



## Appeals Court: J-1 Visa Employee at MSU Ineligible for Workers' Compensation

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In May 2019, the Michigan Court of Appeals decided *Kuhlbert v Michigan State University*. This case examines several interesting workers' compensation issues which we will analyze in a three-part series. Today, we discuss the case's complicated facts and procedural history, and whether the plaintiff should be considered an "employee" pursuant to Michigan's Workers' Disability Compensation Act (the "Act").

### A. The Facts

The plaintiff, Dr. Elisabeth Ostendorf, was a post-doctoral researcher at Michigan State University ("MSU"). She was the lead scientist on a project funded by the Advanced Research Projects Agency for the Department of Energy. Ostendorf was a German national and was in the United States as a "research scholar" on a J-1 visa. A J-1 visa is a non-immigrant visa issued by the United States to research scholars, professors and exchange visitors participating in programs that promote cultural exchange established by the Mutual Education and Cultural Exchange Act ("MECEA").

In October 2014, Ostendorf walked out of the building in which she worked, the MSU Food and Safety Toxicology building, toward her car, which she had parked in a nearby lot on campus. She had walked about 900 feet when she was struck by an MSU truck that was backing up toward a loading dock. At the time she was struck, the plaintiff was texting on her cell phone and a freight train was passing by. She sustained severe injuries to her face, skull, and brain. She continues to live at a brain rehabilitation center in Mason, Michigan.

### B. The Procedural History

In the first lawsuit, Ostendorf's husband and conservator, Sebastian Kuhlger, filed a civil negligence action against MSU in the Court of Claims. MSU's excess liability insurance provider, United Educators ("UE"), filed a motion to intervene in the lawsuit. It argued that

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Ostendorf was an MSU employee and as such, her exclusive remedy should be workers' compensation benefits. Notably, MSU is self-insured for workers' compensation. If the Court granted the relief UE sought, MSU would be liable only for workers' compensation benefits. The Court of Claims denied UE's motion as untimely, and UE appealed the decision.

UE, along with MSU's no-fault insurer, State Farm, filed a second lawsuit in the Michigan Workers' Compensation Agency. The workers' compensation magistrate ultimately concluded that Ostendorf's status as a research scholar under the MECEA prevents her from being considered as an "employee" pursuant to Michigan workers' compensation law. UE appealed the decision to the Michigan Compensation Appellate Commission ("MCAC"). The MCAC affirmed the magistrate's decision.

In a third lawsuit, Ostendorf's conservator asked the Court of Claims to consider whether Ostendorf's status as a research scholar exempted her from receiving workers' compensation benefits. The Court of Claims held that Ostendorf's employment under the J-1 visa program made her ineligible for workers' compensation benefits. The Court also held that Ostendorf's injury did not occur "in the course of her employment" because her movement outside of her building was "purely personal". UE appealed the decision.

The Michigan Court of Appeals consolidated the appeals from the first, second, and third lawsuits.

### **C. Part One of the Court of Appeals' Decision – Was Ostendorf an Employee?**

In the consolidated appeal before the Court of Appeals, UE argued that Ostendorf, whose salary MSU paid, was an employee entitled only to workers' compensation as her exclusive remedy.

In response, the Court pointed out that the Michigan Workers' Disability Compensation Act defines an "employee" broadly, but provides the following exemption in MCL 418.161(1)(b):

"Nationals of foreign countries employed pursuant to section 102(a)(1) of the Mutual Educational and Cultural Exchange Act of 1961 (MECEA) shall not be considered employees under this act."

The Court held that MCL 418.161(1)(b) applied directly to Ostendorf's situation. The Court stated that the U.S. Department of State, in carrying out the requirements of the MECEA, administers an international exchange program in which Ostendorf participated as a research scholar at MSU. Additionally, while MSU paid Ostendorf's salary, the Court stated that the MECEA (see 22 U.S.C. 2452(a)(1)) entitles MSU "to seek reimbursement from federal grant funds for compensation and expenses it pays the foreign national." The Court ultimately agreed with the conclusions of the Court of Claims and MCAC that Ostendorf was ineligible for workers' compensation benefits because she was not an "employee" as defined by the Act.

### **D. Conclusion**

*Kuhlgert* holds that even where an individual may otherwise qualify as an employee pursuant to the 20-factor test set forth in the Michigan Workers' Disability Compensation Act, other provisions of that statute may work to disqualify him/her from being an employee entitled to receive workers' compensation benefits. As a



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consequence of this statutory disqualification, the 8,229 Michigan J-1 visa holders retain the civil remedies normally unavailable to other employees whose exclusive remedy is workers' compensation.

The *Kuhlgert* case is now before the Michigan Supreme Court, and we will track any rulings the justices make. In the second article in our series, we will discuss the Court of Appeals' discussion regarding whether Ostendorf was injured in the course of her employment.

If you have questions regarding the implications surrounding this case or any Workers' Compensation questions in general, please contact a member of Foster Swift's Workers' Comp practice group.