



# Recent Developments In Employment Law

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## MICHIGAN SUPREME COURT REJECTS TITLE VII STANDARD FOR IMPOSING LIABILITY FOR SEXUAL HARASSMENT UNDER MICHIGAN LAW

In *Chambers v Tretco, Inc.*, (July 31, 2000) the Michigan Supreme rejected by a six to one margin the U.S. Supreme Court's standard for imposing liability under Title VII of the federal Civil Rights Act on employers for sexual harassment allegedly committed by supervisors.

Two years ago, in *Faragher v Boca Raton* and *Burlington Industries, Inc v Ellerth*, the U.S. Supreme Court announced the standard by which employers are held liable under Title VII of the federal Civil Rights Act of 1964 ("Title VII") for sexual harassment committed by supervisors. The court determined that the labels "hostile environment" and "quid pro quo" are irrelevant for determining employer liability. Instead, the court decided that an employer is automatically liable for sexual harassment committed by a supervisor that results in a "tangible employment action." But, when no tangible action is taken by the supervisor, the employer may raise an affirmative defense that: (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

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The employee in *Chambers* brought suit in state court under the Michigan Elliott-Larsen Civil Rights Act. She alleged that for a one week period, a supervisor rubbed her buttocks, grabbed her breasts and repeatedly propositioned her for sexual favors. At trial, the jury concluded that the employer was liable for both *quid pro quo* and hostile environment sexual harassment. The court of appeals followed *Faragher* and *Ellerth* and ignored the labels *quid pro quo* and hostile environment sexual harassment. The court affirmed judgment for the employee because the employer could not have established the affirmative defense.

The Michigan Supreme Court concluded that the labels *quid pro quo* and hostile environment are relevant for determining liability under Michigan law. According to the court, an employer is automatically liable for *quid pro quo* harassment which occurs when an agent of the employer uses submission to or rejection of unwelcome sexual conduct or communication as a factor in decisions affecting employment. When submission to or rejection of unwelcome sexual conduct or communication is not factored into an employment decision, there is no *quid pro quo* harassment though the conduct may still create a hostile work environment. An employer is not automatically liable for a hostile work environment even when it is created by a supervisor. To establish such a claim, an employee must show some fault on the part of the employer. That is, an employee must show that the employer failed to take prompt and adequate remedial action after reasonable notice of the alleged harassment.

The court explained that notice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring. The court further explained an employer's remedial action

is adequate if it reasonably served to prevent future harassment of the employee.

Applying its ruling to the facts, the court decided that the trial court should have dismissed the claim for *quid pro quo* harassment because no decisions affecting the employee's employment were made. However, the court determined that the employee had established the existence of a hostile environment and returned the case to the court of appeals to determine whether the employee had presented enough evidence to demonstrate that the employer failed to rectify the problem after adequate notice.

The *Chambers* case is significant because unlike *Faragher* and *Ellerth*, which placed the burden of proving the affirmative defense on the employer, the court in *Chambers* placed the burden of proving fault in hostile environment cases on the employee. Additionally, with respect to hostile environment harassment, the *Chambers* court did not distinguish between conduct perpetrated by a supervisor and conduct perpetrated by a coworker. Thus, under Michigan law, regardless of who creates the hostile environment, the employer is not liable unless it failed to take prompt, remedial action after having received adequate notice. However, as a practical matter, employees are likely to file claims under Title VII or both federal and state law. (Note: filing a civil rights complaint with the EEOC or MDCR is a prerequisite to filing a claim under Title VII.)

Ultimately, this case serves as yet another reminder of the importance not only of having a sexual harassment policy that is distributed to every employee, but of immediately investigating and, if necessary, remedying any incidents of sexual harassment. The ability to avoid all liability for hostile environment sexual harassment by taking such actions is an opportunity that no employer can afford to miss.

### **MICHIGAN SUPREME COURT RULES THAT TUITION CONTRACTS FOR ON-THE-JOB TRAINING VIOLATE WAGES AND FRINGE BENEFITS ACT**

The Michigan Supreme Court recently ruled that an employer violated the Wages and Fringe Benefits Act (“WFBA”) by requiring an employee to sign a tuition contract which required reimbursement for mandatory on-the-job training if the employee failed to complete six years of employment.

In *Sands Appliance Services, Inc v Wilson* (July 31, 2000), an employer sued its former employee for breach of a tuition reimbursement contract. The employer required the employee to sign the contract before beginning employment. Under the contract, each week of employment during the first three years was considered “training,” and each week of continued employment by the employee after the first three years constituted payment for one week of training. If the employee worked for six years, the training would have been considered repaid in full. If the employee left before the six years, he or she would owe an amount that varied depending on how long he or she had worked for the employer. As previously reported, the Michigan Court of Appeals ruled that there was no public policy against allowing a prematurely departing employee to agree to partially reimburse an employer for specialized training.

The Michigan Supreme Court reversed the court of appeals and decided that this contract violated the WFBA which prohibits an employer from demanding or receiving from an employee a fee, gift, tip, gratuity or other remuneration or consideration as a condition of employment or continuing employment.

The Michigan Supreme Court distinguished this type of tuition contract from an arrangement where an employer funds an employee’s education with the understanding that the

employee will repay the employer unless he or she remains with the employer for a specific period. Such an arrangement does not violate the Act since it is optional and not a condition of employment.

### **U.S. SUPREME COURT CLARIFIES EVIDENCE NEEDED TO SUSTAIN JURY VERDICTS IN EMPLOYMENT DISCRIMINATION CASES**

In *Reeves v Sanderson Plumbing Products, Inc* (June 12, 2000), the U.S. Supreme Court, in a unanimous opinion, clarified the kind and amount of evidence necessary to sustain a jury’s verdict in an employment discrimination case.

In most employment cases, direct evidence of discrimination is lacking. Consequently, most employees attempt to prove discrimination through circumstantial evidence using the burden shifting method established by the U.S. Supreme Court in *McDonnell Douglas Corp v Green*. Under *McDonnell Douglas*, an employee has the initial burden of proving a *prima facie* case of discrimination. Typically, employees must show that they were a member of a protected class, were qualified for their position, suffered an adverse employment action, and were replaced by someone outside of the protected class. The burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. Once the employer produces its explanation, the employee must prove that the employer’s reason was not its true reason, but was a pretext for discrimination.

In *Reeves*, the employee used the above burden shifting method to try to prove that he was discharged because of his age. The employee established a *prima facie* case: he was over forty, he was qualified for his supervisor position, he was discharged, and he was replaced by a younger person. He also produced evidence that the reason given for his discharge, the

keeping of inaccurate attendance records, was false. He offered evidence that he properly maintained the attendance records. He also produced evidence that he was not responsible for any failure to discipline late and absent employees, but, rather, another employee had that responsibility.

The jury ruled in the employee's favor, but the court of appeals reversed the verdict and ruled in favor of the employer. The court conceded that a reasonable jury could have concluded that the employer's explanation for the termination was false. The court, however, reasoned that in addition, the jury had to find that the employee presented sufficient evidence that he was discharged because of his age. The court examined the employee's evidence that the decision maker made age-related comments and singled him out for harsher treatment but found that the alleged comments were not made in the context of the employee's termination, there was no allegation that the other two individuals involved in the decision to discharge the employee were motivated by age, and that these two individuals were over the age of 50. The court concluded that the employee had not presented sufficient evidence for a jury to conclude that he had been discharged because of his age.

The supreme court reversed the court of appeals. According to the court, in appropriate circumstances, the jury can "reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." The supreme court, therefore, decided that an employee's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the jury to conclude that the employer unlawfully discriminated. The court cautioned, however, that such a showing by the employee will not always be adequate to sustain a jury's finding of liability. For example, an employer would be entitled to win if the record

demonstrated some other, nondiscriminatory reason for the employer's decision.

The U.S. Supreme Court's decision reemphasizes the importance to employers of providing employees with a truthful explanation for their disciplinary decisions. To spare an employee's feelings or to avoid a confrontation, employers sometimes fail to provide employees with the real reason for the employer's action. For example, an employer will tell an employee he is being laid off for economic reasons when, in fact, he is being discharged because of performance problems. Under such a scenario, a jury may be permitted to infer that the employer unlawfully discriminated.

#### **COURT UPHOLDS REGULATION THAT COULD REQUIRE MORE THAN TWELVE WEEKS OF FMLA LEAVE**

The Sixth Circuit Court of Appeals recently endorsed a Labor Department regulation that requires employers to designate an employee's leave as FMLA-qualifying or run the risk of having to provide employees with more than twelve weeks of leave in a given twelve month period.

In *Plant v Morton International, Inc.*, (February 4, 2000), a former employee, who was terminated while out on medical leave, alleged that he had been wrongfully terminated in violation of the FMLA. The employee had injured his back in a 1995 car accident and received paid medical leave. Months after returning to work, the employee aggravated his back injury while on the job and took another paid leave of absence at his doctor's direction. Weeks later, while still out on leave, the company terminated the employee for poor performance.

The trial court dismissed the employee's FMLA claim, ruling that because the employee

could not have returned to work within the twelve weeks of leave allotted by the FMLA he could not make a successful FMLA claim. The Sixth Circuit reversed and held that the employee may have been entitled to an additional twelve weeks of leave under the FMLA because his employer failed to notify him that it was counting his absence against his FMLA leave allowance.

The court made clear that employer-provided leave, whether paid or unpaid, may be counted toward the twelve weeks' minimum leave required by the FMLA. However, the FMLA regulations place the burden on the employer in all circumstances to designate leave, paid or unpaid, as FMLA-qualifying and to give notice of that designation to the employee. The court noted that the regulations require that employers wishing to count paid leave against the twelve-week minimum must do so within two days of learning of the employee's reason for requesting the leave. Failure to give notice within this time period prevents the employer from designating paid leave as FMLA leave retrospectively, and only that portion of the leave following notification by the employer may be designated as FMLA leave and counted against the twelve-week entitlement. As such, the regulation and the court's holding create the possibility that an employer could provide a considerable amount of paid leave time to an employee during the course of a year, and still be obligated to provide up to twelve more weeks of leave under the FMLA.

#### **STATES NOW MAY PROVIDE UNEMPLOYMENT COMPENSATION TO NEW PARENTS**

The U.S. Department of Labor (DOL) has adopted a new interpretation of the existing federal unemployment compensation law so that states can now provide unemployment compensation to parents who take approved leave or who "otherwise leave employment" to

be with their newborns or newly-adopted children. This program is called Birth and Adoption Unemployment Compensation (BAUC) and the new DOL interpretation is contained in the Birth and Adoption Unemployment Compensation Final Rule, which became effective on August 14, 2000. The rule will allow, but does not require, that individual states provide unemployment compensation to new parents. If states wish to provide unemployment compensation under BAUC, those states must amend their unemployment compensation statutes.

In the past, DOL has consistently required that applicants for unemployment compensation be "able to work and available for work." DOL is now making an exception for new parents. This is an experimental program, with the goal of ascertaining whether the provision of unemployment compensation to new parents will promote the parents' continued connection to the workforce. Under this voluntary and experimental program, states can set eligibility criteria, duration of eligibility, compensation amounts and may also define under what circumstances, if any, employees "otherwise leaving employment" are eligible for compensation.

While there are many other aspects of this experimental program described in the rule, it is clear that Michigan will not participate in providing BAUC in the immediate future. No legislation has been sponsored in the Michigan legislature, which is in recess until mid-September. While we cannot predict whether Michigan will amend its statute to participate in this experimental program, Jack Wheatley, Director of the Michigan Unemployment Agency, is opposed to the BAUC program. On March 9, 2000, Mr. Wheatley testified before the Ways and Means Committee of the U.S. House of Representatives that the BAUC program could undermine the integrity of the unemployment compensation program in Michigan. For

example, if only 25% of new parents in Michigan received BAUC benefits, the cost would exceed \$190 million, which is 22% of the total expenditures for benefits in 1999.

Across the country, fifteen states have introduced legislation to implement the BAUC program. In neighboring states, bills have been introduced in Illinois, Indiana and Minnesota, but none has passed.

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We are distributing this RECENT DEVELOPMENTS IN EMPLOYMENT LAW to our clients and friends. This newsletter is intended to provide a concise overview of some recent legal developments which may affect employment practices. The matters discussed are intended to provide general information only and are not intended to provide legal advice. Specific action should be taken only after obtaining competent legal advice.

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