EMPLOYMENT DISCRIMINATION

I. EMPLOYMENT DISCRIMINATION BASICS

A. Various laws (state and federal) prohibit discrimination on the basis of age, sex, race, religion, national origin, genetic history, handicap, among other "protected characteristics."

B. Protected Class

1. Age, sex, race, religion, national origin, genetic history, handicap, and other "protected characteristics."

2. State law adds height, weight, familial and marital status

C. "Bona Fide Occupational Qualification"

1. Federal

a) Title VII permits an employer to discriminate on the basis of "religion, sex, or national origin in those instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise." 42 USC 2000e-2.

b) Also applies to age discrimination under the Age Discrimination in Employment Act (ADEA). 29 USC 623(f)(1).

c) Race can NEVER be the basis for a bona fide occupational qualification.

D. Exceptions to Title VII

1. Exempt Employers

a) Employers with less than 15 employees each working day for 20 or more calendar weeks. 42 USC 2000e(b).

b) Indian tribes, religious organizations (partially), membership clubs. 42 USC 2000e(b)(1)-(2).

2. State

a) State law also allows for bona fide occupational qualifications. MCL 37.2208;

II. TYPES OF DISCRIMINATION

A. Age Discrimination - Federal

1. Protected Persons

a) Persons 40 years of age and older are protected by the Age Discrimination in Employment Act (ADEA). 29 USC 623 *et seq*.

2. Covered Employers

a) Employers with 20 or more employees that are engaged in interstate commerce are covered by ADEA.

3. Prohibited Practices

a) Pursuant to the ADEA, it is unlawful for an employer with 20 or more employees that is engaged in interstate commerce to:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter

4. Exceptions

a) Despite the provisions of the ADEA, an employer that is subject to the ADEA may still:

(1) Differentiate between employees or prospective employees for legitimate and reasonable reasons other than age. For example, if the job in question entails heavy lifting, the employer may subject prospective employees to a physical examination and may legitimately decide to hire the 20-year-old who does quite well on the examination and not hire the 40-year-old who did not do as well on the examination without violating the ADEA;

(2) Enforce good faith occupational qualifications that are reasonably necessary to the normal functioning and operation of the employer's business;

(3) Provide early retirement incentives under certain circumstances or encourage retirement based on pension plans;

(4) Differentiate between employees pursuant to a bona fide seniority system.

5. Penalties for Violation

a) Backpay (double backpay if the employer willfully violated the ADEA)

b) Reinstatement or restoration to comparable position

c) Employees' Attorney fees

6. Posting Requirements

a) An employer that is subject to the ADEA must post, in a conspicuous place on its premises, a notice prepared or approved by the EEOC setting forth information on age discrimination.

B. Age Discrimination – State

1. Protected Persons

a) State law does not specify an age limit like federal law; *see* MCL 37.2010.

b) This means that young people might have causes of action if terminated for being "too young"; e.g., *Zanni v Medaphis Physician Services Corp (Zanni II)*, 240 Mich App 472 (2000)

(employee terminated because sounded "too young" on the telephone, which employer's customers did not like).

2. Covered Employers

c) Michigan's Elliot-Larsen Civil Rights Act does not have a minimum number of employees to be covered; therefore, it applies to all Michigan employers.

3. Prohibited Practices

a) It is unlawful for an employer to not hire, to discharge, or to otherwise discriminate against a person with respect to compensation, terms of employment, conditions of employment, or privileges of employment because of that person's age.

C. Sex Discrimination

1. Protected Persons

a) Both men and women are protected by the provisions of Title VII (Federal Law) and the Elliott Larsen Civil Rights Act (State Law)

2. Prohibited Practices

a) It is unlawful for an employer to not hire, to discharge, or to otherwise discriminate against any person with respect to compensation, terms of employment, conditions of employment, or privileges of employment because of that person's sex.

3. Examples

a) Rules or policies that apply only to one gender; *Phillips v Martin Marietta Corp*, 400 US 542 (1971) (rule prohibiting children applied only to women).

b) Employment decisions based on gender stereotypes. *Price Waterhouse v Hopkins*, 490 US 228 (1989)

c) Providing benefits to one sex but not the other. *City of Los Angeles Dep't of Water and Power v Manhart*, 435 US 702 (1978).

d) Sexual harassment (described in more detail below).

e) Title VII includes discrimination based on pregnancy, and pregnancy-related medical conditions and disabilities affecting an employee's ability to work. 42 USC 2000e-(k). This also means that employers may not consider an employee's

pregnancy status in making employment decisions. *Id*.; See also 29 CFR 1604.10(a)-(b).

f) Sexual *orientation* is not protected by Title VII. *Spearman v Ford Motor Co*, 231 F3d 1080 (7th Cir 2003).

D. Religious Discrimination – State and Federal

1. Protected Class: "all aspects of religious observance and practice, as well as belief." 42 USC 2000e-(j). The EEOC Guidelines further elaborate that protected religious practices "include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 CFR 1605.1.

2. Michigan state law also extends protection to agnostics and atheists. *Cline v Auto Shop Inc*, 241 Mich App 155 (2003); MCL 37.2202(1)

3. Employer's Duty to Accommodate: Title VII and state law impose a duty to "reasonably accommodate to an employee's religious observance or practice" unless doing so would impose an "undue hardship on the conduct of the employer's business." 42 USC 2000e-(j); See also 29 CFR 1605.2(b)(1)-(3); *Michigan Dept of Civil Rights ex rel Parks v General Motors Corp, Fisher Body Division*, 412 Mich 610 (1982).

4. Religious organizations partly exempt: Title VII exempts "religious corporation[s], association[s], educational institution[s], or societ[ies] with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 USC 2000e-1(a).

E. Race Discrimination – State and Federal

1. Pursuant to Title VII (Federal Law) and the Elliott-Larson Civil Rights Act (State Law), it is unlawful for an employer to not hire, to discharge, or to otherwise discriminate against a person with respect to compensation, terms of employment, conditions of employment, or privileges of employment because of that person's race

F. Disability Discrimination/Handicap Discrimination

1. Americans With Disabilities Act (Federal Law)

a) Protected Persons

(1) Any person suffering from a physical or mental impairment that substantially limits that person's life activities, any person with a record of such an impairment, or any person that is regarded as having such an impairment. (Following are some examples of what may constitute a disability under the law:

orthopedic disorders; visual impairments; speech impairments; hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; HIV infection; cancer; heart disease; diabetes; mental retardation; emotional illness; learning disabilities; drug addiction; and alcoholism).

b) Persons subject to the Act

(1) The Americans with Disabilities Act (ADA) applies to employers engaged in an industry that affects commerce with 15 or more employees

c) Prohibited Practices

(1) Pursuant to the ADA, it is unlawful for an employer to discriminate against a qualified person because that person is disabled (i.e. a protected person as defined above) with respect to the application process, hiring, advancement, discharge, compensation, job training, and other terms, conditions, or privileges of employment. Thus, an employer cannot discriminate against a qualified person who, with or without reasonable accommodation, could perform the essential functions of the job in question).

d) Required Accommodations

(1) Pursuant to the ADA, an employer is required to alter a job, work environment, or the application process to enable a qualified person with a disability to enjoy equal employment opportunities where this can be done without imposing an undue hardship on the employer. These accommodations may include:

(2) Making the work area readily accessible to and usable by disabled persons;

i. Restructuring a job on a marginal scale;

ii. Reassigning a disabled employee to a vacant position;

iii. Establishing part-time or revised work schedules;

iv. Acquiring or modifying equipment or devices that are job-related. The employer is not, however, required to provide the employee with devices or equipment that helps the employee both on and off the job. Instead, the employer simply must allow the disabled employee to bring such devices and/or equipment to the job. (For example, a leader dog);

v. Adjusting or changing examinations, training materials, or policies;

vi. Providing qualified readers or interpreters.

e) Posting Requirements

(1) Every employer subject to the Act must post a notice on its premises that is accessible to applicants and employees and which describes the provisions of the ADA.

G. Disability – State - The Michigan Persons with Disabilities Civil Rights Act (State Law) – MCL 37.1101 *et seq*

1. Protected Persons

a) Any person suffering from a physical or mental impairment that substantially limits that person's life activities, any person with a record of such an impairment, or any person that is regarded as having such an impairment. (Following are some examples of what may constitute a disability under the law: orthopedic disorders; visual impairments; speech impairments; hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; HIV infection; cancer; heart disease; diabetes; mental retardation; emotional illness; learning disabilities; drug addiction; and alcoholism.)

2. Persons Subject to the Act

a) The Act applies to all employers.

3. Prohibited Practices

a) Pursuant to the Act, it is unlawful for an employer to:

(1) Fail or refuse to hire, recruit, or promote a person because of a handicap that is not related to that person's ability to perform the duties of the particular job or position;

(2) Discharge or otherwise discriminate against a person with respect to compensation or the terms, conditions or privileges of employment because of a handicap that is not related to that person's ability to perform the duties of the the particular job or position;

(3) Limit, segregate, or classify an employee or applicant in a way that deprives or tends to deprive a person of employment opportunities or otherwise adversely affects the status of an employee because of a handicap that is not related to the person's ability to perform the duties of the particular job or position;

(4) Fail or refuse to hire, recruit, or promote a person on the basis of physical or mental examinations that are not directly related to the requirements of the specific job;

(5) Discharge or take other disciplinary action against a person on the basis of physical or mental examinations that are not directly related to the requirements of the specific job;

(6) Fail or refuse to hire, recruit, or promote a person when adaptive devices or aids may be utilized to enable that person to perform the specific requirements of the job;

(7) Discharge or take other discriminatory action against an individual when adaptive devices or aids may be utilized to enable that person to perform the specific requirements of the job;

(8) Discriminate against an individual because of a handicap in admission to, or employment or continuation in, a program established to provide apprenticeship or other training;

(9) Print, publish, or cause to be printed or published, a notice or advertisement relating to employment by the employer indicating a preference, limitation, specification, or discrimination, based on a handicap that is not related to the person's ability to perform the duties of the particular job or position; and

(10) Except as permitted by Federal Law:

i. Make or use a written or oral inquiry or form of application that elicits or attempts to elicit information concerning the handicap of a prospective employee for reasons contrary to the Act; and

ii. Make or keep a record of information or disclose information concerning the handicap of a prospective employee for reasons contrary to the Act;

iii. Make or use a written or oral inquiry or form of application that expresses a preference, limitation, or specification based on the handicap of a prospective employee for reasons contrary to the Act.

4. Required Accommodations

a) Pursuant to the Rights Act, private, for-profit employers must expend a certain amount of money to accommodate each worker with a disability. The amount that such employers must spend to

make such accommodations is keyed to the state average weekly wage (SAWW) as determined by the Michigan Employment Security Commission (as of 2012, the SAWW was $860.34), and is limited by the nature of the accommodation and the number of employees as set forth below:

b) Equipment or devices

(1) Employers with 1-3 employees are not required to spend more than the current SAWW;

(2) Employers with 4-14 employees are not required to spend more than 1.5 times the SAWW;

(3) Employers with 15-24 employees are not required to spend more than 2.5 times the SAWW;

(4) Employers with 25 or more employees are required to spend 2.5 times the SAWW or less.

(5) (Effective July 26, 1994, an employer with 15 or more employees will be required to spend 2.5 times the SAWW or less.)

c) Reader or interpreter

(1) Employers with 1-3 employees need not spend more than 7 times the SAWW for the first year the handicapped person is hired, promoted or transferred; need not spend more than 5 times the SAWW for each subsequent year.

(2) Employers with 4-14 employees need not spend more than 10 times the SAWW for the first year the handicapped person is hired, promoted or transferred; need not spend more than 7 times the SAWW for each subsequent year.

(3) Employers with 15-24 employees need not spend more than 15 times the SAWW for the first year the handicapped person is hired, promoted or transferred; need not spend more than 10 times the SAWW for each subsequent year.

(4) Employers with 25 or more employees may be required to spend up to 15 times the SAWW for the first year the handicapped person is hired, promoted or transferred; and up to 10 times the SAWW for each subsequent year.

d) Job restructuring or rescheduling

(1) Employers with less than 15 employees are not required to make this accommodation.

(2) Employers with 15 or more employees are required to make such accommodations only with respect to minor or infrequent duties relative to a particular job.

III. SEXUAL HARASSMENT

A. Definition of sexual harassment: Sexual harassment is defined by Michigan statute and federal regulations as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when any of the following is true:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

2. An individual's submission to or rejection of such conduct is used as the basis for employment decisions affecting him or her; or

3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

See MCL 37.2103.

B. In both state and federal context, this applies to both traditional male-female, female-male, and same sex harassment. *Robinson v Ford Motor Co*, 277 Mich App 146 (2007); *Oncale v Sundowner Offshore Services*, 523 US 75 (1998).

C. Two theories of harassment: **Quid Pro Quo** Sexual Harassment and **Hostile Work Environment**. State law recognizes a distinction between quid pro quo and hostile work environment sexual harassment.

1. The Michigan Supreme Court has held that sexual harassment that falls into one of the first two categories ("submission to such conduct…" and "an individual's submission") above is known as quid pro quo harassment, while the third category ("such conduct has…") refers to hostile work environment sexual harassment. *Chambers v Trettco, Inc,* 463 Mich 297, 310 (2000).

It is worth noting that this distinction, while still present in federal caselaw, is increasingly ignored.

D. QUID PRO QUO HARASSMENT

1. Quid Pro Quo Harassment is defined as: Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to

such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by and individual is used as the basis for employment decisions affecting such individual (such as not being hired, being fired, denying a raise, or losing a promotion). The largest number of these cases involve sexual harassment, typically by a supervisor toward a subordinate.

a) Elements of the offense:

(1) The employee was subjected to **unwelcome** sexual conduct or communications (including advances, requests for sexual favors, or other verbal or physical conduct) of a sexual nature;

i. Unwelcome: Can it be unwelcome if the complainant consents?

ii. The U.S. Supreme Court says harassment can be unwelcome even if the complainant consents. In *Meritor Sav Bank v Vinson*, a bank employee alleged that she had a relationship with her supervisor because she thought she'd lose her job if she did not comply. The Court commented that the employee's consent to a sexual relationship with her supervisor did not mean that the relationship was welcome. "The correct inquiry is whether [the employee] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in the sexual intercourse was voluntary." But the Court also said that the teller's sexually provocative speech or dress "may be relevant" in determining whether she regarded advances as unwelcome. 477 US 557 (1986)

iii. State law takes a different position. As a general matter, conduct and communications arising out of a consensual relationship (up to and including sexual activity) have been held as not sufficient to constitute "unwelcome" conduct or communication for purposes of proving a quid pro quo or hostile work environment claim. *See, e.g. Haseley v Kelley Svcs, Inc*, 2003 WL 22204743 at *4 (Mich App).

b) The harassment was based upon the employee's sex; and

c) As a result of the employee's reaction to the harassment, some aspect of the employee's employment was affected (compensation, benefits, status, conditions, privileges).

2. Employer's duty upon learning of harassment:

a) If it comes to an employer's attention that one of his supervisory employees is sexually harassing another employee, the employer is required to take immediate appropriate corrective action.

b) Employer's liability for quid pro quo harassment: Strict liability (federal), preponderance of the evidence (state). *Quinn v Pipe & Piling Supplies (USA) Ltd*, 2010 WL 4226734 at *2 (WD Mich); *Chambers v Trettco, Inc, supra*.

c) An employer can be held automatically liable for quid pro quo sexual harassment under both federal and Michigan law. *See Henson v City of Dundee*, 682 F2d 897 (11th Cir 1982) (holding employer strictly liable for actions of its supervisors amounting to sexual discrimination or harassment resulting in tangible job detriment to subordinate employee); *Champion v Nationwide Sec, Inc, 450 Mich* 702, (1996) (overruled on other grounds) (Civil Rights Act imposes strict liability on employers for quid pro quo sexual harassment committed by supervisory personnel); *See also Hamed v Wayne County,* 284 Mich App 681, 688-693 (overruled on other grounds) (holding same).

d) Under federal law, the employer can oftentimes be held vicariously liable for hostile work environment sexual harassment. *See Faragher v City of Boca Raton*, 524 US 775 (1998); *Meritor Sav Bank, supra* (employers are not automatically liable for sexual harassment by their superiors, but absence of notice to an employer does not necessarily insulate that employer from liability).

e) Under State law, the employer can be vicariously liable for quid pro quo harassment when the employer's employee uses supervisory authority to perpetrate harassment.

(1) Defeating strict liability

a) As the US Supreme Court has explained, an employer can only defeat liability (in the quid pro quo federal context) by raising a specific defense outlined in the case of *Burlington Indus Inc v Ellerth*, 524 US 742, 761 (1998):

> When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence…The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm...."

E. Hostile Work Environment Harassment

1. Hostile work environment harassment occurs when an employee is repeatedly subjected to unwelcome sexual conduct (comments, actions) to the point that the harassment unreasonably interferes with the employee's work performance or creates an intimidating, hostile or offensive working environment.

2. Elements of the offense

   Under Michigan law, to state a prima facie case of hostile work environment sexual harassment, a plaintiff must establish all of these five elements:

   a) the employee belonged to a protected group;

   b) the employee was subjected to communication or conduct on the basis of sex;

   c) the employee was subjected to **unwelcome** sexual conduct or communication;

   d) 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

   e) respondeat superior.

      Radtke v Everett, 442 Mich 368, 382-83 (1993) (internal footnote omitted) (emphasis added).

3. Employer's duty upon learning of harassment:

   If it comes to an employer's attention that one of his supervisory employees is sexually harassing another employee, the employer is required to take immediate, appropriate action

   a) Employer's liability for HWE harassment:

   b) Federal: "presumption of liability" but not strict liability. *Quinn v Pipe & Piling Supplies (USA) Ltd*, supra.

   c) State: Liability only if did not take prompt action to remedy the situation upon learning about the harassment.

4. Defeating Liability

   a) Federal: Under federal law an employer may show that they have "exercised reasonable care to avoid harassment and to eliminate it when it might occur." *Faragher*, *supra* at 805.

   b) State: "an employer may avoid liability [in a hostile work environment case] 'if it adequately investigated and took prompt and appropriate remedial action upon notice of the

alleged hostile work environment.'" *Chambers v Trettco, Inc*, *supra* at 312.

F. Suggesting How to Prevent Sexual Harassment

1. Let employees know that sexual harassment of any form is not acceptable and will not be tolerated.

2. Create a written sexual harassment policy which includes a clear explanation of how employees can report sexual harassment and the consequences for employees engaging in harassment.

3. Be receptive to all complaints and observations. Don't merely dismiss an employee's concerns as over-sensitivity!

4. When and if you are notified of any potential harassment, immediately investigate the allegations fully, document the investigation and take appropriate corrective actions if necessary.

5. Once an investigation has begun, maintain confidentiality at all times.

6. Establish a complaint procedure that enables an employee to present a complaint to one of several designated employees, including individuals other than direct supervisors.

7. Make sure supervisors are trained to recognize harassment and intervene when appropriate. Supervisors should also know that they risk further discipline and potential legal liability for engaging in harassing behavior or failing to take appropriate action to stop it.

8. Communicate the results of the investigation and the decision to both the alleged victim and the alleged harasser.

9. Follow up with complainant to confirm that the problem has not recurred, if applicable.

10. Maintain thorough and up to date personnel records. This is the best safeguard against contrived allegations of discrimination and harassment.