

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.

CHRISTINE GERDES (P67649)
UNIVERSITY OF MICHIGAN
Associate General Counsel
503 Thompson St # 5010
Fleming Admin Bldg
Ann Arbor, MI 48109
T: (734) 764-0304
F: (734) 763-5648

MARK H. COUSENS (P12273)
MARK H. COUSENS, ATTORNEY
Attorney for Graduate Employees Organization,
AFT, AFL-CIO
26261 Evergreen Road, Suite 110
Southfield, Michigan 48076
T: (248) 355-2150
F: (248) 355-2170

DAVID FINK (P28235)
DAVID FINK & ASSOCIATES
Attorney for University of Michigan
100 West Long Lake Road
Suite 111
Bloomfield Hills, MI 48304
(248) 971-2500
(248) 971-2600

BRIEF FOR THE PETITIONER

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

Introduction

A.

1.

The Commission should direct an election among the two thousand plus Graduate Student Research Assistants employed by the University of Michigan because these persons meet every test of employment status. They are recognized as employees by the University because they are hired like employees, expected to function like employees and have the same obligations as employees. The record shows that the Graduate Student Research Assistants are not “working for themselves” but are engaged in a task selected by the University, supervised by the University and owned by the University. As such, GSRAs are employees of the University.

2.

The University has acknowledged that GSRAs are employees. Stipulation 2 recites the text of a resolution of the Regents:

“Resolved, that consistent with the University of Michigan’s proud history of strong, positive, and mutually productive labor relations, the Board of Regents supports the rights of University Graduate Research Assistants, whom we recognize as employees, to determine for themselves whether they choose to organize.”

This resolution was not created to grant jurisdiction to the Commission; it was adopted because it reflects the truth. The Regents are the best judge of events at the University; their determination is entitled to deference. However, the Petitioner acknowledges that the Commission seeks facts to support the resolution. The record provides those facts.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

 223

3.

The point of departure here is that a person may be both a student at and an employee of an institution. This dual status was recognized in *Regents of the University of Michigan v Employment Relations Commission*, 389 Mich 96 (1973). There the Supreme Court noted the policy behind PERA is to grant rights to all public employees:

“The only exception is for the classified civil service. No exception is made for people who have a dual status of students and employees. If the Legislature had intended to exclude students/employees from the operation of PERA, they could have written such an exception into the law.”

Id., 111

As for the dual status:

“We do not regard these two categories as mutually exclusive. Interns, residents and post-doctoral fellows are both students and employees. The fact that they are continually acquiring new skills does not detract from the findings of the MERC that they may organize as employees under the provisions of PERA. Members of all professions continue their learning throughout their careers.”

Id., 112.

Graduate Student Research Assistants are both students and employees. But their status as a student does not drive their status as an employee. They are employees because they meet every relevant test for employment status. They are employees because the work they are doing is that of the University of Michigan. They are employees although they may share an interest in and derive an academic benefit from the work they do. They are employees because, quite contrary to the conclusion reached by the Commission in 1981, they are abundantly not “in business for themselves.”

The Commission should direct an election in the proposed bargaining unit.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



B. Proofs Required

1.

The Commission has tasked the Petitioner with demonstrating that there has been "...a substantial and material change in circumstances since the 1981 decision..." This is the same standard applied when a party seeks to avoid any of the preclusion doctrines—res judicata or law of the case. Those doctrines do not apply here as they are affirmative defenses. However, there is some intellectual similarity. And the question, then, is just how much evidence is required to overcome a previous decision. The answer is that the burden is neither overwhelming nor impossible.

“Generally, the law of the case doctrine applies “without regard to whether the decision was actually correct, but it is a matter of practice and discretion rather than an absolute limit on the court’s authority.” *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). The law of the case doctrine will not be applied if there is a material or substantial change in the facts or if there has been a change in the law.”

Latif v John Oram 2009 Mich App LEXIS 806

It should not be necessary to demonstrate that every fact extant in 1981 is different today. Rather, the Commission should recognize that *sufficient* facts are different and that the *law* is different, so that the 1981 decision is not a “limit on the court’s authority.” *Latif, id.* The Commission can review this record and readily reach the conclusion that there are sufficient changes in fact to justify a change in result.

2.

The record adduced before Judge Sperka in 1978-1979 is not available. However, from the decision, it is clear that a great deal of information secured today (by testimony, exhibit and stipulation) was not introduced then. The internet did not exist. The Petitioner’s ability to

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

 223

secure information from a then intransigent University was limited. Hence, this record includes facts which were not addressed in Judge Sperka's decision. That, itself, is a change in circumstances.

On consideration of this record, the Commission should decide that sufficient information has been provided to conclude that the bargaining unit includes public employees.

The Facts

I. The University's Commitment to Research

A.

The University of Michigan has dramatically increased its participation in research since 1981. Adjusted for inflation, in 1981 the University spend about \$355,000,000 for research. Today, the University spends in excess of \$1,200,000,000. R2/33. The change is the result of a commitment by the government of the United States to research and a resulting increase in funding. R2/85. The Bayh-Dole Act was intended to, and has had the effect of, spurring research by major universities. But the change at the University of Michigan is striking. The University of Michigan spends more on research, both outside funded and University funded, than any other public university. R2/33.

B.

The substantial change in research spending has required a great deal more assistance from non faculty. Most of the support work for grants is provided by Graduate Student Research Assistants. In 1981, the University employed about 340 GSRAs. Today, the proposed bargaining unit is some 2128 GSRAs. Stipulation 4, 1981 MERC Lab Op at 792. There are

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



now more Graduate Student Research Assistants employed than there are Graduate Student Instructors—individuals rightly recognized as employees in 1981. Stip 6.

C.

The increase in research funding has allowed the University to adopt a “full funding model.” In this approach, persons admitted to a graduate program at the University of Michigan are promised income for five years; the money may come from a fellowship, work as a Graduate Student Instructor or work as a Graduate Student Research Assistant. R2/56. However, eighty percent of the money to pay for Graduate Student Research Assistants comes from grants. R2/68. This means that the grants pay to employ Graduate Student Research Assistants. Indeed, Graduate Student Research Assistants are included in a proposed grant budget as “personnel.”

II. The Grant Process

A.

1. The University encourages faculty to apply for and secure grants to conduct research. Research is now the principal function of the University. The “product” of this effort is fully consistent with the goals of the University of Michigan—the production of academic papers and new knowledge. R4/65.

The grant process starts with an idea. R4/58. A faculty member has an idea which may merit serious research. An application is then prepared and submitted for thorough review to an office of the University of Michigan; the faculty member is listed as “principal researcher.” There may be more than one PI. R4/61. The application is checked for form. But it is also carefully reviewed for merit. The “narrative” is examined for substance. R4/117; R5/33. The application is then submitted to a granting agency.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



If the grant is approved, the grant is awarded to the Regents of the University of Michigan. R4/61, 123. A grant is not sought for a single graduate student. R5/37. Nor is the grant awarded to an individual. Money directed to a single person is titled as a "fellowship." R4/61. Research funds are available from agencies of the United States government. The National Science Foundation, the National Institutes of Health, the Department of Defense and the Center for Disease Control, among others, have funds available for the purpose of research. See e.g., R4/58.

2.

External grants fund about 80% of GSRA appointments. 4/26. That means that the money to pay a GSRA salary and provide benefits comes from funds provided by a grant. A grant application will incorporate a budget. The budget will include personnel. 4/68. That includes GSRA salaries and benefits. 4/27; 4/69; R5/36. Also includes non GSRA such as dishwasher and technicians. 4/83.

3.

The GSRA's are essential to the project. The University would have to hire other individuals to do the work if GSRA's were not available. R4/49, for example persons who have already received their doctorate --"postdocs." R4/125.

B.

1.

The process of incorporating a GSRA into a grant is exactly like hiring. It is a mutual selection in which there is interaction between the prospective GSRA and the Principal Investigator. 5/6. An incoming graduate student may seek out a specific faculty member because of an interest in ongoing research. Or a faculty member may solicit an incoming

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



graduate student. In the Medical School, a graduate student will do a rotation through at least two different projects. At the conclusion, the person will select a project they like. 4/16-17. The attachment of a GSRA to a project is very much the product of mutual effort. The graduate student is not simply assigned nor may they claim a right to work on a specific task. There has to be an appropriate relationship between the Principal Investigator and the GSRA. See R5/6. So a GSRA and a PI may "pick each other." R5/77.

2.

The selection is not necessarily permanent. A GSRA may change the project on which they are working. This happens if a GSRA does not have a suitable "fit" with an advisor, 4/31, or their interests change. R4/34. And a GSRA may not work with their academic advisor. The GSRA may choose to work in another research area or group. R5/13-14.

C.

1.

There is a symbiotic relationship between the GSRA and the project. R4/51. In simple terms, they need each other. A granting agency expects that it will receive a product in exchange for the money it has provided. True, the product is not necessarily tangible. But the goal of the grant is to ask questions and seek answers. R4/78. The goals of a grant may change but the expectation is that work will be done to investigate the questions raised by the grant. R4/73-74.

A grant is not issued for the purpose of paying for a PhD dissertation. The grant expects that efforts will be expended toward the goals of the grant and not those of any GSRA. However, it is entirely possible, indeed likely, that a GSRA will use information, methodology

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

 223

or data as part of a dissertation. But the proverbial tail does not wag the dog. The project goals come first; the dissertation is the byproduct.

2.

There is not necessarily a link between a dissertation and the grant. Indeed efforts are made to “delink” the two. R4/102. A project may well have been underway long before any graduate student sought admission to the University and may continue long after they are gone. R4/100. So, the record reveals no instance in which a grant is sought or issued for the purpose of supporting a dissertation.

What is more common is the use of data for dissertations. However, a granting agency is likely to want to be reassured that the work done by a GSRA is within the scope of inquiry established by the grant. R4/24, 5/49. But if relevant, a GSRA project may accomplish simultaneous goals: the project may fit within the scope of the grant and may fit within the scope of the dissertation. That is the case for Ms. Lande, R1/60; Ms. Gould-Werth, R1/96, Mr. Slater, R3/13.

D.

Grants are supervised by the granting agency. First, it is common to have to present periodic reports on progress. R5/38. Second, there may be periodic deadlines by which certain data must be delivered. R1/43. And the project may require demonstrations or what amounts to a “show and tell.”

The University’s commitment to research is funded by grants. Greater than \$600,000,000 comes from agencies to the Regents to support grants. These grants can function because GSRA’s do the work that is needed.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



Argument

I. GSRAs Function As And Are Treated As Employees

Graduate Student Research Assistant function as employees, are hired as employees, are provided wages and emoluments of employment that are the same as employees, are subject to the same obligations as employees and must provide and confirm effort as a condition of continued employment. Students are provided none of these benefits and are subject to none of these obligations. Graduate Student Research Assistants are employees in every respect.

A. Who they Are

A GSRA is a graduate student in good standing who provides a service to the University and gets paid for their work. The University Academic Human Resources Department provides guidance to the University faculty with regard to the employment of GSRAs. See Jt. ex. 1. A Graduate Student Research Assistant is defined in this document as:

“A Graduate Student Research Assistantship (G.S.R.A) is an appointment which may be provided to a student in good standing in a University of Michigan graduate degree program who performs personal research (including thesis or dissertation preparation) or who assists others performing research that is relevant to his or her academic goals.”

The Graduate Student Research Assistant position is not defined based on a dissertation or other research. The definition expressly recognizes that a GSRA may work on projects other than “personal research.” That is generally the case.

Most GSRAs work on projects funded by an outside agency. R2/68. By contrast, a graduate student may be funded to do research for their dissertation. However, such persons are not usually titled as “Graduate Student Research Assistants.” They are customarily called “Fellows” and the funds are considered as part of a fellowship. Stipulation 12 states:

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



“12. When money is provided to graduate students without a defined research objective above and beyond the students’ progress on their academic research, the payment is usually in the form of a scholarship or fellowship.”

This Stipulation was supported by the testimony of Provost Hanlon. R2/103-104. He confirmed that monies directed at an individual student come from the department.

B. GSRA's are Hired As Employees are Hired

1.

A GSRA is hired in the same manner as any other employee. What amounts to an interview is often conducted by a professor in which the GSRA and the professor determine whether the GSRA is a good fit for the available work.

A GSRA is likely to work in a field relevant to their area of study. The GSRA brings both an interest in a project and the skills to do what is required. However, a GSRA has some discretion with regard to the project on which they will work. The individual may solicit work with a particular academic because they want to participate in the research being done by the professor. But the professor is not necessarily the person’s advisor at the start; the person may seek the work first and create the advisor relationship next. That is what Andrea Jokisaari did. See R1/32ff.

A veteran of work on other projects, Ms. Jokisaari had decided to change advisors—a privilege of most graduate students. She approached a faculty member who was one of the principal researchers for a national project involving several universities and numerous private entities. Jokisaari found the research interesting; she and the faculty member discussed how Jokisaari could help on the project. At the time, Ms. Jokisaari did not have a dissertation topic. She began work on the project without knowing if or how the data she might generate would help her.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



Jeremy Moore, R2/8ff, found work with a project by asking friends which professor might have jobs available. Moore met with the professor—who was not his advisor—and the two decided that his skills would be a good fit for the project. Moore joined the research team although he did not have a broad background in the research subject. He decided to take courses in the area in order to expand his skills. Moore, too, joined a project without knowing if or whether the data he might generate would be of help to his dissertation.

2.

The GSRA hire is managed in the same manner as any other hire. The University Academic Human Resources Department has a protocol which must be followed. See *Jt. ex.*

1. An “appointment request” is used. This may result in an offer letter. The form of the letter is what would be expected in the initiation of any other hiring.

To: [name]

From: [authorized agent of the appointing academic or research unit]

Date:

Subject: GSRA appointment

I am pleased to inform you that the Department of << _____ >> is able to offer you a graduate student research assistantship. The beginning date for this appointment will be _____, and the ending date will be _____. Your appointment fraction will be ____%. This fraction will provide you with a stipend of \$<<x,xxx/term or /mo.>> Your appointment will support research with Professor <<X>> in her <<lab or on her project titled <<name>>]. Specific duties and schedules should be discussed with Prof. <<X>>. Given that research support and the related activity can vary over time, your specific duties and schedules may also change.

This offer is conditional and contingent upon the following:

- Satisfactory documentary evidence of work eligibility in the U.S.
- Satisfactory contributions to the involved research
- Continued satisfactory performance in your academic program.

In the case of Fall or Winter Term appointments: Registration for at least 6 credit hours of graduate course work during the term(s) of employment.

- A summary of the important features of GSRA appointments is contained in the attached document, titled: “Some Important Features of GSRA Appointments.”

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
NORTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

 223

Please indicate your acceptance of this offer signing below in the spaces provided, and the letter to me by <<date>>.

Finally, if other opportunities for support become available to you, or if there is a change in your plans which result in a decision not to accept or to continue as a GSRA in the department, please notify me immediately. If you have any questions about this appointment please see <<name>> at <<phone number or email>>.

I accept this offer:

3.

As a condition of hire, every GSRA must provide the University with verification of employment eligibility. See stipulation 16(a). The form I-9 must be submitted with appropriate evidence where necessary. The University is subject to the same statutes as any other employer with regard to the employment of persons who are either citizens or otherwise authorized to work in the United States. Students are never required to submit an I-9 form.

Also as a condition of hire, the GSRA must execute the oath of allegiance to the United States Constitution required by MCL 388.401. See Stip 16(b). Only employees are required to execute the oath; no student is so obligated.

C. GSRA's Are Treated as Employees are Treated

1.

The University establishes a minimum wage for GSRA's. Stipulation 9. Currently, the minimum is \$17,630 per semester. A department may pay more than the minimum but may not pay less. GSRA's, like their GSI colleagues, are paid in "fractions" of full time. So, the semester minimum is based on a full time, or 100%, fraction. There is no minimum stipend for any student.

2.

GSRA's are required to pay tax on the income received and are issued a form W-2 each year. Stipulation 16(g) (i). The payments to the GSRA is not exempt from income tax because

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

 223

it is considered to be “reasonable compensation for the performance of services rendered to the University...” *Id.* However, fellowship payments are not subject to income tax. Stipulation 16(g)(ii). GSRA income is taxed because it is received in exchange for work.

3.

GSRA receive emoluments of employment; none of which are provided to students. Stipulation 14. GSRA receive employer paid health and life insurance; dental insurance; travel accident insurance. GSRA also have their tuition paid. Further, GSRA may consume up to three weeks of sick leave in any twelve month period. *Id.*

D. GSRA Have Rights under Statutes Which Apply Only to Employees

1.

The Family Medical Leave Act is, by its terms, applicable only to employees. The statute was adopted in 1993, a dozen years after the Commission’s decision in 1981. It is applicable only to employees; no student may claim a right to a leave under the law. The University recognizes that FMLA rights are available to Graduate Student Research Assistants who meet the other statutory terms (hours worked and reason for leave). See Jt. ex. 1, p. 6-7; stipulation 15. A GSRA would not be entitled to FMLA leave unless she was an employee. No student may claim rights under FMLA.

2.

Graduate Student Research Assistants are protected by Title VII of the Civil Rights Act of 1964. In cases decided following the close of the Sperka record, Title VII of the Civil Rights Act of 1964 has been applied to Graduate Student Research Assistants. In *Cuddeback v Florida State Board of Education et al*, 381 F3rd 1230 (CA11, 2004) a Graduate Student at the University of South Florida engaged in research performed for her dissertation claimed that she

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



was terminated due to her gender. The University defended the claim by asserting that she was a student, not an employee, and was not protected by Title VII. The District Court rejected the contention and the 11th Circuit affirmed.

“The University argues that Cuddeback was not an employee for purposes of Title VII. Title VII defines an “employee” as “an individual employed by an employer.” 42 U.S.C. § 2000e(f). This court has not addressed the specific issue of whether a graduate student assistant constitutes an employee for purposes of Title VII. However, generally, this circuit has adopted the “economic realities” test to determine whether a Title VII plaintiff is an employee. See *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 340-41 (11th Cir. 1982). Under this test, the term “employee” is “construed in light of general common law concepts” and “should take into account the economic realities of the situation,” “viewed in light of the common law principles of agency and the right of the employer to control the employee.” *Id.* Specifically, the court should consider factors such as whether the defendant directed the plaintiff’s work and provided or paid for the materials used in the plaintiff’s work. *Id.* at 341. Because the question presented is whether Cuddeback, as a graduate research assistant, is an “employee,” we conclude that the economic realities test should apply.

“Courts that have considered whether graduate students constitute employees for the purposes of Title VII have distinguished between their roles as employees and as students, and have typically refused to treat them as “employees” for Title VII purposes only where their academic requirements were truly central to the relationship with the institution. Compare *Stilley v. University of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 968 F. Supp. 252, 261-62 (W.D. Pa. 1996) (finding that a plaintiff was an employee when she was a student researcher); *Ivan v. Kent State Univ.*, 863 F. Supp. 581, 585-86 (N.D. Ohio 1994) (finding that a graduate student researcher was an employee where she was under an employment contract, was paid biweekly, and had retirement benefits withheld); with *Jacob-Mua v. Veneman*, 289 F.3d 517, 520-21 (8th Cir. 2002) (concluding that a volunteer graduate student researcher was not an employee because she was not financially compensated for her work); *Pollack v. Rice Univ.*, 1982 U.S. Dist. LEXIS 12633, 28 Fair Empl. Prac. Cas. 1273 (S.D. Tex. 1982) (finding that paid research or instruction by the plaintiff was “attendant to his capacity as a graduate student” because it was a central part of the graduate program and, therefore, the plaintiff’s status was that of “student” rather than “employee”). Therefore, even though Cuddeback’s course work obligations required her to complete a rotation in three laboratories and much of her work in Dr. Wang’s lab was to fulfill the program’s requirements, the economic realities of this particular situation lead us to conclude that the district court correctly found that Cuddeback was an employee for Title VII purposes.”

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

 223

This decision has been followed. See *Ruiz v the Trustees of Purdue University*, 2008 US Dist LEXIS 118835 (US DC, ND ID, 2008) (holding Graduate Student Research Assistant is an employee for purposes of Title VII).

3.

Michigan's Whistleblower's Protection Act, MCL 15.361 was adopted in 1980 and made effective in March, 1981, long after the record was closed in the hearing before Administrative Law Judge Sperka. The statute applies solely to employees.

"An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action."

MCL 15.362.

An "employee" is "...a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied." MCL 15.361.

This statute has been applied to a Graduate Student Research Assistant employed by the University of Michigan. In *Mcgee, v University of Michigan Regents*, 2011 Mich App Lexis 632 the Court of Appeals affirmed a jury verdict finding that the University did not discharge a Graduate Student Research Assistant for engaging in protected activity. However, the jury had found that the GSRA had, in fact, engaged in protected activity. Neither the Trial Court nor the Court of Appeals questioned that finding. The statute—applicable only to employees—was applied to a GSRA employed by the University of Michigan.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



E. GSRA's Are Subject to Termination for Cause

1.

A GSRA is required to earn the money they receive. Each GSRA is subject to periodic review of their work performance. R2/94. The evaluation is based on their effort. Results of research are not guaranteed. But a GSRA is expected to do the work necessary to fulfill the goals of the project. A GSRA is subject to non renewal if they fail to put forth the proper effort. The GSRA appointment could be ended. R2/96. See also Jt. ex. 1, p.2.

“If it is determined that the appointee is not making satisfactory progress towards a degree, *or when appointment performance is unsatisfactory (including cases involving misconduct)* the appointment duties may be reduced and the appointment fraction and stipend may be reduced correspondingly, *or the appointment may be terminated.* Prior to initiating a termination, the matter should be discussed with the G.S.R.A. in an effort to correct the problem. Where efforts at correction are inappropriate or prove to be unproductive, the proposed termination of appointment and support should be reviewed and approved in advance by the department chairperson or an equivalent level of authority (in an Institute or Center) prior to proceeding. In addition, the Academic Human Resources Office should be made aware of the pending action.”

Emphasis added.

2.

A GSRA may be terminated for unethical or dishonest behavior. R4/94. Persons who falsified data or engaged in other misconduct can be separated from their position as a GSRA.

F. As with Other Employees, GSRA's Do Not Own Their Intellectual Property

Intellectual property created by employees of the University is owned by the University unless other arrangements are made. The University policy is expressed in section 303.4 of the Standard Practice Guide, Jt. ex. 5. The policy states in part:

“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*

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



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.”

“E. The University will own Intellectual Property made by a former University employee if the Intellectual Property was made both (I) with substantial University faculty guidance or University resources and (2) during activity directly relating to and closely following employment. *For example, if a graduate student researcher completes a research project and is no longer technically an Employee, and an invention is conceived during the creation of a dissertation or similar activity relating to the research involving faculty guidance, the University will own the patent rights related to the invention.* This rule does not affect a graduate student’s ownership of the copyright on the dissertation itself.

“F. All Intellectual Property made under sponsored research agreements and material transfer agreements shall be owned by the University except where previously agreed otherwise in writing based on the circumstances under consideration. Such exceptions shall be approved and negotiated by OVPR: Intellectual Property subject to such an exception shall nevertheless be subject to the disclosure requirements of this Policy.”

The University claims the IP of the GSRAs precisely because they are not “in business for themselves.” The work that they do as Graduate Student Research Assistants is the work of the University. It is entitled to own the product of their work because that product was produced while the GSRA was assigned as an employee of the University.

G. GSRAs Are Subject to Rules Applicable Only to Employees

1.

GSRAs are subject to rules regarding “integrity of scholarship” which are applicable only to employees. It. ex. 4 is section 303.3 of the Standard Practice Guide. The rule is intended to permit discipline of employees who engage in misconduct doing research. A presumed example would be the creation of false or misleading data. The rule includes

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



Graduate Student Research Assistants in the same category as any other employee of the University.

“These procedures apply to all instructional faculty, primary researchers, and other staff members, including without limitation *graduate student research assistants*, graduate student teaching assistants, graduate student staff assistants, undergraduate students employed in research or other scholarly activity, postdoctoral fellows and postdoctoral research associates, visiting faculty or staff, faculty or staff on sabbatical leave, adjunct faculty when performing University work, and faculty or staff on leave without pay.”

However, the rule expressly does not apply to students: “These procedures apply to students only when acting in their employment or service capacity, and not as students per se.”

The rule expressly applies to Graduate Student Research Assistants. It defines an employee as:

““Employee” means a person who receives a salary or other consideration from the University for performance of services, part-time or full time. A University employee with less than a full year (e.g., 9-month) appointment shall be considered an “Employee” for acts during a period of appointment. A student that is compensated (e.g., financially through a stipend, tuition, etc., including *graduate student research assistants and graduate student instructors*) is considered an *Employee under this Policy*.”

2.

Graduate Student Research Assistants are subject to the same restriction on relationships as faculty. Jt. ex. 7 is section 601.22 of the Standard Practice Guide. This rule cautions against the development of romantic or sexual relationships between a faculty member and a student. Graduate Student Research Assistants are expressly included:

“This policy applies to any University or University-sanctioned teacher, mentor, or supervisor of students. This includes, but is not limited to, *regular instructional faculty*, clinical faculty, supplemental and research faculty, postdoctoral fellows, graduate student instructors, *graduate student research assistants*, preceptors, and graders. Throughout this policy, the term “faculty member” is used to refer to all regular instructional faculty and to all other

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

 223

individuals with supervisory responsibility for students in an educational setting.”

II. GSRA's Are Performing the University's Work, Not Their Own

Graduate Student Research Assistants are performing the work of the University and not their own work. They are not “in business for themselves.” Rather, the GSRA's are engaged in a task which is owned by the University and controlled by the University. The GSRA is likely to derive both an economic and an academic benefit from this relationship. But that reality does not change the fundamental nature of the relationship between the GSRA and her employer.

A. The Economic Reality Test

1.

The economic reality test is used to determine whether a person is an employee for a wide variety of statutes. It has been used historically to determine applicability of the Worker's Disability Compensation Act. The test has several parts:

“The factors of the “economic reality” test as described in *McKissic [v Bodine]*, 42 Mich App 203; 201 NW2d 333 (1972),] are:

“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?

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



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

“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.”

Progressive Mich Ins Co v Citizens Ins Co of Am, 2010 Mich App LEXIS 2122, 7-8 (2010)

See also *Clement v Cincinnati Ins Co*, 2011 Mich App LEXIS 2218, 4-5 (2011) (The “economic reality test” is the “appropriate standard to determine the existence of an employment relationship under the Michigan no-fault act.” [F]actors to be considered include: [1] control of the worker’s duties, [2] payment of wages, [3] right to hire, fire and discipline, and [4] the performance of the duties as an integral part of the employer’s business towards the accomplishment of a common goal.”)

This test has been preferred to others. See *Mantei v Mich Pub Sch Emples Ret Sys*, 256 Mich App 64, 78 (2003) (declining to apply IRS “20 factor test” as being inappropriate except in disputes involving questions of *respondeat superior*.).

2.

The 1981 decision turns on the second part of this test. There, the Commission concluded that the GSRAs were not doing the work of the University; they were not engaged in tasks that were an “integral part of the employer’s business.” Instead, the Commission decided that the GSRAs were doing work for themselves. If that was ever true, it is not true now. The University employs Graduate Student Research Assistants to conduct research that is a central part of the University’s mission. The GSRA may use data coming from the research

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



in her academic tasks. But that does not turn the employment relationship on its head. The academic concerns do not drive the employment concerns.

B. The University's Work is Being Performed

1.

Research is a core mission of the University. Hence, the University encourages its faculty and staff to solicit and secure grants for the purpose of advancing knowledge and innovating. The University has been remarkably successful in these pursuits. No one should doubt that the University supports research as part of its mission. Research is not undertaken for the sole benefit of its graduate students. It is performed as part of the University's goals.

The University, not a faculty member and certainly not any GSRA, is the party to the research grant. The University owns the grant; only the University can contract with the granting agency and promise to perform the tasks associated with the grant. R2/83-85. The research is the University's work.

2.

A GSRA employed to assist on a project is performing the University's work and not their own. The witness testimony was consistent. In each case, a person was hired to work on a project which was designed by someone else. They were expected to do the work that was necessary in order to meet the project goals.

The research projects are not designed or secured for any one graduate student or group of graduate student. When that occurs, the graduate student should be titled as a "fellow." The Graduate Student Research Assistants are uniformly working on a grant secured by someone else, designed by someone else and owned by the University.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



3.

The record adduced in 1978-1979 appears to have suggested that GSRA's were working on projects which were secured for them; secured for the purpose of gaining data for the GSRA's dissertation. It is clear that that is not true now, if it ever was. The GSRA's are working on a project which has certain expectations. The granting entity requires periodic reports and will usually may require periodic reports and, perhaps, periodic "deliverables." And the project was never developed or secured for the GSRA.

C. Not "In Business For Themselves"

1.

Graduate Student Research Assistants may use data from the project on which they are working. The data may be incorporated into a dissertation or may be the entire dissertation. However, the project comes first, the dissertation second.

The record shows that it is common for a GSRA to decide that the project on which they are working can be used for a dissertation. In that event, the GSRA will conform the dissertation topic to utilize the information. Or they may change their dissertation topic to utilize the information. But there is no evidence that a dissertation topic ever drives the project or its goals. The objective of the project is determined at the time that the application for funding is submitted and approved by the University. That objective is not going to be modified to suit the interests of any GSRA. The GSRA will modify her objectives to suit the project.

2.

The employment obligations of GSRA's come first; the dissertation second. A GSRA is required to actually work on the project for which they are hired. A GSRA can be discharged for lack of effort. A granting agency is not going to provide funds for personnel without

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



knowing that the money is used properly. So every GSRA working on a grant funded by the United States have to confirm that they have actually performed the services for which they are compensated. GSRA's are not paid without an expectation of work.

3.

A GSRA is not assigned to a project; they have discretion and can match the project to their interests. A graduate student may choose to leave one project and move to another. The reasons will vary; sometimes the change is based on personality differences; sometimes the change is based on a change in the GSRA's interests. While departmental courtesies may require some interaction between faculty, the choice of projects is generally that of the individual. A change in projects may mean a change in focus for the individual. But the quality of the persons admitted to the programs at the University is such that changes can and are made without problem.

III. Change in Facts, Change in Law

Both the facts and the law have changed since 1978-1979; there has been change sufficient to conclude that the 1981 decision is obsolete and that the Commission should reach a different conclusion today.

A. Change in Facts

1. The facts in this record demonstrate that the premise on which GSRA's were excluded from PERA is no longer valid (if it ever was). The record makes clear that GSRA's are engaged in tasks which are the essence of the University's mission; they are not doing their own work. The GSRA benefits from their assignment. They often use data from their research for their dissertation. Indeed, sometimes the entire dissertation is based on their research. But the dissertation does not drive the research; the research may drive the dissertation.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



Put another way, the research performed by GSRA's would be done whether a GSRA was hired or not. It would be done by other employees of the University. The GSRA is the beneficiary of the research project; the research project is the beneficiary of the work performed. That the relationship is bilateral should not be a surprise.

2.

The University's relationship with Graduate Student Research Assistants has likewise changed. The University recognizes them as employees. It expects them to function like employees. It treats them like employees, providing them employee benefits and subjecting them to employee rules.

B. Change in Law

Statutes that apply only to employees are applicable to Graduate Student Research Assistants. The 1978-1979 record did not contain any information about rights under Title VII. Since then, federal courts have recognized that Graduate Student Research Assistants are protected by that statute. The former record did not contain any information about FMLA or the Whistleblower's Act because those statutes had not been enacted. The former record did not contain any information about the Americans with Disabilities Act because that statute had not been enacted. All of these statutes cover Graduate Student Research Assistants.

This change in the law, like the change of facts, justifies a departure from the 1981 decision. The world is simply different now. Part of that change is due to the sheer volume of research performed at the University of Michigan. Part of the change is due to legislative modification of law. Whatever the source, the change in law and facts is dramatic. So dramatic, that the 1981 decision has to be viewed as obsolete.

MARK H. COUSENS
ATTORNEY

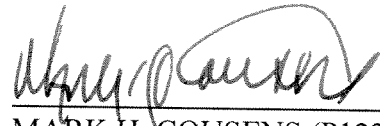
26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170



Conclusion

GSRAs are employees of the University of Michigan because they are engaged in work that is part of the University's mission; work for which they are paid; work which must meet ethical standards. A GSRA benefits from the experience in both an economic and academic sense. A GSRA may base a PhD dissertation on the work they performed. But the GSRA's use of data or methodology does not change the essential fact that their work on the project comes first. The granting entity provided funds to gain a result or to investigate a question. That is the first priority.

GSRAs are engaged in important work for the University of Michigan. That it is of assistance to them does not change the fundamental nature of the employment relationship. The Commission should agree that GSRAs are employees and direct an election in the proposed unit.

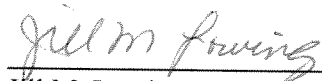


MARK H. COUSENS (P12273)
Attorney for the Petitioner
26261 Evergreen Road, Ste. 110
Southfield, MI 48076
(248) 355-2150

February 28, 2012

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing reply was served upon Christine Gerdes, Assistant General Counsel for the University of Michigan to the following address: 503 Thompson St., # 5010, Fleming Admin Bldg, Ann Arbor, MI 48109; and David Fink of David Fink & Associates, 100 West Long Lake Road, Suite 111, Bloomfield Hills, MI 48304; on February 28, 2012 by: U.S. Mail and e-mail transmittal.


Jill M. Lowing

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

© 223