

# HOW TO AVOID, MITIGATE RISK, AND DEFEND AGAINST CLAIMS OF HARASSMENT AND FAILURE TO ACCOMMODATE DISABILITIES

## I. THE LAWS GOVERNING HARASSMENT AND DISABILITIES IN THE WORKPLACE

A. What are the relevant state and federal statutes governing harassment and accommodating disabilities in the workplace?

### 1. Harassment

a. Federal – Title VII of the Federal Civil Rights Act of 1964 (“Title VII”)

b. Michigan – Elliott-Larsen Civil Rights Act (“ELCRA”)

i. Important to note that ELCRA is modeled after Title VII, meaning that Michigan Courts regularly turn to Title VII for guidance.

(A) Thus, a failure to review, analyze, and understand Title VII precedent, even when it is just remotely related to ELCRA, can potentially lead to substantial consequences

(B) However, Michigan courts are not bound to follow federal precedent under Title VII, even when no Michigan law is on point. Likewise, no interpretations of Title VII must control when state law dictates a different result.

ii. Both Title VII and ELCRA recognize workplace harassment as a form of employment discrimination.

### 2. Disability Accommodation

a. Federal – American with Disabilities Act (“ADA”)

b. Michigan – Michigan’s Persons with Disabilities Civil Rights Act (“PDCRA”)

B. **Focusing on Harassment First** – Although the state and federal statutes do have some relevant differences, they share many similarities

1. Title VII – Prohibits any employer with at least 15 employees from discriminating against an applicant or employee because of that person’s race, color, religion, sex, or national origin. 42 USC 2000e(b).

- a. Supreme Court recently ruled that discrimination and harassment on the basis of sexual orientation or gender identity is prohibited under Title VII
  - i. *Bostock v Clayton Cnty, Georgia*, 207 L Ed 2d 218; 140 S Ct 1731 (2020)
- 2. ELCRA – Applies to any employer with one or more employees, and prohibits workplace discrimination and harassment on the basis of religion, race, color, national origin, age, sex, height, weight, or marital factors
  - a. The Michigan Supreme Court just recently ruled that discrimination and harassment on the basis of sexual orientation or gender identity is prohibited under ELCRA
    - i. *Rouch World, LLC v Dep’t of Civil Rights*, \_\_ Mich \_\_; \_\_ NW2d \_\_ (2022)

C. **Disabilities and Reasonable Accommodations**

- 1. ADA – 42 USC 12101 et seq.
  - a. Under the ADA, “*disability*” is defined in one of three ways:
    - i. A physical or mental impairment that substantially limits one or more of the major life activities;
    - ii. A record of such an impairment; or
    - iii. Being regarded as having such an impairment. 42 USC 12102(1).
      - (A) “major life activities” includes, but is not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 USC 12102(2)
  - b. It is unlawful for a covered entity to fail or refuse to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its business
    - i. No bright-line definition of what constitutes a “reasonable accommodation,” but rather ADA gives examples. 42 USC 12111(9).
      - (A) (1) job restructuring; (2) part-time or modified work schedules; (3) reassignment to a vacant position; (4) acquisition or modification of equipment or devices; (5) appropriate adjustment or modification of examination;

(6) training materials or policies; (7) provision of qualified readers or interpreters; and (8) other similar accommodations for individuals with disabilities

2. PDCRA – MCL 37.1101 et seq.

- a. Prohibits discrimination by Michigan employers, employment agencies, and labor organizations because of a disability (or genetic information) that is unrelated to an individual’s ability to perform the duties of a particular job or position.
  - b. The PDCRA recognizes three types of accommodation: (1) the purchasing and maintenance of equipment and devices, (2) the hiring of readers or interpreters, and (3) the restructuring of jobs and the altering of schedules for minor or infrequent duties
    - i. Unlike the ADA, the PDCRA does not require transfer to another job as a form of accommodation
3. Both the ADA and the PDCRA require that an employer reasonably accommodate a person with a disability for purposes of employment, unless the employer demonstrates that the accommodation would impose an undue hardship.

a. What constitutes an undue hardship?

- i. ADA – when employers attempt to reasonably accommodate disabled employees under the ADA, reasonableness is decided on a case-by-case basis
- ii. PDCRA – however, the PDCRA uses a specified formulaic approach to determine whether purchasing any equipment, device, or hiring any readers or interpreters constitutes an undue hardship.

(A) The formula depends on the number of employees at the company and is tied to the state average weekly wage. MCL 37.1210.

II. CREATING PROCESSES FOR RESPONDING TO HARASSMENT COMPLAINTS AND DISABILITY ACCOMMODATION REQUESTS

A. Harassment

1. Create, design, and implement a clear and informative harassment policy

a. An effective policy should contain 3 basic aspects:

- i. A clear definition of “harassment”
- ii. A formal, internal statement and/or notice prohibiting all types of harassment

- iii. A formalized and known process instructing employees both how to file any complaints and how to file complaints with, but also a transparent
- 2. So what types of processes and procedures should a company implement in order to ensure it properly responds to any harassment complaints?
  - a. Maintain a comprehensive understanding of what constitutes discrimination and harassment
    - i. As discussed prior, many issues are decided on a case by case basis. Staying up to date on applicable law is vital to ensure the company stays aware of what types of conduct are prohibited and the classes of employees who are protected
  - b. Ensure that employees are trained with respect to the prohibited conduct and proper procedures for reporting any potential complaints
    - i. This entails not only an understanding of what types of conduct are prohibited, but also how and when to report any complaints to management or HR
- 3. Reporting Procedures and Guidelines
  - a. Simple and clear as possible; all employees should know for certain who they can and should go to in order to report any complaints
  - b. Goal of the employer should be to resolve any and all complaints of workplace harassment at the earliest possible stage and without ever having to involve any outside agency or court
  - c. Wise to have multiple people to report to, and also to have both men and women as supervisors/managers to report to.
    - i. Having multiple people to report to ensures that the employees can be confident and comfortable in reporting any issues they may be having. Also, if only one person and they are out/sick/busy/etc then the employee is not forced to wait around until they can report a complaint.
    - ii. Furthermore, if there is only one person to report to if can heavily discourage reporting harassment and other issues
      - (A) Could be friends with the person(s) at issue or otherwise have a close relationship with them;

(B) Employees may feel more comfortable reporting certain issues to managers/supervisors who can identify to their issues such as man to man or woman to woman;

(C) Employees need to believe that the overall process is fair and effective. If not, it makes it less likely that they will utilize and trust it.

d. Ensure that **every single complaint is in writing or otherwise memorialized in a physical document**

i. Although employees should be encouraged to report any issues in writing, there should be a policy in place requiring any managers/supervisors to create a physical, written document in the event an oral complaint is made

ii. Not only gives employees peace of mind knowing that there is a specific process for handling the complaint, but also employers as it helps alleviate issues or circumstances wherein complaints “fall through the cracks”

e. Finally, implementing an investigation process and procedures for managers/supervisors/etc. when they receive a complaint

i. While this process should be kept as confidential as possible, it is important that complaining employees know that absolute confidentiality may not be possible in order to fully investigate and handle any complaints

B. Reasonable Accommodations for Disabilities

1. Again, crucial to not only have a clear process and people to report to, but also a transparent process for handling and responding to any requests for accommodations

a. Just as with harassment, employee should know and understand that the request and any conditions will be kept as confidential as possible, but understand that complete confidentiality may not be possible

2. In the event a supervisor/manager does not know how to properly respond to an accommodation request, or if they are not fully certain whether or not such a request can be granted, what should be done?

a. Just as employees should have a transparent and clear understanding for how to file requests and how they will be handled, the manager/supervisor should also have policies and procedures in these instances

i. Whether it be going to their supervisor or “up the ladder,” or contacting a labor and employment attorney to seek clarification, the most important thing is

that there is a system in place on how to handle such instances, and not the manager/supervisor having to figure it out on their own

C. Keeping Complaints and Accommodation Requests as Confidential as Possible

1. Any complaints or accommodation requests are almost always of a highly personal nature, and thus critical that the information be kept confidential to protect the privacy of the employee. However, it will not always be possible to maintain complete confidentiality
  - a. When investigating harassment complaints for example, the supervisors/managers will often interview not only the parties directly related to the issue at hand, but also potentially any witnesses or employees who may have knowledge of a specific incident
  - b. Rather than assuring employees that their complaints or accommodation requests will receive complete confidentiality, a more proper approach would be to emphasize that any information related to the complaint or request will be on a strict **need to know basis**
2. How can the employer maintain this level of confidentiality and privacy?
  - a. Ensure any documents containing personal information or otherwise directly related to a complaint or request is secure and not accessible by any employee
    - i. Specific examples of this are requiring supervisors/managers to save

III. INVOLVING THE MANAGEMENT TEAM IN DOCUMENTING APPROPRIATELY AND FOLLOWING UP ON INTERNAL COMPLAINTS AND REQUESTS

A. Importance for employers is two-fold:

1. Any and all “decision making” is removed from supervisors/managers hands
  - a. Every step for recording, investigating, and following up on any complaint or accommodation request is specifically listed, and there is no room for independent decision making or areas to deviate from the policies and procedures
2. Ensuring the supervisors/managers/etc. responsible for receiving and handling complaints and accommodation requests actually follow the policies and procedures
  - a. These issues are the same for both responding to harassment complaints and accommodation requests
  - b. Employers goal needs to be that in the event a lawsuit arises related to harassment or disability accommodations that it will have any and all documentation and other records to properly, and successfully defend against them

- B. Ensuring an appropriate team is in place to handle complaints and disability requests
1. Having these policies in place is pointless if the managers/supervisors/etc. are unaware of the policies and procedures, or fail to enforce and follow them as written
    - a. Most issues will happen when a person unilaterally decides to deviate from the policies
      - i. Broad, vague, or otherwise missing and incomplete records
      - ii. Saving or storing documents in incorrect places
      - iii. Failing to notify any and all necessary persons after receiving a complaint or accommodation request
      - iv. Failing to follow up on any complaint or accommodation request
    - b. Example – person receives complaint, doesn't fully document everything as needed. If the behavior being complained about continues, the primary issues are two-fold:
      - i. In the event an employee brings an action against the employer, such poor record keeping and failure to adhere to the written policies can be extremely detrimental
      - ii. If employees continue about harassing behavior and nothing is done about it, and they learn that the complaint was not even recorded, it will destroy any confidence in that employee and others in reporting such behavior in the future
      - iii. Furthermore, there will likely be instances where the same person or issue is being complained about to 2 or more people
        - (A) People quit, get promoted, move departments, and many other reasons for leaving their position. These policies also ensure that anyone who takes over that role or otherwise needs access to such information and records can do so without issue
        - (B) Things fall through the cracks and issues arise when those in these positions are saving documents on their own systems or haphazardly keeping records
  2. Confidentiality and Privacy Concerns
    - a. Requiring all complaints and accommodation requests to be memorialized or otherwise reduced to a physical document has its risks if these documents are not properly stored and maintained





- b. Frequent meetings (monthly or bi-monthly) with the relevant employees to ensure everyone is on the same page still and any questions/confusion can be sorted out
  - i. These processes are not intended to make every employee expert in these fields, but rather to keep them informed and as prepared as possible to handle complaints, accommodation requests, and other related issues to the highest extent possible
  - ii. Obviously, there will likely be situations where the employee is unsure how to handle a complaint or accommodation request. The goal and purpose of these policies and procedures is to ensure that employee has the resources and help available to solve the issue in the best and most efficient way possible
- c. ICLE and SHRM seminars are two examples of resources available to provide training to employers