A History of the Development of Sex Discrimination Law in Michigan

By Deborah Gordon

The recent string of high-profile sexual misconduct cases and the rise of the #MeToo movement has brought the topic of sex discrimination in the workplace to the forefront of our national consciousness. Here in Michigan, sex discrimination was banned in the workplace in 1966 when the Fair Employment Practices Act (FEPA) of 1955 was amended to include sex discrimination.[1] In 1977, the Elliott-Larsen Civil Rights Act (ELCRA) was passed, originally prohibiting only "[t]he opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities because of religion, race, color, national origin, age, sex, or marital status."[2] Since its enactment, ELCRA has been amended several times to include sex-neutral civil rights like height, weight, and familial status[3] and other civil rights that are inherently sex-based, such as pregnancy, childbirth, and related medical conditions.[4] Michigan courts were instrumental in creating early law before passage of ELCRA and in its interpretation since.

This article reflects on some of the most significant legal changes to and interpretations of the law in Michigan—and improvements to women's civil rights—over the past 40-plus years.

Before ELCRA: No access to the courts; no ban on sex discrimination

In 1963, Michigan enacted a new constitution that provided for the "equal protection of the laws" regarding discrimination based on "religion, race, color or national origin."[5] In addition, the constitution established a Civil Rights Commission "to investigate alleged discrimination against any person because of religion, race, color or national origin."[6] Discrimination based on sex or gender was not included.

Before ELCRA, employees' rights were governed under FEPA, which required a party to file a complaint of discrimination with the Civil Rights Commission within 90 days of the offense.[7] Sex discrimination was not originally covered by FEPA, and the act prohibited access to the courts. Before 1971, the commission had exclusive jurisdiction to hear discrimination complaints arising out of private employment.[8]

1986
WLAM joins a coalition supporting passage of a City of Detroit ordinance requiring large social clubs like the Detroit Athletic Club to allow female members

Julia Donovan Darlow, a WLAM past president, becomes the first female president of the State Bar of Michigan

1990
Gay Secor Hardy becomes the first female solicitor general of Michigan

1992
The Black Women Lawyers Association of Michigan forms

However, in *Pompey v General Motors*, the Michigan Supreme Court first held that an employee at a private company could maintain an independent civil action against an employer for discrimination.[9] Michigan's 1963 constitution "elevated plaintiff's statutory right [under FEPA to be free from discrimination] to the status of a constitutional right, but the limitational period [under FEPA] remained intact."[10] Because protection of civil rights is a fundamental legal protection, the Michigan Supreme Court held that when a person's civil rights are violated, he is entitled to pursue remedy to be made whole, "notwithstanding [FEPA] did not expressly give him such a right or remedy."[11] For the first time in Michigan history, individuals had the right to maintain independent actions against employers from wrongful discrimination.

For several years, the *Pompey* decision was limited to racial discrimination. Similar to *Pompey*, the plaintiff in *Holmes v Haughton Elevator Co* filed a complaint with the Civil Rights Commission 184 days after he was laid off, alleging age discrimination in excess of the FEPA limitations statute.[12] The trial court rejected the holding in *Pompey*, finding that there existed "material distinctions in law…between racial and age discrimination," and that the same private right of action did not apply to age discrimination claims.[13] The Court of Appeals reversed the trial court and the Michigan Supreme Court affirmed, holding that "there is nothing in our decision in *Pompey* which suggests that the holding is to be limited to…racial discrimination in private employment."[14] The Supreme Court held that the same legislation that outlawed discrimination based on race also outlawed discrimination on the basis of age and other protected classes.[15] This case set in motion the expansion of a claimant's private right of action for civil rights violations based on all protected classes.

Moreover, before ELCRA, no statute or law existed to bar sexual harassment. As such, plaintiffs who were sexually harassed needed to be creative in the way they pled and argued their cases. In *Tash v Houston*, for example, the plaintiff, a female employee of a union working under the defendant president of the local union, complained that her employment was terminated because she rebuffed the defendant's sexual advances.[16] The plaintiff in *Tash* was an at-will employee and thus her employment could be terminated for any reason or no reason at all (unless the reason was a violation of the law).[17] Without sexual harassment laws to rely on, the plaintiff alleged that her termination constituted tortious interference with her contract of employment, and that the defendant was liable.[18] The Court found "that an at-will employee has a significant interest in his continued employment that will be protected against illegal interference by third persons."[19]

The Court then considered what constitutes a "third person" in a tortious interference claim. Ordinarily, if an individual who is an agent of a corporation is "acting for and on behalf of the corporation," the individual is *not* a third person for the purposes of tortious interference.[20] However, when the agent is acting on his sexual desires, those sexual desires are not the "legitimate interests of the organization he represents."[21] The Court remanded this case for the plaintiff to have the opportunity to prove her allegations and for the defendant "to show that he acted in good faith, i.e., intending to benefit the union."[22] The defendant was only required to "show that as the principal officer of the union he discharged plaintiff, not because, as she alleges, she spurned his sexual advances, but, instead, because he believed that the union would benefit by not having her as its employee."[23] This analysis is very similar to the second prong of the *McDonnell Douglas* burden-shifting test, which permits the defendant to demonstrate a legitimate,

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Given the growing number of cases of sex discrimination and evolving attitudes toward women in the workplace, the legislature may find additional amendments to ELCRA necessary.

1993
The Michigan Supreme Court rejects the "reasonable women" standard for deciding if sexual harassment occurred—a decision supported by WLAM

1994
WLAM joins seven organizations intervening in the Maranda Ireland custody case

Candice S. Miller is elected Michigan's first female secretary of state

1996
Victoria A. Roberts becomes the first African-American female president of the State Bar of Michigan; two years later, she is appointed to the federal bench (Eastern District)

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nondiscriminatory reason for having taken a certain action alleged by the plaintiff to be discriminatory.[24]

Sexual harassment in Michigan

When it was passed in 1977, ELCRA included discrimination on the basis of sex as a protected category but did not include prohibitions against "sexual harassment." It was not until 1992 that the Michigan legislature amended MCL 37.2103 to add the following language:

> (i) Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:
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> *(i)* Submission to such conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.
>
> *(ii)* Submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment, public accommodations or public services, education, or housing.
>
> *(iii)* Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.

Radtke v Everett was a major milestone case in 1993 that clarified the requirements to sustain a claim for sexual harassment causing a hostile environment in a workplace.[25] The plaintiff in *Radtke* was a veterinary technician who alleged that the defendant, her supervisor, used force to restrain her, grabbing her neck as he attempted to kiss her.[26] The plaintiff alleged that she was constructively discharged on the basis of sex, and the Court noted that the crux of her case was that she was forced to resign due to the hostile work environment (HWE) created by the defendant's unwelcome sexual conduct. To establish a prima facie case of HWE sex discrimination, the plaintiff must show five elements:

> (1) the employee belonged to a protected group;
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> (2) the employee was subjected to communication or conduct on the basis of sex;
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> (3) the employee was subjected to unwelcome sexual conduct or communication;
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> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
>
> (5) *respondeat superior*.[27]

The Michigan Supreme Court determined that, regarding the first element, "all employees are inherently members of a protected class in hostile work environment cases because all persons may be discriminated against on the basis of sex."[28] The Court then clarified that the conduct giving rise to an HWE sex harassment case does not need to be "sexual in nature," only that "but for the fact of [the plaintiff's] sex, [the plaintiff] would not have been the object of harassment."[29] In *Radtke*, the defendant failed to show that his "innocent romantic overture" was not sexual in nature; rather, the Court held that "but for her womanhood, [the defendant] would not have held [the] plaintiff down and attempted to solicit romance, if not sex, from her."[30] Third, "[t]he threshold for determining that conduct is unwelcome is 'that the employee did not solicit or incite it, and the employee regarded the conduct as undesirable or offensive.'"[31] Finally, the Court explained that if an employer—as opposed to a coworker or a supervisor, assuming the employer takes prompt and appropriate remedial action—is accused of sexual harassment, "then the *respondeat superior* inquiry is unnecessary because holding an employer liable for personal actions is not unfair."[32]

The key question in *Radtke* was whether the unwelcome sexual conduct substantially interfered with the plaintiff's employment. The Court focused on the inquiry of whether "'one or more supervisors or co-workers create an atmosphere so infused with hostility toward members of one sex that they alter the conditions of employment for them.'"[33] "This is

1997
Judge Anna Diggs Taylor becomes the first African-American woman to be chief judge of a Michigan U.S. District Court (Eastern District)

1998
Jennifer M. Granholm is elected the first female attorney general of Michigan

2001
Margaret M. Chiara is the first woman appointed U.S. attorney in Michigan (Western District)

2002
Jennifer Granholm is elected as Michigan's first female governor

so because '[t]he employer can thus implicitly and effectively make the employee's endurance of sexual intimidation a "condition" of her employment.'"[34]

The Court rejected suggestions in several amicus briefs—including one from the Women Lawyers Association of Michigan—that existences of a hostile work environment should be based "solely by reference to plaintiff's reactions."[35] Instead, the Court found that an objective inquiry taking into account the totality of the circumstances determined whether an HWE existed. Similarly, the Court rejected a "gender-conscious" standard—i.e., how a "reasonable woman" subjected to the same conduct would feel—in favor of a "reasonable person" standard[36] and held that a single incident, if sufficiently traumatic—naming rape and sexual assault as two possible scenarios—may suffice to create an HWE.[37]

Michigan appellate courts did not address same-gender HWE claims until 2007. In *Robinson v Ford Motor Co*, the male plaintiff alleged that his male coworker sexually harassed him on the job.[38] The defendant, however, moved for summary disposition, arguing that sexual horseplay by a heterosexual male directed against another male was outside the statutory definition of sexual harassment under ELCRA.[39] After reviewing the United States Supreme Court's decision in *Oncale v Sundowner Offshore Services, Inc*, which held that sexual harassment of any kind—regardless of the gender of the parties—that meets the statutory requirements is prohibited,[40] the Court found that ELCRA's "discrimination…because of…sex," was identical to the language in the Title VII statute analyzed in *Oncale*.[41] As a result, ELCRA does not exclude same-gender harassment claims, and the Court rejected the defendant's argument that ELCRA excludes same-gender HWE claims.[42]

Next, the defendant in *Robinson* argued that the conduct was not "of a sexual nature" because the plaintiff and his alleged harasser were both heterosexual. The Court found that, like Title VII in *Oncale*, ELCRA does not *require* any proof of the harasser's sexual desire. However, a same-gender HWE plaintiff must still demonstrate that the harassment happened "because of sex."[43] One method is showing whether "the harasser making sexual advances is acting out of sexual desire."[44] A plaintiff can also offer evidence when the harasser is motivated by general hostility to the presence of men in the workplace and where the plaintiff offers "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[45]

Pregnancy discrimination in Michigan

In response to the United States Supreme Court's 1976 decision in *General Electric Co v Gilbert*,[46] which held that Title VII of the federal Civil Rights Act did not prohibit discrimination based on pregnancy, the Michigan legislature amended ELCRA in 1978 to include in its definition of sex "pregnancy, childbirth, or a medical condition related to pregnancy or childbirth."[47] The United States Congress also amended Title VII by passing the Pregnancy Discrimination Act of 1978.[48]

Until approximately 2006, the law in Michigan protected women who were pregnant or had medical conditions related to pregnancy or childbirth from adverse actions by their employer. However, in 2006, the Sixth Circuit Court of Appeals in *Reeves v Swift Transportation Co* held that the defendant's policy of granting light-duty assignments only to workers who sustained job-related injuries as opposed to pregnancy-related limitations like weight-lifting restrictions was a legitimate, nonpregnancy based reason for the plaintiff's termination under the Pregnancy Discrimination Act of 1978.[49]

2006

Judge Charlene M. Elder is widely believed to be the first Muslim female appointed to a judgeship in the U.S. (Wayne County Circuit Court)

Timeline References

Credit: Nicole M. Smithson and Kristina Bilowus

Sources consulted: *Attorney General v Abbott*, 121 Mich 540, 544; 80 NW 372 (1899); Harley & MacDowell, *Michigan Women: Firsts and Founders, Vol I* (Lansing: Michigan Women's Studies Association, 1992); Harley & MacDowell, *Michigan Women: Firsts and Founders, Vol II* (Lansing: Michigan Women's Studies Association, 1995); Littlejohn, *Michigan Black Lawyers' "Firsts,"* 94 Mich B J 5, 20 (May 2015); Michigan Supreme Court Historical Society (www.micourthistory.org); Michigan Women's Hall of Fame (www.michiganwomenshalloffame.org); OAG, 1935, No. 93, p 254 (July 30, 1935); Sharlow, *Michigan Lawyers in History: Sarah Killgore Wertman*, 95 Mich B J 38 (March 2016); Stevens, *Assistant US Attorney Ella Mae Backus: "A most important figure in the legal profession in the Western District of Michigan,"* 42 Mich Historical Rev 2, pp 1–30 (Fall 2016); *The Arab Daily News*; *Detroit Free Press*; *Lansing State Journal*

When Title VII and ELCRA have similarly worded provisions, Michigan courts often interpret ELCRA provisions using Title VII caselaw.[50] Thus, the Michigan legislature, concerned that the *Reeves* decision would bleed over into Michigan jurisprudence, amended ELCRA in 2009 to protect an employee from discrimination because of "pregnancy, childbirth, or a related medical condition differently for any employment related purpose from another individual who is not so affected but similar in ability or inability to work, *without regard to the source of any condition affecting the other individual's ability or inability to work*" (emphasis added).[51] Regardless of how the Sixth Circuit, the Supreme Court, or any federal law ultimately ruled on this issue, Michigan employers were still required to provide employees who were pregnant or had medical conditions related to pregnancy or childbirth with accommodations similar to those provided to other employees with alternative jobs as a result of their disabilities.

Conclusion

Given the growing number of cases of sex discrimination and evolving attitudes toward women in the workplace, the legislature may well find additional amendments to ELCRA necessary. Whatever the future holds for the act, it is important to understand the history and context of the law and the jurisprudence surrounding it. Protections against gender-based discrimination have come a long way since ELCRA was enacted. But, as the daily deluge of new high-profile sex discrimination cases demonstrates, there likely will be more work to do in enacting laws to prevent sexual harassment and sex discrimination. ■

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ENDNOTES

1. *Eide v Kelsey Hayes*, 431 Mich 26, 43 n 8; 427 NW2d 488 (1988); *Bully v Gen Motors*, 120 Mich App 165, 168, 170; 328 NW2d 24 (1982).
2. 1976 PA 453, as amended by 1992 PA 124; MCL 37.2102.
3. MCL 37.2102(1).
4. 2009 PA 190; MCL 37.2202.
5. Const 1963, art I, § 2.
6. Const 1963, art V, § 29.
7. *Pompey v Gen Motors*, 385 Mich 537, 550; 189 NW2d 243 (1971).
8. Mich Dept of Civil Rights, *Michigan Civil Rights Commission, 1964–2004: Forty Years and Beyond* (2004), pp 11–12, available at <https://www.michigan.gov/documents/MCRC_history_book_77052_7.pdf> (accessed March 26, 2018).
9. *Pompey*, 385 Mich at 560.
10. *Id.* at 550 n 11.
11. *Id.* at 553.
12. *Holmes v Haughton Elevator Co*, 404 Mich 36, 40–41; 272 NW2d 550 (1978).
13. *Id.* at 41.
14. *Id.* at 42.
15. *Id.* at 42–43.
16. *Tash v Houston*, 74 Mich App 566; 254 NW2d 579 (1977).
17. *Id.* at 569–570.
18. *Id.* at 568.
19. *Id.* at 570.
20. *Id.* at 573.
21. *Id.* at 574.
22. *Id.*
23. *Id.*
24. *McDonnell v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), adopted in Michigan by *Lytle v Malady*, 458 Mich 153; 579 NW2d 906 (1998). To establish a prima facie case of discrimination, a plaintiff must show (1) she is a member of a protected class, (2) she was subject to an adverse employment decision, (3) she was qualified for the position, and (4) she was discharged "under circumstances that give rise to an inference of discrimination." *Lytle*, 458 Mich at 173. Once the prima facie case is alleged, the burden of proof shifts to the employer to show there was a reason for the adverse employment decision that was unrelated to the employee's gender.
25. *Radtke v Everett*, 442 Mich 368; 501 NW2d 155 (1993).
26. *Id.* at 376.
27. *Id.* at 382–383, citing MCL 37.2103(h) and MCL 37.2202(1)(a).
28. *Id.* at 383.
29. *Id.*
30. *Id.* at 384.
31. *Id.*, citing *Burns v McGregor Electronic Indus, Inc*, 955 F2d 559, 565 (CA 8, 1992).
32. *Id.* at 396.
33. *Id.* at 385, citing *Lipsett v Univ of Puerto Rico*, 864 F2d 881 (CA 1, 1988).
34. *Id.*, citing *Bundy v Jackson*, 641 F2d 934 (DC 1981).
35. *Id.* at 385–386; *Brief Amici Curiae—University of Michigan Women and the Law Clinic and the Women Lawyers Association of Michigan*, 1992 WL 12152136 (Mich December 4, 1992)
36. *Radtke*, 442 Mich at 389–394.
37. *Id.* at 394–395.
38. *Robinson v Ford Motor Co*, 277 Mich App 146, 148; 744 NW2d 363 (2007).
39. *Id.* at 150.
40. *Oncale v Sundowner Offshore Servs*, 523 US 75, 80; 118 S Ct 998; 140 L Ed 2d 201 (1998).
41. *Robinson*, 277 Mich App at 153.
42. *Id.*
43. *Id.* at 153–154.
44. *Id.* at 157, citing *Oncale*.
45. *Id.* at 157–158.
46. *Gen Electric Co v Gilbert*, 429 US 125; 97 S Ct 401; 50 L Ed 2d 343 (1976).
47. MCL 37.2201(d).
48. See *Cunningham v Dearborn Bd of Educ*, 246 Mich App 621, 628; 633 NW2d 481 (2001), discussing the history of the pregnancy amendment to ELCRA.
49. *Reeves v Swift Transp Co*, 446 F3d 637, 641–642 (CA 6, 2006), abrogated by *Young v United Parcel Serv*, 135 S Ct 1338; 191 L Ed 2d 279 (2015).
50. *Wasek v Arrow Energy Servs*, 682 F3d 463, 468 (CA 6, 2012), citing *Pena v Ingham Cnty Rd Comm'n*, 255 Mich App 299, 311 n 3; 660 NW2d 351 (2003).
51. MCL 37.3302(1)(d).