

# *Campbell v. DHS:* The Michigan Court of Appeals Resolves *Garg's* Open Question and the Result is "Mmm Mmm Good" for Plaintiffs

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## INTRODUCTION

The Michigan Court of Appeals recently decided *Campbell v Dep't of Human Services*, \_\_\_ Mich App \_\_\_; 2009 WL 4114149 (Docket No. 281592, November 24, 2009), holding that while acts of discrimination occurring outside of the applicable three-year statute of limitations period are not actionable, evidence of these acts may, in appropriate cases, be used as "background evidence" to establish a pattern of discrimination. *Id.*, slip op at 4. This decision, slated for publication, provides welcome direction to practitioners who handle employment discrimination claims and, absent Supreme Court intervention, perhaps finally resolves the debate as to the admissibility of evidence of discriminatory acts that occurred outside the limitations period.

## CAMPBELL ON "PRE-HEAT"

In order to understand and appreciate the significance of the *Campbell* decision, it is necessary to revisit *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263 (2005), amended 473 Mich 1205 (2005). In that case, the Supreme Court overruled the "continuing-violations" exception to the statute of limitations, first recognized in *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505 (1986). Under the continuing-violations exception, "an alleged untimely actionable event w[ould] allow consideration of and damages for connected conduct that would otherwise be barred." *Id.* at 510. In *Garg*, 472 Mich at 281-282, the Court held that the continuing-violations exception is inconsistent with MCL 600.5805 and is no longer a viable doctrine in Michigan.

In its original *Garg* opinion, the Michigan Supreme Court explicitly rejected the proposition that incidents that happened outside of the limitations period are admissible as background evidence in the now notorious footnote 14. However, the Court subsequently amended *Garg* and deleted the footnote without comment.<sup>1</sup> The amended *Garg* decision left practitioners retreating to the rules of evidence to support their respective positions as to the admissibility—on the plaintiffs' side—or the inadmissibility—on the defendants' side—of such evidence.

The *Garg* decision armed defense counsel with a weapon they used to object to acts that fell outside of the limitations period. Consequently, plaintiffs' counsel found themselves in the unenviable position of arguing motions to compel discovery to secure evidence of acts that while not themselves actionable, were necessary to establish the pattern of discrimination. Plaintiffs' attorneys argued that the removal of footnote 14 supported their contention that discovery and proofs at trial included acts outside the limitations period.

Subsequent to the amended *Garg* decision, the Court of Appeals decided *Ramanathan v Wayne State Univ Bd of Governors* (*Ramanathan I*), unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007, 2007 WL 28416 (Docket No. 266238), rev'd

in part on other grounds by *Ramanathan v Wayne State Univ Bd of Governors* (*Ramanathan II*), 480 Mich 1090 (2008). In *Ramanathan I*, the court considered the implications of *Garg*, as amended, observing:

... [T]he implications of *Garg* are unclear with respect to the admission of evidence in other cases. Although the Court in *Garg* placed some significance on the statute of limitations in MCL 600.5805 when reviewing evidence in that case, the question before the Court was whether the jury's verdict, based on alleged acts of retaliation, could be sustained under the standards for reviewing judgments notwithstanding the verdict. *Garg*, [472 Mich] at 271-272. The evidence was viewed in a light most favorable to the plaintiff to determine if she could establish a claim for unlawful retaliation occurring within the limitations period. *Id.* at 272, 278.

Despite the language in *Garg*, referencing limitations on the admissibility of evidence in that case, we cannot read the amended opinion so broadly as to exclude per se all background evidence of alleged discriminatory or retaliatory acts occurring outside the limitations period. Absent clear guidance in this regard from the Supreme Court, we conclude that this evidence is subject to the rules of evidence and other applicable governing law, and its admissibility is within the discretion of the trial court. [*Ramanathan I*, 2007 WL 28416 at \*3.]

While *Ramanathan I* provided plaintiffs with helpful authority for using acts outside of the three-year limitations period for purposes of establishing a pattern of discrimination, questions about discovery and admissibility seemingly remained unresolved and left practitioners wading in the broth, so to speak.

## SOUP'S ON: CAMPBELL v DHS

### A. *Campbell's* Procedural Background.

The plaintiff alleged that DHS discriminated against her on the basis of her gender in violation of the Elliott-Larsen Civil Rights Act ("ELCRA"), MCL 37.2101 *et seq.* More particularly, *Campbell* contended that her civil rights were violated when DHS passed her over for promotion and instead promoted a male. The parties agreed that the plaintiff's claim was governed by the three-year statute of limitations prescribed by MCL 600.5805(10).

The defendant moved for summary disposition, principally arguing that the plaintiff failed to present evidence of discrimination within the three-year limitations period. DHS contended that *Garg* mandated that acts occurring outside of the limitations period should not be considered "in order to support a claim based on an act that occurred within that period." *Campbell*, slip op at 2. The plaintiff argued that *Garg* does not "mandate the exclusion from evidence of acts outside the limitations period in order to show a pattern of discrimination, as long as the claim itself is based on an act within that period." *Id.*, slip op at 2.

The trial court rejected the defendant's "interpretation of *Garg*" in view of *Ramanathan I*, stating that it had discretion to consider acts occurring outside of the limitations period as "background evidence in order to establish a pattern of discrimination." *Campbell*, slip op at 2. In applying the burden-shifting analysis set forth in *McDonnell Douglas Corp v Greene*, 411 US 792, 802-804 (1973), the trial court held that the plaintiff presented sufficient evidence to establish a prima facie case and that a genuine issue of material fact existed as to whether unlawful discrimination was a motivating factor in the de-

fendant's decision not to promote the plaintiff.<sup>2</sup> *Campbell*, slip op at 2. The trial court also found that while the defendant articulated a legitimate, nondiscriminatory reason for failing to promote the plaintiff, admissible evidence, including acts outside the limitations period, sufficiently supported a rational inference of discrimination. Consequently, the trial court denied the defendant's motion for summary disposition. Following a two-day trial, the jury awarded the plaintiff \$328,000 in economic damages and \$50,000 in non-economic damages. Thereafter, DHS appealed.

### B. *Campbell* Holds That Acts Outside The Limitations Period, While Not Actionable, May Be Considered As "Background Evidence" For Timely Claims.

For purposes of this article, the relevant issue on appeal was whether the acts occurring outside the three-year limitations period should have been excluded by the trial court. Because neither party disputed that a plaintiff cannot recover for any injuries that occurred outside the three-year limitations period for ELCRA claims under *Garg*, the issue centered on whether evidence of acts or events outside the limitations period can be considered as "background evidence to establish a pattern of discrimination in order to prove a timely claim." *Campbell*, slip op at 3. The *Campbell* Court recognized that *Garg* did not definitively decide this issue. The court further observed that there is a distinction between allowing recovery for injuries that occur outside the limitations period and merely allowing evidence of an injury to be used as background evidence to demonstrate a claim associated with an injury that occurred during the limitations period. *Id.*, slip op at 3-4. Next, the Court of Appeals turned to *Ramanathan I*, noting in part that a "per se rule [of exclusion] cannot be inferred from *Garg* given the Supreme Court's amendment of the opinion to delete footnote 14, which expressly sanctioned such blanket exclusion of evidence in claims under the CRA." *Id.*, slip op at 4.

In *Ramanathan II*, the *Campbell* Court observed, the Supreme Court reversed *Ramanathan I* in part and remanded the case to the trial court without addressing the "background evidence" portion of the opinion. Justice Markman, in his lengthy dissent in *Ramanathan II*, took issue with the majority's silence and raised concerns about the trial proceeding without a determination as to the scope of admissible evidence. *Ramanathan II*, 480 Mich at 1097 (Markman, J., dissenting); *Campbell*, slip op at 4.

*Campbell* held that "[g]iven the absence of a 'bright-line' rule set forth in *Garg*, given the deletion of the footnote, and given the Supreme Court's failure to address the 'background evidence' issue in *Ramanathan II*," it declined to interpret *Garg* to hold that injuries outside of the limitations period may never be used as evidence in support of a claim for an injury occurring within the limitations period. *Campbell*, slip op at 4. The *Campbell* Court instead adopted the reasoning of the court in *Ramanathan I*, holding "that acts occurring outside the limitations period, although not actionable, may, in appropriate cases, be used as background evidence to establish a pattern of discrimination." *Campbell*, slip op at 4. Such evidence, the court continued, "is subject to the rules of evidence and applicable governing law, and may be admitted under the sound discretion of the trial court." *Id.*, slip op at 4.<sup>3</sup> The Court of Appeals was careful to point out that it was not "resurrect[ing]" the continuing-violations exception. *Id.*, slip op at 4. Nevertheless, it found "no reason why the use of such acts as background evidence should not be subject to Michigan's evidentiary rules and the trial court's discretion" as to admissibility. *Id.*, slip op at 4-5.

Consequently, the court in *Campbell* held that the trial court did not err when it concluded that acts outside the limitations period may

be considered as background evidence to establish a pattern of discrimination. The court noted that, in view of the background evidence's probative value, the trial court did not abuse its discretion in admitting such evidence and the Court of Appeals affirmed the trial court's denial of the defendant's summary disposition motion.<sup>4</sup>

### IS CAMPBELL TO YOUR LIKING OR ARE YOU SENDING IT BACK TO THE KITCHEN?

*Garg*, as amended, left the question of discovery and admissibility of acts outside of the limitations period open. However, in view of the undisturbed holding regarding "background evidence" in *Ramanathan I*, *Campbell* does not necessarily "make new law." But, *Campbell* should not be discounted. Indeed, *Ramanathan I* is an unpublished opinion and thus, while persuasive, it is not binding under the rule of *stare decisis*.<sup>5</sup> *Campbell*, which has been designated for publication by the Court of Appeals, constitutes binding precedent and its "background evidence" ruling will undoubtedly assist plaintiffs in (i) obtaining discovery for purported acts of discrimination outside of the three-year limitations period for ELCRA claims, and (ii) allowing them to proffer relevant evidence of "time-barred" acts to establish a pattern of discrimination. Correspondingly, *Campbell* will make it difficult for defendants to limit discovery and proofs at trial to the three-year period preceding the allegedly actionable conduct.

Plaintiffs will still have to demonstrate the probative value of the acts that occurred outside the statutory time period and trial courts will retain their discretion to admit only relevant "background evidence." Further, courts will no doubt wrestle with the appropriate jury instruction regarding the weight of such evidence. Still, *Campbell* is assuredly a welcome decision to "hungry" plaintiffs. Defendants, on the other hand, may have trouble digesting *Campbell* and may even ask the Supreme Court to give it a "thumbs down" review.

### — END NOTES —

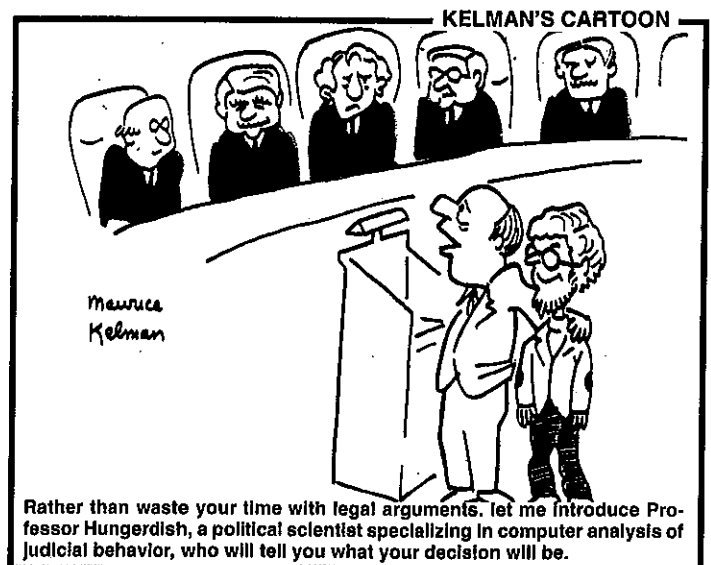
1 473 Mich 1205 (2005).

2 The *McDonnell Douglas* burden-shifting analysis was adopted in Michigan in *Harle v Ford Motor Co*, 464 Mich 456, 462-463 (2001).

3 Citing *Rathburn v Autozone, Inc*, 361 F3d 62, 76 (CA 1, 2004), the Court of Appeals observed in a footnote that federal courts allow time-barred acts as "background evidence" for purposes of considering "timely acts" of discrimination. See also *Nat'l R.R. Passenger Corp v Morgan*, 536 US 101, 113 (2002) (Title VII does not "bar employees from using prior acts as background evidence in support of a timely claim of discrimination").

4 The *Campbell* Court denied the defendants' other bases for appeal. *Campbell*, slip op at 5-9.

5 See, e.g., MCR 7.215(C)(1); *Superior Hotels, LLC v Mackinac Twp*, 282 Mich App 621, 640 (2009). ■



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