IN THE

SUPREME COURT OF THE UNITED STATES

WASHINGTON D.C.

YUSONG GONG,

Petitioner,

Vs

UNIVERSITY OF MICHIGAN, et.al.

Respondents.

/

Supreme Court Case No.: 19-7641

Lower Court Case No.: 19-1068

YUSONG GONG, In Pro Per
Petitioner
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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I. Whether the July 8, 2013 settlement agreement between the University and Plaintiff prohibiting Plaintiff from applying for employment at the University should be enforced to bar Plaintiff's claims of failure to rehire?

The District Court answered: Yes.

The Sixth Circuit Court of Appeals answered: Yes.

The Defendants answer: Yes.

The Plaintiff answers: No.

II. Whether Plaintiff's claims against the University under the ADA are barred by sovereign immunity?

The District Court answered: Yes.

The Sixth Circuit Court of Appeals answered: Yes.

The Defendants answer: Yes.

The Plaintiff answers: No.

III. Whether the Plaintiff's claims under Title VII and the ADA are subject to dismissal as to individual supervisors as they are not covered employers under the title VII and the ADA?

The District Court answered: Yes.

The Sixth Circuit of Appeals answered: Yes.

The Defendants answer: Yes.

The Plaintiff answers: No.

IV. Whether Plaintiff has failed to exhaust her administrative remedies for all allegations except for the claim of failure to hire in 2016?

The District Court answered: Yes

The Sixth Circuit Court of Appeals answered: Yes.

The Defendants answer: Yes.

The Plaintiff answers: No.

V. Whether the District Court properly denied Plaintiff's Motion to amend as futile?

The District Court answer: Yes.

The Sixth Circuit Court of Appeals answered: Yes.

The Defendants answer: Yes.

The Plaintiff answer: No.

LIST OF PARTIES

1. Yusong Gong, Petitioner
2. The University of Michigan, Respondent
3. Richard Simon, Respondent
4. Michele Henderson. Respondent
5. Timothy Lynch, Respondent

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent disputes that 5 U.S.C. §2302(b)(8) and (9) cited by Petitioner is involved in this case as Petitioner failed to make a claim based upon this statute in her complaint filed in this matter.

Respondent disputes that the Rehabilitation Act of 1973 42 U.S.C. §504 cited by Petitioner is involved in this case as Petitioner failed to make a claim based upon this statute in her complaint filed in this matter.

Respondent has failed to cite to the Eleventh Amendment. The District Court and Sixth Circuit held that the University of Michigan was entitled to sovereign immunity under the Respondent Eleventh Amendment to the U.S. Constitution which provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Petitioner accepts the remaining statutory citations submitted by Respondents.

STATEMENT OF THE CASE

This is the third lawsuit filed by Plaintiff, Yusong Gong, against the University of Michigan and various University employees. Despite agreeing to a settlement, Plaintiff has continued to engage in protracted litigation.

Plaintiff was discharged from her Research Lab Specialist position at the University of Michigan effective April 11, 2012 (ECF72-2 Page ID 824 Faculty and Staff Layoff and Termination Request). As part of the discharge, Plaintiff was classified as not to be rehired.

On July 13, 2012, Plaintiff filed Case No. 12-749-CD in Washtenaw County Circuit Court alleging discrimination based upon national origin and retaliation under the Elliott-Larsen Civil Rights Act as well as a violation of the Michigan Whistleblower's Protection Act (ECF72-3 Page ID 828-835 Complaint 12-749-CD). On February 6, 2013, Plaintiff filed Case No. 13-10469 in the United States District Court alleging her discharge was the result of discrimination and retaliation in violation of the Rehabilitation Act (ECF72-4 Page ID 837-841, Complaint 13-cv-10469).

On or about June 28, 2013, Plaintiff filed a Motion to Reinstate Case No. 12-749-CD (ECF72-5 Page ID 843-846 Motion to Reinstate). In the motion, Plaintiff's counsel represented to the court that the parties had been engaged in months of settlement discussions in the federal court matter. (ECF72-5 Page ID 844, Motion to Reinstate, Paragraph 8)

On July 8, 2013, the parties appeared in the federal court case and after additional negotiations, Plaintiff agreed to a Full and Final Release of All Claims (ECF72-6 Page ID 848-852, Full and Final Release of all Claims). Plaintiff agreed to a settlement payment of $41,000, subject to her submission of a W9 in return for a full and complete release of all claims including, but not limited to, any and all claims arising from her employment. In addition, Plaintiff agreed

not to be employed or apply for employment at the University of Michigan. Plaintiff agreed as follows:

> Yusong Gong agrees not to be employed by, apply for or otherwise seek or accept employment with, or provide any personal services to or for U of M or any of the Released Parties, and entry into this agreement and payment of the sums specified above shall be sufficient ground, and a legitimate non-discriminatory and non-retaliatory basis to reject any such application or terminate any such employment. Yusong Gong and the Releasing Parties agree such rejection or termination shall not be the basis for any claim, complaint or cause of action by her against any Released Parties. Yusong Gong understands that her status with U of M will remain not eligible for rehire. (ECF #72-6 Page ID 850-851)

Plaintiff also agreed that she could revoke the settlement agreement within seven days of signing the release provided that the revocation was in writing and delivered to the Office of the General Counsel within 7 days after signing the release (ECF72-6 Page ID 851). Plaintiff signed the settlement agreement on July 8, initialing all of the handwritten changes.

In addition, on July 8, 2013, the parties placed their agreement to this settlement on the record (ECF72-7 Page ID 854-867, Transcript of Status Conference Motion to Withdraw). Plaintiff was represented by counsel, Gerald Wahl and had the assistance of a support person, Dr. Douglas Smith (ECF72-7 Page ID 856). Plaintiff was placed under oath, and indicated that she understood the settlement and she had not been coerced into signing the settlement (ECF72-7 Page ID 862-864). Dr. Smith also confirmed that Plaintiff understood the settlement (ECF72-7 Page ID 865). As a result, Judge Cox entered an Order of Dismissal with Prejudice based upon the settlement (ECF72-7 Page ID 869 Order of Dismissal with Prejudice).

On July 9, 2013, Daniel Tukel, counsel for the University sent Plaintiff's counsel an email attaching a clean copy of the settlement agreement incorporating the handwritten edits negotiated by the parties while in court on July 8 that had already been signed and initialed by Plaintiff. (ECF72-9 Page ID 871-873 email from Tukel to Wahl July 9, 2013). In the email, Mr. Tukel noted

that he included language indicating that upon signing the clean copy of the July 9 agreement, the July 8 agreement would be superseded. Plaintiff did not sign the July 9 agreement. However, Plaintiff did not provide any notice indicating that she was revoking the July 8 agreement (ECF72-10 Page ID 979-880, Affidavit of Daniel Tukel), (ECF72-11 Page ID 882-883 Affidavit of Jennifer Traver).

On July 12, 2013, Plaintiff met with her psychiatrist and told her that she had settled her lawsuit ECF72-12 Page ID 885 Psychiatric note dated July 12, 2013).

On August 2, 2013, Mr. Tukel sent an email to Mr. Wahl indicating that the University was prepared to tender the settlement checks once Plaintiff met the condition precedent to the settlement payment, submission of a W-9 and entry of an Order of Dismissal of the state court action (ECF72-13 Page ID 889 Email from Tukel to Wahl August 2, 2013).

On or about August 28, 2013, the University responded to Plaintiff's Motion to Reinstate arguing that Plaintiff's case should be reinstated for the sole purpose of dismissing the case with prejudice based upon the July 8, 2013 Settlement Agreement (ECF72-14 Page ID 891-893 Reply to Motion to Reinstate).

On September 23, 2013, Plaintiff and her attorney, Mr. Wahl had an email discussion in which Mr. Wahl bluntly told Plaintiff that she had signed a settlement agreement and was bound by that agreement (ECF72-15 Page ID 895-897 Email between Wahl and Plaintiff).

On September 25, 2013, the parties appeared before the Hon. David Swartz and argued Plaintiff's Motion to Reinstate (ECF 72-16 Page ID 899-905 Transcript of Motion to Reinstate Hearing). Judge Swartz granted the University's motion and reinstated the case and dismissed it with prejudice based upon the settlement agreement (ECF72-16 Page ID 903); (ECF72-17 Page ID 907-908 Order of Reinstatement and Dismissal with Prejudice).

Subsequently, on or about November 26, 2013, counsel for the University again sent an email to Plaintiff indicating that she could obtain her settlement payment of $41,000.00 by simply executing a W-9 as required by the settlement agreement (ECF72-18 Page ID 910 Email from Donica Varner). Subsequently, on June 9, 2016, counsel for the University again reminded the Plaintiff that her settlement payment was available. Plaintiff responded by attempting to renegotiate the settlement to include the payment of health insurance. Again, on August 22, 2017, counsel for the University in seeking Plaintiff's concurrence in a Motion to Dismiss this case reminded Plaintiff that Defendants were ready to pay the settlement amount upon Plaintiff's submission of a W9 (ECF72-19 Page ID 912 Email from David Masson).

Despite specifically agreeing as part of her settlement agreement that she would not apply for employment at the University, was not eligible for employment at the University, and that the settlement agreement was a sufficient non-discriminatory, non-retaliatory basis for rejection of any application for employment, Plaintiff allegedly applied for employment at the University in direct contravention to her settlement agreement. Pursuant to the settlement agreement, the University appropriately rejected Plaintiff's application. In response, Plaintiff filed EEOC charge 471-2016-02821 against the University of Michigan alleging that in January 2016 she attempted to apply for employment at the University and that her application was rejected and that the denial of employment at the University constituted disability discrimination and retaliation for prior litigation and EEOC charges (ECF72-20 Page ID 915 EEOC Charge 471-2016-02821). Plaintiff's EEOC charge did not allege any other facts except for the failure to hire, as a basis for her claims of disability discrimination or retaliation. Plaintiff subsequently received a Right to Sue notice from the EEOC on October 6, 2016 (ECF72-21 Page ID 918 Right to Sue Notice).

Plaintiff filed the instant three-count Complaint on December 28, 2016, alleging retaliation under Title VII, failure to accommodate Plaintiff's disability prior to her discharge in 2012 in violation of the ADA, and failure to place Plaintiff in a vacant position as accommodation for her disability in violation of the ADA (ECF1 Page ID1 2016 Complaint).

On August 23, 2017, Defendants' filed a Motion to Dismiss Plaintiff's Complaint. On February 13, 2018, the District Court issued an Opinion and Order Granting the Motion in Part and Denying the Motion in Part (ECF41 Page ID 406 Memorandum Opinion and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss). The court held that pursuant to the Eleventh Amendment, the University was immune from Plaintiff's claim for damages under the ADA but that Plaintiff could proceed with a claim for injunctive relief against the University seeking reinstatement. The court also granted the motion dismissing the claims in their entirety against the individual Defendants, as there is no personal liability against individual employees/supervisors under the ADA and Title VII.

On May 15, 2018, Plaintiff sought to amend her complaint to add a First Amendment claim. On July 17, 2017, the court denied the motion as futile as the claims was barred by the Eleventh Amendment (ECF65 Page ID 771 Opinion and Order Denying Motion to Add Applicable Law to Complaint)

On December 14, 2018, the District Court granted Defendants' Motion for Summary Judgment on all of Plaintiff's remaining claims (ECF82 Page ID 1170 Order and Opinion Granting Motion for Summary Judgment). The court held that Plaintiff's claims relating to her 2012 termination were barred by her failure to exhaust administrative remedies and/or her failure to file suit within the related limitations period. In addition, the court held that Plaintiff's claims were also barred by the Full and Final Release entered into by the parties on July 8, 2013.

SUMMARY OF ARGUMENT

Plaintiff seeks cert to review three decisions of the District Court that were affirmed by the Sixth Circuit. On February 13, 2018 the District Court granted in part Defendants' Motion to Dismiss, ruling that the Plaintiff's claims under the ADA against the University of Michigan were barred by the Eleventh Amendment and that that there was no personal liability of individual employees under Title VII or the ADA. Both decisions rely on settled law, were correct, and should be affirmed. The Sixth Circuit has previously found that the University of Michigan as a state entity is protected by the Eleventh Amendment. *Estate of Ritter by Ritter v. University of Michigan*, 851 F2d 846, 850-51 (6th Cir. 1988). In *Board of Trustees of the University of Alabama v Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), the Supreme Court held that the Eleventh amendment bars claims under the ADA. The Sixth Circuit has also repeatedly held that individual supervisors are not employers under Title VII or the ADA. *Wathen v General Electric*, 115 F. 3d 400 (6th Cir. 1996); *Hiler v Brown*, 177 F. 3d 542 (6th Cir. 1999).

Plaintiff also appeals from the decision of the District Court and affirmed by the Sixth Circuit, denying her motion to file an amended complaint adding a claim under the First Amendment. The District Court denied the motion holding that the proposed amendment was futile in that the claims was barred by the Eleventh Amendment. The District Court's and Sixth Circuit decision relied on settled law, was correct, and should be affirmed pursuant to *Will v. Michigan Dep't. of State Police*, 491 U.S. 58, 66, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). In addition, Defendants responded to the motion to amend by arguing that the First Amendment claim was barred by the statute of limitations. Although, the District Court did not rule on this

argument the claim is clearly barred by the statute of limitations in that it was filed more than three years after Plaintiff's discharge.

Finally Plaintiff also appeals from the December 14, 2018 Order of Summary Judgment and denial of Motion for Reconsideration on February 4, 2019 (ECF91 Page ID1422-1424). The District Court's decision affirmed by the Sixth Circuit relied on settled law, was correct, and should be affirmed. The District Court and Sixth Circuit properly found that Plaintiff's claim arising from her discharge was barred by Plaintiff's failure to exhaust her administrative remedies. The only claims not barred by the Plaintiff's failure to exhaust her administrative remedies is the 2016 failure to hire as that is the only claim raised in her EEOC charge. The District Court and Sixth Circuit also properly found that Plaintiff's claim was barred by the settlement agreement between the parties.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY RELIED ON SETTLED LAW THAT THE UNIVERSITY WAS IMMUNE FROM PLAINTIFF'S ADA CLAIM UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY

The United States Supreme Court has repeatedly held that claims for money damages or injunctive relief[1] brought against the state are barred by sovereign immunity granted by the Eleventh Amendment to the US Constitution. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); *Will v. Michigan Department of State*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

[1] The district court's decision refusing to dismiss Plaintiff's claim for injunctive relief seeking reinstatement against the University was incorrect as the University is immune from claims for both monetary damages and injunctive relief.

The University is a state entity protected by sovereign immunity. The Regents of the University of Michigan is a constitutional body corporate established and existing pursuant to the Michigan Constitution 1963, Article VIII, §5. The Michigan Supreme Court has stated expressly that "[t]he Legislature has included 'public universit[ies]' in its definition of the 'State' for purposes of immunity." Specifically, MCL 691.1401(g) provides that "'State' means this state and its agencies, departments, commissions, courts, boards, councils, and statutorily created task forces. **State includes a public university or college of this state, whether established as a constitutional corporation or otherwise.**" (Emphasis Added)

The courts in the Sixth Circuit have also held specifically that the Regents of the University of Michigan, as a state constitutional body corporate established under the Michigan Constitution, is an arm of the state protected by sovereign immunity. *Estate of Ritter by Ritter v. University of Michigan*, 851 F2d 846, 850-51 (6th Cir. 1988) ("We conclude that the Eleventh Amendment does apply and the Board [of Regents] is entitled to claim this immunity").

The U.S. Supreme Court has expressly made clear that sovereign immunity under the Eleventh Amendment applies to bar all claims under Title I of the ADA against the States. *Board of Trustees of the University of Alabama v Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). The Sixth Circuit citing *Garrett* has likewise held that the Eleventh Amendment bars claims against the states under Title I of the ADA. *Whitfield v Tennessee,* 639 F.3d 253 (6th Cir. 2011).[2]

The University has not waived its sovereign immunity for this litigation. Courts "will give effect to a State's waiver of Eleventh Amendment immunity only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other

[2] Plaintiff's citation of cases that hold that sovereign immunity does not apply to Rehabilitation Act claims is irrelevant as Plaintiff's complaint only pled claims under the ADA.

reasonable construction." *Port Auth. Trans-Hudson Corp v. Feeney*, 495 U.S. 299, 305, 110 S.Ct. 1868, 109 L.Ed. 2d 264 (1990); "We have insisted, however, that the State's consent be unequivocally expressed." *Pennhurst,* at 465 U.S. 99.

The Supreme Court has rejected plaintiff's argument that the university's acceptance of federal funds acts as a general waiver of Eleventh Amendment immunity. *Atascadero State Hosp. v Scanlon*, 473 U.S. 234, 246–47, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). The Sixth Circuit has also rejected this argument in *Cardinal v Metrish*, 564 F.3d 794, 799-800 (6th Cir. 2009).

II. THE CIRCUIT COURT PROPERLY RELIED ON SETTLED LAW THAT THE NAMED SUPERVISORS ARE NOT LIABLE FOR PLAINTIFF'S STATUTORY DISCRIMINATION CLAIMS

The Plaintiff's Complaint in the instant matter lists as individual defendants Richard Simon, Michelle Henderson, and Timothy Lynch. None of these individuals are proper defendants for Plaintiff's claims of discrimination under the ADA or Title VII.

The Sixth Circuit has held that individual supervisors are not included in the definition of employers and are not be liable for employment discrimination under Title VII or the ADA. *Wathen v General Electric*, 115 F. 3d 400 (6th Cir. 1996); *Hiler v Brown*, 177 F. 3d 542 (6th Cir. 1999).

III. THE CIRCUIT COURT PROPERLY RELIED ON SETTLED LAW THAT PLAINTIFF HAS FAILED TO EXHAUST HER ADMINISTRATIVE REMEDIES AS TO CLAIMS UNDER THE ADA AND TITLE VII

In the instant case, Plaintiff filed an EEOC charge against the University of Michigan only on July 18, 2016 (ECF72-20 Page ID 915). In this charge, Plaintiff alleged only that in January 2016 the University refused to accept her job application for the position of Research Laboratory Specialist II, and informed her on or about January 14, 2016, that she was not allowed to apply for

any positions with the University. Plaintiff alleged the she was denied hire due to her disability and in retaliation for filing lawsuits and EEOC charges.

In her EEOC charge, Plaintiff did not allege any facts related to her claims that occurred before the filing of the EEOC charge, including that she was discharged in 2012; denied medical treatment; or that Timothy Lynch subjected her to discrimination and retaliation in January 2016. Plaintiff also did not file her EEOC charge against any of the named Defendants in the instant Complaint.

The federal appellate courts including the Sixth Circuit have held with respect to Title VII and ADA claims that the federal courts do not have subject matter jurisdiction unless the Plaintiff exhausts administrative proceedings before the EEOC. *Jones v Sumser Retirement Village*, 209 F. 3d 851 (6th Cir. 2000); *Parry v Mohawk Motors of Michigan*, 236 F3d 299 (6th Cir. 2000). In *Jones* the court stated[3]:

> 'Federal courts do not have subject matter jurisdiction of Title VII claims unless the claimant explicitly files the claim in an EEOC charge or the claim can reasonably be expected to grow out of the EEOC charge.' The regulatory requirement that a claimant's written charge be '**sufficiently precise to identify the parties, and to describe generally the action or practices complained of**' has two purposes. First, the requirement provides the basis for the EEOC's 'attempt to obtain voluntary compliance with the law.' Second, these attempts 'notify potential defendants of the nature of plaintiff's claims and provide them the opportunity to settle the claims before the EEOC rather than litigate them.' *Id*, at 853 (citations omitted) (emphasis added)

In *Taylor v Donahoe*, 452 Fed.Appx. 614, 617 (6th Cir. 2011) this court stated:

> Although retaliation claims are often excepted from the exhaustion requirement when they arise after an EEOC charge is filed, retaliation claims based on conduct that preceded the charge must be included in that charge. *Abeita v. TransAmerica Mailings, Inc.*, 159 F.3d 246, 254 (6th Cir.1998).

[3] Court decisions under Title VII are relevant to a claim under the ADA since the ADA adopts Title VII administrative procedures. 42 USC §12117.

See also. *Blackburn v Shelby County*, 770 F.Supp.2d 896, 917 (W.D. Tenn. 2011) (failure to allege discriminatory conduct in EEOC charge precludes subsequent lawsuit based upon that conduct).

In the instant case, Plaintiff filed her EEOC charge on July 18, 2016 alleging only a failure to hire in 2016. However, in her subsequent lawsuit and on appeal here Plaintiff alleges claims involving conduct prior to the date of her EEOC charge yet not included in the charge[4]. These claims include that she was improperly discharged in April 2012 (ECF1 Page ID 4 Paragraph 41); subjected to discrimination and retaliation by Mr. Lynch in January 2016 (ECF1 Page ID 6, Paragraph 56-57); and denied medical treatment on June 14, 2016 (ECF1 Page ID 6, Paragraph 59). Plaintiff has failed to exhaust her administrative remedies as to all of these claims.

In the instant case, Plaintiff's failure to exhaust her administrative remedies as to the Title VII and ADA claim as to all claims with the exception of the 2016 failure to hire claim as to the University only.

IV. PLAINTIFF'S CLAIMS RELATED TO HER DISCHARGE ON APRIL 11, 2012 ARE BARRED BY THE STATUTE OF LIMITATIONS

The basis of the claims raised in the current lawsuit should be limited to Plaintiff's 2016 charge before the EEOC in this matter alleging a refusal to hire in 2016. Any claims related to Plaintiff's April 11, 2012 discharge and the event leading up to the discharge are barred by the statute of limitations.

Under the ADA, a Plaintiff is required to exhaust administrative remedies by filing a charge with the EEOC within 300 days of the date of discrimination. Once the charge is

[4] Plaintiff's claim that the court should rely on her intake form should be rejected as the Defendant was not served with the intake form and were not put on notice of these claims by the EEOC charge. In addition, the intake form has not been placed into the record.

dismissed, Plaintiff has 90 days in which to file a lawsuit. *Williams v Northwest Airlines, Inc.*, 53 Fed. Appx. 350 (6th Cir. 2002).

The courts in the Sixth Circuit have also repeatedly denied requests to amend complaints to add new discrimination claims submitted after the 90-day statute of limitations had closed. In *Reynolds v Solectron Global Services*, 358 F.Supp.2d 688 (W.D. Tennessee 2005), the court denied plaintiff's motion to amend her complaint to add a claim of sex discrimination because the motion was filed more than 90 days after receipt of the Right to Sue letter. Similarly, in *Simns v Maxim Healthcare Services, Inc.*, 2013 WL 435293 (W.D. Tenn. 2013), the court denied a motion to amend to add a claim of age discrimination where the motion was filed after the 90-day statute of limitations.

In the instant case, Plaintiff may not resurrect claims that have long-since been barred by the 300 or 90 day filing requirement. Plaintiff also cannot contend that the statute is tolled by her previous lawsuits as more than three years have passed between lawsuits as argued in Section V. below.

V. PLAINTIFF'S PROPOSED AMENDED COMPLAINT WAS PROPERLY DENIED AS FUTILE BY THE DISTRICT COURT

The District Court denied Plaintiff's motion to amend her complaint as futile in that the proposed amendment was barred by the Eleventh Amendment (ECF 65 Page ID 775). Since the District Court effectively denied the amendment because it could not withstand a motion to dismiss the standard of review is *de novo*. *Total Benefits Planning Agency, Inc. v Anthem Blue Cross and Blue Shield*, 552 F.3d 430, 437 (6th Cir. 2008).

Interpreting Fed. R. Civ. P. 15 regarding the factors to be considered on a Motion to Amend, the U.S. Supreme Court in *Foman v Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962), indicated a request to amend a complaint could be denied based upon the futility of

the amendment. In *Kreipke v Wayne State University*, 807 F.3d 768, 782 (6th Cir. 2015), the Sixth Circuit held that an amendment should be denied as futile when it would not be able to withstand a motion to dismiss.

A. Plaintiff's Request to Amend her Complaint to Add a Claim Under the First Amendment as to the University of Michigan is Barred by the Eleventh Amendment

At the time that Plaintiff sought to amend her complaint the only remaining Defendant was the Board of Regents of the University of Michigan. For the reasons stated in Section I of this Brief, the University of Michigan is entitled to Eleventh amendment immunity.

Any claim brought by Plaintiff under the First Amendment, must plead a claim under 42 USC 1983. In *Thomas v Shipka,* 818 F.2d 496, 499 (6th Cir.1987), *vacated and remanded on other grounds,* 488 U.S. 1036, 109 S.Ct. 859, 102 L.Ed.2d 984 (1989), (42 USC §1983 provides the exclusive remedy for constitutional claims); *Campbell v University of Louisville*, 862 F.Supp.2d 578, 582 (W.D. Ky. 2012) (claim filed directly under constitution construed as claim under 42 USC 1983).

The U.S. Supreme Court has expressly made clear that sovereign immunity applies specifically to federal §1983 claims against a state entity. *Will v. Michigan Dep't. of State Police*, 491 U.S. 58, 66, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

B. Plaintiff's First Amendment Claim is Barred by the Three Year Statute of Limitations

Plaintiff alleged in her Motion to Add Applicable Law to her Complaint (ECF 48 Page ID 469), that her First Amendment claim related to the claims she filed in her 2012 state court lawsuit. These claims are barred by the statute of limitations.

The statute of limitations for a claim under 42 USC §1983 claim is three years. *McCune v City of Grand Rapids*, 842 F.2d 903 (6th Cir. 1988). Furthermore, the Sixth Circuit in *Sharpe v.*

Cureton, 319 F.3d 259, 268 (6th Cir. 2003), held that there is no continuing violation for discrete acts such as discharge, failure to promote, and failure to hire. In the instant case, Plaintiff was discharged effective April 11, 2012. Plaintiff's proposed First Amendment claim is filed more than three years after her discharge and as a result is barred by the statute of limitations and Plaintiff cannot obtain damages or injunctive relief reinstating her employment.

Plaintiff cannot contend that the statute is tolled by her previous lawsuits as more than three years have passed between lawsuits: Plaintiff was discharged effective April 11, 2012 and filed her first lawsuit in state court on July 13, 2012- 93 days after her termination. Her state court lawsuit was ultimately dismissed on September 25, 2013. Plaintiff filed the instant complaint on December 28, 2016-1,190 days or 3 years, 3 months, and 3 days after the dismissal of her state court lawsuit on September 25, 2013.

VI. THE SEPTEMBER 25, 2013 DECISION OF THE WASHTENAW CIRCUIT COURT ENFORCING THE SETTLEMENT AGREEMENT COLLATERALLY ESTOPS PLAINTIFF FROM CHALLENGING THE SETTLEMENT AGREEMENT IN THE INSTANT CASE

In *Polk v Yellow Freight System, Inc.,* 801 F.2d 190 (6th Cir. 1986), the court held that a state court decision that Plaintiff was fired for just cause was binding on a federal court in a subsequent discrimination litigation. The court stated that the federal court was to give the same preclusive effect that a Michigan state court would give the decision. The court noted that the test in Michigan for collateral estoppel is as follows:

> Where a question of fact essential to the judgment is actually litigated and determined by a valid judgment, the determination is conclusive between parties in a subsequent action on a different cause of action. *Id.,*at p. 194, citing *Senior Accountants, Analysts & Appraisers v City of Detroit,* 399 Mich. 449, 458, 249 NW2d 121 (1976)

In the instant case, it is clear that the settlement agreement was raised during the motion to reinstate Plaintiff's complaint in the Washtenaw Circuit Court action. In the motion to

reinstate, Plaintiff alleged in Paragraph 8 of the motion that the parties had been in settlement negotiations for months. On September 3, 2013, the University responded to Plaintiff's motion to reinstate by arguing that the settlement agreement entered before Judge Cox was binding and mandated dismissal of the Washtenaw County case. Furthermore, the oral argument before the court clearly centered on the enforceability of the settlement agreement. Ultimately, Judge Swartz granted the University's motion and dismissed the case with prejudice based upon the settlement agreement.

The Circuit Court in dismissing the state court action based upon the settlement agreement necessarily determined that the settlement agreement was a valid and binding agreement. Therefore, since the Circuit Court has determined the validity of the settlement agreement the decision is binding on the parties in the federal courts should adhere to the decision of the Washtenaw Circuit Court that the settlement agreement is binding and valid and that it precludes Plaintiff's claims.

VII. PLAINTIFF'S CLAIMS ARE BARRED BY THE FINAL JUDGMENT AND SETTLEMENT AGREEMENT ENTERED IN PLAINTIFF'S PRIOR FEDERAL COURT ACTION

A. The Release was Knowingly and Voluntarily Executed.

In the instant case, Plaintiff, who was represented by counsel, entered into and signed a settlement agreement on July 8, 2013, during a hearing before the District Court in case number 13-10469. Plaintiff with the assistance of her counsel confirmed the settlement on the record before Judge Cox. As a result, Judge Cox entered an Order of Dismissal with Prejudice.

There is strong judicial and legislative policy supporting the finality of court judgments and settlement agreements and a parties' remorse is insufficient to justify setting aside a settlement agreement. *Cummings v Greater Cleveland Regional Transit Authority*, 865 F.3d 844

(6th Cir. 2017). Settlement agreements in Title VII cases are favored. *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.1986); *Redmon v Sinai-Grace Hosp.*, 2013 WL 5913985 (E.D. Mich. 2013).

The Sixth Circuit has held that ordinary contract principles apply in determining whether a waiver is valid. The Court has also held that if a release is knowingly and voluntarily executed it will be enforced by the court. *Adams v Philip Morris, Inc.*, 67 F.3d 580 (6th Cir. 1995). In *Adams,* the Plaintiff faced the choice of being laid off or accepting a severance agreement and signing a release. Plaintiff argued that the economic pressure invalidated the release. The court rejected this argument finding that economic pressure is always present during settlement negotiations.

The *Adams* court described the factors to consider in evaluating whether a release has been knowingly and voluntarily executed: (1) plaintiff's experience, background, and education; (2) the amount of time the plaintiff had to consider whether to sign the waiver, including whether the employee had an opportunity to consult with a lawyer; (3) the clarity of the waiver; (4) consideration for the waiver; as well as (5) the totality of the circumstances. *Id*, at 583.

In *Dorn v General Motors,* 131 Fed. Appx. 462 (6th Cir. 2005), the court stated that the factors cited in *Adams* set the framework for determining whether a release is knowing and voluntary.

In the instant case, the evidence on the factors described in *Adams* clearly indicates that the release was knowing and voluntary. In the instant case, the Plaintiff is a college educated medical researcher. In addition, Plaintiff has been deeply involved in litigating her claims filing several pro-se complaints, and is familiar with the legal process and her email correspondence with her counsel certainly indicates her involvement with this litigation.

The evidence also indicates that Plaintiff had substantial time to consider the settlement. Plaintiff's counsel advised the Washtenaw Circuit Court that the parties had been engaged in extensive settlement discussions from October through June 2013. Furthermore, the parties had time to discuss the settlement agreement in court on July 8, 2013. In fact, the evidence of the handwritten alterations to the settlement agreement and Plaintiff's testimony in accepting the settlement indicates that the parties made substantial changes to the settlement agreement through negotiations on July 8, 2013. In addition, Plaintiff was represented by counsel and had a support person with her during the settlement negotiations on July 8.

The Release clearly states its terms. The Release provides that Plaintiff is to be paid $41,000, and her counsel will be paid $19,000 upon presentation of W9s as a precondition to payment. In addition, the Release also clearly provides that Plaintiff releases and discharges U of M and its agent from all claims. The Release also clearly provides that Plaintiff agrees not to seek employment with the University in the future and that her employment status shall remain as not eligible for rehire. The *Adams* court found a release with similar language to be clear and easily understandable. Similarly, in *Gascho v Scheurer Hospital,* 400 Fed. Appx. 978 (6th Cir. 2010), the Sixth Circuit found a release with similar language to be clear and understandable. Furthermore, Plaintiff testified under oath before Judge Cox that she understood the settlement agreement.

The University paid a total of $60,000, which is ample consideration for this release. Plaintiff has never contended that the consideration is inadequate.

As to the totality of the circumstances, Plaintiff raises three issues:

1. Duress

First, Plaintiff claims that she was under duress from her attorney in forcing her to settle. Plaintiff's claims should be rejected for several reasons. In *Gascho,* plaintiff alleged that physical and verbal abuse from her husband, a hospital executive, forced her to sign the settlement agreement under duress. The court rejected this argument noting that the fact that the husband's actions may have been improper did not apply to the release for the hospital[5]. Plaintiff has presented no evidence that counsel for the University participated in the duress and Plaintiff specifically testified that she was not coerced into settling.

2. Mental Incapacity

Plaintiff also argues that due to her mental condition she was unable to understand the settlement. However, the facts do not support Plaintiff's claim. Plaintiff testified repeatedly before the court that she understood the settlement. Plaintiff's support person Dr. Smith also testified that she understood the settlement. Furthermore, the record from Plaintiff's psychiatrist written on July 12, 2013, four days after the hearing indicated that Plaintiff understood that she had settled her case and that although she didn't get everything she wanted she was resigned to the agreement.

At least one Federal District Court has held that mental incapacity is not grounds for setting aside a settlement agreement. *Freeman v Liberty Mutual Insurance Co.,* 2018 WL 542972 (E.D. Tenn. 2018). However, in Michigan the test for whether consent was illusory because of severe stress is that of mental capacity to contract. *Vittiglio v. Vittiglio*, 297 Mich. App. 391, 402, 824 NW2d 591 (2012), *Howard v. Howard*, 134 Mich. App. at 396, 352 N.W.2d 280 (1984). Plaintiff would have to show that she did not even comprehend the nature or terms of the

[5] In *Grand Rapids Growers, Inc. v Old Kent Bank*, 99 Mich App 128, 297 NW2d 633 (1980), the Court held that a plaintiff claiming duress from their own attorney was not entitled to set aside the settlement without evidence that defendant participated in the duress.

agreement. *Vittiglio*, 297 Mich. App. at 402. Plaintiff has not shown anything of the sort. She certainly testified that she understood the settlement and told her psychiatrist four days later she understood the settlement.

3. Failure to Pay Consideration

The University has not breached the settlement agreement. Nonperformance does not amount to breach when the time for performance has not accrued. *Woody v. Tamer,* 158 Mich. App 764, 772; 405 NW2d 213 (1987), citing Restatement Contracts, 2d, § 235, Comment b, p 212. A settlement cannot be set aside for nonperformance if performance has not come due. Although the University has not yet paid Plaintiff the $41,000, the obligation to pay has not yet accrued because the obligation to pay was conditioned on Plaintiff tendering her W-9. (Settlement Agreement, p. 1). Because the University has not received the W-9, performance has not come due, and the University has not breached the settlement agreement. The University has repeatedly affirmed that it will honor the settlement agreement and tender payment upon receipt of Plaintiff's W-9. Thus, Plaintiff has no basis for rescinding the settlement agreement, and remains bound by its terms.

4. Revocation

Finally, Plaintiff claims that she revoked the settlement agreement. However, the evidence does not support this claim. The settlement agreement provided specifically that to revoke the agreement Plaintiff was required to provide written notice to the Office of the General Counsel within seven days of signing the agreement. The affidavits of Daniel Tukel and Jennifer Traver indicate that Plaintiff did not provide the written notice of revocation as required by the settlement. In addition, four days after accepting the settlement agreement, Plaintiff told her psychiatrist that she had settled her case (Exhibit K p. 1). Furthermore, In a September 23, 2013

Email discussion between Plaintiff and her counsel, Mr. Wahl in preparation for the motion to reinstate Mr. Wahl clearly advised Plaintiff that she had settled her case and that her actions were contradictory to her agreement. Certainly, Mr. Wahl would not have taken that position had Plaintiff revoked the settlement agreement.

Plaintiff argues alternatively that the University should have understood that she revoked the settlement agreement when she failed to sign the clean copy of the agreement presented on July 9 or that by sending the clean copy for signature on July 9 indicates that the parties never intended for the July 8 settlement to be binding. The evidence does not support either argument. First, her statement to her psychiatrist does not support Plaintiff's claim that she immediately determined not to accept the settlement as 4 days later that she told her psychiatrist that she had accepted a settlement. The email from Mr. Tukel to Plaintiff's counsel also indicates that he made several minor changes to the settlement agreement presented on July 9. Plaintiff's failure to sign the slightly altered agreement only indicated to the University that she did not accept the changes proposed by Mr. Tukel. Finally, Mr. Tukel's July 9 email also indicates the understanding that the University believed that the July 8 settlement was binding as Mr. Tukel added language in the July 9 settlement that the July 9 agreement when signed will supersede the July 8 settlement. Mr. Tukel would have had no reason to include that language if the University did not believe that the July 8 settlement was binding.

B. The Release in Prohibiting Plaintiff from Reapplying for Future Employment and Indicating Plaintiff's Agreement that the No-Rehire Restriction Remained in Place is not a Prospective Waiver and Therefore Prohibits Plaintiff from Reapplying for Employment.

In *Adams,* the Sixth Circuit held that an agreement in a release prohibiting the future applications for employment is valid if the evidence demonstrates that the release was meant to incorporate the future effects of prior discrimination in the release. *Id.*, at 584. (See also, *Hank v*

Great Lakes Construction Co., 2018 WL 3433874 (N.D. Ohio 2018) (future claims arising from termination barred).

The *Adams* court continued to hold that the issue regarding the validity of the settlement was whether it was the intent of the parties to remove plaintiff from the employer's labor pool. *Id.*, at 585.

In the instant case, the intent of the parties to the settlement agreement is clear that the no-rehire restriction was meant to release any claims for prior discriminatory conduct. On April 11, 2012, when Plaintiff was discharged, the University indicated that Plaintiff was not recommended for rehire. Plaintiff agreed in the release to accept this recommendation and agreed that it could remain in place. Furthermore, consistent with the agreed no-rehire restriction, Plaintiff agreed that she would not reapply for employment at the University. This agreement provides clear evidence that Plaintiff intended to be taken out of the University's hiring pool.

The court from other circuits have also enforced settlement agreements that contain no rehire restrictions. Courts typically enforce these agreements, and an employer's reliance on such an agreement in denying employment is non-discriminatory, and non-retaliatory. *See, e.g.*, *Jencks v. Modern Woodmen of Am.*, 479 F.3d 1261, 1267 (10th Cir. 2007) (rejecting a plaintiff's argument that reliance on such a settlement agreement to deny employment was discriminatory); *Ruggieri v. Harrington*, 146 F. Supp. 2d 202, 220 (E.D.N.Y. 2001) (same); *Kersey v. Washington Metro. Area Transit Auth.*, 586 F.3d 13, 17 (D.C. Cir. 2009) (same).

In the instant case, Plaintiff has agreed that the April 2012 no-rehire restriction would remain in place and that she would not reapply for employment at the University. This settlement

agreement is binding on the Plaintiff and bars any claim that the University's refusal to allow her to reapply to University employment was discriminatory, and bars any claim for reinstatement to University employment.

CONCLUSION

Defendants respectfully request that this Honorable court affirm the decisions of the District Court dismissing this matter in its entirety.

THE UNIVERSITY OF MICHIGAN
OFFICE OF THE VICE PRESIDENT AND GENERAL COUNSEL

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Dated: March 13, 2020

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2020, I caused the foregoing paper to be electronically filed with the Clerk of the Court using the ECF system that a copy of the foregoing paper was served upon Plaintiff, Yusong Gong, In Pro Per, by mailing the same to her at her address as disclosed on the pleadings of record herein with postage fully prepaid thereon on the 13th day of March 2020.

I declare under penalty of perjury that the statement above is true to the best of my knowledge, information and belief.

THE UNIVERSITY OF MICHIGAN
OFFICE OF THE VICE PRESIDENT AND GENERAL COUNSEL

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