UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BBF ENGINEERING SERVICES, P.C.
a Michigan Corporation, and
BELLANDRA FOSTER, an individual

PLAINTIFFS,

v.

CASE NO.: 11-CV-14853

HON. NANCY G. EDMUNDS

THE HONORABLE RICK SNYDER, in his capacity as GOVERNOR OF THE STATE OF MICHIGAN, KIRK T. STEUDLE, in his capacity as DIRECTOR of the MICHIGAN DEPARTMENT of TRANSPORTATION, VICTOR JUDNIC and MARK STEUCHER

DEFENDANTS.

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PLAINTIFFS BBF ENGINEERING SERVICES, P.C. AND BELLANDRA FOSTER'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

According to Greek mythology, a chimera is a monstrous fire-breathing beast, comprised of the parts of three different animals: a lion, a serpent and a goat, even though the chimera itself, however, is just one creature. Defendants Victor Judnic ("Judnic"), Mark Steucher ("Steucher"), the Honorable Rick Snyder ("Snyder"), Kirk Steudle ("Steudle") and Michigan Department of Transportation ("MDOT") (collectively "Defendants") comprise the chimera that Plaintiffs BBF Engineering Services, P.C. ("BBF") and Bellandra Foster ("Foster") (collectively "Plaintiffs") must battle. Defendants' motion offers a continuous series of themes that: (a) neither Judnic, Steucher, Snyder, Steudle, nor MDOT are responsible for their actions; (b) neither Judnic, Steucher, Snyder, Steudle, nor MDOT are aware of the actions of or have any control over their coterie of cohorts and conspirators; neither Judnic, Steucher, Snyder, Steudle, nor MDOT should have any responsibility for their concomitant acts of discrimination. This chimera is the illusion that Defendants would like this court to believe.

Defendants' have proffered several fragile filaments in their most recent Motion for Summary Judgment. First, Defendants Snyder and Steudle lacked notice of the amended complaint. Second, the evidence supporting subsequent discrimination and intent to discriminate must be excluded. Third, parts of Defendants' enterprise are justifiable and do not give rise to liability. Fourth, Defendants' acts of discrimination should be disregarded. Fifth, Plaintiffs' calculations of damages are insufficient. Sixth, despite this Court's Order to the contrary, Defendants are not liable in their individual capacities under the Whistleblower Protection Act, MCL § 15.362. The facts belie Defendants' claims. Therefore, Defendants' motion for Summary Judgment should properly be denied.

FACTUAL BACKGROUND

Plaintiff Foster is a black female professional engineer, licensed by the State of Michigan since 1987. Very likely, given her 29 years of experience, she was the first black female professional engineer licensed by the State of Michigan. She also earned a PhD in Civil Engineering. At all times relevant to discovery in this case and this complaint, she was the smartest person in the room, which likely led to her untimely professional demise. Plaintiff Foster is the sole shareholder of BBF. BBF provides civil engineering services to various clients, including the MDOT. BBF performed work for MDOT since 1997. BBF is certified as a Disadvantaged Business Enterprise ("DBE").

While Defendants have destroyed an entire forest full of trees trying to suggest that there are no genuine issues of material fact in this case (which is false by weight and volume alone) the basic facts of this matter remain unchanged and, if anything, have been proven as true. First, Defendants have done nothing to refute the conclusions of the report issued by Mary Finch (Civil Rights Program Manager) on behalf of the United States Federal Highway Administration ("FHWA") under Title VI that Plaintiffs were discriminated against and have been subjected to disparate treatment. (See Exhibit 1) This report, which was not authored by Plaintiffs, remains unrefuted and at a minimum creates a genuine issue of material fact and a hurdle that Defendants cannot overcome. Defendants elected not to pursue the depositions of the investigators after the Government objected under 49 CFR §§ 9.1-9.19. The findings of the report are only exacerbated and coroborated by the notes of interviews of MDOT personnel and the depositions of the key witnesses.

Defendants have offered the typical "I do not recall doing those things" answers. For example, Judnic testified that he may have used the combination of words over a span of seven

(7) years and Ms. Caldwell merely plucked a word a year out of thin air to draw her conclusions. (Exhibit 2: Judnic Dep., p. 157-158).

Second, the witness to Defendant Judnic's claims that no woman should be making that kind of money, Marilyn Caldwell acknowledges in her deposition that Mr. Judnic did in fact make this statement. (Exhibit 3: Caldwell Dep., pp. 35-38). More importantly, Ms. Caldwell noticed that BBF's personnel were no longer around after the statement was made. (Exhibit 3: Caldwell Dep. pp. 35-38) And while Ms. Caldwell was browbeaten by the Attorney General and MDOT into softening her story, she does admit in her deposition that the only person who fits Judnic's bill in the Detroit TSC was Bellandra Foster. This admission was conceded despite the heavy handed attack that the State levied against Ms. Caldwell and the claims of privilege the State wants to now assert as a matter of convenience even as it claims non-involvement by the State. (Exhibit 3: Caldwell Dep., pp. 13-15).

The true nature of the incendiary and insidious discrimination and disparate treatment wrought by Mr. Judnic is demonstrated by Mr. Judnic's calculated pattern to destroy Love Charles. Defendants take great pains to now attack the credibility of Mr. Charles, a witness that they subpoenaed. In his deposition, Mr. Charles makes clear that he understood and Ms. Foster understood that he was the key to the destruction of Plaintiffs' business. Mr. Charles understood that Mr. Judnic and his team were engaged in a calculated and orchestrated process to destroy him and to force him out. (Exhibit 4: Charles Dep., pp. 45-49, 69-72) Mr. Charles stated irrefutably that Mr. Judnic understood that if he got rid of Mr. Charles the domino effect would eliminate Plaintiffs from being meaningful participants in MDOT work assignments.

Defendants' response is the tortured affidavit of Deanna Papanek, who now asserts a host of undefined deficiencies regarding Mr. Charles' work that are mere subterfuge. First, nowhere

are these deficiencies defined. When Plaintiffs requested a list, Judnic refused to provide it. (Exhibit 2: Judnic Dep., pp. 141-143). Moreover, he refused to discuss it with Mr. Charles. (Exhibit 4: Charles Dep., pp. 29, 41 and 42). Second, it was Mr. Charles who trained Judnic and enabled him to be certified. (Exhibit 4: Charles Dep., pp. 28 and 59 and 60). Third, if Charles was that horrible, why did MDOT independently engage him after Judnic forced him out. (Exhibit 4: Charles Dep., p 16).

Papanek is hardly in a position to cast aspersions. She succeeded to the position from which Charles was ousted. While in the position, she managed to prepay contractors millions of dollars that still have not been recovered or accounted for by anyone. (Exhibit 5: Papanek, Meeting Notes at 7.20.1) Her documented blunders left Mr. Dargin in a state of bewilderment. (Exhibit 6: Dargin Dep. pp. 35-37). With all of her complaints, neither Plaintiffs nor Mr. Charles heard anything about her complaints before the "rough" July 18, 2008, meeting.

Fourth, Defendants' tactics with respect to Defendant Steucher are equally deplorable. While now asserting that the final evaluation form for BBF Engineering was a consensus through the affidavit of one additional member of the scoring team (Mr. Kostinen), Defendants never take a necessary step of refuting Plaintiffs' contentions that Mr. Steucher walked into the room, looked at the original score sheets, stated that, "Oh no I hate her" [Ms. Foster] and began to change the score sheets to basically eliminate Plaintiffs from contention on the contract in question. The testimony of Cedric Dargin on this point is unrefuted. (Exhibit 6: Dargin Dep. p. 81). While Defendant Steucher now asserts that he cannot remember these events, and that there could not have been any scoring done without the complete team being in place, Mr. Dargin's testimony on this point is unrefuted. Moreover, if Defendants truly are going to offer Mr. Kostinen's testimony to contend that there was a consensus score, Kostinen should be able to

state unequivocally that Mr. Dargin's testimony was incorrect. This simply did not happen. Mr. Kostinen, who was Steucher's direct report, does not do that. Instead, he verifies that there was an initial set of scores and that Steucher returned and altered the landscape out of discriminatory animus. Mr. Dargin's testimony stands unrefuted and demonstrates that Mr. Steucher intentionally discriminated against Plaintiffs.

Fifth, the invidious and destructive nature of Defendants' discriminatory tactics is perhaps reflected in the ease at which Defendants and their counsel operate behind the scenes to attack and bring to bear the full weight of the government against an innocent contractor like BBF Engineering. While disclaiming all knowledge of BBF Engineering, or retaliatory conduct, emails from the State of Michigan clearly demonstrate that the State issued an all points bulletin asking everybody in the State to disclose any information that they might have about BBF Engineering. (Exhibit 7: Multiple Emails).

While MDOT's audit division disclaims any knowledge of the current litigation or any interrelationship between the current litigation and the audit of BBF Engineering, emails are exchanged within MDOT all demonstrate something to the contrary. Linda Shepard was merely the final tip of the spear designed to end the life of BBF as an MDOT consultant. While Ms. Shepard denies this claim, the all points bulletin to all of MDOT belies this denial. (See Exhibit 7) Furthermore, Mr. Judnic admits in his deposition that he did talk to Ms. Shepard's direct report Chris Shaefer. Of course, he again conveniently does not recall the subject of the conversation.

Finally, despite the all points bulletin and the circling of the wagons after the litigation commenced, MDOT and its minions know that they have wronged Plaintiffs. Indeed, it was MDOT's personnel that advised Ms. Foster in an email that trampling of her rights was

actionable under Title VI. The attached email to Ms. Foster from Pat Collins referring her to Title VI and to Mary Finch, FHWA, Civil Rights Program Manager proves that Plaintiffs' claims are way beyond speculation. (Exhibit 8: Collins' Email).

The sole motivation of the auditing department was a conclusion that indeed BBF and its principal Bellandra Foster was a consultant that was making too much money. The attack comes full circle and BBF and Bellandra Foster are simply eradicated and eliminated as Shepard and Judnic joined hands and drove the final nail of BBF's coffin destruction while Judnic moves on to a plush position with another contractor to whom he referred millions and millions of dollars of business in the Detroit TSC before leaving MDOT. At a minimum, BBF deserves the opportunity to present this sordid story to the trier of fact.[1]

STANDARD OF REVIEW

Fed. R. Civ. P. 56(c) empowers the court to render summary judgment "forthwith if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to judgment as a matter of law." (emphasis added). In evaluating a motion for summary judgment the court must look beyond the pleadings and assess the proofs to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). If the moving party carries its burden of showing there is an absence of evidence to support a claim, then the non-moving party must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-325, 106 S. Ct. 2548, 91 L.Ed. 2d 265 (1986).

[1] While labeled a motion for summary judgment, presumably Defendants' motion is a motion for partial summary judgment because it does not address Plaintiffs' claims under 42 U.S.C. § 1981, which has been held to protect minority owned companies. *Gersman v Group Health Assn, Inc.*, 289 U.S. App D E 332, 931 F2d 1565 (DC Cir. 1991)

Substantive law governs which facts are material for purposes of summary judgment: "[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986).

> A fact is material" and precludes grant of summary judgment if proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by parties and would necessarily affect [the] application of appropriate principle[s] of law to rights and obligations of parties. *Bunch v. Long John Silvers, Inc.*, 878 F.Supp 1044, 1046 (E.D. Mich. 1995), quoting *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984).

To defeat summary judgment motion, the nonmovant "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248, citing *First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed. 2d 569 (1968).

> [T]he issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 248-49, quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed. 2d 569 (1968).

See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59, 90 S.Ct. 1598, 26 L.Ed. 2d 142 (1970) (where the court held summary judgment improper where "moving parties submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury... to infer from the circumstances' that there had been a meeting of the minds.") Furthermore, the *nonmoving party need not produce evidence in the form admissible at trial, such as an affidavit, in order to avoid summary judgment. O-So Detroit, Inc. v. Home Ins. Co.*,

973 F.2d 498, 505 (6th Cir. 1992), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed. 2d 265 (1986) (Emphasis added).

Generally, the moving party's evidence supporting a motion for summary judgment is closely scrutinized. However, the non-moving party should be granted more indulgence by the Court: *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255; *Board of Ed. Of City of Cincinnati, v. Dept. of Health Ed. and Welfare, Region 5*, 532 F.2d 1070, 1071 (6th Cir. 1976) (court must construe evidence in a light most favorable to the party opposing motion), citing *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 452 (6th Cir. 1962)).

The purpose of summary judgment, as a procedural device, is not to permit the court to decide issues of fact, but to decide whether any material issues of fact are actually in dispute. *Kelly v. Carr*, 567 F.Supp. 831, 835 (W.D. Mich. 1983), citing *Bohn Aluminum & Brass Corp. v Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. The inquiry performed by the trial judge is the "threshold inquiry of determining whether there is the need for a trial-whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Anderson*, 477 U.S. at 255.

ARGUMENT

I. This Court Should Properly Deny Defendants Governor Snyder and Director Steudle's Motion For Summary Judgment As Defendants Had Constructive Notice of the Complaint.

First, no second summons was issued for this second amendment. The parties were really no different. It was the Governor for the State and Steudle for MDOT. Defendants never affirmatively stated that they were not defending these parties.

Second, the Sixth Circuit Court of Appeals has held that the notice required by Fed. R. Civ. P. 15(c)(3)(A) can be either actual or constructive. *Berndt v. Tennessee*, 796 F.2d 879 (6th Cir. 1986). The *Berndt, supra,* court discussed a "non-exhaustive" list of factors[2] to be considered in determining whether a newly-named defendant had constructive notice of a lawsuit. *Berndt, supra, at 884.* These factors include the relationship of the new defendants to the defendant(s) originally named, whether the same attorney represented both original and new defendants, and whether the new defendants are officials of the original defendant. *Berndt* at 884. These factors are evident here. First, we have privity of relationship between all the Defendants, both the original and new defendants. Director Steudle is the Director of MDOT. MDOT's webpage confirms this:

> Steudle oversees MDOT's more than $3 billion budget and is responsible for the construction, maintenance and operation of nearly 10,000 miles of state highways and more than 4,000 state highway bridges. He also oversees administration of wide range of multi-modal transportation programs statewide. MDOT currently has 2,500 employees statewide. (Exhibit 9: MDOT webpage).

There is also a clear undeniable relationship between Defendants Snyder and Steudle. "On January 1, 2011, Governor Rick Snyder appointed Kirk T. Steudle as the State Transportation Director." (Exhibit 9: MDOT webpage).

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[2] We also emphasize that although the above are appropriate considerations for the district court, they are only guides. *Berndt v. Tennessee*, 796 F.2d 879, 883-884 (6th Cir. Tenn. 1986).

Second, the same attorney, the Michigan Attorney General represents both the original and new defendants. By the filing of this motion on behalf, Defendants Snyder and Steudle, it is clear that Michigan Attorney General represents the new defendants. Notwithstanding, the 2010 Biennial Report of the Attorney General of the State of Michigan, defense counsel own's published and public report, confirms that the Attorney General represents the governor and the Michigan Department of Transportation. "Michigan's Supreme Court has recognized that one of the "primary missions" of the Attorney General is to give legal advice to the Legislature, and to departments and agencies of state government." (Exhibit 10: Attorney General Biennial Report, p. 1ix). The Attorney General reinforces his representation of MDOT in his own report:

> Attorneys in this division represent MDOT and each of its agencies in all lawsuits and administrative proceedings... The areas of litigation range from contract and tort litigation; to employment/discrimination claims; to lawsuits to collect damages from motorists, insurance companies and other responsible for damage to MDOT property; to appellate litigation in all areas of civil practice. (Exhibit 10: Attorney General Biennial Report, p. 219).

The Attorney General's representation of the Governor of Michigan is mandated in Michigan's Complied Laws. The Attorney General:

> (1) "shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party... may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested." MCL 14.28
> (2) "prosecute and defend all suits relating to matters connected with their departments." MCL 14.29
> (3) "shall keep, in proper books to be provided for that purpose at the expense of the state, a register of all actions or demands prosecuted or defendant by him in behalf of the people of this state, and of all proceedings had in relation thereto..." MCL 14.34
> (4) "is authorized and empowered to intervene in any action heretofore or hereafter commenced in any court of the state whenever such intervention is necessary in order to protect any

> right or interest of the state, or of the people of the state." MCL 14.101.

Third, and finally, Governor Snyder and Director Steudle are "officials of the original defendant" MDOT and the State of Michigan. *Berndt, supra,* at 884. (Exhibit 9: MDOT webpage). (Exhibit 10: Attorney General Biennial Report, p. 1ix). Governor Snyder is at the apex of the state government hierarchy for the State of Michigan with Steudle, Judnic and Steucher following. As the Attorney General represents the Governor and the Director of MDOT, service of the amended pleadings is properly made upon the Attorney General.

Defendant cites *Turner v. City of Taylor*, 412 F.3d 629 (6th Cir. 2005) as holding that an attorney's assumption that opposing counsel accepted service of an amended complaint on behalf of newly named defendants did not constitute excusable neglect. *Turner v. City of Taylor, supra.* This is mischaracterization of the case. In *Turner, supra,* the court elaborated that defense counsel did not have a practice of accepting service, much less representing the newly-named defendants, which is not true here.

> Plaintiff's conduct was inexcusable. The 120 day rule is explicit, and defense counsel did nothing to convey a "practice" of accepting service on behalf of newly-named Defendants. Moreover, because Plaintiff purported to sue the newly named Defendants in their individual capacities, Plaintiff knew or should have known that defense counsel was not presumptively authorized to accept service on their behalf. *Turner, supra* at 651.

The Attorney General without question has an "established practice" of representing and a duty to represent both the Governor and the Director of MDOT. *Turner, supra,* is inapplicable to this case.

A finding of constructive notice is required in the present case. Ultimately, the question of constructive notice is a patently factual inquiry. *See Doe v. Sullivan County, Tenn.*, 956 F.2d 545, 552 (6th Cir. 1992). This factual inquiry overcomes Defendants' motion for summary

judgment. Defendants' Motion for Summary Judgment should be denied since Defendants Snyder and Stuedle had notice of the complaint. Moreover, the Attorney General represented both MDOT and the State at all stages leading up to this point. It should not be allowed to switch horses at this late date.

II. This Court Should Properly Deny Defendants' Motion for Summary Judgment as the Three Year Statute of Limitations for 42 U.S.C. § 1983 Claims Does Not Bar Evidence Supporting Subsequent Discrimination Claims And Intent to Discriminate.

Plaintiffs respect this Court's determination that Plaintiffs' claims against Defendant Judnic before November 3, 2008 are barred by the statute of limitations." (Exhibit 11: 2/6/12 Order, p. 11) although the evidence shows that these contracts remained open well after the billing was completed and the contracts are still being audited by MDOT because they are not closed. Defendants now attempt to erect a protective wall around Defendants' misdeeds which occurred both prior to and after November 3, 2008 and prevent Plaintiffs from establishing the pattern of wanton discrimination and substantiating Plaintiffs' damages.

Fortunately, this nation's courts have not turned a blind eye to past acts of discrimination which have future consequences.[3] "Plaintiff has the burden of proving purposeful discrimination on the basis of race. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272; 99 S. Ct. 2282; 60 L.Ed.2d 870 (1979). However, "determining the existence of discriminatory purpose 'demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Rogers v. Lodge*, 458 U.S. 613, 618; 102 S.Ct. 3272; 73 L.Ed.2d 1012 (1982) and *Burks v. Benton Harbor Area School Dist.*, 1989 U.S. Dist. LEXIS 17915 (W.D. MI 1989). To establish such background circumstances, a plaintiff can present evidence of defendants' unlawful consideration of race as a factor justifies a suspicion that there were

[3] Defendants' reasoning is illogical and if accepted would eliminate any and all programs remedying past acts of discrimination.

incidents of capricious discrimination. *Jamison v. Storer*, 830 F.2d 194 (6th Cir. 1987). Acts outside of the statute of limitations may be used to authenticate and establish a pattern of discrimination.

> [W]e decline to read Garg as holding that injuries occurring outside the limitations period may never be used as evidence to support a claim for an injury occurring within the limitations period. We instead choose to adopt the reasoning in Ramanathan I and hold 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. This evidence is subject to the rules of evidence and applicable governing law, and may be admitted under the sound discretion of the trial court. *Campbell v. Dep't of Human Servs.*, 286 Mich. App. 230, 238 (Mich. Ct. App. 2009). (Emphasis added).

Defendants' present no legal authority for their creative attempt to limit the evidence of discrimination. In fact, in an analogous situation, our Congress, in response to the infamous *Ledbetter* decision, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007), remedied any potential misunderstandings regarding past evidence of discrimination that could be potentially barred by the statute of limitations by the Lilly Ledbetter Fair Pay Act of 2009 ("Fair Pay Act"), which states in pertinent part:

> [A]n unlawful practice occurs . . . when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.
> Pub. L. No. 111-2, § 4, 123 Stat. 5, 6 (emphasis added); see also 29 U.S.C. § 626(d)(3).

Thus, the Fair Pay Act provides that the statute of limitations for an ADEA claim begins to run each time an employee is paid pursuant to a "discriminatory compensation decision." See also *Pratesi v. New York State Unified Court System*, 2010 WL 502950, at *6 n. 2 (E.D.N.Y.

2010) ("The Ledbetter Act deems each paycheck issued pursuant to a discriminatory compensation decision or pay structure an independent, actionable act."). The application of past background circumstances, to establish a discrimination claim has been accepted by this court. In Title VII reverse discrimination cases, the plaintiff may establish the first prong by showing there are "background circumstances" indicating the defendant employer is that "unusual employer who discriminates against the majority. *Sutherland v. Mich. Dep't of Treasury*, 344 F.3d 603, 614 (6th Cir. 2003) (citations omitted). *Thompson v. City of Lansing*, 410 Fed. Appx. 922, 932 (6th Cir. 2011).

a. Changed Contracts

With respect to contract 2008-0044, Defendant Judnic acknowledged that the Plaintiff BBF's evaluation scores were being rendered well into 2010. Plaintiff received its final evaluation score on June 2, 2010, for which her discrimination claims are based. In short, the tail to this dog extended well beyond the arbitrary date into relevant time-frames. As shown by Ms. Collins email, Ms. Foster's knowledge of her rights and the claims did not surface until July 2010. This is within the statute of limitations period. Ms. Collins' notice to Ms. Foster was in 2010. Defendant Judnic in his deposition confirmed:

> Q. And this was a meeting that was requested after she got the final evaluation scores on the 2008-0044 contract?
> A. When was the date of the final evaluation of the 004?
> Q. I believe it was June 2010, June 2nd of 2010.
> A. I believe July of that same year is when we had scheduled a meeting, roughly one month later that was postponed.
> (Exhibit 2: Judnic Deposition, p. 141).

Correspondingly, with regard to contract 2006-0490, Defendant Judnic also acknowledged that the work continued through 2009, well after the November 3, 2008 bar.

> Q. And do you know when that contract was closed out?
> A. I am guessing – I don't know. No, I really don't know.

Q. 2008, 2009?
A. If you're looking for a year, it will be late '08 or early or mid '09, but I don't know.
(Exhibit 2: Judnic Deposition. p. 95).

The corresponding problematic evaluations which Defendants' admit constitute an important part of the process of evaluation for future work extended well past the operative date. Mr. Voigt was writing evaluations in 2011.

b. Love Charles

Plaintiffs' allegations regarding the attack on Love Charles and the critical July 18, 2008 meeting also survive any bar. Mr. Charles left Plaintiff BBF's employ in December 2008 after being forced out by Judnic. Both Mr. Charles and Ms. Foster testified conclusively on this point. Mr. Charles was working on all of the relevant contracts and Judnic forced him out to eliminate Plaintiffs. (Exhibit 12: Foster Deposition, p. 94). (Exhibit 4: Charles Deposition at pp. 45-49 and 69-72) This would make the operative date December 2011. While Mr. Charles is now suddenly and conveniently incompetent, MDOT subsequently hired Love Charles as an independent contractor. (Exhibit 12: Foster Deposition, p. 94). (Exhibit 4: Charles Deposition at p. 16). Plaintiff Foster testified that because the ambush perpetrated at the July 18, 2008 meeting, she postponed a subsequent meeting with Judnic (Exhibit 12: Foster Deposition, p. 112). Judnic himself sent an email acknowledging it was a "rough" meeting (Exhibit 13) which Foster sent to Screws (who denies knowing anything). Thus, events prior to November 3, 2008 are critical in providing a foundation of subsequent discrimination. Defendants' motion on this issue should be denied. The operative act did not occur until December 2010.

c. Mark Steucher

Clearly, the claims regarding Steucher withstand any statute of limitations bar.

III. This Court Should Properly Deny Defendants' Motion for Summary Judgment as Defendants Judnic and Steudle Are Liable For the Actions of MDOT And Not Entitled To Qualified Immunity.

Defendants' argue that under 42 U.S.C. § 1983, the plaintiff show that the employer made an adverse employment decision with discriminatory intent and purpose and that Defendants are entitled to qualified immunity. (Defendants' Motion for Summary Judgment, p. 15). Defendants' claims ignore the procedural history and facts of this case. This court previously granted Defendants' motion to dismiss Plaintiff's Title VI claims against Defendants' Steucher and Judnic, noting that "both no longer occupy the office against which the official capacity claim is being raised." (Exhibit 11: 2/6/12 Order, p. 8). In any event, there is a plethora of direct evidence of discrimination in this case that does not even get this Court to any form of burden shifting. Defendants' motion ignores some fundamental truths that exist from the cases they cite. First, in *Rondigo, LLC v Township of Richmond*, 641 F.3d 673, 681-682 (6th Cir. 2011), the Court held that:

> The *Equal Protection Clause* prohibits discrimination by government which either burdens a fundamental right, targets a suspect class or intentionally treats one differently than others similarly situated without any rational basis for the difference.

Even though this Court concluded the interface of 23 U.S.C. § 324 and 42 U.S.C. § 2000e did not protect "gender" under Title VI, the Honorable Stephen Murphy in *Raisin Landscape and Associates v Michigan Department of Transportation,* 2011 U.S. Dist. Lexis 155270 (E.D. MI 2011) did find that: "MDOT requires that prime contractors enter into a contract with MDOT which mandates that the contractors comply with Title VI, 23 U.S.C. § 324 and other non-discrimination laws". *Id* at p.*2. Both sides to a contract are bound. MDOT's Title VI information boldly asserts that it will not discriminate in "its selection or retention of contractors....on the basis of their race, color, national origin or sex."

A. Plaintiffs Have Presented Direct Evidence of Discrimination.

Through the continued discovery, Plaintiff has obtained evidence substantiating material facts of discrimination. Reviewing the whirlwind of evidence in favor of Plaintiffs, we have:

1. MDOT employees recognized the fact of discrimination and the viability of Plaintiffs' claims under Title VI. (See email from Pat Collins to Plaintiff Foster. (Exhibit 8)). Defendants' belated denials are simply orchestrated obfuscations. For example, Rita Screws' affidavit asserts that she never was made aware of any alleged claims or she would have commissioned an investigation. However, she orchestrated a meeting with Ms. Foster and Mr. Greg Johnson, Region Engineer where Mr. Judnic's attendance was hotly contested because of Plaintiffs' concerns about discrimination and retaliation. (See Exhibit 14). The issue is not about which lie but how many lies Defendants will offer. Defendants were told to obfuscate the truth.

2. Prior history of discrimination. Paul Cristini, an MDOT employee, filed an MDOT Internal Complaint against Victor Judnic on or about July 25, 2008, also alleging discrimination, harassment and hostile work environment. (Exhibit 15: MDOT 000048). Mr. Judnic when asked about such complaints denied that there were any. (Exhibit 2: Judnic Dep. pp. 58-60).

3. Discriminatory Treatment. Plaintiffs' have continually argued about the shifting bar for evaluating requests for proposals. In the one of the more blatant situations, contract 2006-0490, Defendant Judnic notified Plaintiffs that the previously awarded contract was going to be rebid. In contrast, Wade Trim Associates, a non-minority firm, received the opposite treatment on a contact award it received. In the Central Sections Review Team ("CSRT") meeting notes of January 25, 2008, CSRT approved Wade Trim's selection for full construction

engineering services on Interstate, U.S. and Michigan routes in the Metro region. However, Wade Trim was not qualified, as it failed to have the necessary prequalifications. In order to assist the non-minority firm, Defendants adjusted the standards. "This recommended vendor did not meet the prequalification classifications and so the project manager requested that the job be reposted for one week with Traffic & Safety Services removed as a secondary classification." (Exhibit 16: MDOT 7221-7230). Wade Trim Associates, Inc. was again awarded the contract. The process is wholly arbitrary and capricious.

Similar examples are rampant everywhere. Great Lakes Engineering was supplied with outside engineers to be able to fully bill its contract, while BBF was sending emails saying it had City of Detroit residents available for the Southfield Freeway project. (See Exhibit 17) HNTB rejected BBF's overtures in favor of a white female owned firm. Then, MDOT and consultant project engineers orchestrated an entire plan to supply Great Lakes Engineering with inspection staff.

4. USDOT Confirmation of Discrimination. U.S. Department of Transportation, Federal Highway Administration investigation of MDOT and its employees, confirmed the discrimination against Plaintiffs. The U.S. Department of Transportation, Federal Highway Administration Michigan Division October 18, 2011, correspondence to Defendant Steudle advised that after a complete investigation of the violations of Title VI of the Civil Rights Act, "Ms. Foster was not treated fairly in the procurement process by MDOT." (Exhibit 18: MDOT 7484). Further, "We encourage you to ... work with Ms. Foster on settlement of her claims." (Exhibit 19: MDOT 7484). The correspondence admonishes MDOT to repair its department, "we are requesting that you form a process improvement team aimed at strengthening MDOT's monitoring of the consulting/service contract award process," and that a Title VI coordinator be

included on the team. (Exhibit 18: MDOT 7484). This report and its conclusions stand unrefuted.

5. Implausible rejection of over 29 of Defendants' RFPs. From 2007 through September 2011, MDOT rejected over 29 projects for which BBF Engineering Services, P.C. submitted RFP's. (Exhibit 19: MDOT 7494). Defendants gloss over this and the fact of Plaintiff BBF's selection as MDOT's contractor of the year in 2008. (Exhibit 2: Judnic Deposition, p. 122-123). Judnic even precluded BBF from enhancing its staff and training younger engineers for free. Love Charles testified that Judnic and his Team were steering engineers away from BBF and preventing the training. (Exhibit 4: Charles Dep. pp. 62 and 62).

6. MDOT's own admissions regarding discrimination. Gregory Johnson's stated, "The two folks identified as culpable in this incident have both left the department. I have a team... to address internal and external concerns with the existing process." (Exhibit 20: MDOT 7649). This claim belies the realities since both parties are working for contractors who perform MDOT work and who subcontract with other consultants. Plaintiffs have in fact been faced with working with Judnic at his new employer HNTB. Indeed, HNTB has even suggested other methods for working together (See Exhibit 21). BBF still labors under a cloud of discrimination. Defendants do not assert that it happened before November 3, 2008.

7. Defendant Steudle's own acknowledgment of discrimination against Plaintiffs. In memorandum to MDOT officials, the supposedly oblivious Mr. Steudle writes: "Please see the attached and take corrective action. Please consult the AG's office as you have been. Seems to me, on a larger scale, we... need a revamp of the consultant selection process again." (Exhibit 20: MDOT 7649). This is the same Defendant Steudle who Defendants now aver had no knowledge or notice of the underlying lawsuit.

8. MDOT's investigation and interview of its employee, Cedric Dargin.

Mr. Dargin's interview and his deposition confirm Plaintiffs' complaints that Defendants ambushed her because of her race and gender during selection team meetings.

> Dargin: I was invited to sit on that selection team. Mark Steucher was the team leader. We were just getting started when Mark got a telephone call and had to leave the team meeting because he was scheduled for a meeting FHWA that day. He stated that the wanted the team to proceed without him and he would catch up with once he returned. By the tem he returned the team had already made their selections. Mark was gone probably about an hour and forty-five minutes. Upon reviewing the results he was giving his opinions of the teams choices. And on one of the contracts, the team did select BBF as number 1, the primary candidate. I do not remember which one. Anyway, when Mark saw that he wasn't happy with it.
> Hudson: Did he say why?
> Dargin: Yes. He said, "I hate her."
> Hudson: He actually said that in front of everybody?
> Dargin: Yes.
> Hudson: What was your reaction?
> Dargin: I was shocked.
> ***
> Hudson: So then what happened?
> Dargin: What he did was that he placed the consultants in the order that he preferred. I never told Bellandra that part about him saying that he hated her.
> ***
> Hudson: Why did they think BBF's proposal was the best?
> Dargin: Because we had a list of factors such as Understanding of Project, Qualification and Experience of Staff. These were the two main criteria.
> ***
> Hudson: Did you recognize that was discrimination?
> Dargin: I thought so.
> Hudson: Have you ever thought Mark was discriminatory before.
> Dargin: I knew him to be outspoken...
> ***
> Hudson: Do you think BBF has been given a fair shake?
> Dargin: In that particular instance no.
> (Exhibit 22: MDOT 7973) (Mr. Dargin confirmed these facts in his deposition. See Exhibit 6, pp. 76-85.

9. Defendant Judnic's secretary confirmation of Defendant Judnic's pattern of discriminatory conduct:

> Mrs. Caldwell recalled part of the conversation with Mr. Judnic. She remembered that he stated, "Not woman should be making money like that," but added that she did not know if he said black woman. However, since Dr. Foster was the only black female consultant firm that Mr. Judnic was using, she surmised it was BBF that he was referring to.
> ***
> She also shared that she has heard some of the assistants to Mr. Judnic say, "We'll give her a contract just to shut her up." Mrs. Caldwell said that she would ask his assistants, Sharleta Paris, Steve Griffith, and others why BBF was not selected. She said that Steve Griffith would say that he doesn't want to get involved.
> ***
> Mrs. Caldwell was aware of the complaint that BBF filed. She stated that she did not think that Mr. Judnic meant any "harm-harm" when he made the statement cited above. I asked her what "harm-harm" meant. She said, "It is just the way he is. Some men feel that women shouldn't [be in this field]." "They should be at home." "It's kind of like being a male chauvinist."
> (Exhibit 23: MDOT 7981)(Emphasis added.) (Ms. Caldwell confirmed these facts in her deposition) (See Exhibit 3, pp. 30-36).

More importantly, right after this statement, Ms. Caldwell noticed negative changes in the volume of work going to BBF (or not). (Exhibit 3: Caldwell Dep. pp. 36 and 37)

10. Discriminatory treatment. Defendants' discriminatory ambush against Plaintiffs did not cease with the simple rejection of Plaintiffs' RFP's. Defendants' rejected her accounting. Plaintiffs timely submitted to multiple responses to audit requests to her company, to which, other non-minority firms were not subjected. These audits are evaluating years as far back as 1999. The basis for this review is that while Defendants claim statute of limitations on one hand, on the other hand, it asserts that the very same contracts are not closed. Notwithstanding, even when Plaintiffs complied with these inquisitions, Defendants attempted to discredit her firm. Defendants' handwritten notes of the audit confirm their malicious attempts, "Look at originals. Compare to copies. Do we trust originals..." (Exhibit 24: MDOT 5649). There is nothing

Plaintiffs could do to remedy the relationship between MDOT, its employees, and higher-ups except metamorphisize her race and her gender. Even now the conclusion of the audit is the same base claim Judnic asserted originally—Ms. Foster made too much money. She was an overpaid female executive in a minority business enterprise.

11. Love Charles' Testimony. Mr. Charles has nothing to gain and no skin this game so to speak. Yet, Mr. Charles testified unequivocally under examination by Defendants that Mr. Judnic engaged in a carefully orchestrated plan to eliminate BBF as a contractor. (See Exhibit 13) Mr. Charles testified that Judnic and his team understood that Love Charles was a key to BBF's operation; if Judnic could force him out, BBF would ultimately be eliminated. This testimony is unrefuted. More importantly, the plan played out exactly as Mr. Charles outlined it. Charles was forced out and Judnic placed Plaintiffs on a slippery slope of discrimination and eradication. (Exhibit 4: Love Charles Dep. pp. 45-48 and 69-72).

The factual evidence of Defendants' discrimination against Plaintiffs is irrefutable and continuing. Plaintiff will present more evidence in the form of affidavits, depositions, witnesses and documents at trial. Now, turning to each individual Defendant, Plaintiffs have even more evidence of discrimination.

B. Plaintiffs Have Presented Sufficient Circumstantial Evidence of Discrimination.

Defendants have correctly cited the burden shifting scheme enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792; 93 S. Ct. 1817; 36 L.Ed.2d 668 (1973). Upon Plaintiffs' *prima facie* presentation that (1) she or her organization is a member of a protected class; (2) she suffered adverse employment action; (3) she was otherwise qualified for the position; (4) she was treated differently than similarly-situated others outside of the protected class, the burden shifts to defendant to articulate a legitimate, non-discriminatory reason for the adverse action.

McDonnell, supra. Here, again, Plaintiffs present more evidence about the specific discriminatory actions of Defendants. Yet, Defendants cannot articulate a legitimate, non-discriminatory reason for their actions. More importantly, the writings from Defendants' cohorts before the motion for summary judgment establish clearly that Defendants knew that Plaintiffs' claims are real and substantive. (See the missives from Mssrs. Steudle and Johnson referenced above). Defendants' citations establish that Plaintiffs may meet their burdens by:

> [S]howing that the asserted reasons were insufficient to explain the employer's decision or were not applied in a non-discriminatory fashion, or by proving that a discriminatory reason more likely motivated the employer. *T & S Service Associates, Inc. v Crenson,* 666 F.2d 722, 727 (1st Cir. 1981).

1. Defendant Judnic

First, let us address Judnic the person whose wife kept her own name (presumably with his indulgence) as evidence of his liberal nature. Yet, his testimony is rife with inconsistencies. at first, he is just senior resident engineer at HNTB (Exhibit 2: Judnic Dep. p. 36). Then when he is exposed, he admits to a more powerful position, Construction Section Manager, (Exhibit 2: Judnic Dep. p. 64). At one point MDOT asserts that Ms. Foster cannot bill as a principal under a policy that has never been presented. Yet in an email to Ms. Foster, he advises her to be more involved (Exhibit 25). Judnic asserts that he cannot recall on multiple occasions to the question of any other consultant to whom he gave a score of "7". (Exhibit 2: Judnic Dep. pp. 115-117) Judnic in his deposition asserted that BBF scored low because the requisite organizational chart was missing. However, excerpts from the proposal itself show the very chart that Judnic asserts was missing or incomplete was there. (Exhibit 2: Judnic Dep. pp. 130-131) and Exhibit 26.

Defendant Judnic treated Plaintiffs with race and gender animosity immediately upon discovering Plaintiff's race and gender. Defendant Judnic was aware of Plaintiff's race and gender when he started his employment with MDOT.

Q. You were aware that BBF was a DBE?
A. Yes.
Q. Were you also aware that it was a woman-owned business?
A. Yes.
Q. And you were also aware that it was a minority-owned business?
A. Yes.
Q. Were you aware that at all times from the inception of your involvement with Mr. Lawton?

* * *

A. Oh, I don't --- I don't know. I'm saying that if I did not know day one, I would have known pretty quick, and I don't know how I found out.
(Exhibit 2: Judnic Deposition, p. 74)

Defendant Judnic was also aware that Plaintiff BBF was chosen as the MDOT DBE Contractor of the Year.

Q. Were you aware that BBF at one point in time in 2008 was selected as the DBE Contractor of the Year for MDOT?
A. Yeah…
(Exhibit 2: Judnic Deposition, p. 122-123)

Nonetheless, Judnic commenced his discriminatory actions against Plaintiffs requiring that Plaintiff, a black female and her minority owned company to resubmit bids for work that she had already won. Yet, there was no policy requiring this action.

Q. Do you recall telling Miss Foster that she should submit another proposal for the work that she had already previously won?

* * *

A. She was selected for work…

* * *

Q. Was there a written document that said that this needs to be re-posted?
A. I don't recall.
Q. Was there a written policy that said there need to be an expansion of the number of consultants that were receiving work from MDOT?
A. A policy, I don't recall.

(Exhibit 2: Judnic Deposition, p. 91-92)

While presenting a maelstrom of affidavits replete with innuendo for days, not once do Defendants proffer the policy. They claim it existed, but it was not in writing. More importantly, it was never presented to Plaintiffs.

In all of the hours of deposition testimony taken by Defendants, there is not one MDOT case referenced where an MDOT contractor was awarded a construction engineering contract, asked to resubmit after award, then ultimately not chosen. There are plenty of cases, cited herein, where the request for proposal requirements are reduced for a non-minority firm to win a bid. Plaintiffs were not treated in this way. Now Defendants contend that Judnic did not make this decision, which is simply untrue. First, the letter from Myron Frierson (Defendants' Exhibit 3) says that the Project Engineers pick the contracts to be split. Why then are the only two consulting contracts in the region to be subjected to this split and rebidding are BBF contracts? The only contract discussed by MDOT is a design services contract, not a construction engineering services contract. This contract was cut prior to final selection and award and is therefore entirely distinguishable. Judnic's subordinate now claims he does not remember why the contract was cut. (Exhibit 27: Voigt Dep. pp. 22-23).

Notwithstanding, applying the burden shifting scheme, Defendants have articulated the following presumably non-discriminatory reason for their actions:

> THE WITNESS (Defendant Judnic): I am a liberal. I am married to feminist that kept her own name. I've been married for twenty-one years. I don't think in those terms.

(Exhibit 2: Judnic Deposition, p. 160).

a. FOIA

Judnic intentionally withheld information from Plaintiffs regarding contract evaluations, delaying Plaintiffs' opportunity to review and appeal any discriminatory decisions.

> A. ... but then my concern was was that when in prior years, it was no problem getting -- if you were a prime you could get evaluations... So I requested and I can't remember if I ended up having to FOIA these or how I ultimately got these.
> (Exhibit 12: Foster Deposition, p. 76)

The issue here is not the fact of the request, it is the process. The scoring process for consultants is subjective. Contracts are awarded based upon the highest scores received and not the lowest bid. Scores are also based in part on historical evaluations and scores. (See Defendants' Exhibit 2 and pp. 19-33) Therefore, when the Project Engineer arbitrarily awarded a consultant low scores on its evaluations, it has a cascading negative impact. (See Defendants' Exhibit 2, pp. 19-33) The consultant is then hampered on future requests for proposals because of the low evaluations of a Project Engineer on other prior evaluations. (See Exhibit 2: Judnic Dep. at pp. 138-141) Thus, the Project Engineer is an important fulcrum who can dictate future awards by historical evaluations. This reality rather than the alleged advent of new competition likely explains why BBF has not been awarded a prime contract after bidding on nearly 29 of them in the past three years. These facts are detailed in Defendants' Exhibit 2. As noted by Exhibit 7, small differences separate the participants. If a consultant is denied the right to improve, it may be done.

b. Gateway Project

Defendant Judnic intentionally prevented Plaintiffs from receiving payments on invoices. Defendant Judnic served as the senior resident and delivery engineer at MDOT, responsible for

signing off and approving invoices. (Exhibit 2: Judnic Deposition, p. 31). In Defendant Judnic's own deposition, he confirmed his sole authority in approving Plaintiff's work:

> Q. But if project engineering services are out-sourced, the resident engineer would be responsible for signing off on work orders, and other approval that are necessary for that out-sourced work?
> A. There's flexibility. The project engineer can also sign-off on it. Within MDOT, there's flexibility. (Exhibit 2: Judnic Deposition, p. 29).
>
> * * *
>
> Q. And when you say full close-out, that means that you did a final sign-off on all of the requisite documents to finish up on the project?
> A. Yes, and it may have even went later than that... (Exhibit 2: Judnic Deposition, p. 34).
>
> * * *
>
> A. They would ask me to collaborate and assist with close-outs of the Gateway Project. (Exhibit 2: Judnic Deposition, p. 34-35).

Judnic's intentional omissions were designed to financially hamstring Plaintiffs. Defendant Judnic was responsible for approving invoices. Defendant Judnic was aware that the Plaintiff BBF was not being paid as a subcontractor, and yet, it was only after Plaintiff Foster's repeated complaints that he made any attempt to remedy.

> Q. Even though the Complaint states that you, in fact, did not take any steps to pursue BBF's non-payment, even though you were responsible for approving the invoices for URS. Do you recall that issue?
> A. I recall the issue.

(Exhibit 2: Judnic Deposition, p. 145).

Defendants now contend that Judnic took steps to clear up the issue. However, it was only at the urging of the Region Engineer Paul Ajegba to whom Ms. Foster complained. Even at that point, Judnic first told Ajegba that BBF's invoicing breakdowns and non-payments were not

MDOT's problem. On an issue of past due invoices, for which Judnic had approval but declined to give to Plaintiffs, Defendant Judnic also excluded Plaintiffs from any meetings to address the unpaid invoices. Defendant Judnic also refused to provide Plaintiffs with a report of the meeting to address unpaid invoices.

> Q. Okay, and was this after Miss Foster had started to complain that you had this meeting?
> A. We had the meeting when the issue was brought up that there was an issue with regards to invoicing.
>
> * * *
>
> Q. Was Miss Foster invited?
> A. I don't know...
>
> * * *
>
> Q. Do you know if she received any report from the meeting?
> A. I don't know.
> (Exhibit 2: Judnic Deposition, p. 145-146).

Yet, Defendant Judnic, has clearly established differences in how he treated Plaintiffs as compared with other contractors. There is not one instance cited in Defendant Judnic's deposition where another contractor was unpaid and excluded from meetings to resolve the issue. To the contrary, Defendant Judnic proudly asserts that all invoices are promptly paid. Defendants' motion is silent on this issue.

> Q. Reimbursement made on a timely basis?
> A. Of course. MDOT always processed – they do due diligence to try to promptly pay...
> (Exhibit 2: Judnic Deposition, p. 147).

Interestingly, Defendants now deny that meetings were held with consultants and that BBF received special treatment. Judnic never attended a meeting and he made the process less than attractive even though it related to evaluation scores that affected future work for BBF.

c. Evaluation Scores

Defendants provide in their motion, "Even if Plaintiffs could state a prima facie case of discrimination regarding their evaluations, there is a legitimate non-discriminatory reason for the scores of "7" on Contract 2006-0490: the deficiencies of the office technician work. This is well documented on the evaluation form, in the July 18, 2008 meeting minutes." (Defendants Motion p. 22). However, this evaluation form is the very problem, and it is subjective. More importantly, the technician with the low scores was Love Charles, who explains in his deposition how he works and his clear expertise in the arena. He was being penalized because he challenged the Project Engineers, which he testified was his job: (Exhibit 4: .Love Charles Dep. pp. 30 and 31). The non-discriminatory pretense is refuted directly by the testimony of the technician at issue. Furthermore, the comments on the form evidence an atmosphere of hedonistic arrogance that only existed prior to the adoption of the 13th Amendment: When MDOT project management makes a decision about billing or staffing, BBF should adhere to the decision of MDOT without question or justification." (See Exhibit 28). Moreover, Jason Voigt who supervised Mr. Charles directly, had no problem with Mr. Charles' work. (Exhibit 27: Voigt Dep. pp. 51 and 52).

Defendants would like this court to ignore all facets of discrimination prior to November 3, 2008, but when it suits Defendants' arguments, they would like to use incomplete details prior to November 3, 2008. Defendant Judnic in his deposition acknowledged that Plaintiff BBF was qualified but, he was looking for something negative:

> Q. Who actually selects the team that evaluates these RFPs?
> A. The project manager would collectively decide how he would pull together the team, and it could be in collaboration with others, depending on the nature of the project. Sometimes it's strictly the project manager, and

sometimes it's the TSC and the project manager. (Exhibit 2: Judnic Deposition, p. 70).

Q. Did you tell Miss Foster that while BBF was qualified, you had to find something since there were so many qualified companies?
A. I don't recall specifically saying that, but I might have said that...
Q. What does that mean?
A. When you're evaluating a set of consultants, they're all in the same level of playing field. You're looking at evaluations to distinguish, to differentiate something. If it's a positive, it's a negative, you're looking to somehow differentiate between firms.
(Exhibit 2: Judnic Deposition, pp. 127-128).

Defendant Judnic's inability to distinguish between the level playing field of consultants is perhaps, best summarized by his secretary Ms. Caldwell in MDOT's investigation and her deposition:

> Mrs. Caldwell was aware of the complaint that BBF filed. She stated that she did not think that Mr. Judnic meant any "harm-harm" when he made the statement cited above. I asked her what "harm-harm" meant. She said, "It is just the way he is. Some men feel that women shouldn't [be in this field]." "They should be at home." "It's kind of like being a male chauvinist."
> (Exhibit 23: MDOT 7981)(Emphasis added.)

> THE WITNESS: [N]o woman should be making that kind of money.
> (Exhibit 3: Caldwell deposition, p. 31).

d. Debriefing Meeting

Defendant Judnic held in-person meetings with the non-minority firms. (Exhibit 12: Foster Deposition, p. 71). This however, is disputed by Defendant Judnic in his motion. (Defendants' Motion for Summary Judgment, at p. 22). Such a factual dispute, acknowledged by Defendants overcomes any motion for summary judgment. Moreover, Mr. Charles testified

that Mr. Judnic was routinely lunching and meeting with representatives of majority firms. (Exhibit 4: Charles Dep. pp. 63 and 64).

e. 2010 RFP

A reasonable juror could find that the new requirement for leased vehicles, which was subsequently discontinued, was used only to eliminate Plaintiff BBF as a contractor in favor of the eventual winner and Judnic's ultimate new permanent employer HNTB. Plaintiffs can prove that this was a pretext for discrimination. Defendant Judnic changed the requirement once HNTB was selected. Defendant Judnic subsequently was hired by HNTB.

Q. And what is your present title at HNTB?
A. I am a senior resident engineer.
Q. What are your duties as senior resident engineer?
A. I administer projects to ensure the quality, and that the projects are done on time, on budget, and to the client's satisfaction.
(Exhibit 2: Judnic Deposition, p. 40).

Defendant Judnic unilaterally decided that subcontractors should be required to lease vehicles for the sole purpose of jettisoning Plaintiffs' opportunities and this pilot program only impacted BBF.

Q. Do you recall developing a Scope of Services and Request for Proposals where you required subcontractors to include a fleet of vehicles in their responses, of a minimum of five vehicles?
A. Yes...

* * *

Q. Were there any other RFPs that contained this requirement?
A. Not to my knowledge.
Q. And what –
A. Not in the State of Michigan...

* * *

Q. Do you know who ended up winning this, or being awarded this contract?
A. The prime consultant?
Q. Yes.

A. HNTB.
Q. Are they still working on this project?
A. I believe they are still.

* * *

Q. And so what is the total contract award amount now for that contract, if you know.
A. It's something like five-million dollars.
(Exhibit 2: Judnic Deposition, pp. 147-150).

In short, we have at a minimum Five Million Dollar contract awarded by Defendant Judnic, who exclaims that no woman should make that amount of money. However, he conveniently awards a large contract to his future employer right before he leaves MDOT. Defendants' defense is that this was Judnic just being creative, and others complained. Tony Kratofil even asserts in his affidavit that it would be cheaper for MDOT to pay the consultants to buy a fleet of vehicles. Meanwhile, the State itself is systematically eliminating fleets of vehicles. Again, not surprisingly, the only known victim of this new plan—BBF; Defendants' affidavits notwithstanding.

f. Office Technician Training

Defendant Judnic discriminatorily required training of Plaintiffs' employees, as another avenue to exclude Plaintiff from contract awards. And, yet, there were no MDOT guidelines requiring this training.

Q. Is there a requirement anywhere in the MDOT guidelines for policies for an office technician to receive re-certification every five years?
A. I don't know what the policy is.
Q. Have you ever seen such a policy?
A. I don't remember seeing a policy.
(Exhibit 2: Judnic Deposition, p. 152).

Q. Do you recall that Fishbeck, Thompson, Carr and Hubert was actually being charged with providing the training course to BBF people?

* * *

A. I know they train, But, I am not -- I didn't know what they charge, or –

* * *

Q. And would Miss Foster be competing with Fishbeck in terms of prime consulting bidding on certain projects?

A. Would she compete with Fishbeck on projects, yes.

(Exhibit 2: Judnic Deposition, pp. 151-152).

Again, while Defendants allude to others that were affected by this requirement the only known target is BBF. Moreover, as testified to by Ray Stewart, he and Love Charles already had the requisite qualifications and the training was crammed down BBF's throat on nothing more than hubris. (Exhibit 29: Stewart Dep. pp. 18-26 and Exhibit 30, Certifications for Stewart demonstrating futility).

g. Principal Billing

Defendants' action to restrict Plaintiffs from principal billing was discriminatory and intentional, such that it would, financial throttle Plaintiffs.

Q. You knew that she was the principal of BBF?

A. I knew that she was the principal, yes.

Q. Did you advise her that as principal she could not bill for her work on any project that you were managing ---

A. Right…

(Exhibit 2: Judnic Deposition, p. 76).

* * *

Q. You understood that she was still working in her business because she was a smaller enterprise?

A. She obviously would be working for the engineering firm that she was the principal of…

(Exhibit 2: Judnic Deposition, p. 79).

Defendants cite to one lone example, where another principal was complained about a restriction on principal billing in 2007. (Defendants' Motion, p. 25). This was one isolated case in 2007. Defendant Judnic then testifies that this policy changed.

A. They had this committee, and then they opened it up to where MDOT project managers were told it is wide open, you have principals charging. (Exhibit 2: Judnic Deposition, p. 84).

* * *

Q. And were there any black females that you negotiated to bill as principal?
A. If I negotiated with black females?
Q. Yes. Any black females you negotiated to be paid as a principal, ever?
A. As a consultant ever, I can't recall in Chicago because Chicago was too far back. I'm not certain if I was dealing with – I can't recall from my Chicago years. In Michigan the answer is no…

(Exhibit 2: Judnic Deposition, p. 174).

The problem is that Ms. Foster was never allowed to bill—even after the policy allegedly changed. Moreover, Ms. Foster was never apprised of this "policy" change whether new or old. A minority DBE enterprise of BBF's size was subjected to undue arbitrarily induced pressure and a concomitant need to downsize. If Ms. Foster negotiated $0 Dollars for her anticipated fees, it was because Judnic never let her bill.

2. Defendant Steucher

The same presentation of a *prima facie* case against Defendant Judnic can also be established against Defendant Steucher.

a. *Prima Facie* Case

Defendant Steucher does not recall in his many panels during his tenure with MDOT selecting a woman-owned firm.

Q. Have you selected a woman-owned firm as a consultant on any project that you managed?
A. I have never selected any firms. I've worked on panels that had made selections.
Q. Have any of the panels you ever worked on selected a woman-owned firm as a consultant on a project you were managing?

* * *

THE WITNESS: I don't know. I -- I – I don't remember.

Defendant Steucher also did not recall in his many selection team panels selecting a DBE as a prime consultant.

Q. Have you ever been on a selection team where the team selected a DBE as a prime consultant?
A. I simply don't recall.
(Exhibit 31: Steucher Deposition, pp. 89-90).

While Defendant Steucher never selected a woman or minority own prime consultant, conversely, he was able to recall unfairly scoring a Michigan based female and minority owned firm, in this case Plaintiff BBF.

Q. Mr. Steucher, just on Exhibit 1, the score sheet, in the upper right-hand corner it says Guideline for Percentage of Work Performed in Michigan. Do you see that?
A. Yes.
Q. It says – am I reading that right, if the person submitting he proposal has ninety-five to one –hundred percent of their work in the State of Michigan, they should get five points
A. Okay…
Q. And were you aware that BBF did one-hundred percent of its work in Michigan?
A. No, I was not.
Q. So it that why they ended up with three?
A. We actually prorated the distances…

* * *

Q. Do you know how far BBF was from the job site?
A. Well somebody did, or we sued a graph, because somehow we as a group determined how far they were, because we did –
Q. So somebody had a map and you actually measured how far?
A. Yeah. We scaled if off the map. We're engineers.
(Exhibit 31: Steucher Deposition, pp. 91-92).

Interestingly, Mr. Dargin scoffed at the idea that this activity ever took place (Exhibit 6: Dargin Dep. p. 106).

b. Legitimate Non-Discriminatory Reason

Notwithstanding, applying the burden shifting scheme, Defendants have articulated a presumably another non-discriminatory reason for their actions, Defendant Steucher explained the reasons for his actions, as:

> THE WITNESS: I'm a Christian man, and it would be out of character for me. (Exhibit 31: Steucher Deposition, p. 79).

While denying that he did it or stating that he did not recall a changing a preliminary score sheet, Steucher ignores the unrefuted testimony of Mr. Dargin. Mr. Dargin, an MDOT employee is clear––there was a preliminary score sheet. BBF had the highest score on the preliminary score sheet, and Steucher unilaterally came back to the meeting and changed the scores to his liking and eliminating BBF after stating, "Oh no, I hate her." (Exhibit 6: Dargin Dep. pp. 76-85) (Notes of Interview with Dargin, Exhibit 22) Dargin is unequivocal. So while the final score sheet may have been a consensus forged by the Project Engineer in charge (Steucher), the actions lending up to it were pure discrimination. If this conduct is validated, it clearly establishes animus against this black woman.

In the end, the proof is in the pudding. MDOT removed Steucher from all further selection teams. He never sat on a selection panel again after this travesty, but the damage was already done to BBF Engineering. (Exhibit 31: Steucher Dep. pp. 80-82)

In general, the weakness of Defendants' claims suggest that at least Mr. Johnson and Mr. Steudle do not believe the proffered non-discriminatory reasons for the adverse actions. Therefore, Defendants' assertions would not withstand muster under the modified honest believe rule referenced by the Sixth Circuit in one of Defendants' cases, *Blizzard v Marion Technical*

College, 698 F.3d 275, 286 (6th Cir. 2012). Here, there is definitely more evidence of a pretext than in for example, *Dunnom v Bennett,* 290 F. Supp 2d 860, 870-871 (WD OH 2003), another case cited by Defendants, where the Court held that the reasons were factually untrue and discrimination was the real reason for the action and held that:

> Bennett was not motivated by legitimate reasons when he rated Plaintiff as having "not met" expectations, when he did not offer to accommodate Plaintiff's knee problem with a modified route, and when he refused Plaintiff's request for training opportunities.

IV. This Court Should Properly Deny Defendants' Motion for Summary Judgment As Plaintiffs Have Identified Violations of Defendants Snyder and Steudle.

Defendants cite the case of *Floyd v. County of Kent*, 454 Fed. Appx. 493, 498-499 (6th Cir. 2012) to support the Defendant Snyder is not "connected to or has any responsibility for" the administration of MDOT consulting contracts and thus, has no liability for violations. *Floyd, supra,* however, specifically held that when performing traditional functions as counsel, a public defender is not a state actor. The court in , *Floyd, supra,* held that:

> A federal court may impose prospective declaratory relief to compel a State official to comply with federal law "regardless of whether compliance might have an ancillary effect on the state treasury[.]" S & *M Brands, Inc. v. Cooper*, 527 F.3d 500, 507 (6th Cir. 2008) (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 & n.10 (1989), and *Ex parte Young*, 209 U.S. 123, 160-62, 28 S. Ct. 441, 52 L. Ed. 714 (1908)). For example, in *Luckey v. Harris*, 860 F.2d 1012, 1013-14 (11th Cir. 1988), the Eleventh Circuit allowed a suit to proceed against Georgia's Governor and the state judges responsible for providing assistance of counsel to indigent criminal defendants where the plaintiffs claimed that systemic deficiencies violated their constitutional rights. The state official sued, however, must have, by virtue of the office, some connection with the alleged unconstitutional act or conduct of which the plaintiff complains. See id. at 1015-16.
>
> In his complaint Floyd complained of inadequate funding, training, qualification, and oversight of attorneys appointed to represent indigent defendants, but he did not allege any facts showing how Governor Granholm is connected to, or has any

> responsibility for, the alleged Sixth Amendment violations, nor did he name as defendants any state judges or court administrators responsible for administering the criminal-defense system. See *Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 570. Therefore, the district court did not err in dismissing Floyd's Sixth Amendment claims against the State of Michigan and Governor Granholm. *Floyd v. County of Kent*, 454 Fed. Appx. 493, 498-499 (6th Cir. Mich. 2012).

Floyd, supra, determined that allegations against a governor must include how the governor is connected to or has any responsibility for the violations. Governor Synder, in his published 2012-2013 Executive Budget details his plan for the Department of Transportation (MDOT). (Exhibit 32: Snyder Executive Budget). Governor Snyder does not simply oversee the billion dollar budget for the Department of Transportation. He has conclusively put together a plan, affecting, and directing "MDOT consulting contracts." (Defendants' Motion, p. 29). Governor Snyder even goes further to elaborate specifically on an MDOT metric, "Total final project costs shall not exceed total bid awards by more than 5% annually." (Exhibit 32: Snyder Executive Budget, p. B-84). Further, Governor Snyder's affirmed his "commitment to government transparency and accountability," and provided, "additional agency-specific performance measures." (Exhibit 32: Snyder Executive Budget, p. A-2). While this preliminary focus has been admittedly on Governor Snyder's financial impetus and control with regard to MDOT, this is intentional. MDOT has claimed spurious financial reasons for its treatment of Plaintiffs. And, by implication, has inferred that the decisions it has made (i.e. withdrawing an award to Plaintiffs, refusing to provide evaluations, requiring short term leased vehicles) were economic related. Governor Synder is connected to and has responsibility for MDOT and its consulting contracts.

Furthermore, it was Governor Snyder appointed Defendant Steudle as Director of MDOT. Defendant Steudle, as Director of MDOT, also oversees MDOT's billion budget and is

responsible for the construction, maintenance and operation of nearly 10,000 miles of state highways and more than 4,000 state highway bridges. (Exhibit 9: MDOT webpage). Both, Governor Snyder and Director Steudle are "connected to and have responsibility for" MDOT and its consulting contracts, as elaborated in *Floyd, supra,* and therefore are liable for violations. Furthermore, it is Steudle who writes that he is aware of the problems in selecting consultants and that corrective measures need to be taken.

V. This Court Should Properly Deny Defendants' Motion for Summary Judgment, the "Class of One" Claim.

Defendants argue that Plaintiffs assert a class of one which is a prohibited claim according to Defendants under *Engquist v Oregon Dept. of Agriculture*, 553 US 591; 128 S. Ct. 2146; 170 L. ED2d 975 (2008). However, *Engquist, supra*, was first and only applied in the context of employment termination decisions. The Supreme Court in *Engquist, supra,* stated as follows:

> In concluding that the class-of-one theory of equal protection has no application of public employment context and that is all we decide--we are guided, as in the past, by the common sense realization that government offices cannot function if every employment decision became a constitutional matter. *Id* at p. 607.

Defendants also argue that this rationale of *Engquist, supra*, has been extended to decisions regarding public contracting as well as in the context of termination of public contracts. citing *Douglas Asphalt Co. v Qore, Inc.*, 541 F.3d 1269 (11th Cir, 2008). Again *Douglas*, dealt with situations where the constitutional claims that turned on a claim involving free speech. It was not fundamental constitutional right that was at issue.

What the United States Supreme Court subsequently addressed in the *Board of County Com'rs Wabaunsee County, Kan. v Umbehr* 518 US 668, 677, 678; 116 S. Ct. 2342; 135 L.Ed.2d 843 (1996) was the balancing test that was required in this context:

> Each of these arguments for and against the imposition of liability has some force. But all of them can be accommodated by applying our existing framework for government employee cases to independent contractors. *Mt. Healthy* assures the government's ability to terminate contracts so long as it does not do so in retaliation for protected First Amendment activity. *Pickering* requires a fact-sensitive and deferential weighing of the government's legitimate interests. The dangers of burdensome litigation and the *de facto* imposition of rigid contracting rules necessitate attentive application of the *Mt. Healthy* requirement of proof of causation and substantial deference, as mandated by *Pickering, Connick,* and *Waters*, to the government's reasonable view of its legitimate interests, but not a *per se* denial of liability.

Perhaps the best analysis of the *Engquist, supra,* factors is found in *JDC Management, LLC v Reich*, 644 F. Supp 2d 905, 922 (2009), where the Court effectively recognized the importance of applying *Engquist, supra,* to suspect classifications such as race and sex which are at issue here:

> Therefore, the most natural reading of *Engquist* is this: (1) if the plaintiff is a government employee challenging a decision made by a government in its role as employer, the class-of-one theory is automatically not available, and (2) if the plaintiff instead challenges a decision made by government in some other role (such as sovereign, enforcer of criminal or traffic laws, or regulator), the trial court must determine whether the circumstances fit E*ngquist's* rationale. To comport with *Engquist's* rationale, the class-of-one theory will not be available if the challenged decision was necessarily subjective and based on an assessment of the plaintiff's personal characteristics (other than per se suspect classifications like race and sex).

Plaintiffs premise all of their claims on *per se* suspect classifications, both race and sex. This takes them out of the context of *Engquist* and this claim should be denied as well.

VI. This Court Should Properly Deny Defendants' Motion for Summary Judgment as Plaintiff's Damages Are an Issue of Material Fact Properly Reserved for Trial.

Plaintiffs have provided a computation of damages for Defendants. (Exhibit 33: Damage Report). Defendants may not appreciate this Nine Million Dollar calculation in lost profit opportunities, resulting from 29 contracts which were not awarded to Plaintiffs.

Notwithstanding, the inquiry on the damage calculation is properly reserved for trial and survives Defendants' motion. The amount of the fees or damages is normally a question for the fact finder. See, e.g., *Zeeland Farm Serv., Inc. v. JBL Enterprises, Inc.*, 219 Mich. App. 190, 555 N.W.2d 733 (Mich. Ct. App. 1996). *Ticor Title Ins. Co. v. Nat'l Abstract Agency, Inc.*, 2008 U.S. Dist. LEXIS 1437 (E.D. Mich. Jan. 9, 2008). Our courts have supported that where a plaintiffs attempt to provide a breakdown of for job activities, the proof of damages is sustained:

> We recognize that "the law does not require impossibilities" when it comes to proof of damages, but it does require whatever "degree of certainty tha[t] the nature of the case admits." *Schankin v. Buskirk*, 354 Mich. 490, 497, 93 N.W.2d 293 (1958). A damage award must not be based on "mere speculation, guess, or conjecture." *Zirin Laboratories Int'l v. Mead-Johnson & Co.*, 208 F. Supp. 633 (E.D. Mich. 1962). In this case, *Green* certainly had it within its power to provide the court with an accounting for the number of extra hours caused by change orders for which it was paid. Green also should have been able to provide a breakdown by job activity for the number of hours that would have been required in the absence of malfeasance by Turner in the performance of its construction management duties. Because of its failure to do these things, there was "no basis for allocation of the lump sum [claimed] between those causes which were actionable and those which were not," making "it proper to reject the entire claim." *Lichter v. Mellon-Stuart Co.*, 305 F.2d 216, 220 (3rd Cir. 1962). *John E. Green Plumbing & Heating Co. v. Turner Constr. Co.*, 742 F.2d 965, 968 (6th Cir. 1984).

Plaintiff's chart includes six columns: funds, monetary losses, pain and suffering, punitive damages, attorney fees and totals. These columns are then further differentiated by projects and years. It unbelievable that Defendants could now argue that Plaintiffs damage claims are "guesswork." Guesswork would have been for Plaintiff to demur that it was entitled to the award value for 29 contracts, which it did not receive. Clearly, Defendants factual inquiry into the basis for Plaintiffs' damage award survives Defendants' motion.

Notwithstanding, the filing of Defendants' motion with regard to the Plaintiffs' damage claims is inappropriate. If Defendants were dissatisfied with Plaintiff's discovery responses, Defendants could have easily served additional discovery upon Plaintiffs, pursuant to the Federal Rules of Civil Procedure. The court in *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F 3d 288, 305 (6th Cir 2007) stated succinctly:

> The scope of discovery under the Federal Rules of Civil Procedure is traditionally quite broad. *Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 402 (6th Cir. 1998). Parties may obtain discovery on any matter that is not privileged and is relevant to any party's claim or defense if it is reasonably calculated to lead to the discovery of admissible evidence. Fed.R.Civ.P. 26(b)(1). "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. But the scope of discovery is not unlimited. "District courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce."

Defendants failed to serve additional discovery and as such, cannot proceed to file a motion for summary judgment on an issue that is appropriately determined by the fact-finder at trial. On the merits, Defendants' position is unfounded. Again, one of Defendants' citations *T & S Service Associates, supra,* holds that:

> Thus, damages for the relevant period are to be determined by measuring the difference between plaintiffs' actual earnings for the period and those that which he would have earned absent the discrimination of defendants. *Id* at 728.

This is a large part of what Plaintiffs are seeking.

VII. This Court Should Properly Deny Defendants' Motion for Summary Judgment As Plaintiffs' Have Presented Evidence To Support Claims of Violations of the Michigan Whistleblowers' Act.

Plaintiff filed this action on November 3, 2011. In Plaintiffs' initial complaint, Plaintiff asserted that "Defendants' actions constitute a violation of Michigan's Whistleblower Act, MCL

§15. 361 et seq." Defendants' subsequently filed two motions to dismiss. Neither of Defendants' motions, in well over 100 pages of documents, alleged any statute of limitations defense specific to Michigan's Whistleblower Act.

Plaintiffs filed an amended complaint on September 5, 2012, with the very same Whistleblower claims. Plaintiffs asserted verbatim, "Defendants' actions constitute a violation of Michigan's Whistle Blower Act MCL §15.361 et seq." (Exhibit 34: Plaintiff's Amended Complaint, p. 27). To wit, Defendants responded by denying the allegations. However, Defendants' denial did not include the affirmative defense of the statute of limitations in any of the counts.

Defendants, affixed to its answer a boilerplate, half page affirmative defense. In sum total, this was:

> **Defendants' Affirmative Defenses**
> 1. Plaintiffs have failed to state claims upon which relief can be granted.
> 2. Defendants Judnic and Steucher are entitled to qualified immunity from Plaintiffs' claims.
> 3. Plaintiffs' claims are barred by the applicable statutes of limitations.
> 4. Plaintiffs' claims are barred by the law-of-the-case doctrine.
> 5. The conclusions in reports drafted by Mary Finch are not binding on this tribunal.
> 6. The results of investigations conducted by Mary Finch are not binding on this tribunal.
> (Exhibit 35: Def Answer to Amended Complaint).

Defendants have not specifically pled the affirmative defense that the Plaintiffs' claims are barred by any applicable statute of limitations. Defendants' Answer and Affirmative Defenses are legal conclusions. *Nixson v. Health Alliance*, 2010 U.S. Dist. LEXIS 133177 (S.D. Ohio Dec. 15, 2010). In any event, since Plaintiffs' contracts are still open, the defense is futile.

The statute runs from the date of termination. There has not been one. *Mojica v United Parcel Service,* 2011 WL 2080247 (ED MI 2011).

Affirmative defenses must contain sufficient factual allegations from which the Court can plausibly infer the existence of a legitimate defense. *Nixson, supra* at 6-7. Defendants' Answer and Affirmative Defenses fail to contain sufficient allegations from which Plaintiffs could infer a legitimate defense.

> This court finds that there is no logical reason why the heightened pleading standard would only apply to complaints and not pleadings generally. Therefore, the court finds that HN4the heightened pleading standards required by Twombly and Iqbal apply to affirmative defenses. See *HCRI TRS Acquirer*, 708 F.Supp.2d at 690-91 (Although "[d]istrict courts have been divided as to whether *Twombly* and *Iqbal* apply to all pleadings, including affirmative defenses contained in an answer, or if they only govern complaints," this court is of the view that *Twombly* and *Iqbal* apply to affirmative defenses.) See also *Openmethods, LLC v. Mediu, LLC*, No. 10-761-CV-W-FJG, Sl. Cop., 2011 U.S. Dist. LEXIS 60980, 2011 WL 2292149, *2 (W.D. Mo. Jun. 8, 2011) (The court "agrees that the *Iqbal* and *Twombly* standards should apply to affirmative defenses."); . . . .
>
> Therefore, "[m]erely listing affirmative defenses is insufficient [as] 'they must be supported by factual allegations.'" *Openmethods, LLC*, 2011 U.S. Dist. LEXIS 60980, 2011 WL 2292149 at *2 (quoting Iqbal, 129 S.Ct. at 1949). The reason for this is that "[b]oilerplate affirmative defenses that provide little or no factual support can have the same detrimental effect on the cost of litigation as poorly worded complaints." *HCRI TRS Acquirer*, 708 F. Supp.2d at 691. . . .

Defendants' claim, that "Plaintiffs' claims are barred by the applicable statute of limitations" is insufficiently pled – provide no notice or factual basis for its assertions. Defendants have had nearly two years to address any possibility of a statute of limitations defense against Plaintiffs. Defendants have not done so. As Defendants' have failed to timely plead this affirmative defense, in its first responsive pleading and the defense is waived.

Defendants may argue that the Defendants' Motion for Summary Judgment appropriately pleads the statute of limitations defense. However, Dispositive motions are not pleadings.

> Dispositive motions, however, are not "pleadings" within the meaning of Fed.R.Civ.P. 7(a). Fed.R.Civ.P. 8(b) requires a response to a pleading to contain a short and plain statement of defenses. *Twombly* makes it clear that labels, conclusions and formulaic recitations are insufficient. Accordingly, I conclude that factual recitations in the dispositive motion papers are an inappropriate basis upon which to assess the plausibility of Defendants' proposed affirmative defenses. *Shinew v. Wszola*, 2009 U.S. Dist. LEXIS 33226, 12-13 (E.D. Mich. Apr. 21, 2009).

Likewise, Defendants Motion for Summary Judgment must also properly be denied. Notwithstanding, Defendant continuing arguments regarding Plaintiffs Whistleblower Act claims are barred by *res judicata*. This Court has already determined that Defendants Steucher and Judnic motions to dismiss Plaintiffs' claims against them individual is denied. (Exhibit 11: 2/6/12 Order, p. 21).

More importantly, on the merits, MDOT's Project Engineers were controlling all facets of Plaintiffs' operations. They worried and harassed Love Charles out of his role with BBF as evidenced by their own admissions and Love Charles deposition testimony. What is even more telling is the evaluation on which Judnic and Voigt collaborated in which they collectively agreed to an evaluation statement that is telling: "When MDOT Project Management makes a decision about billing or staffing, BBF should adhere to the decision of MDOT without question or justification by MDOT." (See Exhibit 28) What could be more callous and telling than this statement?

The primary motivation for a whistleblowers claim must be a desire to inform the public. *Tapkey v Wagonworks,* 2010 WL 63097 (2010 E.D. MI). Furthermore, this Court has upheld a

claim where the claimant was only effectively an employee. *Shimkus v Hickner,* 417 F. Supp 2d 884 (E.D. MI 2006).

CONCLUSION

For all the foregoing reasons, Plaintiffs Bellandra Foster and BBF Engineering, P.C. respectfully request that the Court deny Defendants' Motion for Summary Judgment.

Respectfully submitted,

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Date: March 7, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2013, I electronically filed the above document with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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