

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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MILWAUKEE COUNTY, et al.,

Plaintiffs,

v.

Case No. 06-CV-0372

MERCER HUMAN RESOURCE  
CONSULTING, INC.

Defendant.

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**MEMORANDUM IN SUPPORT OF MERCER'S MOTION TO STRIKE  
THE "SHAM AFFIDAVITS" SUBMITTED BY MILWAUKEE COUNTY**

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**INTRODUCTION**

As Mercer has argued in its Reply Brief and Response to Plaintiffs' Motion to Strike, and demonstrated in detail in its Response to Plaintiffs' Proposed Findings of Fact, Milwaukee County does not want to deal fairly with the facts surrounding Mercer's Motion for Summary Judgment. That motion was directed toward a narrow issue – the fact that the County cannot establish *any* reliance on Mercer's work in connection with its enactment of the BackDROP. The County's massive submission in response is a calculated and cynical exercise in obfuscation.

Most troubling are the key affidavits the County has submitted in opposition to Mercer's motion. These affidavits are from former members of the Pension Study Commission ("PSC") – Derek Kenner, James McClutchy, Mark Borkowski, and Lynne DeBruin. Borkowski and DeBruin are current County Supervisors. All of their affidavits purport to show "reliance" on Mercer's advice in enacting the BackDROP. But each affidavit squarely contradicts the same witnesses' previous *sworn* deposition testimony. The affidavits must therefore be disregarded

under the “sham affidavit” rule, which prohibits parties from manufacturing material issues of fact by submitting affidavits taking positions at variance from positions the same witnesses have taken in the past while *under oath* in depositions.

## **ARGUMENT**

### **I. THE “SHAM AFFIDAVIT” RULE PREVENTS THE SUBMISSION OF AFFIDAVITS CONTRADICTING PRIOR SWORN TESTIMONY TO DEFEAT SUMMARY JUDGMENT.**

The standards for applying the “sham affidavit” rule to strike affidavits are well established. The Seventh Circuit has “long recognized that summary judgment would be meaningless if litigants could manufacture genuine issues of material fact through self-serving and unsupported ‘admissions’ materially different from positions taken in the past.”<sup>1</sup> In the first place, affidavits are substantially less reliable than depositions because they are not subject to cross examination and because they are often drafted by lawyers rather than the affiant.<sup>2</sup> More importantly, if such contradictions were permitted, “the very purpose of the summary judgment motion – to weed out unfounded claims, specious denials, and sham defenses – would be severely undercut.”<sup>3</sup> Put simply, “courts do not countenance the use of so-called ‘sham affidavits,’ which contradict prior sworn testimony, to defeat summary judgment.”<sup>4</sup> Thus, where a prior deposition and the affidavit “are in conflict, the affidavit is to be disregarded unless it is *demonstrable* that the statement in the deposition was mistaken.”<sup>5</sup>

### **II. AFFIDAVITS BY FORMER PSC MEMBERS THAT CONTRADICT THEIR PRIOR SWORN TESTIMONY MUST BE STRICKEN.**

Mercer’s summary judgment motion demonstrated that the County cannot show *any*

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<sup>1</sup> See *Flores v. Hegerty*, 2008 WL 153543, \*8 (E.D. Wis.) (citing *U.S. v. Funds in Amount of Thirty Thousand Six Hundred Seventy Dollars*, 403 F.3d 448, 466 (7th Cir. 2005)).

<sup>2</sup> See *Russell v. Acme-Evans Co.*, 51 F.3d 64, 67-68 (7th Cir. 1995). Here this point seems particularly apt, as the affidavits in issue often appear to have identical lawyer-drafted language.

<sup>3</sup> See *Bank of Ill. v. Allied Signal Safety Restraint Sys.*, 75 F.3d 1162, 1168-69 (7th Cir.1996).

<sup>4</sup> See *Funds in Amount of Thirty Thousand Six Hundred Seventy Dollars*, 403 F.3d at 466.

<sup>5</sup> See *Russell*, 51 F.3d at 67-68 (emphasis added).

reliance on statements or omissions by Mercer regarding the BackDROP during the October 27, 2000 PSC hearing. The County alleges that Mercer should have “spoken up” at this meeting to inform PSC members that Mercer had not yet performed a cost analysis of the BackDROP. Disclosing this fact was supposedly necessary because Dobbert had submitted an October 25, 2000 memorandum to the PSC suggesting incorrectly that “the actuary” had performed such an analysis and had concluded the BackDROP’s cost was “minimal.” As Mercer showed, however, *none* of the PSC members – and none of the County’s other decision-makers – relied on a misinterpretation of Dobbert’s memorandum in approving the BackDROP, for the simple reason that there is no evidence that any of them ever read it.

In response, Plaintiffs has submitted affidavits from all three of the former members of the PSC who voted “yes” for the BackDROP, Kenner, McClatchy, and Supervisor Borkowski, as well as an affidavit from Supervisor DeBruin, who voted “no.” Each now claims (or implies) that he or she received and reviewed a packet of materials containing the Dobbert memorandum, concluded from those materials that the BackDROP was cost neutral, and relied upon Mercer’s silence in confirming that misunderstanding, before casting their votes on October 27, 2000 at the PSC hearing.

As a threshold matter, although these PSC members now claim they received and reviewed materials in advance of the PSC meeting, these statements are directly contradicted by former PSC Clerk Maribeth Welchman, who stated she did not “provide anything prior to the meeting” to PSC members because “it wasn’t received in enough advance time to send it to the members.”<sup>6</sup> Notably, although Ms. Welchman submitted an affidavit in this case, her affidavit does not mention when (or what) materials were distributed to the PSC members.

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<sup>6</sup> See Supplemental Declaration of Paul D. Bauer, August 11, 2008 (“Bauer II”), Exh. 76, p. 16.

The main problem with these new affidavits, created nearly eight years after the events, is even simpler. In each case, the affidavits directly contradict earlier sworn testimony by the affiants in prior depositions, and hence violate the “sham affidavit” rule. For the convenience of the Court, comparisons of the current affidavits with the affiants’ prior sworn testimony will be presented in the following table:

**A. Sham affidavit of PSC member Derek Kenner**

Sham Affidavit	Prior Sworn Testimony
<p>¶ 8: “The purpose of the Pension Study Commission was to review the actuarial effect, the costs implications and the desirability of proposed benefit changes.”</p>	<p>Kenner attended only one meeting of the PSC during his entire tenure.<sup>7</sup> Kenner did not know the PSC’s responsibilities or duties.<sup>8</sup> Kenner had never received any training or guidance on how to perform his duties as a member of the PSC.<sup>9</sup></p>
<p>¶ 10: “I received and reviewed a package of information regarding the pension benefit enhancement package by the time of that meeting. That packet . . . contained analysis by the actuaries from Mercer.” Kenner understood that “the cost was minimal” for the BackDROP and “assumed it to be correct.”</p>	<p>Kenner could not identify whether he had been given <i>anything</i> prior to the PSC meeting.<sup>10</sup></p> <p>Kenner was not even aware prior to the meeting that the County was considering making changes to the pension.<sup>11</sup></p> <p>At the time of the PSC hearing, Kenner did not understand what the BackDROP meant or what it entailed, and does not recall any discussion of the BackDROP.<sup>12</sup></p>

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<sup>7</sup> Bauer II, Exh. 77, pp. 12-13.

<sup>8</sup> *Id.* at p. 13, 39.

<sup>9</sup> *Id.* at p. 34.

<sup>10</sup> *Id.* at pp. 14, 19, 22, 29, 38-39.

<sup>11</sup> *Id.* at p. 22.

**B. Sham affidavit of PSC member James McClutchy**

Sham Affidavit	Prior Sworn Testimony
¶ 5: “I voted in favor of the pension benefit package because of the confidence and trust I had in the statements of the Mercer actuaries.”	McClutchy did not recall having read Mercer’s October 3, 2000 letter, Dobbert’s October 25, 2000 memorandum, or any of their contents. <sup>13</sup> He testified that “I don’t recall receiving any packet regarding the pension system” before or during the PSC meeting. <sup>14</sup> He testified that “I don’t recall reading about a five-year vesting. I don’t recall reading about a 2 percent multiplier for each year of service. I don’t recall reading about the bonus added to the final average salary of 7.5 percent for each year of service. I don’t recall the backdrop. I don’t recall the provision of all accrued sick allowance. I don’t recall those.” <sup>15</sup>
	McClutchy also testified that he had not even seen the proposed Ordinance enacting the benefits prior to his vote. <sup>16</sup>
	Not only did McClutchy “not recall” reading Mercer’s October 3, 2000 letter, he also did not recall whether any of these items were even “discussed at that meeting.” <sup>17</sup>

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<sup>12</sup> Mercer’s Proposed Findings of Fact (“DPFOF”), ¶¶ 81-82; Declaration of Paul D. Bauer, June 9, 2008 (“Bauer I”), Exh. 46.

<sup>13</sup> Bauer II, Exh. 72, p. 18-19.

<sup>14</sup> *Id.* at p. 29.

<sup>15</sup> *Id.* at pp. 18, 24.

<sup>16</sup> *Id.* at p. 19.

<sup>17</sup> *Id.*

**C. Sham affidavit of PSC member (and County Supervisor) Mark Borkowski**

Sham Affidavit	Prior Sworn Testimony
<p>¶ 4: “I received a package of information regarding the pension benefit enhancement package before the meeting. That packet . . . contained analysis by the actuaries from Mercer.”</p>	<p>Borkowski “never saw” Mercer’s October 3, 2000 letter.<sup>18</sup> He testified that the “first time I’m seeing” the letter was during his 2003 deposition.<sup>19</sup> He “did not see \$7.6 million” referenced in Mercer’s October 3, 2000 letter, which was Mercer’s estimate for the cost of the pension package <i>without including</i> the BackDROP.<sup>20</sup> Borkowski “would remember if I saw a \$7 million price tag on something.”<sup>21</sup></p>
<p>¶ 5: Borkowski voted in favor because “I was convinced by staff prior to the meeting and by Mercer actuaries at the Pension Study Commission meeting that the changes proposed were either cost neutral, meaning that they could be made with no increase in tax levy, or very affordable, meaning that they could be made with an insignificant tax levy increase. I relied upon those Mercer representations to cast my vote.”</p>	<p>The <i>only</i> information Borkowski considered was the fiscal note, which did not include any reference to the BackDROP.<sup>22</sup> He testified that “as far as county government is concerned, my costing out is the fiscal note”<sup>23</sup> and “for me . . . the fiscal note on the resolution is what salted my vote.”<sup>24</sup></p>

<sup>18</sup> DPFOF, ¶ 83; Bauer I, Exh. 47.

<sup>19</sup> *Id.* at p. 47.

<sup>20</sup> *Id.* at p. 51.

<sup>21</sup> DPFOF No. 84; Bauer I, Exh. 47, p. 46.

<sup>22</sup> DPFOF No. 112; Bauer I, Exh. 47, p. 56-57.

<sup>23</sup> DPFOF No. 113; Bauer I, Exh. 47, p. 56-57.

<sup>24</sup> DPFOF No. 114; Bauer I, Exh. 47, p. 72.

**D. Sham affidavit of PSC member (and County Supervisor) Lynne DeBruin:**

Sham Affidavit	Prior Sworn Testimony
<p>¶ 6: DeBruin “received and reviewed” Mercer’s October 3, 2000 letter before the October 27, 2000 PSC meeting. She “reviewed that material” and “assumed it to be correct.”</p>	<p>DeBruin did not see Mercer’s October 3, 2000 letter until “after the scandal broke, sometime after.”<sup>25</sup> In response to the question “you don’t recall seeing it at or about the time it was authored?” DeBruin responded “Oh, absolutely not.”<sup>26</sup></p>
<p>¶ 8: If Mercer had told DeBruin “they had not done a study to analyze either the actuarial effect or cost implications of the backDROP,” DeBruin would have “raised red flags to County officials, including moving that the item be laid over so that a full actuarial study could be completed on the benefit and that the matter be referred to the Finance Committee for study of financial impact.”</p>	<p>Dobbert told her an actuarial study had not been done prior to enactment of the BackDROP for the majority of the unions.<sup>27</sup> “He told me it could not be done. He specifically said, you cannot do an actuarial report on the impact of the pension changes until after it’s adopted. That’s one of the reasons I voted against the package.”<sup>28</sup></p>

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As the above record makes clear, these affidavits all directly contradict prior sworn testimony and are therefore “sham affidavits.” The Court should disregard the affidavits and all proposed Findings of Fact that rely upon the affidavits should be stricken, including PPFOFs 18, 76, 78, 97, 104, 105, 106, 107, 108, 109, 109-A, and 110.

**CONCLUSION**

As Mercer has noted throughout this litigation, the County’s lawsuit has often been Orwellian in its attempt to rewrite the past. Usually this tack has emerged in the County’s attempts to airbrush inconvenient facts out of history, to pretend as if they never happened. Here, it comes in the form of sham affidavits that create new fictions in place of the same witnesses prior recollections given *under oath* at a time when their memories were presumably

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<sup>25</sup> Bauer II, Exh. 78, p. 40.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at pp. 51-52.

<sup>28</sup> *Id.*

fresher. Those affidavits are wholesale re-imaginings of what happened prior to and during the PSC hearing, contradict earlier sworn testimony, and should be stricken from the record in this case.

Dated this 11th day of August, 2008.

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