

SBM Labor and Employment Law Section
Comparison of State and Federal Anti-Discrimination Law
September 27, 2007

Mary Anne M. Helveston

Federal precedent

While this Court is not compelled to follow federal precedent or guidelines in interpreting Mich law, this Court may, as we have done in the past in discrimination cases, turn to federal precedent for guidance in reaching our decision. *Radke v Everett*, 442 Mich 368 (1993)

Interpretations of Title VII need not control where state law dictates a different result. *MDCR ex rel Jones v Michigan Dep't of Civil Serv*, 101 Mich App 295 (1980)

ELCRA

Title VII

Number of employees:

1 or more

15

Protected categories:

Race, color, religion, national origin, age, sex.(incl. pregnancy), height, weight, or marital status.

Race, color, religion, sex or national origin.

Individual Liability

Supervisors can be individually liable. *Elezovic v Ford Motor Co*, 472 Mich 408 (2005) Overruled *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464 (2002) which held supervisors not individually liable.

No individual liability unless individual qualifies as an employer. *Grant v Lone Star Co*, 21 F3d 649, 653 (5th Cir) cert denied 513 US 1015 (1994)

Filing requirement:

MDCR w/in 180 days
Civil action in circuit court
w/in 3 yrs.

EEOC w/in 180 days or 300 days if state proceedings instituted. Federal court within 90 days after Right to Sue Letter issued by request or after investigation.

Shortened SL in a contractual provision enforceable unless the provision would

violate law or public policy. *Rory v Continental Ins Co.*, 473 Mich 457, 470 (2005)

No tolling by filing of a charge with the EEOC or state agency.

Continuing violation:

A person is limited to making claims for incidents that occurred within the statutory three years even in hostile work environment cases. *Garg v Macomb County Cmty Mental Health Servs*, 472 Mich 263, *amended*, 473 Mich 1205 (2005). This overruled *Sumner v Goodyear Tire and Rubber Co.*, 427 Mich 505 (1986) which held that acts that occurred outside the statute of limitations were actionable as long as one incident fell within the statutory time.

Preemption

Only where claim requires interpretation of collective bargaining agreement. *Hall v Kelsey-Hayes Co.*, 184 Mich App 277 (1990)

Arbitration:

Predispute agreements to arbitrate statutory employment discrimination claims are valid and enforceable, provided that minimal conditions are met, including a valid agreement between the employer and employee that meets the general rules of contract law. *Rembert v Ryan's Family Steak Houses, Inc.*, 235 Mich App 118 (1999). Those are: 1) notice to the employee that she is waiving her right to adjudicate discrimination claims in a judicial forum and opting to arbitrate. 2) the right to counsel, 3) a neutral arbitrator, 4) reasonable discovery, 5) a fair hearing.

A Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts, such as termination, failure to promote, denial of transfer, or refusal to hire, must be raised within the appropriate time period. *AMTRAK v Morgan*, 536 US 101 (2002). However, in a hostile environment claim, Acts that occurred outside the statute of limitations are actionable as long as one incident fell within the statutory time.

While the Supreme Court in *Circuit City Stores, Inc v Adams*, 532 US 105, 112, 113 (2001) affirmed the arbitrability of most employment related claims, on remand the Ninth Circuit found the arbitration agreement to be procedurally and substantially unconscionable under California law because it lacked mutuality. *Circuit City Stores, Inc v Adams*, 279 Fed 3rd 889, 894-895 (9th Cir), *cert denied*, 535 US 1112 (2002).

An agreement between employer and an employee to arbitrate employment related disputes does not bar the EEOC from pursuing victim-specific judicial relief,

such as back pay, reinstatement, and damages, in an enforcement action under the ADA. *EEOC v Waffle House, Inc.* 534 US 279 (2002).

Arbitration of Civil Rights Claims in Collective Bargaining Agreements:

Mandatory arbitration of civil rights claims in individual contracts are allowed but not in collective bargaining agreements because the interests of the individual in enforcing statutory rights may be subordinated to perceived greater interest of the bargaining unit. *Arslanian v Oakwood Hosps, Inc*, 240 Mich App 540, 550 (2000).

For a collective bargaining agreement to require employees to arbitrate an alleged violation of the ADA, the arbitration clause must clearly and unmistakably include such disputes. *Wright v Universal Mar Serv Corp*, 525 US 70 (1998)

Circumstantial Evidence

Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. *Farmington Education Assoc v. Farmington School District*, 133 Mich. App. 566 (1984).

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. *Reeves v. Sanderson*, 530 U.S. 133(2000)

With no direct evidence of impermissible bias, Plaintiff must present a rebuttable prima facie case which infers unlawful discrimination. Once the defendant presents a legitimate, nondiscriminatory reason for its employment decision, the presumption of the prima facie case drops away. Plaintiff must then demonstrate that the evidence construed in plaintiff's favor is sufficient to permit a reasonable juror to conclude that discrimination was a motivating factor in the employer's actions, and that the proffered reasons for its actions were merely a pretext for discrimination. *Hazle v. Ford Motor Company*, 464 Mich. 456 (2001).

In showing pretext, once the plaintiff has disproved the reasons offered by the defendant, the fact finder is permitted to infer discrimination. *Kline v. TVA*, 128 F3d 337 (6th Cir. 1997)

Jury Trial:

Plaintiffs have a right to a jury trial under the ELCRA. *Barbour v Dep't of Soc Servs*, 172 Mich App 275 (1988)

Under the 1991 CRA, plaintiffs have a right to a jury trial in actions alleging intentional discrimination under Title VII and the ADA.

Marital Status

ELCRA prohibits employment decisions based on marital status. The legislature's intention in including marital status in the act was to prohibit discrimination based on whether a person is married. *Miller v CA Muer Corp*, 420 Mich 355 (1884)

Title VII does not prohibit discrimination based on marital status.

Height and Weight

ELCRA prohibits employment decisions or the setting of employment conditions based on height or weight.

Title VII has no such provisions

Sexual Harassment

Hostile environment

To establish a case of hostile work environment, the plaintiff must prove the following five elements:

Williams v GMC, 187 F3d 553, 561 (6Cir 1999)

- (1) the employee belongs to a protected group
 - (2) the employee was subjected to communication or conduct on the basis of sex;
 - (3) that communication or conduct was unwelcome;
 - (4) that 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;
 - (5) Respondeat Superior
- Radke v Everett*, 442 Mich 368 (1993)

Who Is Protected:

Men and women are protected

Men and women are protected

No protection for sexual orientation

No protection for sexual orientation

Employees are protected from sex harassment by individuals of the same sex

The law does not require that the conduct at issue be physical or that it be targeted specifically at the plaintiff. *Broderick v Ruder*, 685 F. Supp 1269 (DC 1988)

Employees are protected from sex harassment by individuals of the same sex if sexual conduct desired. *Oncala v Sundowner Offshore Servs*, 523 US 75 (1998)

Nature of Harassment:

The harassment must be sexual in nature. While nonsexual gender-related comments would satisfy the “because of sex” requirement, they would not meet the “sexual conduct or communication” test and could not provide the basis for a sexual harassment claim under ELCRA. *Haynie v State of Michigan*, 468 Mich 302 (2003)

Non sexual conduct can create a cause of action for sexual harassment if it evinces anti-female animus. *Williams v GMC*, 187 F3d 553, 564-565 (6th Cir 1999).

Single Incident:

A single incident at issue was sufficient under the circumstances because the perpetrator was alleged to be the employer. *Ratke v Everett*, 442 Mich 368 (1993)

Under Title VII, most courts have held that a single incident of sexual harassment does not create a hostile work environment. *Chamberlin v 101 Realty, Inc.* 915 F 2d 777, 783 (1st Cir 1990)

What Is Not Harassment:

If both males and females are offended, it is not sexual communication because of sex. *Linebaugh v Sheraton Michigan Corp.*, 198 Mich App 335 (1993)

Title VII prohibits gender discrimination, not harassment in general or vulgar horseplay in the workplace. *EEOC v Harbert-Yeargin, Inc.*, 266 F3d 498 (6th Cir 2001)

Slight and abuses are not hostile if not based on a man’s status as a male. *Bowman v Shawnee State Univ.*, 220 F3d 456 (6th Cir 2000)

Harassment Must Be Severe or Pervasive:

The sexual harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Meritor Savings Bank, FSB v Vinson*, 477 US 57 (1986)

It Must Be Unwelcome:

The gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome. *Meritor Savings Bank, FSB v Vinson*, 477 US 57 (1986)

Although the court found that the workplace was permeated with vulgarity and sexual innuendo, there was no hostile environment where the plaintiff was among the most prevalent and graphic participants in this overall atmosphere. *Weinsheimer v Rockwell, Int'l Corp*, 754 F Supp 1559, 1563-1564 (MD FLA 1990), *aff'd*, 949 F2d 1162 (11th Cir 1991).

Totality of the Circumstances:

All of the relevant circumstances must be reviewed including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance and whether it unreasonably interferes with an employee's work performance. *Harris v Forklift Sys*, 510 US 17, 23 (1993)

The totality of the circumstances should be reviewed to determine whether the sexual conduct in the aggregate is sufficiently severe or pervasive to create a hostile work environment. *Randolph v Ohio Dep't of Youth Servs* 453 F3d 724 (6th Cir 2006).

Continuing violation:

There is no liability for sexual harassment that occurred outside of the three-year statute of limitations. *Garg v Macomb Cty Mental Health Serv*, 472 Mich 263 amended, 473 Mich 1205 (2005).

A charge alleging a hostile work environment claim will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period. *National Railroad Corp v Morgan*, 536 US 101, 121-122 (2002).

Liability:

For Co-workers' harassment:

An employer is liable for co-worker harassment only if the employer was negligent in failing to stop the harassment after receiving actual or constructive notice. *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234 (1991).

For supervisors' harassment:

An employer can be held liable for hostile environment sexual harassment only if the employer has actual or constructive notice of the hostile environment and fails to take prompt remedial action. *Chambers v Trettco, Inc*, 463 Mich 297 (2000)

Employer had notice of hostile environment and failed to take appropriate prompt remedial action. *Meritor Savs Bank, FSB v Vinson*, 477 US 57, 72 (1986).

The employer is always vicariously liable for sexual harassment by a supervisor, even if the employer had no prior notice, but if the harassment never culminates in a tangible employment action, the employer may assert a defense based on its reasonable efforts to prevent and correct the harassment. *Faragher v City of Boca Raton*, 524 US 775 (1998) *Burlington Indus v Ellerth*, 524 US 742 (1998)

Notice:

When an employee requests confidentiality regarding harassment by a former supervisor and the request is honored, this constitutes a waiver of the right to give notice. *Elezovic v Ford Motor Co.* 472 Mich 408 (2005)

The purpose of providing notice to the employer is to enable it to investigate and take prompt and appropriate remedial action so the notice must be timely. *Hartelip v NcNeilab, Inc.*, 83 F3d 767 (6th Cir 1996)

A company may be held liable for hostile environment harassment even where no employee has complained if the employer had constructive knowledge of the harassment, i.e., it is so open and pervasive that the employer should have known of it. *Sharp v City of Houston*, 164 F3d 923, 930 (5th Cir 1999)

Notice to Whom:

Someone with hiring and firing authority who can take action against the alleged harasser must be aware of the sexual harassment for notice to be imputed to the employer. That person must possess the ability to exercise significant influence in the decision-making process of hiring, firing and disciplining the offensive employee. That person must be one who can effectuate change in the workplace. *Sheridan v Forest Hills Pub Sch*, 247 Mich App 611, 637 (2001).

The law requires that the complaint be made to higher management unless the harassment is so pervasive that constructive knowledge may be inferred. *Hartleip v NcNeilab, Inc.*, 83 F3d 767 (6th Cir 1996)

Notifying an employee who is not the plaintiff's supervisor and is not in higher management is insufficient to provide notice to the employer, even if the employee notified a manager *Jager v Nationwide Truck Brokers, Inc.*, 252 Mich App 464, 477 (2002) *overruled on other grounds*, *Elozovic v Ford Motor Co.*, 472 Mich 408 (2005).

Plaintiff's general indication to a supervisor that something was wrong did not constitute actual or constructive notice that sexual harassment was occurring in the

plaintiff's workplace, even though the supervisor failed to keep his promise to follow up. *Chambers v Trettco, Inc*, 463 Mich 297 (2000) (*On Remand*), 244 Mich App 614, 624 (2001)

Employer's Sex Harassment Policy:

An employer's sexual harassment policy will often be used to determine whether notice is sufficient. *Maddin v GTE, Inc*, 33 F Supp 2d 1027 (MD Fla 1999)

If the employer's policy does not clearly specify who can receive complaints or the point person is not easily accessible, notice will be sufficient if it is given to a department head or someone who the complainant reasonably believed was authorized to receive and forward (or respond to) a complaint of harassment. *Parkins v Civil Constructors*, 163 F3d 1027, 1037 (7th Cir 1998)

Appropriate Remedial Action:

A prompt termination of the alleged offender has been held to be a sufficient means of avoiding sexual harassment liability. *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234 (1991)

Remedial action is considered adequate if it is reasonably calculated to end the harassment *Katz v Dole*, 709 F2d 251, 256 (4th Cir 1983)

The court held that the company took prompt and appropriate remedial measures once the plaintiff complained that she was being sexually harassed when it removed to harassing supervisor from the location, began an investigation, and assured the plaintiff that she would never have to report to the harassing supervisor again. *Chambers v Trettco, Inc*, 463 Mich 297 (2000) (*On Remand*) 244 Mich App 614, 624 (2001)

Even if some remedial action is taken, it may not be sufficient to satisfy the employer's burden. Giving the alleged harasser a verbal warning and attempting to separate him from the plaintiff was not sufficient to satisfy the employer's burden to promptly remedy sexual harassment where, although the alleged harasser continued his conduct after the verbal warning, he was not more severely disciplined. *Intlekofer v Turnage*, 973 F2d 773 (9th Cir 1992)