Smoke-Free Environments Law Project
The Center for Social Gerontology, Inc.
2307 Shelby Avenue
Ann Arbor, Michigan 48103
734 665-1126 • fax 734 665-2071 • sfelp@tcsg.org

Retaliation by Employers for Requesting Accommodation Under the ADA

INTRODUCTION

A plaintiff who has suffered various forms of retaliation at work after pursuing his rights under the Americans with Disabilities Act (ADA) has several state and federal statutory and common law claims available to him. First, if he experiences adverse employment action, such as discharge, he can sue under the ADA and the Michigan Persons with Disabilities Civil Rights Act (PDCRA) for retaliation. He also may have a claim for retaliation under the Michigan Whistleblowers' Protection Act (WPA), which protects employees who report or are about to report a violation of a law by their employers. Second, if an employee is a victim of harassment and abuse at work, he may have a cause of action for hostile work environment under the ADA or the PDCRA. Finally, if the employee is subjected to particularly offensive and extreme conduct he may pursue a common law claim for intentional infliction of emotional distress.

APPLICABLE STATUTES

U.S.C. Title 42 The Public Health and Welfare. Chapter 126. Equal Opportunities for Individuals with Disabilities. Employment § 12112 Discrimination.

> (a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

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U.S.C. Title 42 The Public Health and Welfare. Chapter 126. Equal Opportunity for Individuals with Disabilities. Miscellaneous Provisions § 12203 Prohibition against retaliation and coercion.

> (a) Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in any investigation proceeding, or hearing under this Act.
> (b) Interference, coercion, or intimidation. It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.
> …

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Mich. Comp. Laws Chapter 13. Miscellaneous Boards and Commissions § 37.1202 Michigan Persons with Disabilities Civil Rights Act Article 2.

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

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Mich. Comp. Laws Chapter 13. Miscellaneous Boards and Commissions § 37.1602 Michigan Persons with Disabilities Civil Rights Act Article 6.

> Sec. 602. A person or 2 or more persons shall not do the following:
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.
> …

. . . .

Mich. Comp. Laws Chapter 15. Public Officers and Employees. Whistleblowers' Protection Act § 15.362 Discharge, threats, or discrimination against employee for reporting violations of law.

> Sec. 2. An employer shall not discharge, threaten, or otherwise discriminate against an employee's compensation, terms, conditions, location, or privileges of

> employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or suspected violation of a law or regulation or rule promulgated pursuant to the law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

. . . .

Mich. Comp. Laws Chapter 15. Public Officers and Employees. Whistleblowers' Protection Act § 15.363 Civil actions for injunctive relief or damages.

> Sec. 3. (1) A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act.
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> (2) An action commenced pursuant to subsection (1) may be brought in the circuit court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom the civil complaint is filed resides or has his or her principal place of business.
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> (3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney fees.
>
> (4) An employee shall show by clear and convincing evidence that he or she or a person acting on his or her behalf was about to report, verbally or in writing, a violation or a suspected violation of a law of this state, a political subdivision of this state, or the United States to a public body.

DISCUSSION

I. Retaliation under the ADA and the PDCRA

Retaliation claims exist under both the ADA and the PDCRA. 42 U.S.C. § 12203 (1999); M.C.L. § 37.1602(a) (2000). Courts use the same analysis for both statutes, so results under one claim mirror results under the other. While all plaintiffs in the relevant case law have filed retaliation claims in conjunction with either a discrimination or failure to make reasonable accommodations claim, plaintiffs need not be disabled under the ADA in order to state a valid claim for retaliation. Muller v. Costello, 187 F.3d 298, 311 (2d Cir. 1999) (stating that a

retaliation finding can stand even without finding that the plaintiff was actually disabled within the meaning of the ADA); Treglia v. Town of Manlius, 68 F.Supp. 2d 153, 158 (N.D.N.Y. 1999) (holding that a plaintiff with an ADA retaliation claim need not establish that he is a qualified individual with a disability). A non-disabled plaintiff who files a retaliation claim must only show that she requested an accommodation under the ADA in good faith. Conley v. UPS, 88 F.Supp. 2d 16, 20 (E.D.N.Y. 2000) (finding that a plaintiff who suffered a miscarriage requested accommodations due to a mistaken belief of disability in good faith and thus had a basis for a retaliation claim).

For a plaintiff to state a valid claim for retaliation under either statute, he must show (1) that he engaged in a protected activity, (2) that the defendant took employment action adverse to him, and (3) that there was a causal connection between the protected activity and the adverse employment action. Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir. 1999); Conley, 88 F.Supp. at 20; Finical v. Collections Unlimited, Inc, 65 F. Supp. 2d 1032, 1048 (Ariz. 1999); Hendler v. Intelecom USA, 963 F. Supp. 200, 212 (E.D.N.Y. 1997). Some courts add a fourth element that the employer must have knowledge of the protected activity, but this addition does not change the analysis since knowledge is a necessary factor in causation. Weissman v. Dawn Joy Fashions, 214 F.3d 224, 234 (2d Cir. 2000); Muller, 187 F.3d at 311; Treglia, 68 F. Supp. 2d at 158; Mitan v. Neiman Marcus, 240 Mich. App. 679, 681, 613 N.W.2d 415, 416 (2000). Once the plaintiff has stated a prima facie case, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the adverse employment action. The burden then shifts back to the plaintiff to show that the defendant's reason for the adverse action is merely pretextual. Butler v. City of Prairie Village, 172 F.3d 736, 751 (10th Cir. 1999); Finical, 65

F.Supp. at 1049; Hendler, 963 F.Supp. at 212; Harmer v. Va. Elec. & Power Co., 831 F.Supp. 1300, 1308 (E.D. Va. 1993).

Plaintiffs who file discrimination charges with the EEOC or request accommodations are engaged in protected activities. Butler, 172 F.3d at 741 (plaintiff who requested a reduced work schedule due to depression was engaged in a protected activity); Kiel, 169 F.3d at 1136 (hearing impaired plaintiff's requests for a TDD device were protected communications); Treglia, 68 F. Supp at 159 (plaintiff's delivery of a doctor's note to his employer limiting him to light duty work was a protected activity); Hendler, 963 F. Supp. at 212 (plaintiff who requested a smoke-free environment and complained frequently to his company's president when he was not accommodated was found to be engaged in a protected activity). However, a plaintiff who wrote a letter to her human resources manager complaining that her supervisor engaged in "job discrimination and harassment" and mentioning that she had a disability was not involved in a protected activity because she never stated or implied that the discrimination was related to her disability or that she opposed a violation of the PDCRA. Mitan, 613 N.W.2d at 416-17.

The most common form of adverse employment action is discharge. However, other forms of adverse employment action that change the terms, conditions, or privileges of employment have also been recognized. The court in Weissman found that the defendant's refusal to rehire the plaintiff after promising to find him a new position upon his return from sick leave constituted adverse employment action. Weissman, 214 F.3d at 234. In Mondzelewski, the court denied the defendant's motion for summary judgment because there was a genuine issue of material fact as to whether a change in work shifts constituted a change in terms, conditions, or privileges of employment. Mondzelewski, 162 F.3d at 787. A plaintiff police officer survived the defendant's motion to dismiss for failure to state a claim because his duties were significantly

changed from activities such as hostage investigation and long-term projects to non-enforcement and administrative duties. Treglia, 68 F.Supp. 2d at 159. However, the plaintiff in Harmer, who requested a smoke-free environment due to asthma, was found not to have suffered averse employment action when his purchasing authority was reduced because the reduction did not change his salary or duties. Harmer, 831 F.Supp. at 1308. Failure to be promoted was also not found to be adverse employment action because the plaintiff never applied for the position. Id. at 1309.

The element of causation is often the most difficult to show in a plaintiff's prima facie case. Whether a fourth element of employer knowledge is explicitly included or not, the plaintiff must first show that the employer knew of the protected activity. So, a plaintiff who stated that retaliation was based on a phone call to the county department of health failed to show causation because he never told anyone about the call and the department of health never contacted the defendant. Hendler, 963 F.Supp. at 212. Inferring causation from proximity in time between the protected activity and the adverse employment action is enough to state a valid claim for retaliation which will survive a motion to dismiss. Conley, 88 F.Supp. at 21 (stating that one way to establish a causal connection is by showing that the protected activity as followed closely by adverse treatment); Treglia, 68 F.Supp. 2d at 159.

In order to survive summary judgment, however, a plaintiff must have more direct evidence of discriminatory retaliation than simply proximity and must be able to show a genuine issue of material fact with respect to pretext for the employer's reason for the adverse action. In Butler, the Tenth Circuit Court of Appeals stated that while temporal proximity alone is insufficient, a combination of close timing and additional evidence of discrimination were enough to create a genuine issue of material fact. Butler, 172 F.3d at 751. In Finical, the court stated that

"very little direct evidence of discriminatory motive is necessary" to create a triable issue of fact with respect to retaliation. Finical, 65 F.Supp. 2d at 1049 (where an owner of the defendant company told plaintiff's supervisor that he was tired of plaintiff's complaining and that she should "shut up and do her job"). The Hendler court explained that the plaintiff need not specifically address the defendant's reasons for adverse action or state why they are untrue but may bring in other evidence such as good performance and receipt of bonuses just prior to the protected activity. Hendler, 963 F.Supp. at 211.

Plaintiffs have been unsuccessful in retaliation claims when they cannot show any evidence that the employer's adverse action was pretextual. In Kiel, the Second Circuit Court of Appeals found that the plaintiff's intervening unprotected activity of yelling at his supervisor that she is selfish defeated any possible causal connection between his requests for accommodation and his termination. Kiel, 969 F.3d at 1136. Similarly, the plaintiff in Harmer could not create a genuine issue of material fact when his purchasing authority, which the defendant explained was increased due to an administrative error, was reduced to match that of other employees, albeit on the same day his request for accommodation was denied. Harmer, 831 F.Supp. at 1308. In an unreported Michigan case, the plaintiffs, who were laid off after participating in a light-duty work program for injured employees, could not create a genuine issue of material fact with respect to defendant's reason that economic hardship and increased worker's compensation insurance costs necessitated the layoffs. Benham v. A.E. Goetze, Inc., No. 1:95-CV-866, 1997 U.S. Dist. LEXIS 4336 at *40 (W.D. Mich. March 3, 1997).

One plaintiff who was successful in his suit for retaliation under the ADA was awarded $300,000 by a jury to compensate him for pain and suffering and mental anguish and to receive

additional education to find different employment. Muller, 187 F.3d at 306 and 135 (upholding jury's award).

II. Claims for Retaliation Under the Michigan Whistleblowers' Protection Act

The Michigan Whistleblowers' Protection Act is available to employees who reported or were about to report violations of law by their employers and were discharged or discriminated against. While this statute has never been used by a plaintiff who was retaliated against for pursuing rights under the ADA, I have found no cases that indicate that the ADA preempts this statute or similar statutes in other states. One advantage of pursuing a claim under this state statute is that one need not exhaust all administrative remedies under the ADA before filing a claim. Tyrna v. Adamo, 159 Mich.App. 592, 600-01, 407 N.W.2d 47, 51 (1987) (holding that plaintiff may pursue WPA remedies and administrative remedies under the Michigan Occupational Safety and Health Act simultaneously). However, as with the ADA, the statute of limitations is relatively short at 90 days. M.C.L. § 15.363(1) (2000).

To state a prima facie case under the WPA, the plaintiff must show (1) that he was engaged in a protected activity, (2) that he was discharged or otherwise discriminated against, and (3) that the protected activity caused the discharge or discrimination. E.g., Shallal v. Catholic Soc. Serv. of Wayne County, 455 Mich. 604, 566 N.W.2d 571, 574 (1997).

The WPA protects and employee who "reports or is about to report, verbally or in writing, a violation or suspected violation of a law or regulation or rule…of this state…or the United States to a public body, unless the employee knows that report is false." M.C.L. § 15.362 (2000). Filing a claim with the EEOC in good faith would certainly qualify as a protected activity. See Melchi, 597 F.Supp. at 578 (finding that plaintiff who sent a letter to the National

Labor Relations Board and the Nuclear Regulatory Commission complaining of management deficiencies and falsification of security reports was engaged in a protected activity); Roulston v. Tendercare (Michigan), Inc., 239 Mich.App. 270, 275, 608 N.W.2d 525, 527 (2000) (plaintiff who reported suspicions of abuse to Department of Consumer and Industry Services and to the Health Care Fraud Unit of the Attorney General's office was engaged in a protected activity). In addition, taking steps towards filing and EEOC claim should be considered protected activity. Lynd v. Adapt, Inc., 200 Mich.App. 305, 306, 503 N.W.2d 766, 767 (1993) (genuine issue of material fact as to being about to report where plaintiff reported alleged abuse to supervisors and organization's board of directors and contacted her state representative to learn to whom to report suspected abuse). In Shallal, the court explained that the "[p]laintiff's express threat to the wrongdoer that she would report him if he did not straighten up, especially coupled with her other actions [including discussing the need to report with co-workers], was more than ample to conclude that reasonable minds could find that she was 'about to report' a suspected violation of law." Shallal, 566 N.W.2d at 579.

To establish the second element, the plaintiff must show that he was discharged, threatened, or otherwise discriminated against regarding his compensation, terms, condition, location, or privileges of employment. M.C.L. § 15.362 (2000). While almost all cases in Michigan courts have involved discharge, the Court of Appeals explained that "[t]he statute is very broad in its coverage. Plaintiff's claim that the defendant failed to promote him falls within the category of otherwise discriminating against an employee regarding the terms of [his] employment." Hopkins v. City of Midland, 158 Mich.App. 361, 377, 4040 N.W.2d 744, 751 (1987).

To determine whether an employee has established the third part of a prima facie case, causation, courts typically look at three elements. First, courts determine whether the timing of the protected act and the discrimination allows one to infer a retaliatory motive. Melchi, 597 F.Supp. at 584 (holding that discharge 3 days after the protected act is sufficient to allow an inference of retaliation to arise); Roulston, 608 N.W.2d at 530 (finding that the employer's angry demeanor and employee's discharge only hours after reporting were sufficient to allow an inference of retaliation). Second, courts decide whether the employer had objective notice of a report or a threat to report since knowledge of the whistleblowing activity is necessary if one is to show retaliation. Melchi, 597 F.Supp. at 582; Roberson v. Occupational Health Ctrs. of Am., Inc., 220 Mich.App. 322, 327, 559 N.W.2d 86, 88 (1996); Kaufman & Payton, P.C. v. Nikkila, 200 Mich.App. 250, 257-58, 503 N.W.2d 728, 732 (1993). Finally, courts require that the report or threat be made in good faith, not with an extortive motive. The Michigan Supreme Court explained that a "plaintiff cannot use the [WPA] as a shield against being fired when she knew she was going to be fired before threatening to report her supervisor." Shallal, 566 N.W.2d at 579.

One plaintiff who was successful in his suit for retaliatory discharge under the WPA was awarded $33,177 in back pay by the court. Melchi, 97 F.Supp. at 585-86 (denying certain aspects of relief because the plaintiff may have acted in part with an improper motive).

III. Hostile Work Environment under the ADA and PDCRA

Little case law exists on the hostile work environment claim available under the ADA. 42 U.S.C. § 12112(a) (1999). However, since language in the ADA matches that in Title VII of the Civil Rights Act, federal courts look to Title VII analysis as precedent when faced with an ADA

hostile work environment claim. 42 U.S.C. § 12112(a); 42 U.S.C. § 2000e-2(a)(1). In addition, Michigan courts recognize a claim for hostile work environment under the PDCRA and also use federal precedent as guidance. M.C.L. § 15.362 (2000); Downey v. Charlevoix County Bd. of County Rd. Comm'rs, 227 Mich.App. 621, 627, 576 N.W.2d 712, 715 (1998). So, as with claims for retaliation, analysis under the ADA mirrors that under the PDCRA.

In order to state a prima facie case of hostile work environment under the ADA, the plaintiff must show (1) that he qualifies as disabled under the ADA, (2) that he was subjected to unwelcome harassment, (3) that the unwelcome harassment was based on his disability, (4) that the harassment unreasonably interfered with work performance by creating an intimidating, hostile, or offensive work environment, and (5) that the hostile conduct can be imputed to the employer. Id. at 629; Benham, 1997 U.S. Dist. LEXIS 4336 at *31; Hafford v. Seidner, 183 F.3d 506, 512 (6th Cir. 1999); Fox v. Gen. Motors Corp., 247 F.3d 169 at 177 (4th Cir. 2001).

I will not address the issue of whether a plaintiff is disabled under the ADA, given the complicated nature of the analysis and the voluminous precedent. To establish the second element, that the plaintiff was subjected to unwelcome harassment, he must show evidence of "verbal or physical conduct that has the purpose or effect of creating an intimidating, hostile, or offensive work environment." Haysman, 893 F.Supp. at 1108 (finding a genuine issue of material fact where the plaintiff alleges being subjected to negative stereotyping, threats, verbal abuse, and punching and kicking.) However, discomfort due to common workplace tension is not severe enough to constitute harassment. The fact that an employee and his supervisor do not get along is not in and of itself evidence of harassment. Rodriguez v. Loctite, 967 F.Supp. 653, 664 (P.R. 1997). Also, "[c]onversations between an employee and his supervisors about his performance

do not constitute harassment simply because they cause him distress." Keever v. City of Middletown, 145 F.3d 809, 813 (6th Cir. 1998).

To establish the third element, the plaintiff must "demonstrate that the harassment was sufficiently related to his disability." Fox, 247 F.3d at 179; Mannell v. Am. Tobacco Co., 871 F.Supp. 854, 861 (E.D. Va. 1994) (stating that plaintiff may have been subjected to a bad work environment, but it could not be due to her disability since other non-disabled employees were given similar treatment). This element was met, for example, where comments such as "handicapped MF" and "hospital people" were directed at disabled employees and where a disabled employee was required to perform tasks beyond his medical restrictions. Fox, 247 F.3d at 179. In addition, "an employer is not free to harass or abuse a disabled individual over the direct consequences of his disability," such as complaints of pain or absences attributable to the disability. Haysman, 893 F.Supp. at 1109.

In establishing element four, the Supreme Court has provided much guidance in a Title VII case. The Court explained that actionable harassment falls between that which is merely offensive and that which causes tangible psychological injury. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). In addition, one must look at all the circumstances of an employee's situation to determine whether the environment is hostile or abusive. Circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 23. In order to be actionable, the conduct must create an environment that is both objectively and subjectively hostile and abusive; that is, both a reasonable person in the situation and the plaintiff himself must perceive the environment as abusive. Id. at 21; Hendler 963 F.Supp. at 209 (finding material issues of fact with respect to

hostile work environment where asthmatic plaintiff encountered repeated jokes by co-workers who continued smoking despite his requests); Spells v. Cuyahoga Community College, 889 F.Supp. 1023, 1027 (N.D. Ohio 1994) (granting summary judgment to the employer where a co-worker repeatedly called the plaintiff "hop-along" and "cripple" in a joking manner); Benham, 1997 U.S. Dist. LEXIS 4336 at *32-33 (granting defendants summary judgment where plaintiffs alleged vaguely that they were called demeaning names and were offended by announcements about their court case on company bulletin boards).

To establish that the conduct can be imputed to the employer, the plaintiff must show either that it was committed by a member of management or that management knew of the conduct and failed to take prompt remedial action. "An employer who has taken reasonable steps to correct and/or prevent the harassment is not liable." Spells, 889 F.Supp. at 1027 (holding that plaintiff has not established a prima facie case of hostile work environment where corrective measures were taken both times plaintiff complained to supervisors). The requirement of respondeat superior is easily met when the harassing conduct is perpetrated by supervisors or managers. Downey, 576 N.W.2d at 717 (respondeat superior requirement met with conduct by manager and supervisor of garage where plaintiff worked); Hendler, 963 F.Supp at 209 (finding that a reasonable juror could impute conduct to the employer where the company's president made comments about the plaintiff's inability to tolerate smoke and continued to smoke at meetings); Haysman, 893 F.Supp. at 1110.

One plaintiff who was successful in his suit for hostile work environment was awarded $200,000 in compensatory damages by a jury. Fox, 247 F.3d at 179-80 (upholding compensatory damages award to plaintiff who suffered anxiety, severe depression, and worsening of his back injury).

IV. Common Law Claim for Intentional Infliction of Emotional Distress

While many plaintiffs who bring a claim under the ADA also bring a common law claim for intentional infliction of emotional distress, all of the common law claims have been dismissed. Therefore, this claim is realistic for only the most egregious circumstances. For a plaintiff to prevail under Michigan case law, the situation must be one "in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim "Outrageous!" The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Mroz v. Lee, 5 F.3d 1016, 1019 (6th Cir. 1993). In other words, the plaintiff must show that the defendant's conduct "has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." Backer v. Wyeth-Ayerst Laboratories, 949 F.Supp. 512, 518 (W.D. Mich. 1996) (quoting Roberts v. Auto-Owners Ins. Co., 422 Mich. 594, 602-03, 374 N.W.2d 905, 908-09 (1985)).

CONCLUSION

A plaintiff's most viable claims for retaliation due to pursuing accommodations for a disability are those provided by the ADA and the PDCRA. While the WPA is a powerful statute, the fact that it has never been used by a plaintiff who was also pursuing ADA remedies makes it a riskier choice. Similarly, a plaintiff who has been harassed is more likely to be successful suing under the ADA and the PDCRA than under common law for intentional infliction of emotional distress since the type of conduct necessary for success under the common law claim is particularly extreme.

Prepared by Julie Rusczek for SFELP, June 4, 2001.