiami.html. In particular, the University had redacted certain items of information from disciplinary records (student's name, social security number, student ID number, and the exact date and time of an incident) in a manner that was generally sufficient to remove all "personally identifiable information" under FERPA for individual disclosures in response to an open records request. However, because the same requestor made multiple requests from various sources at the University, the cumulative effect of releasing the records in that form would be that the identities of the student victims and witnesses would be made easily traceable. As we had previously advised the Georgia Board of Regents, we advised the University that it must take into account other publicly available information and that the redaction of nominally identifying information may not be sufficient to prevent a student's identity from being easily traceable with respect to a highly publicized incident, or with respect to a series of requests for information that make a student's identity easy to trace due to the disclosure of related information.

In sum, where a disclosure of personally identifiable information in education records does not fall within an exception to the prior written consent rule, an educational agency or institution itself is in the best position to determine, at least at the outset, what information must be removed from education records in order to ensure that a student's identity is not easily traceable. If, because of other records that have been released, or other publicly available information, the redaction of names, identification numbers, and dates and times of incidents is not sufficient to prevent the identification of a student involved in a disciplinary proceeding, including student victims and student witnesses, then FERPA prohibits an educational agency or institution from having a policy or practice of releasing the information. The educational agency or institution must either remove or redact all of the information in the education record that would make a student's identity easily traceable or refuse to release the requested education record at all.

Thank you for contacting us regarding this matter. I trust this guidance will assist you in complying with FERPA in this regard.

Sincerely,
/s/
LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Texas OAG

EXHIBIT 12

KIMBERLY BETZOLD, Plaintiff-Appellant, v SAGINAW COOPERATIVE HOSPITALS, Defendant-Appellee.

No. 251258

COURT OF APPEALS OF MICHIGAN

2005 Mich. App. LEXIS 418

February 15, 2005, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Saginaw Circuit Court. LC No. 01-041064-NZ.

DISPOSITION: Affirmed.

JUDGES: Before: Markey, P.J., and Murphy and O'Connell, JJ.

OPINION

PER CURIAM.

Plaintiff appeals as of right the trial court's orders granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) in this employment action. We affirm.

Plaintiff was employed with defendant from 1973 until 1999, when the psychiatry department she worked in was closed. During her employment, she applied for a physician recruiter position and a social worker position. Defendant hired a younger male from outside the hospital for the physician recruiter position and a younger female from outside the hospital for the social worker position. Plaintiff filed this suit claiming age and gender discrimination, under the Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq.*, in the failure to hire her for either position and in her termination, wrongful discharge, and a violation of the Bullard-Plawecki Employee Right to [*2] Know Act, MCL 423.501 *et seq.*

Plaintiff first argues that the trial court erred in finding that she failed to meet her burden of showing that gender or age was a determining factor in defendant's decision not to offer plaintiff the physician recruiter or a social worker position. We disagree. We review de novo a trial court's ruling on a motion for summary disposition. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich. 609, 613; 664 N.W.2d 165 (2003).

A plaintiff may prove a disparate treatment case of discrimination by either direct evidence of discrimination or indirect or circumstantial evidence of discrimination. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich. 124, 132; 666 N.W.2d 186 (2003). To prove a case with indirect evidence, our courts have adopted the burden-shifting approach set forth by the United States Supreme Court in *McDonnell Douglas Corp v Green*, 411 U.S. 792; 93 S. Ct. 1817; 36 L. Ed. 2d 668 (1973). *Sniecinski, supra* at 133-134. Although this test was originally used in racial discrimination [*3] cases, the approach has been adopted and used in age and gender discrimination cases brought under the CRA. *Hazle v Ford Motor Co*, 464 Mich. 456, 462-463; 628 N.W.2d 515 (2001).

Under *McDonnell Douglas*, a plaintiff can establish a prima facie case of discriminatory intent by showing: (1) the plaintiff was a member of a protected class, (2) the plaintiff suffered an adverse employment action, (3) the plaintiff was qualified for the employment position, and (4) the plaintiff's failure to obtain the position gives rise to an inference of unlawful discrimination on the part of the defendant. *Hazle, supra* at 463. Once a plaintiff presents a prima facie case of discrimination and establishes a rebuttable presumption of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* at 464. This articulation requirement means that the defendant has the burden of producing evidence that the employer's actions were legitimate and nondiscriminatory. *Id.* Once defendant offers a nondiscriminatory reason, the presumption under *McDonnell Douglas* [*4] drops away. *Id.* at 465. The *Hazle* Court explained the analysis which then follows:

> At that point, in order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is "sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." . . . [A] plaintiff "must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful] discrimination." [*Id.* at 465-466 (citations omitted).]

In other words, in the context of summary disposition, the plaintiff's disproof of the defendant's nondiscriminatory reason must "also raise[] a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action." *Lytle v Malady (On Rehearing)*, 458 Mich. 153, 175; 579 N.W.2d 906 (1998).

It is undisputed that plaintiff belonged to a protected class and did not receive either position. Although defendant argued that plaintiff was not [*5] qualified for either position, defendant found plaintiff to be qualified enough to be interviewed for both positions. Our Supreme Court has held that in order to present a prima facie case of discrimination, a plaintiff does not have to show that she was at least as qualified as the successful candidate. *Hazle, supra* at 470. Therefore, for purposes of proving her prima facie case, it is arguable that plaintiff was minimally qualified for the positions. However, plaintiff did not satisfy the "ideal" criteria or qualifications sought by the hospital in filling the positions. We shall continue our analysis under the presumption that plaintiff was minimally qualified. Plaintiff also must show that defendant's decisions, if unexplained, gave rise to an inference of discrimination. For the physician recruiter position, defendant hired a younger male from outside the hospital to fill the position. For the social worker position, defendant hired a younger female from outside the hospital to fill the position. Accordingly, plaintiff presented a prima facie case of discrimination for both positions.

As plaintiff presented a prima facie case of discrimination, defendant [*6] had the burden of producing a nondiscriminatory reason for the hiring decisions. Defendant met this burden by presenting evidence reflecting that it hired the candidates for both positions based on their qualifications, which were believed to be superior to plaintiff's qualifications and which better met the "ideal" criteria. Once defendant gave a non-discriminatory reason for its decision, the inference of discrimination raised under the *McDonnell Douglas* test dropped away.

Plaintiff thus had to show that defendant's reason for making its decision was a pretext for discrimination and that discriminatory intent or animus was a motivating factor in defendant's decision. To show that defendant's reason for its decision was a pretext for discrimination, plaintiff stated that she was more qualified for both positions. However, for both positions, defendant advertised that an ideal candidate would have a four-year degree. It was undisputed that the candidate for the physician recruiter position possessed a master's degree and that the candidate for the social worker position possessed a bachelor's degree in social work while plaintiff did not possess a four-year degree. The evidence [*7] in both situations indicated that defendant attempted to hire the most qualified candidate and that age or gender were not factors in making the hiring decision.

Plaintiff also argues that defendant's failure to follow a company policy of posting open positions internally before posting the positions externally showed that

defendant's actions were a pretext for discrimination. We first find that the policy applied specifically to nursing and clerical positions, and there was evidence that the positions at issue did not fall within those categories. Therefore, the policy cannot support plaintiff's position. Furthermore, plaintiff fails to show how defendant's actions served as a pretext for discrimination based on plaintiff's age or gender. Plaintiff applied and was interviewed for both positions. In the end, defendant appears to have made its decisions based on who was most qualified for the positions, and there was no evidence that these decisions were based on age or gender. The policy does not suggest that defendant is required to fill a position internally if hospital employees who apply do not meet all of the desired criteria as listed by defendant.

Plaintiff next argues that [*8] the trial court erred when it granted summary disposition to defendant on her claim of age discrimination regarding her termination. We disagree. To show a prima facie case of age discrimination when a plaintiff is discharged from employment, a plaintiff must show that (1) the plaintiff was a member of a protected class, (2) the plaintiff was discharged, (3) the plaintiff was qualified for the position, and (4) the plaintiff was replaced by a younger person. *Meagher v Wayne State Univ*, 222 Mich. App. 700, 711; 565 N.W.2d 401 (1997). To establish that she was qualified, a plaintiff must show that she was performing the job at a level that met the employer's legitimate expectations. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich. App. 347, 369; 597 N.W.2d 250 (1999). In regard to the fourth prong, a plaintiff may also show that she was treated differently from other similarly situated employees who were not members of the protected class. *Id.*

In this case, plaintiff was a member of a protected class because of her age, and she was terminated from her employment. Defendant does not dispute that at the time of her termination, [*9] plaintiff was performing up to expectations, so she was qualified for purposes of presenting a prima facie case. With respect to the fourth prong, plaintiff was not replaced with a younger worker. Rather, the psychiatry department where she worked was closed. Plaintiff also did not present evidence of other similarly situated employees who were younger and who were treated differently. Plaintiff only argues that the psychiatry department did not really close. However, plaintiff admitted in her deposition that she did not have any evidence that the hospital board did not actually determine to close the psychology department, and she cannot point to anyone who has taken over her former duties. Plaintiff offered no evidence that suggested that the closing of the department and her termination had anything to do with her age. Because plaintiff cannot meet the fourth prong to show a prima facie case of discrimination, the trial court did not err in granting defendant's motion for summary disposition.

Plaintiff next claims that the trial court erred when it dismissed her claim for breach of contract and wrongful discharge. We again disagree. "Generally, and under Michigan law by presumption, [*10] employment relationships are terminable at the will of either party." *Lytle*, *supra* at 163-164 (citation omitted). However, an employee can rebut the presumption of employment at will by presenting proof of a contract provision for a definite term or a provision that forbids discharge absent just cause. *Rood v General Dynamics Corp*, 444 Mich. 107, 117; 507 N.W.2d 591 (1993). There are three ways a plaintiff can prove that such a contractual term exists: (1) proof of an actual contract term that allows discharge only for just cause, (2) an express written or oral agreement that is clear and unequivocal regarding job security, or (3) a contractual provision that is implied at law where "an employer's policies and procedures instill a 'legitimate expectation' of job security in the employee." *Lytle*, *supra* at 164, citing *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 615; 292 N.W.2d 880 (1980).

Plaintiff testified in her deposition that she did not have a contract that permitted only just-cause termination. Plaintiff argued that oral assurances made when she was hired [*11] that as long as she did her job well, she would have a job and assurances made by her supervisors that they would keep her employed constituted an oral agreement for just-cause employment. However, there was no evidence presented by plaintiff that these assurances were made during a negotiation for employment or with an intent to contract for just-cause employment. Plaintiff's testimony on this subject was vague and conflicting. Oral assurances must be clear and unequivocal and be more than just "an optimistic hope of a long relationship" to establish a just- cause employment contract. *Rowe v Montgomery Ward & Co, Inc*, 437 Mich. 627, 640; 473 N.W.2d 268 (1991). Plaintiff failed to meet her burden.

Plaintiff also argues that certain policies of defendant created a legitimate expectation of just-cause employment. In reviewing a legitimate-expectation claim, courts determine (1) what the employer has promised, if anything, and (2) whether the promise was '"reasonably capable of instilling a legitimate expectation of just-cause employment . . . ."' *Lytle*, *supra* at 164-165, quoting *Rood*, *supra* at 138-139. The only [*12] policy plaintiff argues in support of her legitimate expectation claim is a policy that defendant would post open clerical and nursing positions internally before recruiting externally. This policy has nothing to do with termination of employment, and it could not be reasonably capable of instilling an expectation of just-cause employment. Plaintiff also argues that defendant's violation of the policy is a cause of action itself. However, as stated above, the policy was not applicable to the positions at issue. Also, the policy does not suggest that defendant is required to fill a position internally if hospital employees who apply do not meet all of the desired criteria as listed by defendant.

Finally, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition regarding her claim under the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq*. We disagree.

MCL 423.503 states that an employer, who receives a written request from an employee, shall provide the employee an opportunity to review the employee's personnel record at a location reasonably near the employee's place of [*13] employment. MCL 423.504 allows an employee to obtain a copy of the personnel record after the review described in MCL 423.503 has taken place or the employee demonstrates that she is unable to review the personnel record at the employer's location and requests a copy of the personnel record in writing.

On May 24, 2001, plaintiff's attorney wrote a letter advising defendant that he represented plaintiff and requesting that defendant produce plaintiff's employment file and personnel handbook or manual. Plaintiff did not present any evidence that she made a request to review her personnel file as she was required to do before she could request a copy under MCL 423.504. Plaintiff also did not offer any evidence that she demonstrated to the employer that she was unable to review her record at the employer's location. The letter to defendant only requested that defendant produce a copy of plaintiff's employment record. Because plaintiff did not first review her file under MCL 423.503 or give a written reason why she could not review the file at defendant's location, plaintiff did not [*14] comply with MCL 423.504. Because plaintiff did not comply with the statute, defendant was not under any obligation to reproduce plaintiff's personnel file when it received the letter from plaintiff's attorney. Therefore, the trial court did not err in granting summary disposition on this claim also.

Affirmed.

/s/ Jane E. Markey

/s/ William B. Murphy

/s/ Peter D. O'Connell

EXHIBIT 13

Not Reported in N.W.2d, 2006 WL 2270382 (Mich.App.)
(Cite as: 2006 WL 2270382 (Mich.App.))

H

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Don SOBIESKI, Plaintiff-Appellant,
v.
TAKATA SEAT BELTS, INC., and Renee Yeutter, Defendants-Appellees.

Docket No. 268366.
Aug. 8, 2006.

Background: Former employee brought action against employer asserting age discrimination in violation of the state Civil Rights Act, and a claim under the Bullard-Plawecki Employee Right to Know Act, following his termination from employment. The Circuit Court, Oakland County, entered summary disposition in favor of employer. Employee appealed.

Holdings: The Court of Appeals held that:
(1) derogatory stray comments about older workers made by former employee's supervisor did not constitute direct evidence of age discrimination;
(2) former employee was unable to establish he was treated differently than younger workers, or that younger workers were similarly situated to employee;
(3) employer's reason for terminating employee was not pretext for age discrimination;
(4) employee was not terminated in retaliation for an internal complaint; and
(5) employee's Bullard-Plawecki Employee Right to Know Act claim was precluded.

Affirmed.

Fitzgerald, P.J., filed opinion concurring in part and dissenting in part.

West Headnotes

[1] Civil Rights 78 ⚿1744

78 Civil Rights
78V State and Local Remedies
78k1742 Evidence
78k1744 k. Employment Practices. Most Cited Cases

Derogatory stray comments about older workers made by former employee's supervisor did not constitute direct evidence of age discrimination in violation of the state Civil Rights Act, where the comments were not directed at anyone in particular, the comments were made months before any adverse employment action was taken against employee, and supervisor was not the person responsible for the ultimate decision to terminate employee. M.C.L.A. § 37.2202(1)(a).

[2] Civil Rights 78 ⚿1744

78 Civil Rights
78V State and Local Remedies
78k1742 Evidence
78k1744 k. Employment Practices. Most Cited Cases

Former employee was unable to establish he was treated differently than younger workers, or that younger workers were similarly situated to employee, as required to support a presumption that former employee was discriminated against due to his age in violation of the state Civil Rights Act; younger employees had been placed on performance evaluations and had left the company as former employee had, and none of the younger employees had the same supervisors as employee or had job responsibilities which were equivalent to employee's. M.C.L.A. § 37.2202(1)(a).

[3] Civil Rights 78 ⚿1209

78 Civil Rights
78II Employment Practices
78k1199 Age Discrimination

Not Reported in N.W.2d, 2006 WL 2270382 (Mich.App.)
(Cite as: 2006 WL 2270382 (Mich.App.))

78k1209 k. Motive or Intent; Pretext. Most Cited Cases

There was no evidence that employer's legitimate nondiscriminatory reason for terminating employee, which reason was given as deficiencies in employee's job performance, was a pretext for age discrimination, as required to support employee's claim that he was terminated due to his age in violation of the state Civil Rights Act. M.C.L.A. § 37.2202(1)(a).

[4] Labor and Employment 231H ⚿774

231H Labor and Employment
231HVIII Adverse Employment Action
231HVIII(A) In General
231Hk770 Exercise of Rights or Duties; Retaliation
231Hk774 k. Causation in General. Most Cited Cases

There was no evidence that employee's internal complaint about supervisor's use of profanity at work, which complaint was made seven months prior to the employee's termination, was causally connected to employee's termination, as required to support employee's retaliation claim.

[5] Labor and Employment 231H ⚿88

231H Labor and Employment
231HIII Rights and Duties of Employers and Employees in General
231Hk88 k. Records and Confidentiality in General. Most Cited Cases

Former employee's failure to allege that his request that employer provide him with a copy of his personnel file was made pursuant to the Bullard-Plawecki Employee Right to Know Act precluded his claim that employer violated such act by allegedly delaying release of the requested information. M.C.L.A. § 423.501 et seq.

Oakland Circuit Court; LC No. 05-063900-CD.

Before: FITZGERALD, P.J., and SAAD and COOPER, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiff, Don Sobieski, appeals the circuit court's order that granted defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm.

I. Facts and Procedural History

Sobieski worked as a project engineer to develop seat belt and restraint systems for defendant, Takata Seat Belts, Inc. (Takata). Sobieski worked for Takata since 1987 and was terminated on October 28, 2004. Defendant, Renee Yeutter, was the supervisor of the engineering group, of which Sobieski was a member.

As part of her supervisory responsibilities, Yeutter completed routine performance evaluations for Sobieski and the other engineers in the group. Yeutter's first evaluation of Sobieski occurred in May 2003, and the evaluation was positive overall regarding Sobieski's performance. However, when Yeutter re-evaluated Sobieski in July 2004, Yeutter noted significant performance deficiencies. As a result, Yeutter placed Sobieski on a performance improvement plan, with reviews to be conducted every 30 days. Yeutter specifically noted that Sobieski failed to timely address client concerns and failed to submit accurate engineering orders. She further observed that Sobieski implemented engineering changes without proper validation which resulted in product safety concerns, delays in manufacture, and client dissatisfaction. Yeutter also stated that Sobieski had production and quality of work problems and an inability to interact effectively with clients.

Sobieski contends that his discharge was the result of age discrimination by Yeutter and that Yeutter retaliated against him because he complained about Yeutter's use of profane language and inappropriate physical contact with other employees. Specifically, Sobieski asserted that Yeutter repeatedly used foul language and that she had to be "counseled" about her behavior. Yeutter maintains that she did not know that Sobieski complained

Not Reported in N.W.2d, 2006 WL 2270382 (Mich.App.)
(Cite as: 2006 WL 2270382 (Mich.App.))

about her language and she denied that she ever engaged in any inappropriate physical contact with other members of Takata's staff.

Sobieski also asserted that he heard Yeutter murmur approximately three comments under her breath and he interpreted the remarks as negative statements about his age. Specifically, Sobieski claims that Yeutter stated that, "She can't work with older guys," and that "These guys just won't work and we've got to get more young people in here." Sobieski indicated that Yeutter also commented that "The younger ones feel better or normal." Sobieski recalled that Yeutter made the remarks in close proximity to him and another older employee, Ron Holler. However, Yeutter did not direct the comments to any particular staff member and she made the alleged comments six months before Sobieski was placed on the performance improvement plan. Sobieski acknowledged that he had difficulty with Yeutter's management style and he described her as controlling.

Yeutter testified that her supervisor, Ahad Zadeh, told her about problems with the engineering group and Zadeh specifically directed her to watch Sobieski's performance. Zadeh was not pleased with Sobieski's work and suggested his termination. Yeutter asserted that she did not want to terminate Sobieski and she made a concerted effort to retain him by placing him on the performance improvement plan. Yeutter further testified that she assigned Sobieski a coop student to assist him, in the hope that it would improve his output and work quality. Nonetheless, Zadeh continued to indicate that Sobieski should be replaced.

***2** At around the same time, Sobieski reportedly made a significant error on a project for GM because he failed to inspect a vehicle's seat belts and it was later discovered that the seat belts did not lock. Yeutter met with Zadeh and another Takata administrator, Patrick Giampaolo, and Zadeh instructed Yeutter to terminate Sobieski. Giampaolo confirmed that he, Zadeh, and other supervisors had been monitoring Sobieski's performance for a two-year period prior to his discharge due to "performance problems." Giampaolo indicated that Yeutter had resisted terminating Sobieski and sought to improve Sobieski's performance by setting up specific goals and objectives. When Sobieski did not meet the performance objectives, he was terminated at Zadeh's direction.

Sobieski denies that he had any performance deficiencies and he maintains that they are a ruse or pretext for his discharge. Sobieski further contends that other, younger engineers had deficiencies in their work that caused problems with GM or other clients but, unlike Sobieski, they did not receive negative evaluations and were not placed on performance improvement plans.

When it granted summary disposition in favor of defendants, the trial court ruled that Sobieski "failed to set forth facts sufficient to prove a prima facie case of age discrimination." The trial court further ruled that Sobieski failed to show that Yeutter made the decision to terminate him or that she made discriminatory comments. According to the trial court, Sobieski also failed to establish that the proffered reason for his dismissal was pretextual. The trial court rejected Sobieski's claim of retaliation because he did not show that Sobieski's complaint about Yeutter's behavior was a significant factor in his termination. Further, the court granted defendants summary disposition on Sobieski's claim under the Bullard-Plawecki Employee Right to Know Act based on the undisputed fact that defendants provided Sobieski's counsel with a copy of his personnel file and there is no time limitation for compliance in the act.

II. Analysis

A. Standard of Review

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. Specifically:

> A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support of a claim. After reviewing the evidence in a light

Not Reported in N.W.2d, 2006 WL 2270382 (Mich.App.)
(Cite as: 2006 WL 2270382 (Mich.App.))

most favorable to the nonmoving party, a trial court may grant summary disposition under MCR 2.116(C)(10) if there is no genuine issue concerning any material fact and the moving party is entitled to a judgment as a matter of law. [*Hazle v. Ford Motor Co.,* 464 Mich. 456, 461, 628 N.W.2d 515 (2001).]

However, the nonmoving party must go beyond the pleadings to offer specific facts and evidence to demonstrate that a genuine issue of material fact exists. *Quinto v. Cross & Peters Co.,* 451 Mich. 358, 362, 547 N.W.2d 314 (1996); MCR 2.116(G)(5). A genuine issue of material fact is deemed to exist when the record maintains as open an issue upon which reasonable minds might differ. *West v. General Motors Corp.,* 469 Mich. 177, 183, 665 N.W.2d 468 (2003).

B. Age Discrimination

***3** As noted, Sobieski alleges that Yeutter and Takata violated the Michigan Civil Rights Act, which provides, in relevant part:

An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of ... age.... [MCL 37.2202(1)(a).]

When asserting a claim for age discrimination, a litigant must prove that he not only suffered an adverse employment action, *Wilcoxon v. Minn. Mining & Mfg. Co.,* 235 Mich.App. 347, 362, 597 N.W.2d 250 (1999), but that age was a factor in the adverse employment decision, *DeBrow v. Century 21 Great Lakes, Inc. (After Remand),* 463 Mich. 534, 539, 620 N.W.2d 836 (2001). A plaintiff may use either direct or circumstantial evidence to prove unlawful discrimination. *Sniecinski v. Blue Cross & Blue Shield of Michigan,* 469 Mich. 124, 132, 666 N.W.2d 186 (2003). Direct evidence is defined as evidence that, if believed, necessitates the conclusion that unlawful discrimination was a motivating factor in the adverse employment action. *Id.* at 133, 666 N.W.2d 186. "In addition, a plaintiff must prove her qualification or other eligibility for the position sought and present direct proof that the discriminatory animus was causally related to the adverse action." *Id.* To avoid liability, a defendant must show that "it would have made the same decision even if the impermissible consideration had not played a role in the decision." *Id.* (citation omitted).

Sobieski asserts that Yeutter's alleged comments constitute direct evidence of discrimination. Specifically, Sobieski cites three comments that suggested a preference for younger workers. Again, however, the alleged comments were not made in reference to a particular employee and were allegedly made six months before Yeutter placed Sobieski on the performance improvement plan and almost eight months before Sobieski was terminated.

[1] Statements that are simply "stray remarks" do not constitute direct evidence of discrimination. *Sniecinski, supra* at 136, 666 N.W.2d 186. Our courts have identified five factors to determine whether remarks are "stray" or if they constitute direct evidence of discrimination:

(1) whether they were made by a decision maker or an agent within the scope of his employment, (2) whether they were related to the decision-making process, (3) whether they were vague and ambiguous or clearly reflective of discriminatory bias, (4) whether they were isolated or part of a pattern of biased comments, and (5) whether they were made close in time to the adverse employment decision. [*Id.* at 136 n. 8, 666 N.W.2d 186.]

Here, Yeutter's alleged remarks do not constitute direct evidence of discrimination. Sobieski has not shown that the statements were, in any manner, related to the decision to discipline or terminate him. The remarks were not directed to anyone in particular or any specific topic or discussion regarding the hiring or termination of an employee.

Moreover, Yeutter allegedly made the statements several months before Sobieski experienced any adverse employment action and, on the basis of Sobieski's own description of the remarks and their context, they were isolated and "vague and ambiguous" in nature.[FN1]

> FN1. We respectfully note that the dissent colleague fails to analyze the alleged comments within the framework set forth by our case law. Again, while, in isolation, the alleged comments refer to age, they were vague, admittedly indirect and remote in time, and no evidence establishes that they were related to Sobieski's termination. Accordingly, contrary to the dissent's conclusion, the alleged remarks do not constitute direct evidence of discrimination. Indeed, such distant and indirect comments simply cannot "necessitate[ ] the conclusion that unlawful discrimination was a motivating factor in the adverse employment action." *Sniecinski, supra* at 133, 666 N.W.2d 186. Further, Sobieski was required, but failed to "present direct proof that the discriminatory animus was causally related to the adverse action." *Id.* Therefore, we must conclude that Sobieski failed to establish his claim.

*4 Sobieski further contends that, before Yeutter became his supervisor, his evaluations were positive and raised no issues or concerns regarding his work. Zadeh, who previously supervised Sobieski, disputes this and maintains that his prior evaluation of Sobieski contained comments indicating a need for improvement. Sobieski does not dispute that his initial evaluation by Yeutter was positive overall. Rather, to show bias, Sobieski relies on the second performance evaluation completed by Yeutter, which led to Sobieski's placement on a performance improvement plan. However, as Zadeh explained, during the second evaluation period, Sobieski began work on a different project "that demands a lot of accuracy, quantity output, customer input, interface, internal and external," Yeutter evaluated Sobieski "based on what he was doing at that time ."

Sobieski argues that Yeutter's affidavit, in which she denied that she was the ultimate decision-maker in his termination, is self-serving and contradicts her deposition testimony in which Yeutter stated that she terminated Sobieski. It is well established that "parties may not contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition." *Dykes v. Wm. Beaumont Hosp.,* 246 Mich.App. 471, 480, 633 N.W.2d 440 (2001). In her deposition, Yeutter noted several reasons for Sobieski's termination and acknowledged she was physically present and was involved in the actual procedural firing of plaintiff. However, throughout her deposition, Yeutter stated that certain employment decisions regarding transfer, promotion, and termination of employees were actually Zadeh's responsibility. Not only does this undermine Sobieski's assertion that Yeutter's affidavit contradicts her testimony, Zadeh also testified that he was the ultimate decision-maker regarding Sobieski's termination and Giampaolo's affidavit confirms this point. Because Zadeh made the decision to terminate Sobieski and Sobieski made no claim of discriminatory treatment by Zadeh, Sobieski has failed to support his claim that his discharge was related to any form of discrimination or bias based on age.

Because Sobieski cannot provide direct evidence of age discrimination, he was required to follow the burden-shifting approach outlined in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Hazle, supra* at 462-463, 628 N.W.2d 515; *Sniecinski, supra* at 133-134, 666 N.W.2d 186. This Court has previously adopted the procedure delineated in *McDonnell Douglas* for use in age discrimination claims brought pursuant to the Michigan Civil Rights Act. *Lytle v. Malady (On Rehearing),* 458 Mich. 153, 172-178, 579 N.W.2d 906 (1998). In accordance with the standards set forth in *McDonnell Douglas,*

plaintiff must demonstrate:

> 1) he belonged to a protected class; 2) he suffered an adverse employment action; 3) he was qualified for the position; and 4) that others who were outside the protected class and similarly situated were not affected by the adverse conduct of the employer. [*Id.* at 172-173.]

***5** If a plaintiff can successfully demonstrate these factors, there is a presumption of unlawful discrimination. *Id.* At issue here is the fourth factor. FN2

> FN2. In reference to Sobieski's qualification for employment, the fact that he did not hold an engineering degree does not establish that he was unqualified to retain his position. Takata knew this fact when it hired Sobieski and his lack of degree was not cited as a reason for terminating him, but was merely noted as a factor that could have affected Sobieski's work.

[2] Sobieski does not assert or establish that he was replaced by a younger worker. Rather, he claims that Yeutter and Takata treated younger engineers more favorably. According to Sobieski, younger engineers were not subject to disciplinary action or adverse employment decisions despite deficiencies in their job performance. However, defendants presented evidence that younger employees *were* placed on performance improvement plans and left the company, and Sobieski did not rebut this evidence. FN3

> FN3. The dissent correctly observes that an older employee, Ron Holler, was also discharged. However, it is important to note that Holler was terminated more than fifteen months before Sobieski and defendants presented unrebutted evidence that Holler was fired because of customer complaints and problems with testing and tooling design. Therefore, clearly this does not raise an inference that Sobieski was terminated because of his age.

Sobieski has also failed to establish that the younger employees were similarly situated. A plaintiff "is required to show that 'all of the relevant aspects" ' of a coworker's employment situation are " 'nearly identical" ' to those of the plaintiff's situation. *Smith v. Goodwill Industries of West Michigan, Inc.,* 243 Mich.App. 438, 449, 622 N.W.2d 337 (2000). Though Sobieski and the younger engineers worked under the same job description, they were assigned different supervisors and responsibilities with regard to various projects. Sobieski failed to show that their respective responsibilities on the projects were the same or that the alleged deficiencies in performance were of an equivalent priority or nature. Sobieski also failed to rebut Yeutter's statements that Takata disputed the complaints from GM about projects handled by younger engineers. Further, Sobieski did not rebut evidence that, contrary to Sobieski's cited performance deficiencies, the alleged deficiencies of the younger engineers did not involve violations or failure to follow Takata's own engineering procedures.

[3] Were we to find that Sobieski satisfied the required elements of *McDonnell Douglas,* defendants also have "the opportunity to articulate a legitimate nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case." *Hazle, supra* at 464, 628 N.W.2d 515. "If a defendant produces such evidence, the presumption is rebutted, and the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination." *Sniecinski, supra* at 134, 666 N.W.2d 186.

Here, Yeutter cited Sobieski's numerous performance deficiencies in the execution of his job duties. While Sobieski denied any problems with his performance, he failed to present any evidence to rebut Yeutter's testimony and documentation evidencing ongoing concerns with Sobieski's performance at Takata. A plaintiff can establish that a

Not Reported in N.W.2d, 2006 WL 2270382 (Mich.App.)
(Cite as: 2006 WL 2270382 (Mich.App.))

defendant's reasons for termination are pretextual "(1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision." *Dubey v. Stroh Brewery Co.,* 185 Mich.App. 561, 565-566, 462 N.W.2d 758 (1990). Sobieski has failed to show defendants' stated reasons for his termination are pretextual or that circumstantial evidence of bias, including Yeutter's alleged comments or the alleged disparate treatment of younger employees, was causally related to his termination. Accordingly, Sobieski's theory that his performance deficiencies were pretext for age discrimination amounts to mere speculation and conjecture.

C. Retaliation

***6** [4] Sobieski further contends that Yeutter terminated him in retaliation for his complaint about her use of profanity at work. Yeutter acknowledged that she was counseled about her language, but she denied that she was disciplined and she denied any knowledge that plaintiff initiated the complaint.

To establish a claim of retaliatory discharge, a party must prove: "(1) she was engaged in a protected activity, (2) the defendant knew of the protected activity, (3) the defendant acted adversely to the plaintiff, and (4) the protected activity caused the adverse employment activity." *Lamoria v. Health Care & Retirement Corp.,* 230 Mich.App. 801, 818, 584 N.W.2d 589 (1998), opinion vacated July 24, 1998; opinion reinstated in part by 233 Mich.App. 560, 593 N.W.2d 699 (1999). The burden is on plaintiff to demonstrate a causal connection between the protected activity and the adverse employment action. *Chiles v. Machine Shop, Inc.,* 238 Mich.App. 462, 470, 606 N.W.2d 398 (1999).

Were we to conclude that Sobieski's internal complaint was sufficient to give rise to a retaliatory discharge claim, he has not shown a causal connection between the filing of the complaint and his discharge. Indeed, even a temporal connection between Sobieski's complaint and the adverse employment action is tenuous because Sobieski complained about Yeutter in March 2004, approximately seven months before Sobieski's termination. Moreover, Sobieski has not established any other connection to his discharge. Accordingly, the trial court correctly dismissed Sobieski's retaliation claim.

D. Bullard-Plawecki Employee Right to Know Act

[5] Sobieski contends defendants violated the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq.,* by not providing him a copy of his employment file within a reasonable time frame. MCL 423.503 requires an employer, upon receipt of a written request from an employee, to provide the employee an opportunity to review the employee's personnel file "at a location reasonably near the employee's place of employment and during normal office hours." In addition, MCL 423.504 permits an employee to obtain a copy of their personnel file following a review, conducted in accordance with MCL 423.503, or to obtain a copy of the file:

> If an employee demonstrates that he or she is unable to review his or her personnel record at the employing unit, then the employer, upon that employee's written request, shall mail a copy of the requested record to the employee.

In his complaint, Sobieski did not assert that he requested the opportunity to review his personnel file in accordance with MCL 423.503. Rather, Sobieski merely complains about the delay between his attorney's written request for a copy of his employment file and the response by Takata and it is undisputed that Takata provided a copy of the file to Sobieski's counsel. As noted by the trial court, the act fails to delineate a time frame for compliance. However, we find it more significant that Sobieski fails to allege that he requested to review his file pursuant to MCL 423.504, which is required before requesting a copy of the file. Sobieski did not offer any evidence to show that he was unable to review his record at the employer's location, in

compliance with MCL 423.504, before his attorney requested the copy. Based on Sobieski's own failure to comply with statutory requirements, Takata was under no obligation to produce a copy of Sobieski's personnel record when it received the written request from Sobieski's counsel. Therefore, the trial court correctly granted summary disposition to defendants on this issue.

*7 Affirmed.

FITZGERALD, P.J. (concurring in part and dissenting in part).

FITZGERALD, P.J.

I respectfully dissent from the majority's conclusion that the trial court properly dismissed plaintiff's claim of age discrimination under the Michigan Civil Rights Act, MCL 37.2202(1)(a).

"Direct evidence" of discrimination is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Sniecinski v. Blue Cross and Blue Shield,* 469 Mich. 124, 132, 666 N.W.2d 186 (2003). In a case where direct evidence of discrimination is present, the plaintiff bears the burden of proving to the factfinder both the discriminatory animus and its causal nexus to the challenged employment decision. *Harrison v. Olde Financial Corp.,* 225 Mich.App. 601, 612-613, 572 N.W.2d 679 (1988). Renee Yeutter became plaintiff's direct supervisor in February 2003. At that time, Yeutter supervised 7 project engineers. Five of the engineers were under thirty years of age and two of the engineers, plaintiff and Ron Holler, were over sixty years of age. Plaintiff presented evidence that Yeutter made comments on "a couple" of different occasions that "these [older] guys just won't work and we've got to get more young people in here." Yeutter also made comments on three occasions that "I can't work with older guys." Plaintiff also presented evidence that both he and Holler were fired while under Yeutter's supervision.[FN1] Viewed in a light most favorable to plaintiff, plaintiff met the initial burden of proving that age discrimination was more likely than not a substantial or motivating factor in the decision to terminate plaintiff's employment and created a fact question for the jury with regard to whether there is a causal connection between Yeutter's age-related statements and the termination of plaintiff's employment. I would therefore reverse the order granting summary disposition of Count I of plaintiff's complaint.

FN1. The other engineer's employment was terminated in June 2003 and plaintiff's employment was terminated in October 2004.

Mich.App.,2006.
Sobieski v. Takata Seat Belts, Inc.
Not Reported in N.W.2d, 2006 WL 2270382 (Mich.App.)

END OF DOCUMENT

EXHIBIT 14

Not Reported in N.W.2d, 2010 WL 1629629 (Mich.App.)
(Cite as: 2010 WL 1629629 (Mich.App.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
ATWATER ENTERTAINMENT ASSOCIATES, L.L.C., and Vivian Carpenter, Plaintiffs-Appellants,
v.
Judith Young DOSS, Defendant-Appellee.

Docket No. 290425.
April 22, 2010.

West KeySummary**Declaratory Judgment 118A**
96

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(B) Status and Legal Relations
118Ak96 k. Corporations. Most Cited Cases

An actual controversy existed as required to maintain a declaratory judgment action to determine whether widow of owner of membership units in a limited liability corporation which owned a minority interest in a casino had a valid claim based on the LLC's alleged failure to maintain records necessary to confirm or effectuate transfer to the widow of membership units. The question presented in the case was whether the transfer of membership units in the LLC resulted in damage to the widow of the owner of the units. The question presented required an adjudication of present rights on established facts. The resolution of the dispute did not call for speculation about hypothetical future events. MCR 2.605(A)(1).

Wayne Circuit Court; LC No. 08-115905-CZ.

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

***1** In this action for declaratory relief, plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Atwater Entertainment Associates, LLC (Atwater) indirectly owned a minority interest in the Motor City Casino in Detroit.[FN1] Plaintiff Vivian Carpenter is Atwater's managing agent. Defendant is the widow of Lawrence Doss, an owner of several membership units in Atwater. Lawrence Doss died intestate on October 28, 2001. In the probate proceedings related to the deceased's estate, there was a dispute over the ownership of seven of the Atwater membership units. Defendant alleged that she would clearly be the owner of the disputed units but for plaintiffs' alleged failure to maintain the records necessary to confirm or effectuate the transfer to her of those membership units. Plaintiffs brought this action for declaratory relief to determine whether defendant has a valid claim based on this alleged failure.

FN1. Atwater voluntarily dissolved on October 18, 2006, but has not completed winding up its affairs because of the continuing legal disputes.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8), arguing that the action was barred because plaintiffs lacked standing, that the matter was not ripe for adjudication, that there was no actual controversy, and that the court should use its discretion to conclude that the case was not appropriate for declaratory relief. The court ruled in defendant's favor:

> I have read through all of this, and I have to admit that I went back and forth as to how I was going to decide this case. I tend to agree with defendant here. I do not believe that this is a case

for declaratory action. I don't believe the issues are ripe. I don't believe there's an actual controversy. And based on my discretion, I don't believe this is a proper case for declaratory action. I don't think there's any actual injury. There's a possibility they could be sued which is a hypothetical. The only injury that's alleged is they can't wind down their affairs. I don't think that is sufficient for a declaratory action based on the case law and pleadings you have submitted.

Thus, the trial court determined this case was not suitable for declaratory relief because it rested on future contingent events. Specifically, the court seems to have concluded that because defendant had not yet filed suit against plaintiffs, there was no actual controversy. We disagree.

Declaratory judgment actions are permitted pursuant to MCR 2.605(A)(1). "In a declaratory judgment action, the trial court may declare the rights and other legal relations of an interested party," *Farm Bureau Ins. Co. v. Abalos,* 277 Mich.App. 41, 43, 742 N.W.2d 624 (2007), but "[t]he existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief." *Shavers v. Attorney General,* 402 Mich. 554, 588, 267 N.W.2d 72 (1978). " '[A]ctual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Id.* This does not preclude a court "from reaching issues before actual injuries or losses have occurred." *Id.* at 589, 267 N.W.2d 72. However, when the dispute is merely hypothetical, no actual controversy exists, and a court lacks jurisdiction to enter a declaratory judgment. *Citizens for Common Sense for in Gov't. v. Attorney General,* 243 Mich.App. 43, 55, 620 N.W.2d 546 (2000).

***2** We conclude that an actual controversy exists in this case. The question presented in this case, did plaintiffs' alleged actions with regard to the transfer of Atwater membership units result in damages to defendant, requires an adjudication of present rights on established facts. The resolution of this dispute does not call for speculation about hypothetical future events. Rather, the present facts indicate that plaintiffs and defendant have adverse interests and that plaintiffs are seeking guidance as to whether they have a liability to defendant so that they can wind up their affairs. Thus, the declaratory judgment requested in this case will "serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." *Flint v. Consumers Power Co.,* 290 Mich. 305, 310, 287 N.W.2d 475 (1939) (quotation marks and citations omitted). The fact that defendant has not filed suit is simply not determinative of whether there is an actual controversy in this case.

Furthermore, even if we were inclined to conclude that there was no actual controversy, "if a case has progressed to the point where a traditional action for damages or for an injunction could be maintained, declaratory judgment will not be denied for lack of an actual controversy." 3 Longhofer, Michigan Court Rules Practice (5th ed), § 2605.3, p. 386. Because it is clear that defendant's allegations against plaintiffs have reached a point where defendant could file a suit for damages against plaintiffs, declaratory judgment was permissible.

As an alternative basis for upholding the trial court's decision, defendant argues that plaintiffs lack standing because Atwater's former members are the only ones who might be injured if defendant ultimately files suit. It is true that Atwater's former members arguably suffer the most from Atwater's inability to make a final distribution. However, Atwater and Carpenter also remain in juridicial limbo. This limbo forces Atwater to retain monies that would otherwise be distributed. Further, plaintiffs clearly have an interest in ensuring that they prevail in the declaratory action so that these retained funds are not lost to defendant. We conclude that plaintiffs have standing because the injuries they allege are concrete and traceable to defendant's failure to act and because it is likely the injuries will be

redressed by favorable decision in this case. Thus, plaintiffs have a demonstrated "interest in the outcome that will ensure sincere and vigorous advocacy." *Associated Builders & Contractors v. Dep't. of Consumer & Industry Services Director,* 472 Mich. 117, 125, 693 N.W.2d 374 (2005).

The fact that the trial court had jurisdiction to hear this case does not, however, resolve the dispute because the decision to grant declaratory relief rests within the trial court's discretion. *PT Today, Inc. v. Comm'r of the Office of Financial & Ins. Services,* 270 Mich.App. 110, 127, 715 N.W.2d 398 (2006), citing MCR 2.605. Under this deferential standard of review, "a reviewing court must affirm the trial court's decision even if a reasonable person might differ with the trial court in its decision to withhold relief." *Id.* at 129, 715 N.W.2d 398.

***3** "The declaratory judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people." *Shavers,* 402 Mich. at 588, 267 N.W.2d 72. Nonetheless, the rule is written permissively such that "a Michigan court of record *may* declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1) (emphasis added). Thus, a court is not required to grant declaratory relief simply because it has the power to grant declaratory relief. *PT Today, Inc.,* 270 Mich.App. at 126-127, 715 N.W.2d 398.

In this case, the court referenced its discretionary power when it granted defendant's motion for summary disposition. Yet for the trial court to have properly invoked its discretionary authority, it must have recognized that it had the power to hear the case, but decided not do so. From the trial court's ruling, it is not clear to us whether the court understood it had the power to hear the case. The court's ruling lumps together its discretionary authority with its jurisdictional findings on the "actual controversy" question. The court seems to be saying that because plaintiffs had not been sued by defendant, any injury was only hypothetical and, thus, it was going to use its discretionary authority to refuse to hear the case. As previously discussed, the trial court erred in finding that any injury was only hypothetical. An error of law can lead to an abuse of discretion. *Donkers v. Kovach,* 277 Mich.App. 366, 368-369, 745 N.W.2d 154 (2007). We conclude the trial court abused its discretion in holding that this was not a proper case for declaratory relief because the court's decision was based on a misapprehension of the law.

We reverse the trial court's decision granting summary disposition in favor of defendant and remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

Mich.App.,2010.
Atwater Entertainment Associates, L.L.C. v. Doss
Not Reported in N.W.2d, 2010 WL 1629629 (Mich.App.)

END OF DOCUMENT