

PITT, DOWTY, McGEHEE & MIRER, P.C.

Overview of the law of discrimination and harassment in the workplace

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I.

Overview of our approach to discrimination/harassment in the workplace

Prospective clients consulting our firm for advice on employment-discrimination matters usually fall into one of four categories. First current employees often present claims of racial, sexual or disability status harassment, inappropriate treatment on the job, denial/failure of promotional opportunity, failure to accommodate a disability, or discrimination in regard to other terms or conditions of employment on the basis of race, gender, national-origin, retaliatory motive, age, religion, disability status, marital status, weight, or status as a whistleblower.

Secondly, we are frequently consulted by current employees who are in a non-work status such as on a medical leave of absence, administrative leave, or suspension. In many cases, the medical leave is the result of stress associated with on-the-job harassment caused by an unlawful hostile work environment or discrimination based on disability status.

Third, we are frequently consulted by former employees who have been involuntarily terminated from their employment or who have resigned under adverse conditions amounting to what the law recognizes as a constructive discharge. A constructive discharge occurs when the employer deliberately creates working conditions so intolerable that a reasonable individual would be forced to resign under these conditions. Whether your employment conditions are so intolerable to create a constructive discharge is a complex factual and legal issue requiring expert evaluation. Do not resign your employment expecting to assert a constructive discharge claim without first consulting with an experienced attorney. We are often consulted by individuals who have been separated from employment and offered a severance package containing a release of claims.

Fourth, we are frequently consulted by prospective employees who claim they were not hired by an employer because of impermissible considerations such as race, gender, national origin, age, religion, marital status, weight, prior Workers' Compensation conditions, disability status, or for other reasons prohibited by law.

II.

current employee claims

1. Harassment Claims:

We can assist prospective clients in distinguishing between inappropriate workplace activities and unlawful harassment. Some forms of inappropriate workplace activities cannot be addressed in a court of law. Generally, harassment, in order for it to be actionable, must be so severe and/or pervasive that it creates a hostile work environment. Most courts recognize that a single incident, if severe enough, can support a claim for a

hostile environment. Single-incident cases of a hostile work environment usually involve physical assaults or extreme verbal assaults creating an extreme emotional response.

Most courts have adopted the totality of circumstances test. This means that the court will consider the cumulative effects of various incidents on the psychological well-being of the target of the harassment.

Employers are legally responsible for injuries caused to its employees by the severe and pervasive harassment of its supervisors. If the supervisor harasses an employee where a tangible job loss occurs (termination, failure to promote, substantial reassignment of duties), the employer may be liable for the harassment even if it did not have notice of the supervisor's conduct. If the supervisor's harassment does not result in a tangible job loss, the employer may still be liable but can defend itself in court by demonstrating that it had reasonable anti-harassment policies and procedures in place, or that the employee was unreasonable in his or her decision not to report the supervisor's misconduct.

Employers can be liable for the results of a hostile work environment caused by an employee's peers or coworkers. In such a case, adequate notice to the employer generally is required. This means that the employer must have known, or had reason to know, that the hostile work environment was occurring and failed to take prompt and remedial efforts to correct the hostile environment.

In all cases, where the employer is on notice of the hostile work environment, the employer is under an obligation to take prompt, corrective and effective remedial action. If the employer fails to take such action, the employer may be liable to the employee for all injuries and damages flowing from the hostile work environment.

In order for a severe and pervasive work environment to be considered an unlawful hostile work environment, the hostile work environment must be the result of bias toward the employee because of his or her gender, race, national origin, religion, age, disability status, retaliatory motive, or status as a whistleblower. Harassment, even if it is severe and pervasive causing a hostile work environment, is not actionable if based on factors such as personality conflict, sexual orientation (which is not a protected status under Michigan law), character assassination, rumor, innuendo, or the perception, accurate or otherwise, that the employee is a poor performer.

2. Failure to Promote Claims

Failure to promote claims require a separate type of analysis. In order to have a viable failure to promote claim, the employee must establish that he or she applied for the promotional opportunity. In addition, the employee must establish that he or she had qualifications superior to the individual hired into the position in question. It is not sufficient that the employee have equal qualifications. In most non-union situations, the employer creates the qualifications necessary for the promotional opportunity. In doing this, the employer can decide how much weight to attach to each qualification criteria. For instance, in some situations, length of service or experience will determine the best-qualified candidates. In other cases, length of service or experience may not be as vital as educational attainment or ability to work productively in a team setting. Employers may not pre-select candidates for promotional opportunity and then adjust qualifications to rig the process. Employers may not provide certain candidates with advantages not made available to other candidates without good cause or reason.

Once it is established that the employee actually applied for the position and possessed qualifications (arguably superior) to the individual who secured the position, the employee must still prove that the difference in treatment was the result of race, sex, age, national origin, religion, marital status, disability status, whistleblower status, or in retaliation for having pursued legal remedies in the past. Applicants for employment are protected by state and federal civil-rights laws. If an applicant in a protected group is denied employment because of his or her gender, race, national origin and the like, he or she may bring an action for what is known as injunctive relief (an order that the applicant be hired), or for money damages. As in the case of termination, the applicant may establish a case by either direct or indirect evidence.

III.
current employees in
non-work status

1. Voluntary Medical Leaves of Absence

A typical scenario presented to the firm involves a current employee who is on non-work status due to a voluntary medical leave of absence. In this situation, the employee has usually taken a medical leave because of work-related injury, illness, or stress caused by workplace harassment. Often, the return to work is delayed because the employer refuses to eliminate the adverse working conditions which caused the original untenable work environment to exist, or the employee's physician requires certain restrictions upon return to work. Legal intervention at this point is often required to facilitate the return to productive employment. Many of these cases involve claims for Workers' Compensation. Under Michigan law, any worker who can establish that he or she is psychiatrically or physically disabled as a result of an objective workplace incident or event, can obtain a statutorily-defined wage loss benefit and payment of medical expenses relating to the compensable injury and pursue a discrimination case at the same time. In all dual-remedy cases, coordination between the attorney representing the employee in the Workers' Compensation matter and the discrimination/harassment claim is required.

We have developed strategies which enable our clients to successfully pursue both discrimination and Workers' Compensation claims and other types of disability benefits. We are capable of advising our clients if pursuing both remedies will be possible and, where dual remedies are not available, to assist the client in selecting the type of claim which makes the most sense. We work closely with expert attorneys who can represent our clients in pursuit of Workers' Compensation claims, long-term and short-term disability claims, Social Security disability claims and retirement benefits.

2. Involuntary Medical Leave of Absence:

Our firm is sometimes consulted by employees who have been involuntarily placed on a medical leave of absence. Most often, the employer regards the employee as being psychologically or physically unable to perform the duties of a particular position. The employee is then placed on an involuntary medical leave of absence so that the employer can determine whether the employee is psychologically or physically fit for duty. An involuntary medical leave of absence can be an unlawful adverse employment action depending on the circumstances under which it occurs. For instance, an employer may not place an employee on an involuntary medical leave because the employer suspects, without objective evidence, that the employee is mentally unstable or suffers from an emotional disorder. In order for such action to be lawful, the employer must have clear and objective evidence that there is an immediate safety risk to either the employee, co-employees, or the public. Depending on the employee's goal, our firm can assist in negotiating a return to work on conditions which are fair, reasonable and legal. When this isn't feasible, we can develop a severance plan or assist in the pursuit of other benefits based on disability status such as Workers' Compensation, short-term and long-term disability, Social Security disability, normal and/or disability retirement status.

IV.

Terminated Employee Issues

1. The At-Will Doctrine:

Most employees in Michigan are considered "at-will" employees. This means that in the absence of a specific written or oral promise not to terminate employment without just cause or to continue to employment for a definite duration, the employer is not legally required to have a reason, valid or otherwise, for an employee's termination. Employees without the protection of such a written or oral agreement are known as "at-will" employees. At-will employees may be terminated by an employer without the employer incurring any legal liability unless the termination violates state or federal civil-rights statutes prohibiting terminations on the basis of race, gender, national origin, age, marital status, weight, or other statutes and/or laws which form an exception to the at-will doctrine.

Unless an at-will employee is protected by these other laws, an employer can legally terminate the at-will employee without a reason or stating a reason; an employer is not required to provide an at-will employee with any notice of deficient performance and notice of pending termination; an employer is not required to follow its own procedures and policies regarding discipline, performance or termination if the employee in question is an at-will employee. The employer can terminate a long-term, at-will employee unfairly (such as without warning). The employer can be mean-spirited in its actions toward an at-will employee (such as firing a family member on Christmas Eve), or downright silly or stupid (terminate an at-will employee because the employee refused to get on his knees and bark like a dog) and not be legally liable to the employee unless the employment action implicates a violation of civil rights.

Most employees are informed by their employers that they are at-will employees. Notification of this status is usually found in the job application, employee handbook, or other company-produced publications. An employer is not required to specifically identify an employee as an at-will employee. Even if the employer is silent as to the status of a particular employee, the law will presume that the employment is at-will. The at-will employment doctrine is very strong in Michigan and is difficult, if not impossible, to overcome.

In order to overcome the presumption of at-will employment status, an employee must present competent evidence of a written or oral agreement to terminate for just-cause only, or a written or oral agreement that employment will continue for a definite duration. If the employer publishes written material which suggests that the employee is a "just-cause" and an "at-will" employee at the same time, usually a question of fact exists for a jury to decide the correct status of the employee.

Claims by an employee that a member of management orally stated that the employee could not be terminated except for just cause will not usually override written material published by the employer establishing the at-will status of the employee.

Many of our prospective clients are surprised to learn that they are at-will employees and, as such, can be terminated without notice or cause, even if the employee has a long-term relationship with the employer and has done nothing to justify the termination. At-will employees, faced with a termination perceived to be unfair, should consult with an attorney to see whether there are any exceptions to the at-will doctrine which might provide relief.

1. Exceptions to the At-Will Doctrine:

Civil-Rights Claims:

Most employees in Michigan are covered by either state or federal civil-rights laws which prohibit employment decisions based on race, gender, religion, age, national origin, marital status, weight, retaliatory motive, disability or whistleblower status. These civil-rights laws prohibit severe and pervasive harassment resulting in a hostile and intimidating work environment because of a status protected by the civil-rights laws. Employees who suffer discrimination or retaliation for opposing a violation of these civil-rights laws, or filing a complaint of discrimination, or participating in a civil-rights proceeding may not be terminated for that reason.

Whistleblower Claims:

Employees who report, or who threaten to report, actual or suspected violations of law to a public body and who are terminated or suffer other adverse employment action are protected under Michigan's Whistleblower Protection Act and can bring a legal action in circuit court for termination, demotion, or other adverse-employment action.

Common-Law Claims

Employees who are terminated because they refuse to violate a Michigan or federal law or are required by the employer to engage in other conduct which may violate Michigan or federal public policy, may not be lawfully terminated and can bring a claim for wrongful termination under what is known as Michigan common law. Common law, as opposed to statutory law, is created by the courts to provide remedies to terminated employees under limited circumstances. A typical example of a common law wrongful discharge claim is a lawsuit for an employee who has been terminated for bringing a Workers' Compensation claim. Michigan public policy encourages injured workers to bring claims for compensation and it is the common law of the State of Michigan that employers may not terminate employees (even at-will

employees) for this reason. Other examples of common law claims arising out of the employment context are defamation (false statements tending to injure an employee's reputation), tortious interference with employment rights (a supervisor maliciously and for personal reasons causes an employee to lose his or her job), invasion of privacy (the employer publishes sensitive information regarding an employee causing the employee to suffer extreme embarrassment or emotional distress), intentional infliction of emotional distress (the employer's agent engages in extreme and outrageous conduct causing severe psychological injury).

An experienced employment attorney can help you assess whether any of these common-law remedies will be available to you.

Unionized Employee Claims:

Employees who are in a union and subject to a collective-bargaining agreement (CBA) are subject to some of the same laws as non-union employees. Most CBAs contain a guarantee that the covered employee will not be terminated without just cause. The same civil-rights laws protect unionized employees and non-unionized employees alike. Terminations of a unionized employee based on race, gender, age (as well as the other impermissible criteria) can usually be (but not always) redressed in a civil-rights claim simultaneously with the pursuit of wrongful-termination grievance procedures set forth in the CBA. Claims of wrongful discharge, separate from any alleged civil-rights violations, can be pursued in a claim of breach of contract against the employer but must be accompanied by a claim that the union failed to represent the employee in the grievance process. In almost all cases, the employee must first exhaust contractual remedies provided by the CBA. If the union fails to prosecute a meritorious grievance or mishandles it so that the employee's termination cannot be properly redressed, the employee must allege and prove that the union breached its duty of fair representation and that this claim must be part of the suit against the employer for breach of the CBA.

Public Employee Claims:

Public employees may be unionized or non-unionized. In general, public employees may bring civil-rights claims for wrongful termination, file grievances against their employer in connection with the collective-bargaining agreement, and may also pursue civil-service procedures set up by the employing government. Public employees may also have what is known as a constitutional property interest in his or her job. If such a property interest is found to exist, the public employer may not deprive that employee of that property interest without due process of law. Public employees can bring a claim that there was a violation of due process under the federal Constitution in the grounds or manner in which the termination occurred. Employees working for private employers cannot assert a violation of due process under the federal Constitution.

Wrongful-Termination Civil-Rights Claim:

In pursuing a claim of wrongful termination in violation of state or federal civil-rights laws, the employee must prove that he or she was a member of a protected group (such as race or gender). The employee must also prove that the termination was because of the individual's protected status.

In order to have a successful case, the employee must either have direct or indirect evidence of discrimination. Direct evidence means that the employee heard or observed a decision maker engage in an overt discriminatory act. Direct evidence usually consists of statements made by a decision maker indicating that the decision maker was biased or prejudiced against the employee because of his or her protected status. It is not required that the employee actually overhear the decision maker make the

comment in question. Reports from reliable sources can serve as a basis for establishing a case of discrimination based on direct evidence.

A second way a claim of discrimination can be established through is the use of indirect evidence. Under the law, once an employee establishes that he or she was a member of a protected group, was adversely treated by the employer, and that he or she was qualified for the job in question, the employer is required to articulate a non-discriminatory reason for the employment action. If the employer does present to the court its reason (i.e., the employee was a poor performer), the burden is on the employee to prove that the reasons given by the employer are false or, as known in law, pretextual. Even if the employee can demonstrate that the reasons given by the employer for the employment action were pretextual, the employee must be able to present sufficient evidence that the action taken by the employer was because of the employee's membership in a protected group.

Other forms of indirect evidence include pattern of discrimination (as where only females are selected for a layoff from a mixed group) statistical evidence (analysis of selection data to establish that overall the selection rates of a particular group could not have occurred by chance) and other evidence from which a discriminatory motive may be inferred.

VI.

Procedures, time limits and type of relief available

Employees or applicants for employment with claims of discrimination may have options in the procedures to be employed in pursuing these claims. Generally, claims brought under Michigan's civil-rights laws do not require the filing of an administrative charge with either the Michigan Department of Civil Rights (MDCR), or the federal Equal Employment Opportunity Commission (EEOC). Claims under the Michigan civil-rights statutes prohibiting race, gender, national origin, religion, age, marital status, retaliatory motive, weight, or disability status can be pursued by proceeding directly to circuit court.

Parallel claims can be pursued under the federal civil-rights laws. Most federal civil-rights statutes require the filing of an administrative claim with either the MDCR or EEOC. A lawsuit under most federal civil-rights statutes requires the filing of these administrative charges before bringing suit. Failure to file a timely administrative charge will result in a dismissal of most federal civil-rights lawsuits.

There are certain time limits which must be observed in bringing either an administrative charge before the MDCR or EEOC or filing suit. Lawsuits under the Michigan civil-rights statutes must be filed in circuit court no later than three years from the date of the complained about act of discrimination. Administrative charges of discrimination under the federal statutes must be filed within 300 days of the alleged act of discrimination. In addition, once the administrative charge is closed, the EEOC will issue what is known as a "right-to-sue letter". A lawsuit must be filed within 90 days of the receipt of the right-to-sue letter. A lawsuit under most federal civil-rights statutes will be subject to dismissal if the administrative charge was not filed within 300 days of the act of alleged discrimination, and the lawsuit was not instituted within 90 days of the receipt of the notice of right-to-sue letter issued by the EEOC.

Lawsuits under the Whistleblower Protection Act must be brought (filed in court) within 90 days of the adverse employment action (such as termination/demotion) or constructive discharge.

Termination claims against an employer where there is an alleged breach of a collective-bargaining agreement are controlled by a complex set of timeliness rules. The time for bringing such a lawsuit can be as short as 6 months from the date of discharge. Similarly, the time limits for bringing a lawsuit against a union for breach of its duty of fair representation is equally complex and could be as short as 6 months from the date of termination from employment.

Certain common-law claims arising out of the workplace, such as defamation, have statutes of limitations as short as one year.

Under the Michigan civil-rights statutes, a lawsuit can seek both money damages and equitable relief. Damages are in the form of economic losses (past and future lost wages, benefits and other economic advantages of employment), and non-economic damages (mental distress, humiliation, loss of reputation, embarrassment). Equitable relief means that the court can order reinstatement, promotion, transfer, reemployment, rehiring, or that the applicant for employment be hired. Employees who prevail in their civil-rights suits can have all or a part of their attorney fees paid by the employer as part of the recovery. Punitive damages are not available under Michigan civil-rights laws. However, there are no caps or limits on the amount of non-economic damages which can be recovered under the Michigan civil-rights statutes.

Suits under the federal civil-rights statutes are similar in that economic and non-economic damages, as well as equitable relief, is available. Punitive damages are available against private employers (not available against public employers). Depending on the size of the employer, suits under most federal civil-rights statutes have a cap or limit on the amount of non-economic damages which can be recovered. For larger employers (500 or more

employees?), the cap on non-economic damages (which includes punitive damages) is \$300,000.00.

Under both the state and federal civil-rights statutes, future economic losses can be recovered.

VII. what to do if you believe your civil rights are violated

Good advice we often give an employee who perceives discrimination at work is to document what has transpired. A journal should be kept of all important dates and events. Statements made by supervisors or coworkers of importance should be recorded verbatim (if possible). Always remember that if your claim proceeds to a lawsuit, your journal will become discoverable by the employer's lawyers. This means that you will be required to turn over the journal for inspection and photocopying by the employer's attorneys. It is, therefore, important that all entries be accurate, business like, and professional in content and tone. Tape-recording of conversations, although legal in some situations, is discouraged because it often places the employee in a negative light.

Management must be notified of any discriminatory or hostile work environments. Notification should be in writing so that there is proof of when the complaint was made, the nature of the complaint, and the relief requested. You should be prepared to cooperate with management in its investigation into your complaint. Without adequate notice of a workplace problem, your employer is usually not legally responsible for injuries caused by problematic conditions.

Request a copy of your personnel file. Michigan has a statute known as the Bullard-Plawecki Right-to-Know Act. Under this law, you must make a written request to your employer to review and photocopy your personnel file. Your employer must produce the personnel file for inspection and photocopying within a reasonable amount of time (usually one week). Your employer can charge you a reasonable fee (usually no more than .25 per page) for photocopying your record. You are entitled to correct any errors in your personnel file by including, on a separate sheet of paper, your version of events in question.

Prepare a chronology of the events in controversy. In proving a discrimination case, the sequence of events is very important. If consulting with us regarding an alleged discriminatory employment action, we will require a concise and accurate written narrative. If you have not begun the documentation of your claim, you should immediately reconstruct the important events in a chronology or time line and continue to add events as they occur.

If you have been terminated from your employment, the law imposes upon you a duty to mitigate your losses. Mitigation means "to lessen the effect of". Your duty to mitigate requires you to pursue comparable employment in your field. The law does not require you to obtain another position in order to have a viable claim. The law, however, does require you to make a reasonable and diligent effort to find comparable work. You will be required to prove that you have taken steps to mitigate your losses. The best way to do this is to keep careful records of all job pursuit activities, including copies of advertisements for positions, applications for employment, correspondence and the like. If a lawsuit is filed on your behalf, you will be able to demonstrate your diligence in pursuing alternative employment opportunities by presenting to the company's lawyer a log of activities and/or copies of your applications and reject letters.

If you are offered a comparable position with another company and refuse to accept that position without a legally-justifiable reason your claim for economic damages may cease as of the date of your rejection. In order for the employer to have the benefit of this rule, it must establish that the position that you turned down with another firm or company was of a comparable nature. Whether the position is of a comparable nature requires the opinion and evaluation of a competent employment-discrimination attorney.

In order to assert a claim of failure to accommodate based upon a disability, you must request the necessary accommodation in writing.

The request should detail the nature of and reason for the accommodation and, should include documentation of need from your medical or psychological provider.

After a claim of discrimination has been presented to your employer on your behalf, the employer may offer to reinstate you to your former position. Failure to accept the offer of reinstatement, without a legally-justifiable excuse, may bar your later claims for economic damages against your former employer. Once again, whether your claim for economic damages will be barred depends on an assessment of your situation by a competent employment-discrimination attorney.

VIII.

positive and negative factors considered in evaluating cases

In selecting cases to be pursued, we evaluate the strengths and weaknesses of each case presented to us. The selection process can occur within a relatively short period of time (immediately after the first consultation), but more likely after several meetings and investigative steps. The selection process can take several weeks or months of review or investigation. Personnel files and medical records are reviewed; available witnesses are interviewed; when necessary, legal principles are researched to determine applicability to the case at hand.

The following is a list of recognized "strengths" in cases we handle:

- Long-term employment and documented consistent satisfactory or better performance.
- Coworkers or peers who will support allegations of high performance or discrimination/harassment.
- Evidence of promotions, regular pay increases or other forms of employer recognition of satisfactory performance.
- In psychiatric/stress cases, no significant prior history or psychological disorder or an aggravation of a preexisting condition.
- Likelihood of bias, such as a female claiming harassment working in a predominantly male environment or profession or a female claiming denial of promotion to a position held solely by men.
- "Large" employers (1,000) or an employer with a known history of discriminatory practices.
- In harassment cases, evidence of complaints to employer without appropriate action, or no evidence of inappropriate participation in the events claimed to form the hostile work environment.
- Although professional medical treatment is not required in order to bring a claim for non-economic damages, physicians/psychologists/psychiatrists supporting claim of injury caused by harassment or discrimination is helpful.

- Positive employee traits, including ability to tell a cogent story, likeable personality, high energy, strong community links.
- Probability of high economic damages because employee unlikely to find comparable employment, such as in a case where the employee is older (55 or older), or has a visible disability.
- Evidence of high integrity and honesty in all dealings with employer and peers.

The following is a list of “weaknesses” found in the cases we are asked to review:

- Short-term employment.
- History of job hopping or frequently changing positions.
- Misrepresentations, exaggerations, or inaccuracies in job application or resume.
- Inconsistent record of performance or evidence of poor performance prior to claimed act of discrimination.
- Multiple supervisors have evaluated the claimant as an unsatisfactory performer.
- Coworkers and/or peers will not support claimant’s position.
- Prior psychiatric history which the employer may use to explain poor performance or misconduct.
- Physicians/psychologists/ psychiatrists who will not support claimant or cannot clearly link injuries from discrimination to current status.
- Low economic damages because of likelihood to find replacement position.
- Any evidence of dishonesty or lack of integrity.
- In harassment cases, failure to report offensive conduct without rational reason.
- In harassment cases, evidence of participation in the creation of the environment alleged to be hostile.
- Small employers (1-20 employees) with limited assets.

- In disability discrimination cases, temporary or minor physical, or mental conditions which are not recognized as legal disabilities.
- Cases which are not timely or barred by the statute of limitations.