

## Older Workers and Reductions in Force



Kenneth G. Galica

The case is *Schoonmaker v Spartan Graphics Leasing, LLC*. Spartan Graphics, a printing operation, employed between 50 and 70 employees. The plaintiff, Harriet Schoonmaker, began working for the company in 1995 as a bindery worker.

In October 2006, Spartan Graphics was required to undergo a reduction in workforce. The plaintiff, then age 58, and a co-worker, age 65, were released from employment. A 29-year-old was retained in the plaintiff's place. Testimony obtained during the case reflected that the 29-year-old was no more qualified than Ms. Schoonmaker but based upon the supervisor's unsupported observations, the younger person was "more productive." In making the decision to lay off the plaintiff, the supervisor did not consider the plaintiff's greater length of service (11 years compared to six) or the younger person's having been "written up" the previous year for excessive absenteeism.

The Plaintiff's lawsuit filed in the United States District Court alleged age discrimination under both the federal Age Discrimination in Employment Act and Michigan's Elliot-Larsen Civil Rights Act, claiming that plaintiff was laid off because of her age. The district court considered all of the evidence produced by the parties and concluded that the plaintiff had failed to establish all of the elements of a case of age discrimination in a workforce reduction setting. It dismissed the case on Spartan's request. The plaintiff appealed to the

U.S. Court of Appeals for the Sixth Circuit.

The Court first noted that Harriet Schoonmaker had not shown that she had been "replaced." There was no proof that another employee was hired or reassigned to perform plaintiff's specific duties, although the younger person worked the same shift as the plaintiff and had the same job description. More importantly, however, the Court noted that the mere termination of a competent employee when an employer is making cutbacks due to economic necessity is insufficient in itself to establish a case of age discrimination.

To win, the Court stated, the plaintiff was required to show that she possessed superior qualities to the younger person. Ms. Schoonmaker did not present such evidence. The Court also concluded that the fact that the two oldest employees were selected for termination did not constitute additional evidence of discrimination. The statistical sample was simply too small.

The conclusion to be drawn from this case is that in certain reduction in workforce settings, older, competent workers can be let go in lieu of younger, but also competent workers. To do so is not necessarily an automatic case of age discrimination. However, the cases are fact specific and in certain instances, the relative qualifications will come into play, as will statistics establishing that older workers are let go more frequently than younger ones.

Kenneth G. Galica

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## CMDA Happenings

### [CMDA Attorney Presents to Insurance Association of Metro Detroit](#)



Timothy S. Ferrand

On Wednesday, January 13, 2010 Timothy Ferrand of the Firm's Sterling Heights office gave a presentation to the Insurance Association of Metro Detroit, Inc. at its January membership meeting.

Mr. Ferrand spoke on the legal effects of the recent changes to the Michigan Supreme Court, discussing the makeup of the Michigan Supreme Court for the past ten years and the shift created by the 2008 election in which Judge Hathaway, a Democrat, defeated Judge Taylor, a Republican. The group discussed the effects the political change could potentially have in the law re-

lating to automobile no-fault liability, the rules of recusal, governmental tort liability and insurance coverage.

### [Attorneys Attend MTA Expo](#)

CMDA Attorneys Christopher Cooke, Haider Kazim, Allan Vander Laan and Andrew Brege recently attended the Michigan Township Association's Annual Conference and Expo.

The annual event was held at the DeVos Place in downtown Grand Rapids. CMDA was a sponsor of the event and attorneys from the Traverse City and Grand Rapids offices were present to provide insight and offer the Firm's vast municipal experience to township officials from across the state.

## MSU Entitled to Governmental Immunity after Woman Injured at College Hockey Game



Susan Lumetta

**D**espite recent changes in the composition of the judiciary of state appellate courts, the Michigan Court of Appeals continues to strictly interpret Michigan's governmental immunity statute. In a case where a spectator was injured at a sporting event on Michigan State University's campus, the Court recently denied recovery under the Governmental Tort Liability Act.

The case arose out of an incident occurring on March 12, 2004 at a college hockey game at MSU's Munn Ice Arena. An errant hockey puck struck and injured a fan watching in the stands. The woman and her husband later brought suit, alleging that a defect in the building, the lack of plexiglass protecting one section of spectators from the ice rink, caused the incident.

The plaintiffs alleged two theories of liability under the GTLA: that MSU was liable because of a defect in a public building and that it was liable for ordinary negligence because it was engaged in a "proprietary function." A "proprietary function" is an activity that a government agency conducts primarily as a profit-making venture, and that is not normally supported by taxes or fees.

MSU had asked the trial court to dismiss the case because the plaintiffs did not submit written notice to MSU of the building defect claimed within 120 days of the incident, as required by the statute. MSU's motion to dismiss also argued that the intercollegiate hockey game was not primarily for the purpose of making a profit. The trial court agreed with MSU that it was not performing a proprietary function, but did not dismiss the case entirely because it said that the plaintiffs had complied with the notice requirement of the public building statute. MSU appealed the trial court's decision not to dismiss the claim of a building defect, and the plaintiff appealed the ruling that MSU was not performing a proprietary function.

sent letters in December 2004 and February 2005 addressed to "Sir/Madam" at "MSU Munn Ice Arena" in East Lansing. The law requires that the notice include the exact location and nature of the defect, the injury sustained and the names of witnesses known at the time by the plaintiff. The letters did not include any of this information. The Court of Appeals agreed with MSU that the plaintiffs had not provided written notice as required before filing suit for a claimed defect in a public building.

The Court rejected the plaintiffs' arguments that they substantially complied with the notice requirement. The Court said the language of the statute is clear, and the letters did not contain the required information, were not sent on time, and were not sent to the correct official or address. The Court held that the trial courts should have dismissed the public building defect claim.

The appellate court, however, upheld the trial court's ruling on the proprietary function claim. Considering the argument that MSU held intercollegiate ice hockey games for the primary purpose of monetary gain, the Court was careful to point out that using profits from an activity to keep it self-sustaining or to defray the expenses of the activity itself is not a profit-making purpose. In a previous case involving the intercollegiate gymnastics program at the University of Michigan, the Court had held that participating in intercollegiate athletics and holding contests at campus venues had a governmental purpose. The Court held that plaintiff failed to show that MSU operated its ice hockey program primarily to generate a profit.

Accordingly, the Court of Appeals decided that Michigan State was protected by governmental immunity for both of the plaintiffs' claims, and dismissed the entire case.

Susan Lumetta

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## Receptionist Celebrates 25th Anniversary with Firm



Sue G. Lott

If you have visited or called our Livonia office, chances are you have met our receptionist Sue Lott. CMDA is proud to announce that Sue is celebrating her 25th anniversary with the Firm this year. When Sue first started working at the

Firm, a gallon of gas cost just over one dollar, Microsoft Corporation released the first version of Windows, Windows 1.0, and a postage stamp cost 22 cents. Needless to say, a great deal has changed since 1985.

CMDA has changed quite a bit over the past 25 years as well. Sue recalls that 12 attorneys worked at CMDA when she first started. The Firm occupied the main level of the building and the upper and lower levels were rented out to other companies. Currently, nearly 40 attorneys work for the Firm, 25 of them working out of our Livonia office alone, and we occupy the entire three-story building. Although the Firm has gone through a considerable amount of growth over the past 25 years, Sue is quick to point out that the core values of the Firm have not changed. "CMDA is a second family to me. I love working at CMDA and truly enjoy coming to work everyday," Sue explains.

One of the things Sue enjoys most about her job is interacting with clients and employees. Anyone that has met Sue will agree that she is definitely a people person. She laughs about the time when she was at the grocery store with her husband George, a retired Detroit police officer. They were walking down the aisle when a man approached her and, recognizing her voice, asked if she worked at CMDA. Although she had never met the client in person, he recognized her voice from talking with her on the phone.

Sue has seen the once-young children of the Firm's owners grow up right before her eyes to become attorneys themselves. Currently, Bernard McClorey's daughter, Gerald Davis' two daughters and Ron Acho's son are all attorneys at the Firm. "I remember when the children were so young. They would visit their dads at work and then when they got a little older, many of the children worked at the Firm during the summer months. It's been really fun to see them grow up."

"We have been very fortunate to have Sue as our receptionist for the past 25 years. She is a great person and is a wonderful asset to the Firm. We thank Sue for her dedication to the Firm," said Joe Seward, the Firm's managing partner.

Sue is just one example of the wonderful, hard-working and dedicated group of people we have at CMDA. Congratulations, Sue!

## Trust Me? Changes to Michigan's Trust Law Start April 1



Gregory L. Ulrich

Changes to Michigan's Trust Law, modeled after the Uniform Trust Code, a model body of law written by the Uniform Law Commissioners and approved by the American Bar Association, may affect many existing trusts. Twenty-two states have adopted some form of the law, which is intended to make it easier to interpret trusts for people who may move

from state to state.

These revisions apply to all trusts created before or after April 1, 2010, so it's important to review current executed trusts.

Key elements are:

- Unless specifically drafted to override the new Trust Code required language, the code will control.
- The changes do not modify long-standing trust practices and court interpretations particular to Michigan, but it adds in some uniformity with other states.
- Trust terminology changes, such as "beneficiary" being replaced by the new term "distributees."
- Compensation to trustees is permitted. A trustee can be reimbursed for any expenses or advances to protect trust property,

including interest.

- A trustee can be reimbursed for attorney fees if incurred in a good faith effort to resolve a dispute about the trust.
- All trusts will be treated as revocable or amendable unless the trust states that it is revocable.
- A "trust protector", a new concept, is someone named to oversee the trustee.
- Challenges to a trust's validity will now have to be brought within two years of the death of the person who set up the trust, or six months after a notice from the trustee.
- Small trusts valued under \$50,000 may be terminated after notice.
- Overall, most trusts should now be reviewed with a lawyer to see how this revamp may affect an existing trust, or whether a new trust should be prepared.
- Current economic trends are another reason to review a trust. While many families have used a trust to transfer wealth, it may now be more advisable to preserve current income.

Gregory L. Ulrich

Mr. Ulrich, an attorney in our Livonia office, concentrates his practice on wills, trusts and estate planning, real estate law, employment and labor law and corporate and business law. He can be reached by calling (734) 261-2400 or via e-mail at [gulrich@cmda-law.com](mailto:gulrich@cmda-law.com).

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## Our Vision

To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.

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