

Employment Discrimination

By Lee Hornberger

Law in Michigan

his article discusses some of the employment discrimination laws applicable to the private sector in Michigan. The discussion will include coverage, the employee's prima facie case, the employer's defenses, and remedies.

Employment discrimination is an ever-changing area of law. Complicated procedures, defenses, and remedies confront attorneys caught within its maze. Vital issues are at stake because employment "controls [employees'] economic destiny," and "provides for their security." Perhaps even more importantly, a person's employment bears upon his or her "personal well being" and "mental and physical health."

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DISCRIMINATION STATUTES COVERAGE

There are three principal federal discrimination statutes: Title VII of the Civil Rights Act of 1964,2 42 USC 1981, and the Age Discrimination in Employment Act (ADEA).3 Of these three statutes, the workhorse is probably Title VII, which covers employers with at least 15 employees, prohibits discrimination based on color, national origin, pregnancy, race, religion, and sex, as well as retaliation, in all terms, conditions, or privileges of employment. The federal discrimination statute with a more focused purpose is 42 USC 1981, which covers all employers. 1981 prohibits race discrimination, using a classical definition of "race," including Arab or Jewish.4 The ADEA, which covers employers with at least 20 employees, prohibits age discrimination against employees 40 years of age or older.

In Michigan, employees are also protected from discrimination by the Michigan Elliott-Larsen Civil Rights Act (ELCRA),⁵ which covers all employers. It prohibits discrimination based on religion, race, color, national origin, age, sex, height, weight, familial status, or marital status, as well as retaliation.⁶ Under the ELCRA, employees who are discriminated against because of their youth are protected.⁷

PRE-COURT FILING REQUIREMENTS

The employee has to exhaust administrative remedies before filing a Title VII or ADEA court action.8 In a deferral state such as Michigan, with a state civil rights agency, the employee must file a discrimination charge with the Equal Employment Opportunity Commission (EEOC) within 300 days of the alleged discrimination. When the EEOC has completed its review or 180 days have expired, the EEOC will issue a notice of right to sue giving the employee 90 days in

which to file a lawsuit. In contrast to Title VII, 42 USC 1981 has no exhaustion requirement, and the statute of limitations is a generous four years.⁹

The ELCRA creates a direct cause of action, without exhaustion or election of remedies, for private sector employees prior to filing a civil suit. ¹⁰ The ELCRA's statute of limitations is three years. ¹¹

In recent years, many employers have required pre-dispute arbitration procedures with their employees. The courts have held that such agreements to arbitrate statutory employment discrimination claims are valid and enforceable, provided that the procedures are fair and the employee waives no substantive rights or remedies. 12 An arbitration agreement does not bar the EEOC from pursuing victim-specific relief, such as backpay, reinstatement, and damages in an enforcement action. 13

EMPLOYEE'S PRIMA FACIE CASE

The rules of pleading and discovery in court are similar to other civil litigation. Notice pleading applies, so the complaint

Fast Facts:

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does not have to allege a prima facie case. 14 The courts will allow wide discovery. 15

There are, however, some particular rules relating to proving an employment discrimination case. An employee can prove a prima facie discrimination case in three ways: disparate impact,16 direct evidence,17 and circumstantial evidence.¹⁸ Disparate impact exists when facially neutral employment practices, such as test-giving or educational requirements, have a statistically significant disparate impact on a group of protected class employees without a business necessity justification. An example of adverse impact might exist where the employer requires a high school diploma for entry level custodial positions, and this requirement precludes 60 percent of one race from hire, and 90 percent of another race from hire, where there is no business necessity for the requirement. In discrimination cases generally, disparate impact is difficult and expensive to prove, and the courts differ as to whether adverse impact is applicable to age discrimination.¹⁹

Direct evidence, if believed, requires the conclusion that discrimination was a motivating factor in the employer's actions.²⁰ If the factfinder believes the direct evidence, the burden of proof shifts to the employer to disprove discrimination. An example of direct evidence would exist where the decision maker at the time of the discharge tells the employee that the reason for the discharge is the employee's protected class membership. In most cases, direct evidence of discrimination is unavailable, so employees must depend upon circumstantial evidence to establish a prima facie case.

The most common method of proof for discrimination cases is circumstantial evidence. To establish a prima facie case through circumstantial evidence, the employee must show that she (1) belonged to a protected class, (2) was qualified for the position, (3) suffered some type of adverse employment action, such as termination or

situations where the employer deviates from its normal inconsistent reasons, or destroys or conceals evidence.

non-selection, and (4) the position was given to another person under circumstances giving rise to an inference of discrimination.

There are some interesting issues related to each of these elements. As far as the "qualified" element, the employee is not required to prove as part of her prima facie case that she was more qualified, or even at least as qualified as the successful candidate.²¹

Perhaps the most complicated element of the circumstantial evidence prima facie case is the fourth prong, by which the employee establishes an inference of discrimination. The employee may establish such an inference if she can show that the employee was replaced by a non-protected class person or a comparable nonprotected person is treated better.²² A case involving circumstantial evidence exists when a protected class employee is discharged for missing one day's work, but there is evidence that non-protected class employees have not been discharged who have missed a day's work under comparable circumstances.

EMPLOYER'S ARTICULATED REASON

Once the employee has presented evidence that satisfies each element of the prima facie case, there is a presumption of discrimination. The burden of production, but not proof, shifts to the employer. The employer merely has to "articulate," with admissible evidence, some legitimate nondiscriminatory reason for its adverse employment action. A legitimate nondiscriminatory reason cannot be motivated by the illegal reason alleged by the employee, but it does not have to be a good or moral reason.

THE STRUGGLE OVER PRETEXT

If the employer meets its burden of production, the employee has to demonstrate that the employer's reason is a pretext for discrimination.²³ Under Michigan law, the em-

ployee must not merely raise a triable issue that the employer's articulated reason was pretextual, but that it was a pretext for unlawful discrimination. When there is sufficient evidence of pretext, the claim survives.²⁴

Evidence that may help establish pretext includes situations where the employer deviates from its normal procedure,²⁵ makes discriminatory remarks,26 offers inconsistent reasons,²⁷ or destroys or conceals evidence.²⁸ The employee may even draw on methods from disparate impact cases, by using statistics to show a pattern or history of discrimination.²⁹ Evidence of employer mendacity is the most common way of showing pretext. Under federal law, an employee's "prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."30

The circumstantial evidence prima facie case methodology need not be submitted to the jury, but instead the question to the jury is whether the employee was a victim of intentional discrimination.³¹ That is, the jury is not instructed to evaluate the circumstantial evidence methodology used to prove the case. The jury's only task is to determine whether the evidence is sufficient to establish that the employee was a victim of intentional discrimination.

If the employee shows that the articulated reason is a pretext, the employer might have additional defenses. One of these defenses is the "same actor" inference. This rebuttable inference arises when the same person made both the initial hiring decision as well as the adverse employment action within a short period of time.³² Arguably, this might raise an inference of personal animus rather than employer discrimination.

REMEDIES

The successful plaintiff has a comprehensive scope of remedies. Title VII allows back

pay and benefits, equitable relief (including reinstatement), attorney fees, front pay (i.e., damages for future income loss), and punitive and compensatory damages (including pain and suffering), up to maximum amounts. The remedies under 42 USC 1981 are the same, but there are no caps. ADEA remedies include back pay and benefits, equitable relief, front pay, attorney fees, and, if the discrimination is willful, liquidated damages equal to the amount of back pay and benefits. Back pay awards are not reduced by unemployment compensation benefits in discrimination cases.33 ELCRA remedies are the same as Title VII, except there are no caps or punitive damages under the ELCRA.34

The employer has some defenses to these remedies. Under federal and state law, the employee must attempt to mitigate her damages.35 In addition, under Michigan law, an employer being sued for discrimination based upon the terms of a collective bargaining agreement can seek contribution from the union that was a party to the agreement. There is no such contribution right under federal law.36 The employer may also limit its damages with "after-acquired evidence."37 The after-acquired evidence rule applies when the employer uncovers evidence after the adverse action, such as pre-hire misrepresentations, that would have resulted in an earlier discharge. When this happens, the employee's remedies may be limited to back pay until the discovery date of the after-acquired evidence, compensatory damages such as pain and suffering, and attorney fees.

CONCLUSION

The discrimination statutes provide an elaborate array of remedies, defenses, and procedures for attorneys that represent individuals and entities with employment law matters. These statutory provisions are constantly subject to an evolving gloss of court interpretation that can change from forum to forum and election to election. •



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FOOTNOTES

- 1. Lowe v Hotel Employees Union, 389 Mich 123, 148 (1973).
- 2. 42 USC 2001e.
- 3. 29 USC 621 et seq.
- Saint Francis College v Al-Khazraji, 481 US 604 (1987), and Amini v Oberlin College, 259 F3d 493, 502–503 (CA 6, 2001).
- 5. MCL 37.2101 et seq.
- 6. Discrimination statutes not discussed in this article include the Americans with Disabilities Act, 42

- USC 12101; the Equal Pay Act, 29 USC 206(d); ERISA, 29 USC 1140; the Family and Medical Leave Act, 29 USC 2601; National Labor Relations Act, 29 USC 151; the Rehabilitation Act, 29 USC 706; Uniformed Services Employment and Reemployment Rights Act, 38 USC 4301; Persons with Disabilities Civil Rights Act, MCL 37.1101; and the Equal Pay Act, MCL 750.556.
- 7. Zanni v Medaphis Physician Services Corp (Zanni II), 240 Mich App 472 (2000).
- 8. Edelman v Lynchburg College, 122 S Ct 1145 (2002); and 42 USC 2000e-5(e)(1).
- 28 USC 1658; and Rodgers v Apple South, Inc, 35 F Supp 2d 974 (WD Ky 1999).
- 10. MCL 37.2801; and *Womack-Scott v Dept of Corrections*, 246 Mich App 70, 77 (2001).
- 11. Bell v CSX Transp, Inc, 172 F Supp 2d 933, 937 (ED Mich 2001); and MCL 600.5805(9).
- 12. Circuit City Stores, Inc v Adams, 532 US 105 (2001); Floss v Ryan's Family Steak Houses, Inc, 211 F3d 306 (CA 6, 2000); and Rembert v Ryan's Family Steak Houses, Inc, 235 Mich App 118, appeal denied, 461 Mich 927 (1999). See generally "To Arbitrate or Not to Arbitrate Discrimination Claims: That is Now the Question for Michigan Employers," Michigan Bar Journal, Sep 2000, vol 79, no 9.
- 13. EEOC v Waffle House, Inc, 22 S Ct 754 (2002).
- 14. Swierkiewicz v Sorema NA, 122 S Ct 992 (2002).
- EEOC v Roadway Express, Inc, 261 F3d 634 (CA 6, 2001).

- 16. *Griggs v Duke Power Co*, 401 US 424 (1971); and 42 USC 2000e-2(k)(1).
- DeBrow v Century 21 Great Lakes, Inc (after remand), 463 Mich 534, 537–539 (2001).
- Reeves v Sanderson Plumbing Products, Inc, 530 US 133 (2000); and McDonnell Douglas Corp v Green, 411 US 792 (1973).
- Hazen Paper Co v Biggins, 507 US 604 (1993);
 Gantt v Wilson Sporting Goods Co, 143 F3d 1042,
 1048 (CA 6, 1998); and Alspaugh v Law Enforcement Commission, 246 Mich App 547, 562–567 (2001).
- Jacklyn v Schering-Plough Healthcare Products Sales Corp, 176 F3d 921 (CA 6, 1999); and Hazle v Ford Motor Co, 464 Mich 456 (2001).
- 21. Hazle, 464 Mich at 469-470.
- 22. Johnson v Kroger Co, 319 F3d 858 (CA 6, 2003); Ercegovich v Goodyear Tire & Rubber Co, 154 F3d 344 (CA 6, 1998); Hazle, 464 Mich at 463; and Lytle v Malady (on rehearing), 458 Mich 153, 172–178 (1998), reh'g denied, 459 Mich 1203 (1998).
- St Mary's Honor Center v Hicks, 509 US 502 (1993); Hazle, 464 Mich at 464; and Lytle, 458 Mich at 173.
- Hopson v Daimler Chrysler Corp, 306 F3d 427, 438–439 (CA 6, 2002); Veenstra v Washtenaw Country Club, 466 Mich 155, 166 (2002); Hazle, 464 Mich at 465–466; and Town v Michigan Bell Telephone Co, 455 Mich 688, 698 (1997), reh'g denied, 456 Mich 1202 (1997).
- 25. Wells v New Cherokee Corp, 58 F3d 233 (CA 6, 1995).
- Ercegovich, 154 F3d 344; Cooley v Carmike Cinemas, 25 F3d 1325 (CA 6, 1994); Debrow, 463
 Mich at 538; and Krohn v Sedgwick James of
 Michigan, Inc, 244 Mich App 289 (2001).
- Cicero v Borg-Warner, Inc, 280 F3d 579 (CA 6, 2002); Tinker v Sears, Roebuck & Co, 127 F3d 519 (CA 6, 1997).
- 28. Byrnie v County of Cromwell, Bd of Ed, 243 F3d 93 (CA 2, 2001).
- Teamsters v United States, 431 US 324 (1977);
 Hopson, 306 F3d at 437–438 (CA 6, 2002).
- 30. Reeves, 530 US at 148; and Kline v Tennessee Valley Authority, 128 F3d 337 (CA 6, 1997).
- 31. Hazle, 464 Mich at 466-467.
- Wexler v White's Furniture, Inc, 317 F3d 564, 572–574 (CA 6, 2003). Wexler is an en banc decision. Buhrmaster v Overnite Transportation Co, 61 F3d 461 (CA 6, 1995); Town, 455 Mich 688, 700–701
- 33. Rasimas v Michigan Dept of Mental Health, 714 F2d 614, 627-628 (CA 6, 1983).
- 34. MCL 37.2801-.2803; and *Dorsey v City of Detroit,* 157 F Supp 2d 729 (ED Mich 2001).
- Morris v Clawson Tank Co, 459 Mich 256 (1998); and Rasheed v Chrysler Corp, 445 Mich 109, 123 (1994).
- Northwest Airlines v Transport Workers Union of America, 451 US 77 (1981); and Donajkowski v Alpena Power Co, 460 Mich 243 (1999).
- McKennon v Nashville Banner Publishing Co, 513
 US 352 (1995); Grow v WA Thomas Co, 236
 Mich App 696 (1999); and Smith v Union Township (on rehearing), 227 Mich App 358 (1998).