EMPLOYMENT LAW SEMINAR

A practical and informative overview
of employment legal issues

Presented by:

Harvey Kruse, P.C.
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS

1050 Wilshire Drive, Suite 320
Troy, MI 48084-1526
(248) 649-7800
Fax (248) 649-2316

4110 Pier North Blvd.
Flint, MI 48504
(810) 230-1000
Fax (810) 230-0844

60 Monroe Center NW, Suite 900 B
Grand Rapids, MI 49503-2926
(616) 771-0050
Fax (616) 776-3646

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www.harveykruse.com

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FEDERAL STATUTES

CIVIL RIGHTS ACT OF 1866 (42 USC 1981)

Protected Groups:

•Race

Prohibited Conduct:

Discrimination in the making and enforcing of contracts based on race. Applies to employment opportunities. §1981 does not protect whites but only provides that all non-whites shall have the same rights as whites.

Relief/Damages:

Back and front pay; compensatory and punitive damages;, damages for emotional distress, humiliation, pain and suffering. Attorney fees and costs based upon the court's discretion.

STATUTE OF LIMITATIONS:

Limitation period for state civil rights actions in forum state.
(3 yrs in Michigan)

TITLE VII - CIVIL RIGHTS ACT OF 1964 (42 USC 2000e AND 12102 ET. SEQ.)

Title VII is the primary federal employment antidiscrimination legislation. It applies only to employment except concerning individuals with disabilities.

WHO IS COVERED:

•Employees and applicants for employment

DEFINITION OF EMPLOYER:

•Any person engaged in business with 15 or more employees
•Any agent of such person

PROTECTED GROUPS:

•Race
•Color
•Religion
•Gender (including pregnancy and marital status applied only to one sex, also can include sexual stereotyping)
•National origin or ancestry
•Disability

Title VII does not prohibit discrimination on the basis of citizenship or nepotism.

PROHIBITED CONDUCT:

Discrimination in hiring, firing, promoting, disciplining, limiting, segregating classifying or other discriminating regarding terms, conditions or privileges of employment on the basis of membership in a protected group.

Retaliation for opposition to a violation of the Act or for making a charge, testifying or assisting or participating in an investigation, proceeding or hearing under the Act. §2000e-3(a).

Title VII is administered by the Equal Employment Opportunity Commission. (EEOC) The EEOC can investigate complaints of discrimination and award monetary and injunctive relief to employees. It may also sue an employer.

PREREQUISITES FOR SUIT/STATUTE OF LIMITATIONS

Exhaustive of Administrative Remedies:

An employee must file a complaint with either the EEOC or state civil rights agency and complete the process including cooperation in any investigation conducted. Agency must issue a right to sue letter before a suit can be maintained.

An employee must file a complaint with the EEOC or a state civil rights agency within 300 days of the alleged discriminatory act. If the EEOC or other agency issues a right to sue letter the employee must file suit within 90 days of receipt of the letter or any federal cause of action is barred.

LIABILITY OF EMPLOYER FOR ACTS OF SUPERVISORS

Employers are liable for the acts of supervisory employees if the employer:

1. Either overtly or covertly authorizes, acquiesces in or ratifies a supervisor's conduct;

2. Holds a supervisor out as having authority to perform particular acts (even if he does not);

3. Fails to investigate complaints of discrimination by supervisors;

4. Fails to adequately monitor or investigate a supervisor's conduct affect equal opportunity employment.

A supervisor's unauthorized conduct does not subject the employer to liability if the employer promptly undertakes measures reasonably calculated to remedy the discrimination.

The Genetic Information Non-Discrimination Act of 2008 prohibits employers from discriminating against any employee because of genetic information

about the employee. This Act becomes effective in November, 2009 and Title VII governs enforcement.

TWO TYPES OF DISCRIMINATION - RACE, SEX, NATIONAL ORIGIN

1) Disparate treatment

2) Disparate impact

PRIMA FACIE CASE OF DISPARATE TREATMENT:

a) An employee must show that he or she is a member of a protected group and was treated differently for the same or similar conduct than a similarly situated member of the non-protected group and that the protected status was a motivating factor, though not necessarily the only factor in the treatment.

e.g. A black, female sales representative is fired for having failed to achieve sales quota. She presents evidence of white or male sales representative who have also failed to make quota but who were not terminated.

b) Intentional discrimination:

An employee must show that the employer was predisposed to discriminate against members of a protected group and actually acted on that predisposition in taking adverse employment action against an employee.

e.g. A supervisor frequently uses racially derogatory language and discharges a black employee.

e.g. A supervisor fires more Hispanic employees than white employees and treats Hispanic employees negatively while treating others well.

Shifting Burden of Proof - Legitimate, Non-discriminatory Reason

If the employee satisfies his or her burden of proof, the burden then shifts to the employer to show a legitimate, non-discriminatory reason for the adverse action. If the employer can demonstrate such reason, the burden shifts back to the employee to prove that the proffered reason is not worthy of credence

and is simply a pretext for discrimination. To do so, an employee must present evidence beyond that which established the initial burden, or prima facie case.

PRIMA FACIE CASE OF DISPARATE IMPACT:

The employer has policies and/or practices which, on their faces, appear to be neutral regarding classification of employees but which, in practice, apply to the detriment of a protected group.

e.g. An employer has a policy requiring pre-employment testing which whites show significantly higher scores on than do blacks resulting in the hiring of less blacks because of their performance on the test.

Shifting Burden of Proof - Business Necessity

The employer must show that the challenged practice or policy is job related and is consistent with business necessity. If the employer makes such a showing, the employee must discredit the evidence.

This type of discrimination usually requires statistical evidence and, in many cases, expert testimony.

TITLE VII RACE DISCRIMINATION

PROTECTED GROUP:

The protected group for racial discrimination is not necessarily limited to blacks. Hispanics and Arabs have been found to be 'races' particularly where the person discriminating views the difference as racially based as opposed to being related to national origin. Jewish people, however, have not been considered as a race because of the wide variety of countries from which Jews hail.

PLAINTIFF'S PRIMA FACIE CASE:

Plaintiff must demonstrate either disparate treatment or disparate impact as discussed above.

In order to demonstrate sex discrimination, an employee need not show that the challenged action was based on a characteristic peculiar to a gender or

that it was directed at all members of the gender. The employee need only establish that gender was a substantial factor in deciding to take the action.

Title VII protects against discrimination base on pregnancy within the prohibition against sex discrimination.

The Act does not prohibit discrimination based on sexual preference.

Title VII does prohibit discrimination on the basis of sex "plus" another factor. "Sex plus" discrimination involves the imposition of a requirement on one sex but not the other coupled with discrimination against or in favor of one gender based on the additional requirement.

e.g A policy of not accepting applications from women with preschool aged children but accepting applications from men with pre-school aged children and employing men with preschool aged children.

e.g. Policy of not hiring married women but permitting the hiring of married men.

TITLE VII NATIONAL ORIGIN OR ANCESTRY DISCRIMINATION AND RELIGIOUS DISCRIMINATION

DEFINITION OF NATIONAL ORIGIN OR ANCESTRY:

Includes birthplace and birthplace of ancestors, association with a national origin group and physical, cultural or linguistic characteristics associated with a nationality.

National origin does not include citizenship (Immigration Reform and Control Act of 1986 prohibits discrimination on the basis of citizenship which includes US citizens or nationals and legal aliens as well as refugees granted asylum)

PLAINTIFF'S PRIMA FACIE CASE RELIGIOUS DISCRIMINATION:

1) Bona fide belief that compliance with the requirement is contrary to religious faith;

2) Employer has been informed of the conflict;

3) Employee was discharged or disciplined for refusing to comply with the requirement;

If met, the employer must then demonstrate that a reasonable accommodation would present an undue hardship.

DEFINITIONS:

•Reasonable accommodation:

Employers are required to provide reasonable accommodation for religious beliefs such as a) refusal to work on holy days or during periods of mourning; b) dress or grooming requirements or; c) objections to medical examinations.

•Undue Hardship:

Employers are not required to make accommodations which present undue hardship. Undue hardship occurs when the employer cannot provide the accommodation without such problems as violating the seniority provision of a valid collective bargaining agreement, suffering more than de minimis costs in terms of money or efficiency in attempting to replace the absent worker, requiring employees or other religions or nonreligious employees to work at times which are undesirable to them in place of the absent worker

Transworld Airlines, Inc. v Hardison 432 US 63 (1977)

Undue hardship is determined on a case by case basis

FACTORS:

•Practices of similarly situated employers
•Burden on the union of accommodation
•Number of employees available to replace absent worker

Because of the accommodation requirement, the disparate impact analysis is inapplicable in religious discrimination cases.

Bona Fide Occupational Qualifications - Sex, National Origin, Religion, Disability

Title VII does not prohibit employers from considering bona fide occupational qualifications (BFOQs) based on sex, national origin, religion or disability in hiring. BFOQs cannot be related to race.

The BFOQ must be reasonably necessary to the normal operation of that particular business or enterprise.

e.g A health club may require that the janitors in the men's locker room be male.

e.g. A requirement that employees speak English satisfactorily is a BFOQ in a sales position.

e.g. A company based on religious beliefs may require that its employees be members of the religion.

The fact that clients or customers prefer men, Americans or members of a particular religion does not establish a BFOQ.

e.g. The fact that most customers of a car dealership are biased against Hispanics does not establish a BFOQ.

Assumptions concerning differences between the performance abilities of individuals are not BFOQs.

e.g. An assumption that women are less knowledgeable than men about cars does not justify hiring only men as sales representatives in a car dealership.

HARASSMENT

Although Title VII does not specifically mention harassment, it has been construed to prevent harassment based on membership in a protected group.

TWO TYPES OF HARASSMENT:

1) Quid pro quo

2) Hostile environment

Quid Pro Quo

Plaintiff must show that submission to or rejection of unwelcome conduct was used as a basis for employment decisions or was made, expressly or implicitly, a term or condition of employment, and that the harasser was acting within the scope of his apparent authority at the time of the harassment.

e.g. A female employee is told that she will not receive a raise unless she engages in sexual activity with her male supervisor.

This form of harassment usually involves the activity of a supervisor as, typically, only supervisors can grant or deny benefits. It is primarily used in sexual harassment situations. It is an issue as to whether employers may be held liable for such discrimination by employees even if management did not know or had no reasonable way of discovering the harassment. The underlying policy consideration for this determination is that the harasser used the means furnished to him by the employer (his authority) to accomplish the harassment.

Hostile Work Environment:

Plaintiff must show that conduct or communications based on protected status which are unwelcome by the employee had the purpose or effect of substantially interfering with the employee's employment nor created an intimidating, hostile or offensive work environment.

•The Conduct:

Whether the challenged conduct rises to the level of prohibited harassment is determined on a case by case basis considering the conduct in the context of all relevant circumstances. In harassment cases, the conduct is to be considered from the perspective of the reasonable person. In sexual harassment cases, it is not necessary to prove physical contact or an invitation to perform sexual acts. For example, the telling of sexually offensive jokes or performing sexually offensive gestures may establish a hostile environment. Similarly, in harassment based on race, religion or national origin, the harassment will most likely not include physical contact. In addition, harassment claims can be based on the treatment of others. Employees may be offended by being subjected to the harassment of others. There is precedent for only one act to constitute a hostile environment if it is substantial. Further, harassment claims can be based on the conduct of co-employees who are not supervisors.

e.g. A female employee is continually subjected to sexually explicit jokes which are offensive to her.

e.g. An Hispanic employee is continually referred to in derogatory terms referring to his national origin.

e.g. A supervisor proselytizes his religious beliefs inducing subordinates of different religions to believe that their job security was affected by their willingness to convert to the supervisor's religion.

•Unwelcome conduct:

The complained of conduct must be unwelcome to the employee. That is, if the employee is not offended by the conduct, although others may be, harassment has not occurred. Factors considered in determining whether the conduct was unwelcome include whether the victim solicited, participated in or incited the conduct. The victim's own conduct is relevant as is whether complaints were made. The difficulty in determining whether the conduct was unwelcome occurs in situations such as uninvited but welcome conduct, and offensive but tolerated conduct. However, according to the Sixth Circuit, only the objective standard is used, rather than the perspective of the involved employee. Not all conduct of a sexual nature will be considered prohibited harassment. For example, the fact that a supervisor merely avoided communication with an employee who rejected

sexual advances has been found to be insufficient as have simple snubs, unjust criticism of an employee's work and an isolated incident in which a supervisor made a few, mild, brief advances then stopped and apologized.

Liability for acts of employees:

Unlike quid pro quo cases, employers are not strictly liable for all claims of harassment. When the harasser is a supervisor, notice to the employer is presumed if the conduct was or should have been known to the employer. When the harasser is a non-supervisory employee, liability may be avoided if the Plaintiff cannot show that the employer or its supervisory personnel knew or should have known of the harassment.

Liability for acts of non-employees

The EEOC has determined that employers may be liable for harassment of its employees by customers, vendors and non-employees.

•Prompt remedial action

If an employer with notice of the harassment undertakes prompt remedial action, including investigation and corrective action, the liability of the employer may be entirely avoidable.

Investigations need not be requested by the victim and must be fair and complete. If the allegations are unsubstantiated after thorough and fair investigation, no further action is required. If the allegations are substantiated, remedial action must be taken such as:

•Reprimanding the harasser after discouraging the conduct and noting the discipline in the harasser's file;

•Relocation or transfer of the victim to a comparable position away from the harasser if the harasser is not terminated.

•Informing a customer that harassment is not tolerated and further action will result in expulsion from the premises.

•Merely discouraging the conduct is rarely sufficient remedial action.

HANDICAP DISCRIMINATION - AMERICANS WITH DISABILITIES ACT (42 USC 12101 ET. SEQ.)

PROTECTED GROUP:

Individuals with (1) a physical or mental impairment which substantially limits one or more major life activity (2) a record of such an impairment or (3) who is regarded as having such an impairment.

Amendments to the Act effective January 1, 2009 have broadened coverages under the Act.

[Insert discussion regarding the Family and Medical Leave Act here]

[Insert overtime regulations material here]

PROHIBITED CONDUCT:

An employer may not limit, segregate or classify an applicant or employee in a way that adversely affects the opportunities or status of a qualified individual with a disability because of the disability, fail to make reasonable accommodation for an otherwise qualified individual's known physical or mental impairments, deny employment opportunities on the basis of the need for reasonable accommodation, use qualification standards, employment tests or other selection criteria that tend to screen out individuals with disabilities or fail to use employment tests in a manner that ensures accurate measure of what the tests purport to measure, discriminate with regard to job application procedures, hiring, advancement, compensation, or other terms, conditions or privileges of employment on the basis of the disability, deny equal opportunity for jobs or benefits to a qualified person because of that person's relationship or association with an individual with a known disability.

Retaliation for opposition to a violation of the Act or for making a charge, testifying or assisting or participating in an investigation, proceeding or hearing under the Act. Interference, coercion or intimidation toward any individual for the exercise of the rights of that individual under the Act or for assisting or encouraging others to exercise their rights under the Act. §12203.

STATUTE OF LIMITATIONS:

Same as Title VII, filing of charge with EEOC within 180 days of the violation and filing of suit within 90 days of receipt of Notice of Right to Sue.

DEFINITIONS:

•Physical Impairment -

Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting a major body system.

Physical impairment includes contagious diseases such as AIDS and can also include alcoholism and drug abuse if the addict is not currently engaged in the illegal use of drugs or if the current use of alcohol does not prevent performance of job duties or present a direct threat to the property or safety of others.

Physical impairment does not cover transitory ailments with no permanent effect, or characteristics such as height or weight within normal ranges (obesity may be an impairment), left handedness, or pregnancy.

•Mental impairment -

Any mental or psychological disorder.

Mental impairment does not include economic, environmental or cultural characteristics such as poverty, lack of education or personality traits which are not symptoms of mental or psychological disorders.

•Major life activity -

Functions such as taking care of oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

•Otherwise qualified -

Able to perform the essential functions of the job with or without reasonable accommodation.

•Essential functions of the job -

A position description may not be determinative. However, deference is given to written job descriptions and the employer's judgment. Whether incumbents are or have been actually required to perform the function is relevant as is consideration of whether removing the function would fundamentally alter the position.

•Reasonable accommodations - may include:

Making facilities readily accessible

Job restructuring such as part time or modified schedules
Acquisition or modification of equipment or devices

Providing readers or interpreters

Transfer to different vacant position with equivalent pay and status

Permitting use or accrued paid leave

Providing additional unpaid leave for necessary treatment

Making employer-provided transportation accessible

Reallocation of nonessential, marginal job functions

•Undue hardship -

An action requiring significant difficulty or expense when considered in light of: a) overall size of the involved facility with respect to the number of employees, b) type of facilities and size of budget, c) type of operation including composition of work force, d) nature and cost of accommodation, e) overall financial resources of the covered entity

with respect to number of employees, f) number, type and location of facilities.

•Exclusions from protection-

The statute specifically states that "disability" does not include certain items such as sexual behavior disorders, compulsive gambling, pyromania or kleptomania.

•Temporary conditions -

Temporary, non chronic, impairments of short duration, with little or no long term or permanent impact are usually not disabilities. Broken limbs, sprained joints, concussions, and surgeries would generally not rise to the level of a disability. Generally pregnancy does not constitute a physical impairment of the ADA.

•Job stress -

"Stress" and "depression" are conditions that may be considered impairments depending upon whether they result from some type of physiological or mental disorder.

•Overtime restricted by impairment -

Cases address a doctor's requirement that an employee not work more than 40 hours per week. Generally such limitations are not sufficiently substantial to rise to the level of protected disability under the ADA.

AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) 29 USC 621 ET. SEQ. FAIR LABOR STANDARDS ACT

DEFINITION OF EMPLOYER:

•Any person engaged in business who employs 20 or more employees and

•Any agent of such person

PROTECTED GROUP:

Employees forty years of age or older - including those within the group such as replacing 50 year old with 41 year old.

PROHIBITED CONDUCT:

An employer may not limit, segregate or classify an applicant or employee in a way that adversely affects the opportunities or status of an individual because of age, discriminate with regard to job application procedures, hiring, advancement, compensation, or other terms, conditions or privileges of employment on the basis of the age, or reduce the wage rate of any employee in order to comply with the Act.

Retaliation for opposition to a violation of the Act or for making a charge, testifying or assisting or participating in an investigation, proceeding or hearing under the Act. 29 USC 623(d).

EXCEPTIONS

BFOQs, bona fide seniority system or benefit plan, mandatory retirement

BFOQs must be reasonably necessary to the essence of a particular business an either a factual basis exists to believe that most members of the protected group cannot perform the job safely and efficiently or the excluded class members cannot be evaluated on an individual basis. Reducing economic expense by terminating older employees is not a reasonable factor other than age which can be used to defend against an age discrimination claim according to the EEOC, 29 CFR §1625.7(f)

PROCEDURE

Filing an administrative charge with the EEOC before commencing a civil action is required.

RELIEF/DAMAGES

Hiring, reinstatement, promotion, and back and front pay. Attorneys fees are recoverable within the court's discretion.

EQUAL PAY ACT (29 USC 206(d)(1) - An amendment to the Fair Labor Standards Act)

PROTECTED GROUP:

Gender only

PROHIBITED CONDUCT:

Discrimination on the basis of gender in pay rates

Retaliation for opposition to violations of the act or for making a charge, testifying or assisting or participating in an investigation, proceeding or hearing under the Act. 29 USC 215.

STATUTE OF LIMITATIONS:

Two years from last act if violation is not willful

Three years from last act if violation is willful

29 USC 255

The Equal Pay Act applies only to equal work an employees of equal skill, effort and responsibility. The working conditions must be similar. Pay pursuant to seniority systems, merit systems, productivity requirements or base on any factor other than sex are excepted from the requirement.

PLAINTIFF'S PRIMA FACIE CASE:

Plaintiff performs work equal to that of a male

Plaintiff is paid less

Plaintiff need not prove intent to discriminate

Shifting burden

If Plaintiff establishes a prima facie case, the employer must show that the pay differential was based on:

1) A seniority system or
2) A merit system or
3) A productivity incentive system or
4) A any factor other than sex

THE PREGNANCY DISCRIMINATION ACT (USC 2000(e)(k))

PROTECTED GROUP:

Gender only

PROHBITED CONDUCT:

Discrimination on the basis of sex, pregnancy, childbirth, or related medical conditions.

OVERTIME OVERVIEW --

WHAT EMPLOYERS AND EMPLOYEES NEED TO KNOW ABOUT OVERTIME REGULATIONS

Dale R. Burmeister, Esq.

Harvey Kruse, P.C.

Introduction

On August 23, 2004, the first major overhaul of Federal Labor Standards Act (FLSA) overtime rules in 50 years went into effect. It is estimated that 6.7 million salaried workers will receive as much as $375 million in additional earnings every year because of it.

Non-compliance is very expensive. In 2008, the Department of Labor's Wage and Hour Division recovered over $185 million in back wages and assessed employers with nearly $10 million in civil penalties.

More important, there are a growing number of huge verdicts and settlements in class action wage and hour lawsuits. Here is a sampling:

- Farmers Insurance Company suffered a $90 million class action verdict involving 2,400 claims adjusters just in the state of California. The case was ultimately settled this summer for $200 million.

- Wal-Mart agreed to a $54.3 million settlement with a class of about 100,000 current and former Wal-Mart workers in Minnesota.

- Staples reached a $42 million settlement in several class-action lawsuits claiming that it had not paid its assistant store managers overtime to which they were entitled.

- FedEx Corp.'s ground unit has agreed to pay about $27 million to settle a lawsuit accusing it of misclassifying about 200 California drivers as independent contractors.

- Coca-Cola paid $20 million to settled misclassification charges brought by California employees.

- A suit by UPS workers misclassified as exempt settled for $18 million.

- The top 10 private wage-and-hour settlements paid or agreed to in 2009 under the Fair Labor Standards Act totaled $363.6 million, a 43.9% increase from 2008, according to a report which analyzed 715 cases in federal and state courts last year.

It is also worth mentioning that it only takes one employee to complain to the Department of Labor about an overtime issue to trigger an investigation into a company's entire classification system.

What follows is a brief overview of the overtime rules – which were changed for the first time in 40 years in 2004 – and a discussion of how they should be applied as well as what you should do now to protect yourself.

The Big Three Exemptions

The first step for an employer or an employee dealing with the new overtime regulations is to understand what has changed, and what has not. Both employers and employees often incorrectly assume that if an employee is paid a**s alary** that he or she is automatically exempt from receiving overtime. That is not true. The FLSA provides that only certain categories of employees are exempt from the overtime requirements of the statute. Typically, employees are eligible for overtime *unless* they hold positions falling within one of three "white collar" exemptions:

1. Executive;

2. Administrative; and

3. Professional.

Even if a "salaried" employee is labeled an "executive," described as an "administrative" employee, or considered a "professional," however, the employee must satisfy both a **salary test** and a **duties test**. In other words, you cannot simply give someone the title of Vice President of Sanitation Engineers and put that individual into an exempt category. Those tests will be addressed next.

A. Salary Basis Test

An employee must be paid "on a salary basis" or "on a salary or fee basis." "Salary basis" is defined as "a predetermined amount constituting all or part of . . . [the

employee's] compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." A salaried employee must receive his or her full salary for any workweek in which he or she performs work, regardless of the number of days or hours the employee actually worked. As a general rule, salaried employees cannot be docked a partial day's pay. Docking any part of a salaried employee's daily compensation may result in the loss of exempt status.

The new regulations maintain the current definition of a salary basis of payment (a fixed amount not subject to reduction or increase based on quality or quantity of work performed). The regulations also generally continue the current rules concerning the deductions from salary that are permitted. But the regulations broaden the scope of permissible deductions in a number of respects. These include partial day deductions for suspensions for infractions of major safety rules (previously, only full day suspensions were permitted). Also permitted now are deductions for disciplinary suspensions for one or more full days for infractions of workplace conduct rules besides just safety issues, pursuant to a written policy applicable to all employees Previously, non-safety related suspensions had to imposed in full week increments to exempt employees.

The new rules also extend the DOL's imprimatur to several practices for salaried employees which were suspect under the old regulations. For example, deductions from accrued leave balances for partial day absences will not destroy the salary basis of payment, nor will requiring employees to record or track hours, or to work a specific schedule. Likewise, providing extra compensation, in addition to a guaranteed minimum salary, will not remove exempt status.

Since 1975, workers paid a salary of less than $155 per week ($8,060 per year) have been eligible for overtime, regardless of their job duties or how they are paid. Now that threshold has been raised considerably, to $455 per week ($23,660 per year). The "highly compensated employee" test will make workers with an annual salary of at least $100,000 exempt, if they perform office or non-manual work and "customarily and regularly" perform one of the duties of either an exempt executive, administrative, or professional employee. The exempt duty need not be the employee's "primary duty."

Manual laborers, other blue-collar workers, licensed practical nurses, and "first responders," such as police officers and firefighters, will be eligible for overtime regardless of salary.

B. Duties Test

An "**executive**" employee must have as his or her "primary duty" the management of an enterprise, or a customarily recognized department or subdivision. The "primary duty" test, however, has been made significantly more flexible, both for "executive" positions and for "administrative" and "professional" employees. First, while duties that

involve more than half an employee's time are still generally considered "primary," the new regulations provide greater leeway for a finding of exempt status even where less than 50% of the employee's time is taken up with exempt functions. In addition, under the new regulations, non-exempt tasks that are "directly and closely related" to an employee's exempt responsibilities may now be counted as exempt work, in determining the employee's "primary duties." The standard for what constitutes "management" duties has also been expanded, as has the definition of a customarily recognized "department or subdivision" of an enterprise.

"**Administrative**" employees must have as their primary duty the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and those primary duties must include the exercise of discretion and independent judgment with respect to matters of significance (because of the "discretion and independent judgment" requirement, there are many "administrative" employees in every organization, including most "administrative assistants," who are *not* covered by the "administrative" exemption, and who *must* be paid overtime premium pay). While this duties test is largely unchanged under the new regulations, the number of positions likely to meet the test has increased.

"**Professional**" employees must have as their primary duties work requiring knowledge of an advanced type, work in a field of science or learning, or work customarily acquired by a prolonged course of specialized intellectual instruction. In addition to loosening the "primary duty" test, the new regulations make it clear that occupations whose educational prerequisites involve three years of non-specialized college instruction and a fourth year in an accredited specialized program will generally be exempt.

In light of the new regulations, each employer should take the following steps:

- **Review your classification of all exempt and non-exempt employees --** if every employee in your organization is treated as exempt, or if most of them are, this may be a problem.

- **Revise or adjust formal job designations as appropriate** – old job descriptions (e.g., more than 10 years) that include as a duty “making photocopies" probably need to be revised.

- **Adjust compensation of lower-paid employees --** bring them in line with the revised exemptions if you can justify a raise.

- **Adjust compensation of higher-paid employees –** take advantage of the new exemption for highly paid employees.

• **Adopt written workplace conduct rules** – so you can suspend exempt employees for non-safety related workplace misconduct.

• **Adopt a policy concerning improper deductions** – for exempt employees.

• **Talk to your lawyer.**

• **Review the FLSA "traps for the unwary"** -- the new regulations have left unchanged many of the traps employers often fall into and create some new pitfalls. The most common of these are as follows:

- Failing to pay for covered travel time;
- Providing "compensatory time off" instead of required overtime premium pay;
- Failing to aggregate hours worked for two or more related employers;
- Counting only base pay in calculating the "time and one-half" overtime premium;
- Paying non-exempt employees with a flat rate or lump sum payment instead of the "time and one-half" rate;
- Ignoring "small amounts" of overtime and other time card inaccuracies; and
- Failing to pay for time worked by employees who start early, stay late or work through lunch.

As you can see, the regulations continue to pose significant risks to employers and should not be taken lightly.

Conclusion

The new overtime law changes took effect on August 23, 2004 and there is still a lot of confusion about how to apply them to a given individual or job classification. You should take the necessary steps mentioned above to ensure compliance with the amended regulations with all deliberate speed.

Footnotes

The penalties involved with FLSA violations can be enormous. Employers who violate the FLSA are liable for the unpaid overtime for two years preceding the complaint, and, if it is determined that the employer willfully failed to comply, the employer is liable for overtime payments for three years preceding the complaint. The employer may also be liable for an additional amount known as "liquidated damages" for non-compliance, effectively doubling the amount of the employer's liability. Those numbers are then multiplied by the number of workers involved.

The official Department of Labor site is designed to help employers and employees understand the Department's new rules. Here is the Internet link: http://www.dol.gov/whd/index.htm

MICHIGAN STATUTES

Michigan's anti-discrimination statutes track the federal statutes to a large degree. Because of recent amendments to the civil rights acts of both the state and federal governments, some differences do exist. Michigan, for example, explicitly forbids sexual harassment where the federal courts and the EEOC have judicially and administratively read such a prohibition into Title VII which is silent on the matter. Michigan also expressly includes protected status not mentioned in the federal legislation such as height, weight, and marital and familial status. The validity of a bona fide occupational qualification is determined upon application by the employer to the civil rights commission. The definitions of "employer" also vary between Michigan and federal law with Michigan requiring only one employee.

The most significant differences involve procedural matters and damages. *There is no requirement in Michigan that a plaintiff exhaust administrative remedies by filing a complaint with the EEOC or state agency prior to filing suit.* In Michigan, an employee has immediate access to the courts without prior notice to the employer. Additionally, for employment discrimination claims (with the exception of claims of violation of the Whistleblowers Protection Act) the statute of limitations is three years from the last date of the alleged discriminatory conduct.

With respect to damages, Michigan has always permitted the recovery of non-economic damages in discrimination cases including emotional distress damages which often compromise the majority of damages awarded to plaintiffs. There are no caps on the amount of non-economic damages a jury can award. Exemplary damages are also available which are intended to supplement emotional distress damages awarded to compensate a plaintiff where the defendant's conduct is particularly outrageous. While exemplary damages appear to be punitive in nature, they cannot be awarded simply to punish the defendant. Michigan does not permit recovery of punitive damages while the federal system does in some circumstances. Furthermore, Michigan permits loss of consortium claims for discrimination.

Until the passage of the Federal Civil Rights Act of 1991 which greatly expanded the rights and remedies available to employees, most of the employment discrimination cases in Michigan were filed in state circuit courts and only pursuant to Michigan law. It is not uncommon for plaintiffs to allege violations of both state and federal statutes and, for the most part, federal courts will consider ancillary state claims.

Michigan courts continue to look to federal judicial and administrative decisions to interpret and apply anti-discrimination statutes notwithstanding the semantic differences between the statutes. While Michigan has placed its own gloss on issues, particularly in matters of proof, federal guidelines continue to be instructive.

ELLIOTT-LARSEN CIVIL RIGHTS ACT (MCLA 37.2201 ET. SEQ.)

DEFINITIONS:

•Employer:

A person who has 1 or more employee;
An agent of that person.

•Sex:

Includes but is not limited to pregnancy, childbirth or a medical condition related to either, excluding non-medical abortions.

•National Origin:

Includes national origin of an ancestor.

•Familial Status:

One or more individuals under the age of 18 residing with a parent or other person having custody or in the process of securing legal custody of the individual or individuals or residing with the designee of the parent or other person having or securing custody with the written consent of the parent or other person.

PROTECTED GROUPS:

•Race
•Color
•Religion
•National origin
•Age
•Sex (includes pregnancy discrimination)
•Height
•Weight
•Familial status
•Marital status

PROHIBITED CONDUCT:

Discrimination on the basis of protected status in providing the opportunity to obtain employment, or in hiring, recruiting, discharging or otherwise discriminating with respect to employment, compensation, or a term condition or privilege of employment.

Limiting, segregating or classifying an employee or applicant in a way that deprives or tends to deprive the person of an employment opportunity because of member ship in a protected group.

Harassment based upon membership in protected group.

Retaliation or discrimination because of a person's opposition to violation of the Act or because of the person has made a charge, filed a complaint, testified, assisted or participated in an investigation, proceeding or hearing under the Act.

Aiding, abetting, inciting, compelling or coercing a person to violate the Act.

Attempting directly or indirectly to violate the Act.

Marsh vs Department of Civil Service 173 Mich App 72 (1988) (sex, race)
Rasheed vs Chrysler Motors Corporation 196 Mich App 196 (1992) rev'd on other grounds 445 Mich 109 (1994) (religion)
Whirlpool Corporation vs. Civil Rights Commission 425 Mich 527 (1986) (marital status)
Micu vs. City of Warren 147 Mich App 573 (1985) (height)
Ross vs Beaumont Hospital 687 F Supp 1115 (ED Mich 1988) (weight)

Plaintiff must establish disparate treatment by a preponderance (greater than fifty percent) of the evidence.

Smith vs Consolidated Rail Company 168 Mich App 773 (1988)

INDIVIDUAL LIABILITY

A number of statutes, both state and federal, have definitions as to "covered employer" which can include an agent of the employer. Traditionally both in federal and state courts, supervisors and decision-makers were not allowed as individual defendants in discrimination suits. Recently, however, Michigan has specifically allowed suits against the employer and named individuals as part of the decision-making process. See *Elezovic v Ford Motor Co.,* 472 Mich 408 (2005), on remand, 274 Mich App 1 (2007).

INTENTIONAL DISCRIMINATION

A) Plaintiff is a member of a protected class;

B) That adverse action was taken against him/her; and

C) Membership in the protected class was a "motivating" factor.

Hazle v Ford Motor Company,464 Mich 456, 462 (2001)

Race, sex, religion, national origin, height, weight, marital or familial status need not be the exclusive cause of the adverse action as long as it is a factor. A prima facie case may be established by circumstantial evidence.

Jenkins vs American Red Cross 141 Mich App 785 (1985)
Pomeranky vs Zack 159 Mich App 338 (1987)

Plaintiff must essentially show that being a member of a protected class was one of the things that influenced the asserted wrongful behavior.

Shifting Burden

Although plaintiff retains the burden of proof at all times, if plaintiff satisfies the initial burden, the burden shifts to defendant to articulate a legitimate, non-discriminatory reason for the treatment. If defendant sets forth such a reason, plaintiff must establish, by a preponderance of the evidence, that 1) the proffered reason has no basis in fact, or 2) if it has a basis in fact that it was not the actual reason motivating the action or, 3) if it was the actual

reason motivating the action, that the factor was insufficient to justify the action.

Dubey vs Stroh Brewery Company 185 Mich App 561 (1990)

In demonstrating pretext, a plaintiff may introduce evidence of other discrimination toward plaintiff or other similarly situated employees or a general pattern of discrimination against such employees.

Clark vs Uniroyal Corporation 119 Mich App 820 (1982)

The plaintiff may not challenge the business judgment of the employer in taking the action.

Clark vs Uniroyal, supra

The proffered reason need not rise to the level of a business necessity.

McDonald vs Stroh Brewery Company 191 Mich App 601 (1991)

Bona fide Occupational Qualification

Bona fide occupational qualifications may be used if the employer applies to the Civil Rights Commission for an exemption. An employer may have a BFOQ without obtaining prior exemption from the commission, provided that an employer who does not obtain an exemption shall have the burden of establishing that the qualification is reasonably necessary to the normal operation of the business.

BFOQs relate only to religion, national origin, age, height, weight or sex. MCLA 37.2208.

AGE DISCRIMINATION

PROTECTED GROUP:

The statute does not specifically set forth ages which are protected. The determination whether a employee is a member of a protected class for age discrimination claims is not based on the age of the plaintiff per se; also to

be considered is the age of the person or persons who benefit from an employer's discriminatory actions.

Zoppi v Chrysler Corp., 206 Mich App 172 (1994).

PLAINTIFF'S PRIMA FACIE CASE:

A) Plaintiff is a member of a protected group;

B) that he or she was discharged or otherwise adversely treated;

C) that he or she was qualified for the position; and

D) that the position was given to a younger employee.

Matras vs Amoco Oil Company 424 Mich 675 (1986)

The mere fact of replacement by a younger employee is insufficient. Courts have held that, in addition to the above factors, plaintiff must show that his or her skills, experience, background or qualifications were comparable to those not adversely affected and that age was a determining factor in the action.

Meeka vs D & F Corporation 158 Mich App 688 (1987)

The remainder of the proofs and defenses to age discrimination claims are very similar to claims based on the other forms of discrimination.

SEXUAL HARASSMENT

MCLA 37.2103 prohibits sexual harassment and specifically defines harassment.

PROHIBITED CONDUCT:

Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:

> (i) submissions to such conduct or communication is made a term or condition, either explicitly or implicitly, to obtain employment. . .
>
> (ii) submission to conduct or communication by an individual is used as a factor in decisions affecting such individual's employment. . .
>
> (iii) such conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile or offensive employment environment.

PLAINTIFF'S PRIMA FACIE CASE - HOSTILE ENVIRONMENT:

(1) Plaintiff belongs to a protected class;

(2) Plaintiff was subjected to communication or conduct on the basis of sex;

(3) Plaintiff was subjected to unwelcome sexual conduct or communication;

(4) The unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the Plaintiff's employment or created an intimidating, hostile or offensive work environment; and

(5) Respondeat superior

Radtke vs Everett 442 Mich 368 (1993)

"On the basis of sex" is the equivalent of "but for the fact of the person's sex"

The threshold for proof that conduct or communication was unwelcome is evidence that the plaintiff did not solicit or incite it and regarded it as undesirable or offensive.

In determining whether the work environment was hostile, an objective, reasonable person standard is used. The subjective evaluations of the plaintiff nor of only the "reasonable woman" were rejected as standards of determining hostility. The totality of the circumstances must be considered and a work environment must be so tainted by harassment that a

reasonable person would believe that the conduct had either the effect or purpose of substantially interfering with the plaintiff's performance or subjecting plaintiff to a hostile, offensive or intimidating environment.

Radtke vs Everett, supra

A single incident, if extremely traumatic can create an offensive or hostile environment. In *Radtke*, the plaintiff was assaulted by her boss at the office which had only three employees. The boss was the owner of the business. Where the conduct was perpetrated by the employer, plaintiff had no recourse and a finding of liability was appropriate without proof that the employer failed to rectify a problem after adequate notice and that a continuous or periodic problem existed or a repetition of an episode was likely to occur.

However, the Michigan Court of Appeals ruled that the rape of a female employee by a male supervisor at work did not set forth a claim against the employer.

Champion vs Nationwide Security Inc. 205 Mich App 263 (1994)

Respondeat superior must be proven in a case where the employer himself is not the perpetrator of the conduct. As in Title VII, prompt and appropriate remedial action will permit the employer to avoid liability for the conduct of a co-employee or supervisor. Plaintiff must demonstrate that the employer had notice of the alleged harassment.

Radtke vs Everett, supra

MICHIGAN'S PERSONS WITH DISABILITIES CIVIL RIGHTS ACT (MCLA 37.1101 ET. SEQ.)

DEFINITION OF EMPLOYER:

- A person who has one or more employees
- An agent of such a person

PROHIBITED PRACTICES:

An employer shall not:

Fail or refuse to hire, recruit or promote an individual because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position or on the basis of a physical or mental examination that is not directly related to the requirements of a particular job.

Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position or on the basis of a physical or mental examination that is not directly related to the requirements of a particular job.

Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee because of a handicap which is unrelated to the individual's ability to perform duties of a particular job.

Fail or refuse to hire, recruit, or promote an individual when adaptive devices or aids may be utilized thereby enabling that individual to perform the specific requirements of the job.

Retaliate or discriminate because of a person's opposition to a violation of the Act or because the person has made a charge, filed a complaint, testified, assisted or participated in an investigation, proceeding or hearing under the Act.

Aiding, abetting, inciting, compelling or coercing a person to violate the Act.

Attempting, directly or indirectly, to violate the Act.

Willfully interfering with the commission or obstructing a person from complying with the Act.

Coercing, intimidating, threatening or interfering with a person's exercise or enjoyment of any right granted under the Act or a person's aid or encouragement of others in the exercise of their rights under the Act.

MCLA 37.2701.

DEFINITIONS:

•Handicap:

(i) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:

A) Substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.

(ii) A history of a determinable physical or mental characteristic described in subparagraph (i).

(iii) Being regarded has having determinable physical or mental characteristic described in subparagraph (i)

Does not include:

(i) A determinable mental or physical characteristic caused by the use of an alcoholic liquor by that individual if that characteristic prevent that individual from performing the duties of the job.

(ii) A determinable mental or physical characteristic caused by the current illegal use of a controlled substance by that individual.

•Unrelated to the individual's ability:

With or without accommodation, an individual's handicap does not prevent the individual from performing the duties of a particular job or position.

•Notice of need for accommodation:

No allegation of a violation of duty to accommodate may be maintained unless the employee informs the employer in writing of the need for accommodation within 182 days after the date the handicapper knew or reasonably should have known that an accommodation was needed.

•Undue hardship:

MCLA 37.1210 contains numerous formulas regarding the expense of adaptive devices, equipment, readers or interpreters and ties the expense into the number of employees and the state average weekly wage. In other words, for an employer of 15 to 25 employees, the cost of an adaptive device cannot exceed 2.5 times the state average weekly wage without being an undue hardship.

Job restructuring is not required of any employer of less than 15 employees. For larger employers, job restructuring and schedule alteration apply only to "minor or infrequent" duties relating to the particular job or position.

PLAINTIFF'S PRIMA FACIE CASE:

1) That plaintiff is handicapped;

2) That the handicap is unrelated to plaintiff's ability to perform the duties of the particular job or position;

3) That plaintiff requested accommodation in accordance with the Act (only applicable in accommodation cases); and

4) That an adverse employment decision was made because of the handicap.

Shifting Burden

If plaintiff sustains his or her prima facie case, the burden shifts to the employer to show either a legitimate, nondiscriminatory reason for the decision or to prove that the requested accommodation presented an undue hardship.

If the employer sustains its burden, plaintiff must then demonstrate pretext as described above.

MCLA 37.1210
Crittendon vs Chrysler Corporation 178 Mich App 324 (1989)

WHISTLEBLOWER PROTECTION ACT (MCLA 15.361 et. seq.)

DEFINITION OF EMPLOYER:

- A person who has 1 or more employees
- An agent of an employer

DEFINITION OF PUBLIC BODY:

A state office, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.

An agency, board, commission, council, member or employee of the legislative branch of state government.

A county, city, township, village, inter-county, intercity or regional governing body or any member or employee of that body.

Any other body which is created by state or local authority or which is primarily funded by or through state or local authority or any member or employee of that body.

A law enforcement agency or any member or employee thereof

The judiciary and any member or employee thereof

PROTECTED GROUP:

Any employee who reports or is about to report, verbally or in writing, a violation or suspected violation of a law regulation or rule promulgated pursuant to state, local or federal law to a public body.

Any employee requested by a public body to participate in an investigation or hearing or inquiry held by a public body or court.

If an employee knows that the report is false, no protection is afforded

PROHIBITED CONDUCT:

Discharging, threatening or otherwise discriminating against an employee regarding the terms, conditions, location or privileges of employment or compensation for engaging in protected behavior.

BURDEN:

The plaintiff has the burden of proving each of the following:

1. That she engaged in a protected activity as defined by the Whistleblower Protection Act.

2. That she was subsequently discharged, threatened or otherwise discriminated against regarding the terms, compensation, conditions or privileges of her employment.

3. That the protected activity was a substantial factor in the decision to discharge, threaten or otherwise discriminate against Plaintiff.

An employee must show that he or she reported a violation or suspected violation of law to a public body or show by clear and convincing evidence (greater than a preponderance) that he or she or a person acting on his or her behalf was about to report a violation or suspected violation of law to a public body.

The employer must have notice of the report or threat to report.

Shifting Burden

If plaintiff sustains his or her prima facie case, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the decision.

If the employer sustains its burden, plaintiff must then demonstrate pretext as described above.

Dudewicz vs Norris Schmid, Inc. 443 Mich 68 (1993)
Melchi vs Burns International Services Inc. 597 F Supp 575 (1984)

Kaufman & Payton, P.C. vs Nikkila 200 Mich App 250 (1993)

DAMAGES:

- Injunctive relief
- Reinstatement
- Backpay
- Actual damages (including economic and non-economic)
- Reasonable attorney fees
- Costs of litigation

MICHIGAN COMMON LAW

WRONGFUL DISCHARGE

Michigan has developed a large, constantly changing body of common law regarding wrongful discharge. In 1993, the Supreme Court issued an opinion which again altered wrongful discharge litigation returning it to a status more favorable to employers than it had been for nearly ten years. Wrongful discharge jurisprudence applies generally to non-union employees and is intended to provide some job security in the absence of a collective bargaining agreement.

Express employment contracts for a term of years are enforceable under normal contract law. The confusion arises when there is no express employment contract but a contract, implied in fact, which limits an employer's right to terminate an employee without cause.

The basic premise of employment law in Michigan is that an employer retains the right to terminate any employee without cause as long as the termination does not violate other laws such as the civil rights laws. Many employers do not understand that they enjoy such a broad authority to terminate employees. Only the employer can curtail his or her own right to terminate "at will."

Conduct or statements, verbal or written, can alter the employment relationship such that an employer must establish the "just cause" for termination. The landmark opinion in *Toussaint v Blue Cross Blue Shield of Michigan 408 Mich 579 (1980)* first established the "just cause" relationship finding that "an employer's express agreement to terminate only for just cause, or statements of company policy and procedure to that effect, can give rise to rights enforceable in contract."

For several years after the *Toussaint* decision, Michigan courts engaged in experimentation with what types of statements, polices or procedures could establish a "just cause" relationship. At its most liberal extreme, the body of law held that such innocent statements as "We hope this will be a good and long lasting relationship", made upon hiring, constituted a contract to terminate only for just cause. There has also been a long-standing debate as to whether personnel policies that contained codes of conduct, "reasons for immediate" termination and progressive discipline guidelines gave rise to contractual rights.

In 1991, the Michigan Supreme Court issued its opinion in *Rowe vs Montgomery Ward 437 Mich 627 (1991)* which represented the first swing back to the presumption of employment at will. In *Rowe*, the plaintiff claimed that during her pre-hire discussions with the employer she was told that as a salesperson, "as long as she met quota," she would not be fired. Additionally, the personnel manual contained a list of Reasons for Immediate Discharge. The Court held that these factors alone did not establish a just cause employment relationship. In so finding, the Court stated that the totality of the circumstances must be reviewed on a case by case basis in order to determine whether a contract had been created. The primary significance of *Rowe* was the finding that "as long as" statements did not, without more, abrogate the at will status of employment.

In 1993, the Michigan Supreme Court issued an opinion in *Rood v General Dynamics 444 Mich 107 (1993)* which currently defines the parameters of wrongful discharge law in Michigan. In *Rood*, the Court distinguished between contract claims and "legitimate expectations" claims. In order to determine whether a contract claim had been established, the Court reviewed oral assurances made to the plaintiff and a series of written personnel policies. The policies had no written at will disclaimer and set forth a number of guidelines for the evaluation and termination of employees as well as a list of conduct which would result in discipline including immediate discharge for certain violations. The Court found that no contract for just cause employment existed. However, the Court found that, given the totality of the circumstances, the acts of the employer could have given rise to a legitimate expectation by the plaintiff that his job would not be terminated absent just cause and summary disposition in favor of the employer was reversed.

Because of the case by case basis upon which wrongful discharge cases are decided, it is difficult to create a format for analyzing such claims. There are some general distinctions and factors which have been decided:

THREE TYPES OF CONTRACT CASES:

1) EXPRESS CONTRACTS FOR A DEFINITE TERM:

Express contracts for a specific duration must be in writing if they are to remain in effect for more than one year and cannot be terminated prior to expiration of the term absent just cause.

e.g. John Smith has a written employment contract for 5 years.

2) IMPLIED CONTRACTS FOR AN INDEFINITE TERM:

No specific duration is set. There is no written contract. Employment is presumed to be terminable at the will of either the employer or the employee unless the employer has limited discharge to just cause.

ELEMENTS:

Evidence of mutual assent determined by examining all of the circumstances from the perspective of the reasonable person. Courts must look to the express words and acts of the parties.

Implied contracts can be created by the acts and written policies of the employer.

A policy manual which provides that employment cannot be terminated absent just cause or a clear and definite verbal assurance that employment will continue absent just cause for termination can create a just cause contract.

PLAINTIFF'S PRIMA FACIE CASE:

The Plaintiff has the burden of proving each of the following:

(a) An employment relationship existed between Plaintiff and Defendant.

(b) The employment relationship could not be terminated unless Defendant had good or just cause.

(c) Plaintiff's employment was terminated by the Defendant.

(d) Plaintiff was performing the duties of her employment up to the time of termination.

(e) Plaintiff suffered economic damages as a result of the termination.

3) LEGITIMATE EXPECTATIONS:

In the absence of a specific statement regarding just cause, policies and statements of the employer may give rise to legitimate expectations of continued employment and bar discharge without cause.

ELEMENTS:

A) The promise.

May be express or implied.

Manifestation of an intention or act or refrain from acting in a specified way so as to justify a promisee in understanding that a commitment has been made.

Must be clear and definite.

b) Reasonable expectation

The promise must be reasonably capable of instilling a legitimate expectation of just cause employment.

An objective analysis must be employed. The subjective beliefs of the plaintiff are insufficient.

e.g. The promise of fairness in decision making does not establish legitimate expectation of just cause employment.

The provision for a probationary period during which the employee can be discharged at any time does not create legitimate expectations of just cause employment after the probation.

A list of conduct from which immediate termination can result does not create legitimate expectations of just cause employment.

A promise that the employee's job is secure does not create legitimate expectations of just cause employment absent special circumstances.

The existence of an evaluation policy does not create legitimate expectations of just cause employment.

An informal policy or history of not discharging employees without cause does not create legitimate expectations of just cause employment.

A combination of the above factors may create legitimate expectations of just cause employment.

A policy requiring detailed review of the circumstances and an opportunity to improve prior to discharge may establish legitimate expectations of just cause employment in the absence of an at will disclaimer.

Rood vs General Dynamics 444 Mich 107 (1993)

PLAINTIFF'S PRIMA FACIE CASE:

See Implied Contract

SATISFACTION CONTRACT OR POLICY

Some employment relationships are neither quite at at-will nor quite just cause. An employment relationship can exist such that the employee will not be terminated unless the employer is dissatisfied with the employee's work. In deciding whether an employer is dissatisfied with the employee's services it does not matter whether the employer's dissatisfaction was reasonable. An employee can "overcome" the employer's assertion of dissatisfaction if the employer can show that the dissatisfaction was insincere, in bad faith, dishonest, or not the real reason for the discharge.

Although the employer may discharge under a satisfaction contract as long as the employer is, indeed, in good faith dissatisfied with the employee's performance, where the employee has secured a promise not to be discharged except for good cause, the employee has contracted for more

than the employer's promise to act in good faith or to provide continued employment absent the employer dissatisfaction.

DEFENSES

At Will Disclaimer

An employer who places in an application for employment or in a policy manual a statement that employment is at will and can be terminated at any time with or without cause is usually protected from liability for wrongful discharge. It is not necessary that the employee sign a disclaimer as long as the disclaimer has been presented to the employee.

Scholz vs Montgomery Ward 437 Mich 83 (1991)

An employer may unilaterally change a written policy from one of discharge for cause to one of termination at will provided that the employer uniformly gives affected employees reasonable notice of the change.

In re: Certified Question Bankey v Storer Broadcasting Company 432 Mich 438 (1989); Farrell v Automobile Club of Michigan 187 Mich App 220 (1991)

Just Cause

Just cause can be established in a number of fashions. First, the employer can point to a policy forbidding the behavior engaged in by Plaintiff. Acts almost always viewed as just cause are theft or other criminal activity, falsification of time cards, etc.

Just cause is based on the business judgment of the employer. The employer must set forth the cause for termination. The jury may not question the business judgment of the employer in determining whether the cause was just. However, the jury may consider whether the reason given was the actual reason, or really a pretext, and whether others were discharged for a similar cause.

An employer can introduce evidence of misconduct which occurred during employment but which were learned of after termination in support of a just cause defense.

Bradley vs Phillip Morris 194 Mich App 44 (1992)

Work force reductions based on economic factors also constitute just cause. The reduction must be legitimately based on actual economic factors.

McCart vs J Walter Thompson USA, Inc. 437 Mich 109 (1991)
Featherly vs Teledyne 194 Mich App 352 (1992)
Lytle v Malady, 456 Mich 1 (1997)

Material misrepresentation on an employment application, discovered after termination, may eliminate any claim for damages if the falsification would have resulted in termination had it been discovered during employment.

Milligan-Jensen v Michigan Technological University 957 F2d 302 (6th Cir 1992)

The employer has the burden of proof on the issue of the existence of an at will disclaimer or just cause.

Damages

The only damages available for wrongful discharge are pure economic damages such as lost wages and benefits. Emotional Distress and other non-economic damages are not recoverable.

RETALIATORY DISCHARGE PUBLIC POLICY

Michigan recognizes common law claims of retaliatory discharge which are not expressly set forth in a statute such as Elliott-Larsen and the Handicappers Act. However, in retaliatory discharge cases, plaintiffs must establish a valid public policy against the retaliation which is most often demonstrated in the firm of a legislative edict. Michigan has been very reluctant to find a public policy exception to at will employment and has basically limited the exception to adverse employment actions resulting from the employee's exercise of a fundamental or statutory right.

Suchodolski vs Michigan Consolidated Gas Company 412 Mich 692 (1982)

e.g. Adverse employment action taken because of an employee exercised his or her right to Worker's Compensation benefits violates public policy.

Sventko vs The Kroger Company 69 Mich App 644 (1976)

Adverse action against an employee for refusing to falsify pollution control reports required by law violates public policy.

Trombetta vs Detroit, Toledo & Ironton Railway Co.l 81 Mich App 489 (1978)

A retaliatory discharge claim based on public policy cannot be sustained in the presence of a specific prohibition against such retaliation such as is found in the Elliott-Larsen Civil Rights Act or the Whistleblowers Protection Act.

Dudewicz vs Norris Schmidt 443 Mich 68 (1993)
Covell vs Spengler 141 Mich App 76 (1985)

Damages

Actual damages are presumably available although no court has specifically addressed the issue. Actual damages include:

•Injunctive relief
•Reinstatement
•Backpay
•Economic and non-economic losses
•Reasonable attorney fees
•Costs of litigation

PROMISSORY ESTOPPEL

Promissory estoppel is a judicially created theory which is used to enforce promises when the elements of a contract action cannot be met. Typically, it is used in cases where the Statute of Frauds (requiring that a contract which cannot be performed within one year be in writing and signed by the party to be charged) has been violated, or when consideration can be established. Promissory estoppel prevents a party who has made a promise from reneging on that promise under certain circumstances. The theory is becoming more prominent in Michigan as the wrongful discharge theory has been sharply curtailed.

Plaintiff's Prima Facie Case:

1) The existence of a promise;

2) The promisor should have expected to induce action of a definite and substantial character by the promisee;

3) The promise in fact produced reliance or forbearance of that nature; and

4) The circumstances were such that the promise must be enforced if injustice is to be avoided.

Schipani vs Ford Motor Company 102 Mich App 606 (1981)

•**The Promise**

As in wrongful discharge law, a promise, to be enforceable must be clear and definite. Vague statements of general optimism or 'as long as' statements will not constitute a promise.

e.g. A promise of continued employment as long as the plaintiff was profitable and doing the job is not enforceable.

Barber vs SMH(US) Inc. 202 Mich App 366 (1993)

•Expectation of Reliance:

There has been little reported litigation on this element. Resort to contract law regarding an intent to be bound and review of the totality of the circumstances is appropriate.

•Justifiable, Detrimental Reliance

Plaintiff must establish first that his or her reliance on the alleged promise was reasonable from an objective perspective; subjective reliance is insufficient.

State Bank of Standish vs Curry 442 Mich 76 (1993)

Plaintiff must also establish that he or she relied on the promise to his or her detriment. Merely giving up one's prior employment to accept a job does not establish detrimental reliance.

McMath vs Ford Motor Company 77 Mich App 721 (1977)

However, giving up former employment which carried with it enforceable job security, such as a collective bargaining agreement, or forgoing substantial pension rights can establish detrimental reliance.

Pursell vs Wolverine Pentronix 44 Mich App 416 (1973)
Rowe vs Noren Pattern & Foundry 91 Mich App 254 (1979)

The reliance must be solely on the promise and not other factors.

Martin vs East Lansing School District 193 Mich App 166 (1992)

•Prevention of Injustice

Again, there is virtually no case law interpreting this element. Factors which have been considered are the retention of some benefit by the promisor, unjust enrichment to the promisor or public policy.

Hawkins vs Peoples Federal Savings & Loan 155 Mich App 237 (1986)

DAMAGES

The only damages available for promissory estoppel are pure economic damages such as lost wages and benefits. Emotional distress and other non-economic damages are not recoverable.

CONSTRUCTIVE DISCHARGE

Constructive discharge, though not a separate cause of action, provides a method by which employees can establish discharge from employment without actually having been fired. The theory is applicable in both state and federal actions and is most frequently used in the context of sexual harassment. Constructive discharges occur when the employer has intentionally made working conditions so intolerable that the average person could not be expected to remain in the employment and would be compelled to resign.

LeGalley vs Bronson Community Schools 127 Mich App 482 (1983)

The trier of fact must look to the employer's intent and the reasonably foreseeable impact on the employee. The employee's subjective feelings are irrelevant. Rather, a reasonable person standard is used.

RECORDKEEPING

INTRODUCTION

Employers are faced with a variety of statutes, federal and state, which address recordkeeping requirements regarding employees. There is no one simple guideline and too frequently employers' lack of attention to recordkeeping, and retention, prejudice the defense of employee claims.

The following are only samples of some of the onerous recordkeeping requirements set forth by federal and state statutes and regulations.

STATUTES/REGULATIONS

The **Equal Employment Opportunity Commission** (EEOC) regulations require an employer to maintain and retain any personnel or employment record for one year from the date of making the record. These include applications and documentation regarding hiring, screening, promotion, discharge, compensation, or transfer. See *29 CFR 1602.14*.

Employers with 100 or more employees must file an Employer Information Report each year.

All employers subject to **Title VII of the Civil Rights Act of 1964** (42 USC 2000(e)(b)) (which includes all companies with 15 or more employees) that have an apprenticeship program are required to retain chronological lists of applicants with breakdowns as to sex and race together with all records pertaining to testing and performance for the apprenticeship program. Some records must be kept for one year and some for two years. Certain prime contractors and subcontractors (defined in 41 CFR 60-1.7) must file, yearly, complete and accurate affirmative action reports.

The **Rehabilitation Act of 1973** (24 USC 701 et. seq.) requires certain contractors dealing with the Federal Government, in certain situations, to take affirmative action to employ and advance qualified individuals with disabilities. Depending upon the number of employees and the amount of the contract, the retention requirement applies to applications, evaluations, examinations, interview notes, and other documentation regarding the administrative process.

The Equal Pay Act (29 USC 206 (d)) requires compliance with the **Fair Labor Standards Act** of 1938 recordkeeping requirements (29 USC 211 (c)). The

Fair Labor Standards Act is very broad and applies to nearly any industry engaged in commerce. Employers are required to keep records of employees' wages, hours and any records that relate to the job evaluations, descriptions, promotion systems, collective bargaining agreements, and documents discussing any wage differential among sexes.

Under the **Vietnam Era Veterans' Readjustment Assistance Act of 1972** (38 USC 4212 (a)) a company that enters into a contract of $10,000 or more with any agency of the United States must take affirmative action to employ qualified disabled veterans. The employer must submit a Federal Contractor Veterans' Employment Report in accordance with 41 CFR 61-250.10. The report must contain information regarding employee hiring.

The Age Discrimination and Employment Act of 1967 (29 USC 621 et. seq.) requires the retention of payroll records and personnel records relating to applications, hiring, promotions, discharges and other employee actions. This would include employee benefits plans, and written promotion systems.

The Americans With Disability Act of 1990 (29 CFR 1602.12) requires the keeping of medical information.

The Occupational Safety and Health Act of 1970 (29 USC 651 et. seq.) requires the retention of a log and summary of occupational injuries and illnesses.

The Immigration Reform and Control Act of 1986 requires the completion of the Immigration and Naturalization Form I-9 within 3 days after hiring a new employee.

The Employee Retirement Income Security Act of 1974 (ERISA) (29 USC 1001 et. seq.) regulates employee welfare benefits plans and pension benefit plans.

The Family and Medical Leave Act of 1993 (29 USC 2601 et. seq.) requires an employer to make and keep a number of records on basic payroll information, employee identification data, copies of all general and specific notices given to employees, and records of any disputes between the employer and eligible employees regarding leaves.

MICHIGAN

THE BULLARD-PLAWECKI EMPLOYEE RIGHT TO KNOW ACT.

The Bullard-Plawecki Employee Right To Know Act (MCLA 423.501 et. seq.) applies to all Michigan employers with four or more employees. Under the Act, an employee has the right to review and copy his/her personnel file and make any submission or response to material in the file.

"Personnel record" is broadly defined as any record kept by the employer that identifies the employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action. To complicate matters, the statute specifically sets forth documents that a personnel record should not include, such as grievance investigations and education records covered by the **Family Educational Rights and Privacy Act of 1974** (20 USC 132g).

A potential serious pitfall occurs when a document that need not be included in an employee's personnel file is kept in some other fashion. If these materials are not placed in a personnel file, and made available to the employee under the Act, potentially important documentation may not be able to be submitted by an employer in litigation.

OTHER MICHIGAN STATUTES

The Wage and Fringe Benefits Act (MCLA 408.471 et. seq.) requires the employer to maintain certain personnel records regarding occupational position, hours worked, total pay, and the amount of deductions and fringe benefits.

The Michigan Occupational Safety and Health Act (MCLA 408.1001 et. seq.) requires the maintaining of a log and summary of occupational illnesses and injuries. Employers are required to report to the Department of Consumer and Industry Services, within 48 hours after an occurrence, or an accident resulting in hospitalization of five or more employees.

POINTERS

- Many reporting requirements are triggered when the company does work with any agency of the Federal Government.

- A number of records must be kept for, generally, three years. Others are significantly longer. Check with Human Resources or your legal counselor to set up a record retention policy.

EMPLOYEE EVALUATIONS

INTRODUCTION

An employer faced with a wrongful discharge or discrimination suit will always be required to produce the employee's personnel file. The success or failure in defending the case is significantly affected by the contents of that file. Performance evaluations, or lack thereof, are powerful pieces of evidence. The performance evaluations can be the employer's best or worst evidence.

Too many companies have no formal evaluation process, or even any process, and many of those that do have a program do not follow it.

Managers, of course, recognize the benefits of a candid and considered evaluation. Deficiencies can be targeted, good work can be recognized and an evolution of progress at the company can be analyzed. Unfortunately, demands of time, avoidance of difficult tasks, and risking popularity thwart proper employee evaluations.

Excellent progress has been made in Human Resources management in the development of proper evaluation criteria. When used properly, the evaluation appraisal is a positive experience which promotes employee morale and performance improvement. Additional dividends occur if a reduction in force, layoff or discharge is necessary.

POINTERS

- Keep personnel files current.
- Create objective criteria for employee evaluations. Have a set periodic review to avoid "after the fact" documentation.
- Discuss reviews with employees--they have a right to review their personnel file.

- An at-will employer should reinforce the at-will status of the employee so that the appraisal process cannot be interpreted as a just-cause standard.

- Although there is no cause of action for "negligent evaluation", effectively a jury will pass judgment on the discharge process.

- In an employment decision, recognize that decisions will be scrutinized. If excessive tardiness is documented and an employee asserts that discharge for tardiness was merely a pretext, the employee could gain support by showing that other employees, equally tardy, were not discharged.

- Employers should recognize that biased evaluation comments--for example, a suggestion that an overweight employee pursue a diet and exercise program--can be enough to shift the burden of proof in discrimination cases to the employer.

- Any system must be consistent with the company's and human resource's corporate strategy. Flexible guidelines may be beneficial to rigid requirements.

CORPORATE POLICIES

HANDBOOKS/POLICIES

Corporate philosophy will dictate the need and content for employee handbooks. Some consideration:

At-Will/Just-Cause Employment

Although the State of Michigan offers protection to employers with at-will employment situations, the company may elect, with good reason, to provide satisfaction or just-cause employments. With work force competition, an employer that offers just-cause employment can provide a hiring advantage. Just-cause employments may deter employees' being sympathetic to union organization.

Discipline

Some employers choose to specifically set forth various types of infractions and specific discipline. Frequently, a number of transgressions are listed that would result in immediate discharge and others that can accumulate to a discharge.

As with any management or Human Resources evaluation or discipline program, specific objectivity and consistency are important.

Pointers

- Progressive discipline programs can co-exist with at-will employment. No promise to use such a system should be made and the employee should be alerted that any progressive discipline system is merely a guideline and does not create a contractual obligation. Do not create a legitimate expectation that the procedure must be followed for termination.

- Consider the benefit of including, in a handbook, an agreement that any disputes or claims would be subject to arbitration. This can avoid expensive and extensive litigation.

- A Statute of Limitations should be supplied with a handbook to give an employee a certain period of time within which to make a claim or

file a suit. the law on this issue is somewhat unsettled. The Michigan Supreme Court recently (*Herweyer v Clark Hwy. Services, 455 Mich 14 (1997*) that courts should defer to the statutory period unless the period in the parties' contract is specific and reasonable.

- Some attempts have been made by employers to effectuate a damage limitation in an employment agreement.

SOME POLICIES SHOULD BE WRITTEN

No matter what corporate philosophy exists as to providing a handbook, setting forth evaluation procedures, detailing a discipline program or general company guidelines, it is important, in some fashion, to provide and publish specific policies.

Equal Employment Opportunity Policy

A written notice must be supplied to all employees indicating that offers of employment, employment selection and all other decisions relating to employment are made without regard to race, color, creed, religion, national origin, gender, disability, handicap, age, height, weight, familial or marital status or any other reason prohibited by law.

An assertion must be made that the company and all of its employees will adhere to all principles of equal opportunity in compliance with all Federal and State Statutes and regulations and all laws governing the principles of equal opportunities.

Sexual Harassment Policy

Because it is necessary to act upon a complaint of sexual harassment to afford protection to the employer, it is important that all employees are instructed regarding the company's sexual harassment policy. It is necessary to supply the following information:

- It is the policy of the company that any form of sexual harassment is conduct that will not be tolerated.

- Examples of sexual harassment should be set forth including sexual propositions, requests for sexual favors, inappropriate touching, displaying of sexually suggestive pictures, the telling of sexually explicit jokes, sexual references, or anything giving any appearance of sexual assault.

- It is important to inform an employee that if the employee feels that he or she is a victim of some type of sexual harassment by any supervisor, co-employee, customer, contractor or anyone associated with the employment, the employee is expected to provide information of the offensive behavior to management. The employee should be encouraged to report the matter to any Human Resources, manager, supervisor or anyone in authority. This encouragement is essential to not create any impediment to such reporting.

- The employee should be advised that all such complaints will be promptly investigated and that the company prohibits retaliation against any person offering such complaint.

Anti-Discrimination Policy

Similar to the policy regarding sexual harassment, employees should be provided with the specific policy that the company maintains a work environment that is free of discrimination based on race, color, creed, religion, national origin, gender, disability, handicap, age, weight, or marital status.

- Discriminatory harassment is any unwelcome conduct that unreasonably interferes with an employee's job performance or creates an offensive or hostile work environment.

- The company will not tolerate offensive remarks about a person's race, color, creed, religion, national origin, gender, disability, handicap, age, weight, or marital status.

- The employee should be instructed to report all discrimination or harassment.

EXCERPTS (42 USC sec 2000 e-2)

TITLE 42 – THE PUBLIC HEALTH AND WELFARE

CHAPTER 21 – CIVIL RIGHTS

SUBCHAPTER VI – EQUIAL EMPLOYMENT OPPORTUNITYS

-HEAD-

§ 2000e-2. **Unlawful employment practices**

-STATUTE-

(a) **Employer practices**. It shall be an unlawful employment practice for an employer-

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

(2) to limit, segregate, or classify his employees or applicants for employment 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 race, color, religion, sex, or national origin.

EXCERPTS (42 USC sec 2000 e-3)

TITLE 42 – THE PUBLIC HEALTH AND WELFARE

CHAPTER 21 – CIVIL RIGHTS

SUBCHAPTER VI – EQUAL EMPLOYMENT OPPORTUNITIES

-HEAD-

§ 2000e-3. Other unlawful employment practices

-STATUTE-

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§ 2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§ 2000e-2000e-17].

EXCERPTS (42 USC sec 2000 e-3)

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception. It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EXCERPTS - ELLIOTT LARSEN CIVIL RIGHTS ACT

§ 37.2102. Nondiscrimination, recognition and declaration as civil right; sex discrimination action based on harassment prior to 1980; action based on familial status, arising out of conduct occurring before addition of subsection.

Sec. 102. (1) The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right.

(2) This section shall not be construed to prevent an individual from bringing or continuing an action arising out of sex discrimination before July 18, 1980 which action is based on conduct similar to or identical to harassment.

(3) This section shall not be construed to prevent an individual from bringing or continuing an action arising out of discrimination based on familial status before the effective date of the amendatory act that added this subsection which action is based on conduct similar to or identical to discrimination because of the age of persons residing with the individual bringing or continuing the action.

EXCERPTS - ELLIOTT LARSEN CIVIL RIGHTS ACT

§ 37.2202. Employers, prohibited conduct; construction; inapplicability to employment by parent, spouse, or child.

Sec. 202. (1) An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(c) Segregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term, condition, or privilege of employment, including, but not limited to, a benefit plan or system.

(d) Until January 1, 1994, require an employee of an institution of higher education who is serving under a contract of unlimited tenure, or similar arrangement providing for unlimited tenure, to retire from employment on the basis of the employee's age. As used in this subdivision, "Institution of higher education" means a public or private university, college, community college, or Junior college located in this state.

(2) This section shall not be construed to prohibit the establishment or implementation of a bona fide retirement policy or system that is not a subterfuge to evade the purposes of this section.

(3) This section does not apply to the employment of an individual by his or her parent, spouse, or child.

EXCERPTS MICHIGAN HANDICAPPER'S CIVIL RIGHTS ACT

§ 37.1202. Employer; prohibited conduct; exceptions; access to genetic information.

Sec. 202. (1) Except as otherwise required by federal law, an employer shall not:

(a) Fail or refuse to hire, recruit, or promote an individual because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position.

(b) Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position.

(c) Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position.

(d) Fail or refuse to hire, recruit, or promote an individual on the basis of physical or mental examinations that are not directly related to the requirements of the specific job.

(e) Discharge or take other discriminatory action against an individual on the basis of physical or mental examinations that are not directly related to the requirements of the specific job.

(f) Fail or refuse to hire, recruit, or promote an individual when adaptive devices or aids may be utilized thereby enabling that individual to perform the specific requirements of the job.

(g) Discharge or take other discriminatory action against an individual when adaptive devices or aids may be utilized thereby enabling that individual to perform the specific requirements of the job.

(h) Require an individual to submit to a genetic test or to provide genetic information as a condition of employment or promotion.

EXCERPTS MICHIGAN HANDICAPPER'S CIVIL RIGHTS ACT

(2) Subsection (1) does not prohibit an individual from voluntarily providing to an employer genetic information that is related to the employee's health or safety in the workplace. Subsection (1) does not prohibit an employer from using genetic information received from an employee under this subsection to protect the employee's health or safety.

(3) This section shall not apply to the employment of an individual by his or her parent, spouse, or child.

(4) Except as otherwise provided in subsection (2), no employer may directly or indirectly acquire or have access to any genetic information concerning an employee or applicant for employment, or a member of the employee's or applicant's family.

EXCERPTS MICHIGAN HANDICAPPER'S CIVIL RIGHTS ACT

§ 37.2103. Definitions.

Sec. 103. As used in this act:

(a) "Age" means chronological age except as otherwise provided by law.

(b) "Commission" means the civil rights commission established by section 29 of article V of the state constitution of 1963.

(c) "Commissioner" means a member of the commission.

(d) "Department" means the department of civil rights or its employees.

(e) "Familial status" means 1 or more individuals under the age of 18 residing with a parent or other person having custody or in the process of securing legal custody of the individual or individuals or residing with the designee of the parent or other person having or securing custody, with the written permission of the parent or other person. For purposes of this definition, "parent" includes a person who is pregnant.

(f) "National origin" includes the national origin of an ancestor.

(g) "Person" means an individual, agent, association, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee in bankrupt bankruptcy, unincorporated organization, the state or a political subdivision of the state or an agency of the state, or any other legal or commercial entity.

(h) "Political subdivision" means a county, city, village, township, school district, or special district or authority of the state.

(i) Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
(i) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.

(ii) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education, or housing.

(iii) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.

EXCERPTS MICHIGAN HANDICAPPER'S CIVIL RIGHTS ACT

§ 37.1210. Burden of proof; cost of accommodation as undue hardship; reduction of limitations; restructuring job or altering schedule; applicability of subsections (2) to (16); violation; notices.

Sec. 210. (1) In an action brought pursuant to this article for a failure to accommodate, the person with a disability shall bear the burden of proof. If the person with a disability proves a prima facie case, the person shall bear the burden of producing evidence that an accommodation would impose an undue hardship on that person. If the person produces evidence that an accommodation would impose an undue hardship on that person, the person with a disability shall bear the burden of proving by a preponderance of the evidence that an accommodation would not impose an undue hardship on that person.

(2) Except as provided in subsections (7), (13), and (17), if the person employs fewer than 4 employees and is required under this article to purchase any equipment or device to accommodate the person with a disability, the total purchase cost required to be paid by that person for that equipment or device is limited to an amount equal to the state average weekly wage. If the cost of an accommodation under this subsection exceeds the limitation established for that accommodation, the accommodation imposes an undue hardship on that person. If the cost of the accommodation does not exceed the limitation established for that accommodation, the accommodation does not impose an undue hardship on that person.

(3) Except as provided in subsections (7), (13), and (17), if the person employs 4 or more employees but fewer than 15 employees and is required under this article to purchase any equipment or device to accommodate the person with a disability, the total purchase cost required to be paid by that person is limited to an amount equal to 1.5 times the state average weekly wage. If the cost of an accommodation under this subsection exceeds the limitation established for that accommodation, the accommodation imposes an undue hardship on that person. If the cost of the accommodation does not exceed the limitation established for that accommodation, the accommodation does not impose an undue hardship on that person.

(4) Except as provided in subsections (6), (7), (13), and (17), if the person employs 15 or more employees but fewer than 25 employees and is required under this article to purchase any equipment or device to accommodate the

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person with a disability, the total purchase cost required to be paid by that person is limited to an amount equal to 2.5 times the state average weekly wage. If the cost of an accommodation under this subsection exceeds the limitation established for that accommodation, the accommodation imposes an undue hardship on that person. If the cost of the accommodation does not exceed the limitation established for that accommodation, the accommodation does not impose an undue hardship on that person.

(5) Except as provided in subsections (6), (7), (13), and (17), if the person employs 25 or more employees and the total purchase cost of any equipment or device required to accommodate an employee under this article is equal to or less than 2.5 times the state average weekly wage, the accommodation does not impose an undue hardship on that person.

(6) Except as provided in subsections (7), (13), and (17), if the person employs 15 or more employees and the total purchase cost of any equipment or device required to accommodate an employee under this article is equal to or less than 2.5 times the state average weekly wage, the accommodation does not impose an undue hardship on that person.

(7) Subsections (2) to (6) do not limit the cost of reasonable routine maintenance or repair of equipment or devices needed to accommodate a person with a disability under this article.

(8) Except as provided in subsections (13) and (17), if the person employs fewer than 4 employees and is required to hire or retain 1 or more individuals as readers or interpreters to accommodate the person with a disability in performing the duties of his or her job, the cost required to be paid by that person is limited to an amount equal to 7 times the state average weekly wage for the first year the person with a disability is hired, promoted, or transferred to that job, and 5 times the state average weekly wage for each year after the first year the person with a disability is hired, promoted, or transferred to that job. If the cost of an accommodation under this subsection exceeds the limitation established for that accommodation, the accommodation imposes an undue hardship on that person. If the cost of the accommodation does not exceed the limitation established for that accommodation, the accommodation does not impose an undue hardship on that person.

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(9) Except as provided in subsections (13) and (17), if the person employs 4 or more employees but fewer than 15 employees and is required to hire or retain 1 or more individuals as readers or interpreters to accommodate the person with a disability in performing the duties of his or her job, the cost required to be paid by that person is limited to an amount equal to 10 times the state average weekly wage for the first year the person with a disability is hired, promoted, or transferred to that job, and 7 times the state average weekly wage for each year after the first year the person with a disability is hired, promoted, or transferred to that job. If the cost of an accommodation under this subsection exceeds the limitation established for that accommodation, the accommodation imposes an undue hardship on that person. If the cost of the accommodation does not exceed the limitation established for that accommodation, the accommodation does not impose an undue hardship on that person.

(10) Except as provided in subsections (12), (13), and (17), if the person employs 15 or more employees but fewer than 25 employees and is required to hire or retain 1 or more individuals as readers or interpreters to accommodate the person with a disability in performing the duties of his or her job, the cost required to be paid by that person is limited to an amount equal to 15 times the state average weekly wage for the first year the person with a disability is hired, promoted, or transferred to that job, and 10 times the state average weekly wage for each year after the first year the person with a disability is hired, promoted, or transferred to that job. If the cost of an accommodation under this subsection exceeds the limitation established for that accommodation, the accommodation imposes an undue hardship on that person. If the cost of the accommodation does not exceed the limitation established for that accommodation, the accommodation does not impose an undue hardship on that person.

(11) Except as provided in subsections (12), (13), and (17), if the person employs 25 or more employees and the cost required to hire or retain 1 or more individuals as readers or interpreters to accommodate the person with a disability in performing the duties of his or her job is less than or equal to 15 times the state average weekly wage for the first year the person with a disability is hired, promoted, or transferred to that job, and is less than or equal to 10 times the state average weekly wage for each year after the first year the person with a disability is hired, promoted, or transferred to that job, the accommodation does not impose an undue hardship on that person.

EXCERPTS MICHIGAN HANDICAPPER'S CIVIL RIGHTS ACT

(12) Except as provided in subsections (13) and (17), if the person employs 15 or more employees and the cost required to hire or retain 1 or more individuals as readers or interpreters to accommodate the person with a disability in performing the duties of his or her job is less than or equal to 15 times the state average weekly wage for the first year the person with a disability is hired, promoted, or transferred to that job, and is less than or equal to 10 times the state average weekly wage for each year after the first year the person with a disability is hired, promoted, or transferred to that job, the accommodation does not impose an undue hardship on that person.

(13) If the person with a disability is a temporary employee, the limitations established for accommodations under subsections (2), (3), (4), (5), (6), (8), (9), (10), (11), and (12) are reduced by 50%.

(14) A person who employs fewer than 15 employees is not required to restructure a job or alter the schedule of employees as an accommodation under this article.

(15) Job restructuring and altering the schedule of employees under this article applies only to minor or infrequent duties relating to the particular job held by the person with a disability.

(16) If a person can accommodate a person with a disability under this article only by purchasing equipment or devices and hiring or retaining 1 or more individuals as readers or interpreters, the person shall, subject to subsections (2) to (13) and subsection (17), purchase the equipment or devices and hire or retain 1 or more individuals as readers or interpreters to accommodate that person with a disability. However, if the person can accommodate that person with a disability by purchasing equipment or devices or by hiring or retaining 1 or more individuals as readers or interpreters, the person shall consult the person with a disability and, subject to subsections (2) to (13) and subsection (17), choose whether to purchase equipment or devices or hire or retain 1 or more individuals as readers or interpreters.

EXCERPTS MICHIGAN HANDICAPPER'S CIVIL RIGHTS ACT

(17) Subsections (2) to (16) do not apply to either of the following:

(a) A public employer. As used in this subdivision, "public employer" means this state or a political subdivision of this state.

(b) An organization exempt from taxation under section 501(c)(3) of the internal revenue code of 1986.

(18) A person with a disability may allege a violation against a person regarding a failure to accommodate under this article only if the person with a disability notifies the person in writing of the need for accommodation within 182 days after the date the person with a disability knew or reasonably should have known that an accommodation was needed.

(19) A person shall post notices or use other appropriate means to provide all employees and job applicants with notice of the requirements of subsection (18).

MICHIGAN CIVIL JURY INSTRUCTIONS

M Civ JI 105.01 Employment Discrimination Statute (Disparate Treatment)—Explanation

The law provides that an employer shall not discriminate against a person regarding employment, compensation, or a term, condition, or privilege of employment because of [religion / race / color / national origin / age / sex / height / weight / marital status].

M Civ JI 105.02 Employment Discrimination (Disparate Treatment)—Definition

The plaintiff must prove that [he / she] was discriminated against because of [religion / race / color / national origin / age / sex / height / weight / marital status].

The discrimination must have been intentional. It cannot have occurred by accident. Intentional discrimination means that one of the motives or reasons for plaintiff's [discharge / failure to be hired / failure to be promoted / failure to be trained / harassment / *[other]*] was [religion / race / color / national origin / age / sex / height / weight / marital status]. [Religion / race / color / national origin / age / sex / height / weight / marital status] does not have to be the only reason, or even the main reason, but it does have to be one of the reasons which made a difference in determining whether or not to [discharge / hire / promote / train / harass / *[other]*] the plaintiff.

M Civ JI 105.03 Employment Discrimination (Disparate Treatment)—Cautionary Instruction as to Business Judgment

Your task is to determine whether defendant discriminated against the plaintiff. You are not to substitute your judgment for the defendant's business judgment, or decide this case based upon what you would have done.

However, you may consider the reasonableness or lack of reasonableness of defendant's stated business judgment along with all the other evidence in determining whether defendant discriminated or did not discriminate against the plaintiff.

M Civ JI 105.04 Employment Discrimination (Disparate Treatment)—Burden of Proof

Plaintiff has the burden of proving that:

a. **defendant [discharged / failed to hire / failed to promote / failed to train / harassed / *[other]*] the plaintiff, and**

b. **[religion / race / color / national origin / age / sex / height / weight / marital status] was one of the motives or reasons which made a difference in determining to [discharge / fail to hire / fail to promote / fail to train / harass / *[other]*] the plaintiff.**

Your verdict will be for the plaintiff if you find that defendant [discharged / failed to hire / failed to promote / failed to train / harassed / *[other]*] the plaintiff, and that [religion / race / color / national origin / age / sex / height / weight / marital status] was one of the motives or reasons which made a difference in determining to [discharge / fail to hire / fail to promote / fail to train / harass / *[other]*] the plaintiff.

Your verdict will be for the defendant if you find that the defendant did not [discharge / fail to hire / fail to promote / fail to train / harass / *[other]*] the plaintiff. Your verdict will also be for the defendant if you find that defendant did [discharge / fail to hire / fail to promote / fail to train / harass / *[other]*] the plaintiff, but that [religion / race / color / national origin / age / sex / height / weight / marital status] was not one of the motives or reasons which made a difference in determining to [discharge / fail to hire / fail to promote / fail to train / harass / *[other]*] the plaintiff.

M Civ JI 105.05 Employment Discrimination (Constructive Discharge)— Definition

The plaintiff [resigned / left the job]. Plaintiff claims that [he / she] was constructively discharged by the defendant. Defendant claims that the plaintiff voluntarily [resigned / left the job]. Plaintiff has the burden of proving that [he / she] was constructively discharged.

Constructive discharge means that an employer deliberately made an employee's working conditions so intolerable that the employee was forced to [resign / leave the job].

It is not necessary to show that defendant intended plaintiff to [resign / leave the job], so long as you find that a reasonable person in the same circumstances as plaintiff would have felt compelled to [resign / leave the job].

M Civ JI 105.10 Employment Discrimination— Sexual Harassment

Sexual harassment is a form of discrimination prohibited by state law. Sexual harassment means [sexual advances / requests for sexual favors / (and other) verbal or physical conduct or communication of a sexual nature] unwelcome to the plaintiff, if:

a. ***(a person explicitly or implicitly makes the plaintiff's submission to such conduct or communication a term or condition to obtain employment, or)**

b. ***(a person uses the plaintiff's submission to or rejection of such conduct or communication as a factor in decisions affecting the plaintiff's employment, or)**

c. ***(under all the circumstances, a reasonable person would have perceived the conduct or communication as:**

   1. **substantially interfering with the plaintiff's employment, or**

   2. **having the purpose or effect of creating an intimidating, hostile or offensive employment environment).**

The plaintiff has the burden or proving that [he / she] was sexually harassed by the defendant(s).

Your verdict will be for the plaintiff if you find that the defendant(s) sexually harassed the plaintiff.

Your verdict will be for the defendant(s) if you do not find that the defendant(s) sexually harassed the plaintiff.

M Civ JI 105.41 Employment Discrimination— Mitigation of Damages for Loss of Compensation

The plaintiff must make every reasonable effort to minimize or reduce [his / her] damages for loss of compensation by seeking employment. This is called "mitigation" of damages.

The defendant has the burden of proving that the plaintiff failed to mitigate [his / her] damages for loss of compensation.

If you find that the plaintiff is entitled to damages, you must reduce these damages by:

a. ***(what the plaintiff earned) (and)**

b. ***(what the plaintiff could have earned with reasonable effort) during the period for which you determine that [he / she] is entitled to damages.**

†(If you find that the plaintiff is entitled to future damages, you must reduce these damages by an amount the plaintiff could reasonably earn or reasonably be expected to earn in the future.)

Whether the plaintiff was reasonable in not seeking or accepting particular employment is a question for you to decide. However, the plaintiff is obligated to accept an offer of employment which is of "a like nature." In determining whether employment is of "a like nature," you may consider, for example, the type of work, the hours worked, the compensation, the job security, working conditions, and other conditions of employment.

M Civ JI 105.42 Employment Discrimination— Mitigation of Damages for Loss of Compensation: Conditional and Unconditional Offers by Defendant

In this case, defendant has offered to [hire / promote / reinstate] the plaintiff to the position [previously held / applied for] or a substantially equivalent position, and plaintiff has rejected the offer. "Substantially equivalent position" means one with virtually identical promotion opportunities, compensation, job responsibilities, working conditions, and status.

Offers to [hire / promote / reinstate] are either conditional or unconditional. It is for you to decide whether defendant's offer was conditional or unconditional. An offer is conditional if it involves discriminatory or other unreasonable conditions. An offer is unconditional if it does not involve discriminatory or other unreasonable conditions.

If an offer is conditional, plaintiff does not have to accept the offer.

If the offer is unconditional, then you should determine whether plaintiff's rejection of the offer was reasonable. To be reasonable, plaintiff's rejection must be grounded in the employment as contemplated by the offer to [hire / promote / reinstate] the plaintiff and not be for a purely personal reason.

If you determine that defendant unconditionally offered to [hire / promote / reinstate] the plaintiff to the position [previously held / applied for] or a substantially equivalent position, and it was not reasonable for plaintiff to reject the offer, then you shall not award damages for loss of compensation after the date plaintiff rejected the offer.

If you determine that the offer was conditional, or that it was reasonable for plaintiff to reject the offer, then you may award damages for loss of compensation after the date plaintiff rejected the offer, so long as plaintiff is otherwise entitled to damages as I have explained to you in these instructions.

M Civ JI 107.01 Whistleblowers' Protection Act: Explanation

We have a state law known as the Whistleblowers' Protection Act which provides that an employer shall not [discharge / or / threaten / or / discriminate against] an employee regarding employment, compensation, or a term, condition, location or privilege of employment because of protected activity.

M Civ JI 107.02 Whistleblowers' Protection Act: Protected Activity—Definition

"Protected activity" means:

***a. [an employee / a person acting on behalf of an employee] [reports / or / is about to report] (verbally or in writing) a violation or a suspected violation of a law or regulation (or rule promulgated pursuant to the law of the state, a political subdivision of the state, or the United States) by [his or her employer / ** a third party / **a co-employee] to a public body, unless the employee knows that the report is false; (or)**

***b. an employee [participates at the request of a public body / has been requested by a public body to participate] in [an investigation / or / a hearing / or / an inquiry held by that public body / or / a court action].**

*****(A request for the employee to participate in [an investigation / or / a hearing / or / an inquiry / or / a court action] is considered protected activity even though the employee does not actually participate in the [investigation / or / hearing / or / inquiry / or / court action]).**

M Civ JI 107.03 Whistleblowers' Protection Act: Causation

When I use the term "because of" I mean that protected activity must be one of the motives or reasons defendant [discharged / or / threatened / or / discriminated against] the plaintiff. Protected activity does not have to be the only reason, or even the main reason, but it does have to be one of the reasons that made a difference in defendant's decision to [discharge / or / threaten / or / discriminate against] the plaintiff.

***(In order to prove causation, plaintiff must show that a decision-maker or a person who influenced the decision knew of plaintiff's protected activity. Knowledge may be shown by direct evidence or circumstantial evidence.**

M Civ JI 107.04 Whistleblowers' Protection Act: Good Faith Belief

Plaintiff must reasonably believe that a violation of law or a regulation has occurred. It is not necessary that an actual violation of law or a regulation has occurred, but the employee can not have a reasonable belief if [he / she] knows [his / her] report is false.

M Civ JI 107.11 Whistleblowers' Protection Act: Distinction in Standard of Proof Between "Report" and "About to Report"

If the plaintiff claims that he or she reported a violation or suspected violation of law or regulation to a public body, the plaintiff must prove by a preponderance of the evidence that [he / she] made such a report.

If the plaintiff claims that he or she was about to report a violation or suspected violation of law or regulation to a public body, the plaintiff must prove by clear and convincing evidence that he or she was about to report such a violation.

M Civ JI 107.15 Whistleblowers' Protection Act: Burden of Proof

Plaintiff has the burden of proving each of the following elements:

a. there was protected activity as defined in these instructions; and

b. the defendant [discharged / or / threatened / or / discriminated against] the plaintiff; and

c. the [discharge / threat / discrimination] was because of protected activity; and

d. the plaintiff suffered damages as a result of the [discharge/threat/discrimination].

Your verdict will be for the plaintiff if you find that plaintiff has proved each of these elements. Your verdict will be for the defendant if you find that the plaintiff has failed to prove any one of these elements.

M Civ JI 110.01 Introductory Instruction Where Wrongful Discharge Is Combined with Other Claims

In this case, plaintiff presents *[number of claims]*. One claim is that the termination of plaintiff's employment violated [a term or condition of the employment relationship / and / or / one or more of defendant's employment policies]. Another claim is that the termination was [unlawful / discriminatory / other] because *[describe discrimination or other claim]*. Each claim consists of different elements which plaintiff must prove. Each claim is entitled to separate consideration.

I will now instruct you on the law applicable to each claim.

M Civ JI 110.05 Wrongful Discharge: Employment Relationship Terminable at Will Unless Terms or Conditions to the Contrary

An employment relationship is terminable at will unless an employer has agreed otherwise or the employer's policies provide otherwise. Terminable at will means that the employment relationship may be terminated by either party at any time, with or without cause, for any reason or for no reason at all. However, the employment relationship is not terminable at will if one or more of the express or implied terms or conditions of the employment relationship provide otherwise. (Where it is claimed that there was an agreement for job security based on oral statements, those statements must be clear and unequivocal.)

M Civ JI 110.06 Wrongful Discharge: Employment Policies or Terms or Conditions of the Employment Contract

The plaintiff claims that the following were [terms or conditions of the employment relationship / and / or / defendant's employment policies]:

a. **that the employment relationship can be terminated by the employer if the employer is dissatisfied with the [employee / or / employee's services].**

b. **that the employment relationship can be terminated by the employer if the employer has good or just cause.**

c. ***[Describe special conditions or performance standards.]*.**

d. ***[Describe other terms or conditions or policies.]*.**

The plaintiff has the burden of proving the [term / condition / terms and conditions] which [he / she] claims [was / were] part of the employment relationship [and / or / defendant's employment policies].

M Civ JI 110.07 Wrongful Discharge: Employment Policies or Terms or Conditions of the Employment Contract—Express or Implied

A term or condition of employment may be either express or implied.

a. **A term or condition is express if the employer and employee have agreed with one another orally or in writing that the employment will not be terminated except in accordance with that term or condition.**

b. **A term or condition is implied if the employer has caused the employee to have a legitimate expectation that [his / her] employment will not be terminated except in accordance with that term or condition. The employee's expectation must arise from the employer's oral or written policy statements, or the employer's actions, as fairly understood. Plaintiff must believe that [his / her] employment could not be terminated except in accordance with that term or condition, and plaintiff's expectation must have been reasonable under all of the circumstances.**

M Civ JI 110.10 Wrongful Discharge: Good or Just Cause Contract or Policy—Burden of Proof

The plaintiff has the burden of proving each of the following:

a. ***(An employment relationship existed between plaintiff and defendant.)**

b. **The employment relationship could not be terminated unless defendant had good or just cause.**

c. **Plaintiff's employment was terminated by the defendant.**

d. **†Plaintiff was performing the duties of [his / her] employment up to the time of termination.**

e. **Plaintiff suffered economic damages as a result of the termination.**

The defendant has the burden of proving that it had good or just cause to terminate the plaintiff's employment.

In order to decide whether there was good or just cause for the termination of plaintiff's employment, you must determine whether plaintiff actually engaged in the conduct complained of by the defendant and whether that conduct was the actual reason for the termination of plaintiff's employment.

If the plaintiff did not engage in the conduct, or if that was not the actual reason for the termination, then there was not good or just cause.

‡(If you decide that plaintiff did engage in the conduct and that the conduct was the reason for the termination, then you must decide whether defendant had a [rule / policy], whether that [rule / policy] was consistently applied, and whether plaintiff's conduct violated that [rule / policy]. If you decide that the conduct violated a consistently applied [rule / policy], then defendant had good or just cause and you cannot substitute your judgment as to the reasonableness of that [rule / policy].)

‡(If you decide that defendant had no [rule / policy], or if you decide that defendant had a [rule / policy] but it was applied only selectively, then it is up to you to decide whether the conduct of the plaintiff amounted to good or just cause for the termination; that is, whether an employer would terminate someone's employment for that reason.)

Your verdict will be for the plaintiff if you decide that the plaintiff has proved each of the elements I have just explained to you, and you decide that the defendant has not proved that it had good or just cause to terminate plaintiff's employment.

Your verdict will be for the defendant if you decide that the plaintiff has failed to prove any one of the elements I have just explained to you, or if you decide that the defendant has proved that it had good or just cause to terminate the plaintiff's employment.

M Civ JI 110.11 Wrongful Discharge: Satisfaction Contract or Policy—Burden of Proof

Plaintiff has the burden of proving each of the following:

a. ***(An employment relationship existed between plaintiff and defendant.)**

b. **The employment relationship could not be terminated unless defendant was dissatisfied with [plaintiff / or / plaintiff's work].**

c. **Plaintiff's employment was terminated by the defendant.**

d. **Defendant was not dissatisfied with [plaintiff / or / plaintiff's work].**

e. **Plaintiff suffered economic damages as a result of the termination.**

In deciding whether the employer is dissatisfied with the employee's services, you may not concern yourself with whether the employer's dissatisfaction is reasonable, †(but you are to decide whether the dissatisfaction is insincere, in bad faith, dishonest, or not the real reason).

Your verdict will be for the plaintiff if you decide that the plaintiff has proved each of the elements I have just explained to you.

Your verdict will be for the defendant if you decide that the plaintiff has failed to prove any one of the elements I have just explained to you.

M Civ JI 110.12 Wrongful Discharge: Special Conditions or Performance Standards—Burden of Proof

Plaintiff has the burden of proving each of the following:

a. ***(An employment relationship existed between plaintiff and defendant.)**

b. **The employment relationship could only be terminated in accordance with *[Describe special conditions or performance standards.]*.**

c. **Plaintiff's employment was terminated by the defendant.**

d. **The termination of employment was not in accordance with *[Describe special conditions or performance standards.]*.**

e. **Plaintiff suffered economic damages as a result of the termination.**

Your verdict will be for the plaintiff if you decide that the plaintiff has proved each of the elements I have just explained to you.

Your verdict will be for the defendant if you decide that the plaintiff has failed to prove any one of the elements I have just explained to you.

M Civ JI 110.13 Wrongful Discharge: Procedural Terms or Conditions—Burden of Proof

Plaintiff has the burden of proving each of the following:

a. ***(An employment relationship existed between plaintiff and defendant.)**

b. **The employment relationship could only be terminated in accordance with *[Describe procedural terms or conditions.]*.**

c. **Plaintiff's employment was terminated by the defendant.**

d. **The termination of employment was not in accordance with *[Describe procedural terms or conditions.]*.**

e. **Plaintiff suffered economic damages as a result of the termination.**

Your verdict will be for the plaintiff if you decide that the plaintiff has proved each of the elements I have just explained to you.

Your verdict will be for the defendant if you decide that the plaintiff has failed to prove any one of the elements I have just explained to you.

M Civ JI 110.20 Wrongful Discharge: Mitigation of Damages [No Instruction Prepared]