

**SBM LABOR AND EMPLOYMENT LAW SECTION
COMPARISON OF STATE AND FEDERAL
ANTI DISCRIMINATION LAW
2007**

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Federal Precedent:

Michigan Courts generally rely on the more developed body of federal cases interpreting the ADEA in deciding age discrimination cases.

ELRCA

ADEA

Employers:

1 or more employees
(state employees must sue
their state employer in state court)

20 or more employees

ELRCA applies to any employer who takes prohibited action against an individual regardless of the existence of an er/ee relationship between the two.

ADEA -entity that has control over an individual's access to emp opportunities but does not pay ee, or is outside the regular er/ee relationship is also w/in the scope of the ADEA.

Protected categories:

No age limits (minimum or max)

Only protects those 40 years of age or older

Individual Liability:

Supervisors can be individually liable (*Elezovic*).

No individual liability

Filing requirement:

No administrative filing requirement
If employee would like to file with MDCR,
must do so w/in 180 days
Circuit court w/in 3 years

EEOC requirements same as Title VII
(180-300/ File DC w/in 90 RTS)

Liability - Burden of Proof

Basically, the plaintiff must establish that age was a determining factor in the adverse decision that is the subject of the litigation. A determining factor need not be the sole reason or the main explanation, as long as it was one factor that made a difference in the decision-making process. *Matras v. Amoco Oil Co.*, 424 Mich 675 (1986).

Michigan has adopted the federal burden shifting method of proof:

Prima Facie Case:

(1) Plaintiff was a member of the protected category; (2) Plaintiff was subjected to an adverse action, (3) plaintiff was qualified for the position, and (4) was replaced by a substantially younger person, or, that a person outside the protected class was treated more favorably than him.

Adverse action includes termination, demotion and failure to hire or promote. Adverse action is not always an ultimate employment decision. To constitute an adverse action, the challenged action must cause a “materially adverse change in the terms or conditions of employment.”

- * Reassignment or transfer that does not result in any adverse consequences such as loss of salary and benefits or change in job location, title or hours does not constitute an adverse action.
- * Must be *objectively* adverse, not subjectively. *Cherry v. Thermo Electron Corp*, 800 F. Supp 508 (ED Mich 1992); *Swystun v. Farmington Sch Dist*, 2003 Mich App LEXIS 438 (Feb 21, 2003)(unpublished).

A replacement need not be outside the protected age group as long as the individual is substantially younger than the plaintiff. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996).

In a case arising out of a workforce reduction, evidence that a competent, older employee was terminated and a younger employee retained is insufficient to establish a prima facie case. *Matras*, 424 Mich at 684; *Lagrang v. Gulf and W Mfg Co.*, 748 F2d 1087 (6th Cir 1984).

Defendant's Burden:

Once the plaintiff establishes prima facie case of age discrimination, burden shifts to the defendant to produce evidence of a legitimate, nondiscriminatory reason for its adverse conduct

Pretext:

Pretext can be shown in three ways:

- (1) **the employer's explanation has no basis in fact;**
- (2) **if the reason had a basis in fact, it was not the actual reason for motivating the decision; or**
- (3) **if the reason was a motivating factor, it was insufficient to justify the decision.** *Dubey v. Stroh Brewery Co.*, 185 Mich App 561 (1990); *Scuderi v. Monumental Life Ins*, 344 F Supp 2d 584 (ED Mich 2004).

An employer's changing rationale for an adverse employment decision may also be evidence of pretext. Shifting justifications over time calls the credibility of the defendant's justification into question. *Cicero v. Borg-Warner Auto, Inc.*, 280 F3d 579 (6th Cir. 2002).

Direct Evidence:

"Old age" comments

Drawing from federal precedent the court in *Krohn v. Sedgwick*, 244 Mich App 289 (2001), focused on four factors used to determine the relevance of such remarks:

- (1) Were the disputed remarks made by the decision maker or by an agent of the employer uninvolved in the challenged decision;
- (2) Were the disputed remarks isolated or part of a pattern of biased comments?
- (3) Were the disputed remarks made close in time or remote from the challenged decision?
- (4) Were the disputed remarks ambiguous or clearly reflective of discriminatory bias?

Isolated, ambiguous or stray remarks are not sufficient to support a finding of age discrimination. *Phelps v. Yale Sec. Inc.*, 986 F2d 1020 (6th Cir), *cert denied*, 510 US 861 (1993).

Release/Waiver Limitations

ADEA

Older Workers Benefit Protection Act (OWBPA). Limits the use of release agreements as a defense to ADEA claims.

Requirements:

Waiver must:

- (1) be in a format calculated to be understood by the average employee;
- (2) specifically refer to the rights arising under ADEA;
- (3) does not waive rights after the date the document is executed;
- (4) be in exchange for consideration in addition to anything to which the employee already is entitled;
- (5) advise the employee to consult an attorney; and
- (6) give the employee at least 21 days to consider signing the document, and 7 days to revoke it.

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None. (Attempts to apply OWBPA to state claims failed, *Davis v. General Motors Corp.*, No. 212297, 2000 Mich App LEXIS 2851 (Jan 16, 2001) Unpublished.

Reduction in Force:

A reduction in force (RIF) for bona fide economic reasons is a termination for just cause. *McCart v. J Walter Thompson, Inc*, 437 Mich 109 (1991), and hence a defense to a discrimination claim. It is not a defense where the plaintiff produces sufficient evidence from which a jury could find that the employer unlawfully implemented this reduction in force – that is, evidence (direct, circumstantial, statistical) tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons. *Kulling v. Grinders for Indus*, 185 F. Supp 2d 800 (ED Mich 2002).

Bone Fide Seniority System

Section 4(f)(2) of the ADEA, as amended by the OWBPA, provides a defense for a bone fide seniority system. However, the seniority system cannot require or permit involuntary retirement of any employee on the basis of age. “Totality of Circumstances” test to determine whether or not a seniority system is bonafide and thus not discriminatory. 29 USC §623 (f)(2)(A); *US Airways, Inc., v. Barnett* 535 US 391, 420 (2002).

Michigan Law very similar - Elliot Larsen has seniority system provision

Damages (The Big Difference)

ADEA

- An employee who prevails is entitled to recover economic damages. Compensatory damages for emotional distress, NOT available for violations of the ADEA
- If an individual establishes that the employer's actions were willful, the plaintiff is awarded liquidated (double) damages. 29 USC 626 (b)
- Back pay, liquidated damages decided by jury
- Empowers court to grant without limitation judgments compelling employment, reinstatement, or promotion; or front pay. Reinstatement preferred remedy, unless exceptional circumstances exist.
- No prejudgment interest
- Attorneys fees

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- Economic and compensatory damages for emotional distress
- Punitive/exemplary damages may be available (sketchy)
- Prejudgment Interest
- Attorney Fees
- Federal Courts have confirmed awards in the same case for liquidated damages and prejudgment interest for the plaintiff for cases brought under both statutes stating that liquidated damages are punitive in nature while prejudgment interest is compensatory. (Lilley v. BTM, 958 F2d 746 (6th Cir. 1992), cert denied, 506 US 940 (1992))