

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

REGENTS OF THE UNIVERSITY OF MICHIGAN

Respondent,

Case No.: R11 D-034

and

GRADUATE EMPLOYEES ORGANIZATION, AFT MI, AFT, AFL-CIO

Petitioner.

Mark H. Cousens (P12273)
Attorney for Graduate Employees Organization,
AFT, AFL-CIO
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MOTION FOR RECONSIDERATION

The Petitioner moves for reconsideration of the decision of the Commission dated September 14, 2011. The reasons this motion should be granted are set forth in the annexed brief and affidavit.



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October 3, 2011

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Brief in Support of Motion for Reconsideration

Introduction

A.

The Graduate Employees Organization, AFT MI, AFT, AFL-CIO, requests that the Commission reconsider its decision to dismiss this petition. The Commission is not bound by *res judicata*; even if it were, the present facts are not the same as those existing in 1981. The role of the Research Assistant is vital to the University's goals as a research institution. The work these individuals do is part of the University's objectives; they are employees.

B.

In dismissing the petition, the Commission reacted incorrectly only to job *titles* while disregarding what the parties had told it about job *duties*. The consent election agreement confirmed the parties mutual understanding that the job duties of Research Assistants made

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them employees. These parties are closest to the facts. And both the University and the Union know that Research Assistants are employees based on the nature of their job duties and the manner of their relationship with the University.

The parties did not present facts to support the consent agreement because they were not asked to do so. Instead, the Commission acted spontaneously. Neither party was able to inform the Commission regarding the nature of the Research Assistant; the process did not permit a presentation of facts.

This motion, and the supporting affidavit, presents the Commission with the facts which justify the statement of the University Regents regarding Research Assistants. These facts—available to the public—confirm what both the Regents and the Petitioner know. Research Assistants are employees because their job duties and their job obligations are those of an employee. The affidavit, coupled with the statement of the Board of Regents, provides an ample factual basis to grant reconsideration and order an election.

Facts

A. The Facts

1.

An affidavit has been provided which presents to the Commission facts of which the Commission should take official notice. These facts demonstrate why this case is different than that previously considered. The University has always emphasized research; but research now is a principal product of the institution. As the affidavit reflects, research grants to the University now exceed 1.5 billion dollars. Research is conducted in virtually every department

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of every College or School. The University has a Vice President for Research. This officer presides over a large department, overseeing multiple research units which emphasize a vast variety of different matters. Research is not just adjunct to the University. It is at the core of the institution's existence.

2.

Research Assistants are essential to the research goals of the University. These persons are graduate students, to be sure. But the work they do is of critical importance; it is not just make-work. The research assistants may well be working on projects which are related to their area of study. It is possible that these projects will be used as parts of Ph.D. dissertations. But the research product produced by Research Assistants is always part of the overall goal of the University.

B. New Facts

While this issue was addressed in the 1981 decision, the circumstances surrounding use of Research Assistants have changed. In 1981, Research Assistants were very often focused on their own dissertations. Research funding was found to, essentially, finance a Ph.D. thesis. Now, the University's focus on research is so substantial that the research would be done whether the University used Research Assistants or not. The research projects are part of the University's mission. Funding graduate students is important but that is not why the research is done.

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Argument

A. Official Notice of Common Facts

MERC may take "...official notice of judicially cognizable facts...". MCL 24.277. See e.g., *76th Judicial District Court*, 8 MPER ¶ 26047; 1995 WL 17944115. It should do so here

The University has used the internet to make comment about itself and its activities. These comments include a vast amount of information on many different matters. The affidavit which is attached cites to the Commission the University's own words and its own rules. The Commission should readily presume that what the University says about itself is true.

B. Res Judicata Does Not Apply

The Commission voted to dismiss the petition here because it felt bound by the doctrine of *res judicata*. The doctrine does not act as a bar to a court or agency considering an issue previously addressed. Rather, *res judicata* is an *affirmative defense* which may be plead against a party. Moreover, the doctrine does not apply because the parties recognize that the facts now are not the same as the facts existing in 1981.

1.

Res judicata is a defense to an action, not a restriction on judicial decision making. *Sloan v. Madison Heights*, 425 Mich. 288, 292-293 (1986) ("The trial court granted FOP's motion to intervene on September 8, 1982. In an amended answer, the city alleged the affirmative defense of *res judicata*."). An affirmative defense may be waived or disregarded as long as it is non-judicial. Indeed, an affirmative defense has to be asserted.

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Here, the Employer is not asserting that the 1981 decision binds either party. Absent the assertion of that defense, the Commission is free to accept the stipulation. And it is not required to follow its 1981 decision because neither party is making that request.

2.

The facts today are different than those extant in 1981. Thus the doctrine of *res judicata* would not apply even if it were asserted. In *Labor Council, Michigan Fraternal Order Police v Detroit*, 207 Mich. App. 606, 608 (1994) the Court of Appeals affirmed a decision of this Commission (1992 MERC Lab Op 76, 78) in which it declined to apply the doctrine as facts had changed:

“Res judicata is the doctrine that bars a subsequent action between the same parties when the facts or evidence essential to the maintenance of the two actions are identical. *Old Kent Bank of Holland v Chaddock, Winter & Alberts*, 197 Mich. App. 372, 379; (1992). However, if the facts change, or new facts develop, res judicata will not apply. *In re Pardee*, 190 Mich. App. 243, 248 (1991).

“In this case, there was a change in circumstances after the 1986 opinion was released. In 1988, a contingency plan was adopted to provide for certain action to be taken in the event of a work slowdown or stoppage by the DFOs. The change in the new plan was significant enough to warrant full review of the dispute and render the doctrine of *res judicata* inapplicable.”

C. Research Assistants are Employees

1.

Applying common law principles, Research Assistants are employees. PERA states that an employee is:

“...a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special

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district, in the service of an authority, commission, or board, or in any other branch of the public.”

MCL 423.201(e)

Research Assistants meet this definition. First, it is clear that they hold positions of employment. They are not simply given money without the obligation to earn it. Funding of Research Assistants is provided only in exchange for services.

Second, Research Assistants may benefit from their work both in an academic and economic sense but so does the University. The work of the Research Assistant is of special value to a project. A grant might be secured to fund a Ph.D. dissertation. *Nevertheless, the grant was awarded because the funding entity wanted the research performed.* Money is not just given to the University as charity. A grant must be awarded; it cannot be demanded. So, a faculty member may well submit a grant application knowing that the funding will help a graduate student earn a Ph.D. But the research performed is provided to the funder pursuant to the provisions of the grant. In short, the funder pays for a product; the University—with the help of the Research Assistant—provides it.

Third, no one should assume that all Research Assistants are working on matter that is essential to their graduate studies. Many Research Assistants are just that—Research Assistants. They do the work necessary to the project to which they are assigned even though the grants under which they are funded may have nothing to do with their areas of study. Some Research Assistants perform the work because they need the money. They are hired because they are qualified.

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2.

Michigan applies the “economic reality” test to determine whether a person is an employee. This common law test is used in all circumstances outside that of Worker’s Disability Compensation claims as that statute has its own definition. But, for all other purposes, the common law test is applied:

“The courts of this state generally apply the economic reality test when determining the employment status of an individual. *Id.* That test requires the consideration of the following factors: “(1) [the] control of a worker’s duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer’s business towards the accomplishment of a common goal.” *Id.*, quoting *Askew v Macomber*, 398 Mich. 212, 217-218; 247 NW2d 288 (1976). None of the individual factors of the economic reality test are determinative. *Id.*

Hill v. Sears Roebuck & Co., 2011 Mich. App. LEXIS 979 (2011)

In *Hoste v. Shanty Creek Mgmt., Inc.*, 459 Mich. 561, 568 (Mich. 1999) the Court of Appeals summarized the common law standards to separate an independent contractor from an employee as follows:

“First, what liability, if any, does the employer incur in the event of the termination of the relationship at will?

“Second, is the work being performed an integral part of the employer’s business which contributes to the accomplishment of a common objective?

“Third, is the position or job of such a nature that the employee primarily depends upon the emolument for payment of his living expense?

“Fourth, does the employee furnish his own equipment and materials?

“Fifth, does the individual seeking employment hold himself out to the public as one ready and able to perform tasks of a given nature?

“Sixth, is the work or the undertaking in question customarily performed by an individual as an independent contractor?

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“Seventh, control, although abandoned as an exclusive criterion upon which the relationship can be determined, is a factor to be considered along with payment of wages, maintenance of discipline and the right to engage or discharge employees.

“Eighth, weight should be given to those factors which will most favorably effectuate the objectives of the statute. [*Id.* at 208-209.]”

Of these, 2, 3, 4, 6 and 8 are especially relevant. The work performed is critical to the University. The work performed by Research Assistants is of value to the Employer even if it is also of value to the employee. However, the existence of a “common objective” does not contraindicate employment status.

The Research Assistants need the income from the project to support their living expenses. The money paid to them is not an honorarium; it is a wage that is determined by the pattern set by the collective bargaining agreement covering Graduate Student Instructors and Staff Assistants.

The Research Assistants are provided tools and equipment by the University. The items needed for a project will vary widely; some will require a screwdriver, others a computer. But in each case the Research Assistants are issued the tools and material needed; the Research Assistants do not provide it themselves.

No Research Assistant claims to be an independent contractor.

3.

The University acknowledges that Research Assistants are employees; it treats them like employees. The University’s own rules provide Research Assistants with benefits that can only

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be offered to persons who are employees. Perhaps no test is more dispositive than the University's recognition of the Family Medical Leave Act. [Http://www.hr.umich.edu/acadhr/grads/gsra/benefits.html#vacation](http://www.hr.umich.edu/acadhr/grads/gsra/benefits.html#vacation). The University acknowledges that Research Assistants may obtain FMLA leave if they otherwise qualify (i.e. hours worked and the existence of a serious health condition). This statutory right is *only* available to employees. CFR 825.110 (a). No student has a right, under FMLA, to take leave from studies; the statute only applies to employment. The University's recognition of this right confirms that the University recognizes the employment status of Research Assistants.

The University requires that Research Assistants take the oath that is required only of employees. SPG 201.17. No student is required to take an oath but *all employees—including Research Assistants* – are so required.

The University, in its electronic representation of itself and through the Board of Regents' resolution of May 19, 2011, has acknowledged that Research Assistants are employees. None of this information was included in the record adduced prior to the 1981 decision because the internet did not exist and the University was less than forthcoming about its employment practices. This information, now, provides an adequate basis for the Commission to decline to be bound by its 1981 decision; that ruling is simply obsolete. Things have changed in thirty years.

D. The Regents' Resolution is Authoritative

The May 19, 2011 resolution of the Board of Regents of the University is authoritative with regard to its factual basis. It is not an effort to confer jurisdiction; it is an exercise of the Regents' responsibility to superintend the affairs of the University.

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1.

Article VIII, sec. 5 of the Constitution of 1963 states in pertinent part:

“The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan; the trustees of Michigan State University and their successors in office shall constitute a body corporate known as the Board of Trustees of Michigan State University; the governors of Wayne State University and their successors in office shall constitute a body corporate known as the Board of Governors of Wayne State University. *Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds.* (Emphasis added)”

The resolution of May 19, 2011 was an exercise in the plenary authority of the Regents. In declaring that Research Assistants were employees, the Regents did not seek to confer jurisdiction on the Commission. Rather, this was an express *finding* and an express *determination of fact*. The Regents have the responsibility to supervise the institution. In adopting the resolution, the Regents confirmed facts known to them. They were aware of the factual basis for their determination.

The Commission should not go behind the determination of the University. The ultimate authority with regard to the actions of the University has informed the Commission that Research Assistants are employees. That conclusion should, in this instance, be sufficient.

2.

The Commission will customarily defer to the determination of an employer with regard to placement of employees in a bargaining unit if the decision is reasonable. *Detroit Public Schools 24* MPER ¶ 8.2011 WL 2178624. The Commission does not micro-manage unit placement because an employer is presumed to know whether a position has a community of interest with a bargaining unit. This situation is not dissimilar.

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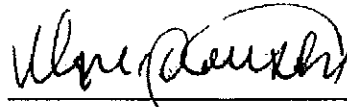
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Here, the University of Michigan has stated that it has concluded that the Research Assistants are employees. This determination is bottomed on the Regents' authority to supervise the institution. No party is disputing the accuracy of this conclusion. The Employer and the Union have told the Commission that there is an adequate factual basis for the Regents' decision. Given, that, and with respect, the Commission should not have *sua sponte* dismissed the petition.

Conclusion

The Commission should reconsider the decision announced on September 14, 2011 and direct an election for the unit described in consent election agreement and in the manner described in that agreement. The Commission is not bound by *res judicata* given that neither party is asserting that doctrine. And, as the Regents have found, there is sufficient disparity of facts between the 1981 record and that extant today. Research Assistants are employees.



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Affidavit of Andrea M. Jokisaari

STATE OF MICHIGAN)
)ss
COUNTY OF WASHTENAW)

A. This Affidavit

1. My name is Andrea M. Jokisaari. I am a graduate student research assistant at the University of Michigan
2. I make this affidavit based upon personal knowledge and I am competent to testify to the matters stated.
3. The University of Michigan maintains a very large number of internet sites which contain considerable information about the University, its Colleges, Schools and Departments.

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4. I have examined many of these sites to determine what information the University makes available to the public at large.
5. What follows is a compilation of statements the University makes about itself and its programs.
6. Each statement is cited to its source.
7. The Commission should take official notice of these statements.

B. Research at the University of Michigan

1. The University of Michigan is a publicly-chartered, state-assisted institution with its main campus located in Ann Arbor.

<http://research.umich.edu/quick-facts/overview-of-u-m-research-and-scholarship/>

2. The Ann Arbor campus enrolls about 41,000 students and includes professional schools in Dentistry, Law, Medicine, and Pharmacy. Two branch campuses conduct research and provide undergraduate education. UM-Dearborn has about 8,725 students, four schools and colleges. UM-Flint has four schools, 6,500 students.

Id.

3. Research is central to the University's mission and permeates its schools and colleges.

Id.

4. The Office of the Vice President for Research (OVPR) and the Division of Research Development and Administration (DRDA) have central responsibility for administration and support of research activity by the faculty.

(<http://research.umich.edu/ovpr/>)

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5. University research expenditures for 2009-2010 totaled \$1.14 billion, an increase of 12% over the previous fiscal year. (See Annual Reports for details.) These expenditures were divided by source as follows:

- a. United States Government — \$751 million
- b. University of Michigan Funds — \$282 million
- c. Industry — \$39 million
- d. Foundations — \$25 million
- e. State, Local, and Other Governments — \$3.8 million

(<http://research.umich.edu/quick-facts/>)

6. The disciplinary reach of the University's research programs is exceptional. Research is conducted within the nineteen academic schools and colleges. Only agriculture is not represented among them, and even this discipline receives basic research attention in the biology units and the School of Natural Resources and Environment.

Id.

7. The University of Michigan is noted for its interdisciplinary research initiatives, such as nanoscience and technology, energy, and life sciences that involve faculty from many units on campus, including the Medical School, College of Engineering and the College of Literature, Science, and the Arts.

Id.

8. Several large-scale research institutes outside the academic units conduct full-time research, usually focused on long-term interdisciplinary problems. The Life Sciences Institute is one, with a new building that opened in 2004. The Michigan Memorial

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Phoenix Energy Institute is another all-campus interdisciplinary effort launched in 2006.

Id.

9. These institutes join numerous research museums, libraries, laboratories, centers, and other units to form a vast network of research resources. Notable resources include astronomy observatories in Michigan, Arizona, and Chile, and the Biological Station on Douglas Lake in Northern Michigan.

Id.

10. Excellence in research is a crucial element in the University's high ranking among educational institutions. National surveys consistently rank the University's professional schools among the top 10, reflecting a research record of important publications and other contributions to the advancement of scholarship

Id.

C. Research Assistants Are Treated As Employees

1. There are about 2200 Graduate Student Research Assistants employed at the University in the several Colleges and Schools.
2. The University maintains a "Standard Practice Guide" which relates to a wide variety of activities. <http://spg.umich.edu/>
3. Certain employment standards are incorporated into the Guide
4. Some of these standards apply to Research Assistants. This includes that Research Assistants:
 - a. Have the right to access to the non collective bargaining grievance procedure (201.08);

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- b. Have the right to be protected against discrimination based on race, gender and other factors (201.35);
 - c. Have the right the right to be provided protective clothing and equipment when necessary for completion of a task (201.45);
 - d. Have the obligation to obtain a security clearance if required for work on the project to which they are assigned (201.53);
 - e. Have the obligation to avoid conflicts of interest (201.65);
 - f. Have the obligation to comply with rules prohibiting sexual harassment (201.89-0);
5. Research Assistants are required to execute the oath required of all employees to support the Constitution of the United States. SPG 201.17 states:

Consistent with the constitutional requirement of the State of Michigan, all University staff members, as a condition of employment, shall swear to and sign the following employee oath:

“I do solemnly swear (or affirm) that I will support the Constitution of the United States of America and the Constitution of the State of Michigan. And that I will faithfully discharge the duties of my position, according to the best of my ability.”

6. Research Assistants are paid a wage. The amount paid is usually patterned after the wage scale contained in the collective bargaining agreement between the Graduate Employees Organization and the University.
7. Taxes and FICA are deducted from the wage. This is required by law.

http://www.finops.umich.edu/system/files/Tax_Help_2011.pdf

8. Research Assistants are eligible for leave under the Family Medical Leave Act if they otherwise meet the requirements of the statute.

<http://www.hr.umich.edu/acadhr/grads/gsra/benefits.html#vacation>.

9. Only employees are eligible to access rights under FMLA See CFR 825.110 [(a) An “eligible employee” is an employee of a covered employer who: (1) Has been employed by the employer for at least 12 months...]

10. Research Assistants are provided emoluments of employment. These include employer paid health care and, sometimes, paid vacation.

<http://www.hr.umich.edu/acadhr/grads/index.html>

11. Research Assistants do not own the product of their research. The research product is provided as required by the research grant. Standard Practice Guide 303.4(D) states:

“The University will not generally claim ownership of Intellectual Property created by students. (A “student” is a person enrolled in University courses for credit except when that person is an Employee.) However, the University does claim ownership of Intellectual Property created by students in their capacity as Employees. Such students shall be considered to be Employees for the purposes of this Policy. Students and others may, if agreeable to the student and OTT, assign their Intellectual Property rights to the University in consideration for being treated as an Employee Inventor under this Policy.”

12. Not all Research Assistants work in areas which are directly related to their academic interests. Some Research Assistants are performing work which will be of no value to their graduate studies or their Ph.D. dissertation. For example, Research Assistant J.P. has been employed on projects that are unrelated to his academic interests. Research

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Assistant H.O. is working on a project which will be used in part for his academic interests but will also be published in scholarly journals unrelated to his area of study.

ANDREA M. JOKISAARI

Subscribed and sworn to before me
this _____ day of October, 2011

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