MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A.

EMPLOYMENT LAW

Selected Topics Presented to Darwin Professional Underwriters, Inc.

November 10, 2008

Todd M. Raskin, Esq.
Mazanec, Raskin, Ryder & Keller Co., L.P.A.

100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
(440) 248-7906
Fax: (440) 248-8861

250 Civic Center Drive
Suite 400
Columbus, Ohio 43215
(614) 228-5931
Fax: (614) 228-5934

Visit us on the Web at: www.mrrklaw.com
Or E-Mail us at:

traskin@mrrklaw.com

TABLE OF CONTENTS

I. INTRODUCTION

These materials are designed to provide a basic overview of various topics in employment law. Discrimination, due process rights, and leave under the Family and Medical Leave Act will be covered. These materials are not meant to be an exhaustive discussion of each area, but rather are designed to give you a working understanding of the basic rights and protections provided. Nothing in these materials is meant to guarantee a certain result. The legality of any particular situation must be determined on its own facts.

II. DISCRIMINATION

An employer cannot discriminate against an employee based upon the employee's sex (gender), race, age, disability, religion or national origin. Applicants in a protected class are also protected from discrimination in the application process.

An employer cannot consider the employee's sex, race, age, disability, religion or national origin in:

- Hiring and firing;
- Determining compensation, assignment and classification of an employee;
- Determining transfer, promotion, layoff or recall;
- Writing job advertisements;
- Recruiting;
- Testing;
- Use of company facilities;
- Training and apprenticeship programs;
- Awarding fringe benefits;
- Setting pay, retirement plans and disability leave; or
- Any other terms or conditions of employment.

Discrimination occurs when an employer:

- Takes adverse action against an employee in a protected class due to the employee's sex, race, disability, age, religion or national origin;
- Treats an employee in a protected class differently than employees of a different sex, race, age, disability, religion or national origin;
- Makes decisions based upon stereotypes or assumptions about the abilities, traits or performance of employees based upon the employee's sex, race, disability, age, religion or national origin;
- Denies employment opportunities to or discriminates against an employee for being married to or associating with an individual of a particular race, religion, national origin or disability;
- Harasses or permits the harassment of an employee which is based upon the employee's sex, race, disability, age, religion or national origin; or
- Retaliates against an employee for filing a claim, participating in an investigation or opposing discriminatory practices.

In general, federal law holds only the employer liable for discriminatory conduct. Under state law, both the employer and the employee's supervisor or manager are liable for discriminatory conduct. In either instance, the employee must show that the employer knew or should have known of the conduct. An employer will be deemed to know of the conduct when an employee complains of the situation, but the employer fails to take any action.

If an employer engages in *intentional* discrimination, then the employer is responsible for both compensatory and punitive damages, as well as attorney's fees.[1] Compensatory damages include future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of

enjoyment of life, and other nonpecuniary losses. Intentional discrimination requires actual discriminatory conduct on the part of an employer. Routinely enforcing facially nondiscriminatory policies is not intentional discrimination, even if these policies fall more harshly on employees in a protected class. Such policies might include requiring employees to pass written exams or verbal exams as part of the application process. The exams may prove more difficult for applicants who are not native English speakers, and thus, effectively discriminate against people based upon race or national origin. As long as the exam is related to the applicant's ability to perform the job, administering such an exam will not be considered intentional discrimination.

A. Sexual Discrimination

Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Section 4112.02 prohibit an employer from discriminating against an employee or applicant based upon gender. Public employees may also bring a claim under the Equal Protection Clause in the U.S. Constitution. The law protects both men and women from discrimination.[2] To prove a claim for sexual discrimination under the Civil Rights Act, the employee must show that:

- The employer took adverse employment action;
- Because of the employee's gender; and
- The employee was either replaced by a member of the other gender or treated differently from similarly situated members of the other gender.[3]

Adverse Employment Action

Mere inconvenience or an alteration of job responsibilities is not an "adverse employment action."[4] Rather, "adverse employment action" presupposes a more drastic action such as:

- Termination;
- Failure to promote;
- Denial of transfer;
- Demotion evidenced by a decrease in wage or salary or a less distinguished title;
- Material loss of benefits; or
- Significantly diminished material responsibilities.[5]

Discipline for poor performance, violation of workplace rules and regulations or the like will not constitute an adverse employment action if there is a *legitimate* reason for the discipline.

An employer must ensure that all employees who violate the same rules are similarly disciplined. The discipline may vary depending upon the employee's job classification, number of violations, etc. as long as all female and male employees of the same job type with a similar employment record are disciplined in the same fashion. Any complaints made regarding the employee and the action taken by the employer regarding those complaints should be documented. Any meetings with the employee regarding the complaint should also be documented, as well as what was discussed in the meeting. The employer should clearly inform the employee of what behavior is expected and, to the extent possible, set objective goals, such as completing a set amount of reports in a particular time period. The precise terms of the discipline and the goals set for the employee should be placed in the file.

Because of Gender

To be unlawful discrimination, any adverse employment action must occur due to the employee's gender. Gender need not be the sole factor, as long as it is a substantial factor in the discrimination.[6] Further, the discrimination does not have to be due to a characteristic that is peculiar to one sex, but may be due to a characteristic common to both sexes.[7] The overarching concern is that it is based on the employee's gender.

Adverse actions taken because of an employee's sexual orientation are not considered to be "because of gender."[8]

Aside from making employment decisions based upon an employee's gender, an employer may not base decisions upon stereotypes about a particular gender. For example, failing to hire a woman for a sales position based on a belief that women are generally not as aggressive as men is sexual discrimination.[9] Likewise, hiring based upon the gender preferences of coworkers constitutes sexual discrimination.[10]

Replacement/Differing Treatment

If terminated, the employee must show that a person of a different gender replaced him or her. If the employee was not terminated, the employee must then show that similarly situated employees of the other gender were treated differently than the employee. Comparative employees must be similarly situated in all material respects.[11] Employees who work under different managers are not similarly situated. The relevant comparison is whether *this* manager treated the employee differently from similarly situated employees.

Intentional Discrimination

To state a claim under the Equal Protection Clause for discrimination, the employee must show intentional discrimination.[12] The employer's conscious failure to protect the employee from abusive conditions created by fellow employees may be sufficient to show intentional discrimination.[13]

Sexual Harassment

Sexual discrimination encompasses claims for sexual harassment, including same-sex harassment and harassment based upon an employee's failure to conform to a gender stereotype.[14] A man may compliment a woman on her appearance by saying she looks "very beautiful" or something similar, and vice versa, without it being considered sexual harassment. Flirtatious or merely offensive conduct is not sexual harassment. [15] Rather, the statutes are concerned with abusive and hostile conduct that, when viewed by both the employee and a "reasonable person," creates a hostile work environment.[16]

A hostile work environment exists where:

- The employee was subjected to unwelcome sexual harassment;
- Based upon the employee's gender, or failure to conform to a gender stereotype;
- The harassment unreasonably interfered with the employee's work performance or created a severe and pervasive hostile or offense work environment; and
- The employer knew or should have known of the harassment and failed unreasonably to take prompt and appropriate corrective action.[17]

When determining whether harassment is severe and pervasive, the court will consider:

- The frequency of the conduct;
- The severity of the conduct;
- Whether the conduct is physically threatening or humiliating; and
- Whether the conduct unreasonably interferes with the victim's work performance.[18]

Using these factors, conduct which occurs only occasionally, unless extremely serious, does not create a hostile work environment.[19] Sexual harassment protections are not designed to rid the workplace of all crude or offensive comments or behavior. The focus is on conduct that is severe, demeaning and continually exposes the employee to ridicule and insult.[20]

A supervisor's one-time question to a female coworker regarding whether she was wearing thong underwear, showing an inappropriate picture of animals mating, and monthly sexual innuendos and occasional vulgar comments were not frequent enough to show "severe and pervasive" sexual harassment such that a hostile work environment was created. A one-time incident where the supervisor allegedly leaned into the female employee, by the employee's own testimony, was neither physically threatening nor sexual in nature. As such, the conduct was not sexual harassment.

Same-Sex Harassment

A hostile work environment may be created by same-sex harassment. To establish same-sex harassment, the employee must show that:

- The harasser is acting out of a sexual desire;
- The harasser is acting out of a general hostility towards employees of the same sex in the workplace; or
- There is direct evidence about how the harasser treated members of both sexes in a mixed-sex workplace.[21]

Same-sex harassment based upon sexual orientation generally does not fall into any of these categories.

Failure to Conform

Harassment based upon an employee's failure to conform to gender stereotypes constitutes sexual harassment.[22] Any nonconformity must be readily observable in the workplace, such as dress, manner of speaking and appearance.[23] Nonconformities that are not readily observable, such as sexual orientation, are not actionable.[24]

Quid Pro Quo Sexual Harassment

Sexual harassment also occurs where the employer, or supervisor:

- Makes submission to an unwanted sexual advance an express or implied condition for receiving job benefits; or

- Takes adverse employment action against an employee based upon the employee's refusal to submit to the sexual demands.[25]

The employer or supervisor does not need to inform the employee that a refusal to submit to the advances will have adverse consequences. If the adverse action occurs because of the employee's refusal to submit to the sexual demands, the employer has engaged in sexual harassment.

Defenses

If gender is a bona fide occupational qualification, such as the need for a male actor, then an employer may legitimately consider gender.[26]

In general, the employer may deny that the conduct occurred, attempt to characterize the conduct as "jokes" rather than discrimination or harassment or show that the harassment did not occur due to the employee's gender. For example, comments made due to a workplace romance going awry would arise out of the romance, not the employee's gender. Additionally, comments made due to ill feelings between employees arising out of personality conflicts are not made because of the employee's gender.[27]

Discrimination does not occur where there is a nondiscriminatory justification for the adverse employment action, such as a violation of a workplace rule that is routinely enforced. If an employer raises this defense, the employee is entitled to attempt to disprove the justification. In other words, the employee may assert an "I am a good employee" argument, where the employee alleges that there was no basis other than gender for the adverse employment action. The employee may also show that this rule was not routinely enforced. The employer must be able to show routine enforcement. A list of other employees who have been disciplined for a violation of the same rule, the terms of the discipline and each employee's gender will greatly aid in showing routine nondiscriminatory enforcement.

Where an employer uses reasonable care to prevent and correct any harassing behavior and the employee unreasonably fails to take advantage of any protective or corrective opportunities offered by the employer, the court will not likely find a hostile work environment.[28] A male employee complained that a female supervisor placed subscription information for "Playboy" in his employee's mailbox and frequently told him about her and her husband's sex life. As the employee resigned shortly after the employer conducted its investigation into his complaints, the employee failed to take advantage of the corrective opportunities offered by the employer and therefore was barred from claiming sexual harassment.

Further, conduct that is not unwelcome is not harassment. If the employee routinely participates in the banter now complained of as harassment, the conduct may not be unwelcome.[29] Regardless of past participation in the conduct, if an employee indicates that a certain subject or behavior is offensive, the employee may still state a claim for sexual discrimination.

B. Racial Discrimination

Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Section 4112.02 prohibit an employer from discriminating against an employee or applicant based upon race.

Racial discrimination occurs where:

- The employee is a member of an indentified race;
- The employee suffered an adverse employment action;
- Due to the employee's race; and
- The employee was either replaced by a member of a different race or was treated differently from similarly situated members of a different race.[30]

Racial Minority

"Race" includes groups identified by ancestry or ethnic characteristics, such as African American, Hispanic, Arabic and Japanese.[31] Caucasians are also protected from discrimination under Title VII in certain circumstances.[32] The law does not require a readily observable indication of race, such as dark skin, to show racial discrimination.[33] As such, an employee that does not appear to be of one particular race may still bring a claim for racial discrimination.

Adverse Employment Action

An adverse employment action must actually disrupt employment rather than inconvenience the employee or alter the employee's job responsibilities.[34] Reassigning an employee to a new position equal to the employee's abilities and salary level, without decreasing compensation, job title, level of responsibility, or opportunity for promotion is not an adverse employment action.[35] Adverse employment action includes:

- Termination of employment;
- Demotion evidenced by a decrease in wage or salary or a less distinguished title;
- Material loss of benefits;
- Significantly diminished material responsibilities;[36]
- Deprivation of increased compensation due to a failure to train; [37] or
- Failing to promote.

A failure to promote an employee is discriminatory if that decision was made based upon the employee's race. Conversely, it is not discrimination if a legitimate reason exists not to promote the employee. A legitimate reason not to promote the employee exists if another employee was more qualified for the position. A legitimate reason also includes the employer's concerns that the employee's other commitments prevent the employee from having the flexibility needed to meet the demands of the new position.[38]

Even if a legitimate reason exists for promoting one employee, an overall disparity in the representation of one race can show discrimination. Race discrimination was found where nonminority employees showed that they were denied promotions, but minority employees were

granted promotions. The evidence showed that minority employees occupied 71% of the promotion positions, of which 29% were African American despite only 7.7% of the available workforce being African American.[39]

Discrimination may also occur in the hiring process. For example, where minorities make up approximately 40% of a city's population, but comprise only 6.2-8.1% of its police force, there is an indication that discrimination is occurring in the hiring process. When that disparity is due to a much higher failure rate on the entrance exam for minorities than nonminorities, the employer must show a legitimate reason for the exam. The police force was unable to show that the exam correlated to the applicant's job performance. Given the disparate impact and lack of legitimate justification, the applicants asserted a successful claim for racial discrimination in the hiring process.[40] On the other hand, nonminority applicants were not discriminated against where these applicants were not hired due to a police department's race-based hiring program targeted at increasing the number of minority employees.[41]

Additionally, an employer may be responsible for failing to train an employee due to the employee's race. Racial discrimination was found where a white co-manager refused to mentor a minority employee or introduce him to department heads. Further, the co-manager criticized the minority employee and blamed him for problems occurring in areas that were not the employee's responsibility. Even though the co-manager was not responsible for the employment decisions, the co-manager discussed the minority employee's performance with the responsible person, blamed problems at the store on the minority employee and aided in compiling the performance review of the minority employee. When these factors are taken together, the co-manager was able to exert influence over the person with the decisionmaking power.[42]

Discipline

Discipline for poor performance, violation of workplace rules and regulations or the like will not constitute an adverse employment action if there is a *legitimate* reason for the discipline. Disciplinary actions such as placing an employee on a brief paid administrative leave have been found not to constitute adverse employment actions.[43]

An employer must ensure that all employees who violate the same rules are similarly disciplined. The discipline may vary depending upon the employee's job classification, number of violations, etc. as long as all employees of the same job type with a similar employment record are disciplined in the same fashion. Any complaints made regarding the employee and the action taken by the employer regarding those complaints should be documented. Any meetings with the employee regarding the complaint should also be documented, as well as what was discussed in the meeting. The employer should clearly inform the employee of what behavior is expected and, to the extent possible, set objective goals, such as completing a set amount of reports in a particular time period. The precise terms of the discipline and the goals set for the employee should be placed in the file.

The employer's records helped to defeat a claim of discrimination based upon an alleged failure to train where the employment records showed that the employee received continual training, and that the employee was repeatedly informed of the areas which needed

improvement. Employment records also showed that the employee received the same training and more pay than a similarly situated Caucasian employee. Despite the training and warnings, the employee failed to improve the quality of her work. Taking all these factors together, there was no basis to believe that discrimination had occurred when the employer terminated the employee for failing to increase her productivity standards.

Harassment

An employee is protected from harassment based upon race that creates a hostile work environment. Isolated incidents, unless extremely serious, do not create a hostile work environment.[44] Rather, the discriminatory conduct must be severe and pervasive, when viewed both by the employee and a "reasonable person."[45] When determining whether harassment is severe and pervasive, the court considers:

- The frequency of the conduct;
- The severity of the conduct;
- Whether the conduct is physically threatening or humiliating; and
- Whether the conduct unreasonably interferes with the victim's work performance.[46]

Racial harassment exists where:

- The employee belongs to a racial minority;
- The employee was subjected to unwelcome harassment;
- Based upon the employee's race;
- Which has interfered with the employee's work performance or created a severe and pervasive hostile or offensive work environment; and
- The employer knew or should have known of the conduct and failed to take prompt and appropriate action.[47]

An employee's exposure for over ten years to racial slurs, demeaning jokes, inflammatory graffiti, disparate discipline and additional duties was sufficiently severe and pervasive to constitute a hostile work environment.[48] Singling out a minority employee for behavior also engaged in by white coworkers was not sufficiently severe and pervasive to create a hostile work environment where the employee could only cite fifteen such instances in a two-year period.[49]

Defenses

In general, the employer may deny that the conduct occurred, attempt to characterize the conduct as "jokes" rather than discrimination or harassment or show that the harassment did not occur due to the employee's race. Additionally, comments made due to ill feelings between employees arising out of personality conflicts are not made because of the employee's race.[50]

Where an employer uses reasonable care to prevent and correct any harassing behavior and the employee unreasonably fails to take advantage of any protective or corrective opportunities offered by the employer, the employer would not likely be liable for creating a hostile work environment.[51]

Further, conduct that is not unwelcome is not harassment. If the employee routinely participates in the banter now complained of as harassment, the conduct may not be unwelcome. Regardless of past participation in the conduct, if an employee indicates that a certain subject or behavior is offensive, the employee may still state a claim for racial discrimination.

C. Age Discrimination

The Age Discrimination in Employment Act of 1967 ("ADEA") and Title VII of the Civil Rights Act of 1964 prohibit an employer from discriminating against an employee based upon age.[52] Discriminatory behavior includes making employment decisions based upon a belief that productivity and competence decline with age.[53] An employer may legitimately terminate or take adverse action against an older employee for a decline in productivity or competence, but these complaints must be founded.[54] An employer may not automatically assume that an older employee's productivity or competence has declined.[55] The focus of the ADEA is to require employers to treat each employee individually, rather than make sweeping assumptions based solely on age.

In order to be protected under the act, the employee must:

- Be 40 years of age or older;
- Be subjected to adverse employment action;
- Be qualified for the position; and
- Be replaced by a younger person or show that a similarly situated person under 40 years of age was treated differently.[56]

Adverse employment action includes demotion, if the demotion was motivated by the employee's age. The employee presented sufficient evidence to show that his demotion was a result of age discrimination where his supervisors commented on the employee's age during his review, stated that the managers were going to be asked to do work that the employee would not want to do, that they told other employees that the employee was stepping down because he was "getting older" and made repeated comments as to the youth of his replacement.[57] It is not discrimination to demote an employee if there is a legitimate business reason for the demotion, such as where the employee was frequently absent from work and refused to cooperate with management to increase his attendance.[58]

Requiring an employee to transfer to another position may constitute age discrimination. For instance, age discrimination was shown where prior to the transfer, the supervisor questioned the employee on her age, made comments that she had no business operating a computer and that she would be retiring sooner than she thought. Additionally, the employer failed to timely complete the employee's performance evaluation, despite being reminded by the employee.[59] On the other hand, age discrimination does not exist where an employee is reassigned to a *lateral* position with a younger employee assigned to his former position, where the reason for the move was unrelated to the older employee's age but rather out of a desire to find a position more suitable to the younger employee's skills.[60]

Policies that appear to be nondiscriminatory but fall more harshly on people 40 years of age or older, such as policies requiring the ability to lift a certain amount of weight or requiring a certain level of physical exertion, may constitute discrimination. Even if the policy is more difficult for people 40 years of age or older to meet, the policy does not violate the ADEA if there is a nondiscriminatory reason for the policy.

Policies which in effect discriminate against employees who are 40 years of age or older do not violate the ADEA if the policy is based upon:

- Bona fide occupational qualifications reasonably necessary to the normal operation of business;[61]
- A bona fide seniority system that is not intended to evade the purposes of the ADEA;[62]
- A bona fide employee benefit plan that is cost justified, or one that involves some permissible adjustment to employee benefit pension plans, or long-term disability benefits;[63]
- A voluntary early retirement incentive plan with the ADEA's relevant purposes; or
- Age-related entry requirements under a bona fide apprenticeship program.

An employer may also legitimately fail or refuse to hire or discharge firefighters and law enforcement offices under certain circumstances, maintain a mandatory retirement age for certain bona fide executives, high policy makers and tenured faculty members and discharge or discipline a person aged 40 or older for good cause.[64]

Additionally, an employer may make an employment decision based upon salary, health-benefit or pension considerations, even where these considerations depend upon the age of the employee. As long as the employer does not directly consider the employee's age, the consideration of these factors does not constitute discrimination.[65]

Harassment

An employee who is subjected to harassment based upon age may have a claim for harassment, if the conduct is sufficient to create a hostile work environment. To show a hostile work environment, the employee must show that:

- The employee is 40 years of age or older;
- The employee was subjected to harassment, either through words or actions;
- Based upon age;
- Which unreasonably interfered with the employee's ability to work and created an objectively intimidating, hostile or offensive work environment; and
- The employer is liable.[66]

Comments and actions must be viewed both from the viewpoint of the employee and a "reasonable person" when determining whether the comments created a hostile work environment. A comment that "perhaps you are too old to change" and speaking into an employee's hearing aid were not age-related harassment where these incidences occurred six years apart.[67] Further, general hostility and animus arising from a clash of personalities is insufficient to show a hostile work environment based on age, even if an employee is over 40 years old.[68]

Defenses

In general, the employer may deny that the conduct occurred, offer a nondiscriminatory justification for the conduct, or attempt to characterize the conduct as "jokes" rather than discrimination or harassment. A nondiscriminatory justification may include an employee's poor performance. A sufficient business justification was shown where the employer showed that other workers over the age of 40 were not terminated, that the employee frequently took time off during the employer's peak season, and that he damaged equipment. Further, a customer filed a police report regarding the employee after a verbal altercation. All of these factors were sufficient to establish a nondiscriminatory justification.

A nondiscriminatory reason for failing to hire an applicant exists where a younger applicant has better qualifications for the position, if the employer can enumerate the qualifications possessed by the younger applicant that are not possessed by the older applicant. For example, a younger applicant's previous supervisory management experience and a degree in operations management that were not possessed by the older applicant constituted sufficient justification for the decision to hire the younger applicant.[69] When the employer is unaware of the older applicant's particular qualifications at the time the decision is made not to interview or hire the older applicant over a younger applicant, the employer may not rely on the qualifications of the younger applicant as a basis for refusing to hire the older applicant.[70]

If the employer offers a nondiscriminatory justification, the employee is entitled to attempt to disprove the justification. In other words, the employee may assert an "I am a good employee" argument, where the employee alleges that there was no basis other than age for the adverse employment action. The employee may also show that the rule that was applied to the employee was not routinely enforced. The employer must be able to show routine enforcement. A list of other employees who have been disciplined for a violation of the same rule, the terms of the discipline and each employee's age will greatly aid in showing routine nondiscriminatory enforcement.

Where an employer uses reasonable care to prevent and correct any harassing behavior and the employee unreasonably fails to take advantage of any protective or corrective opportunities offered by the employer, the employer would not likely be liable for creating a hostile work environment.[71]

Further, conduct that is not unwelcome is not harassment. If the employee routinely participates in the banter now complained of as harassment, the conduct may not be unwelcome. Regardless of past participation in the conduct, if an employee indicates that a certain subject or behavior is offensive, the employee may still state a claim for age discrimination.

D. Disability Discrimination

Title I of the Americans with Disabilities Act of 1964 ("ADA") prohibits an employer from discriminating against an employee because of a disability. The ADA's protections extend not only to employees who have a disability, but also those who have a record of having a disability or who are perceived as having a disability. A protected disability is a physical or mental impairment that substantially limits one or more of the "major life activities."[72] "Major life activities" are those activities of central importance to daily life, such as the ability to perform manual tasks, walk, hear, see, speak, breathe, learn, and work.[73] Short-term non-chronic impairments that restrict a major life activity generally are not disabilities.[74]

When determining if an employee is disabled, the employer may consider the disability in conjunction with any mitigating factors, such as medication or treatment.[75] Further, medical conditions must be evaluated for each employee.[76] What may be a disability for one employee may not be a disability for another employee.[77] Potential disabilities include:

- Rheumatoid arthritis;[78]
- Obesity, if the result of a physiological condition;[79] and
- Diabetes.[80]

Disabilities generally do not include:

- Alcoholism, if there is no impact on a major life function;
- Paranoid schizophrenia controlled by medication;[81] and
- Asthma.[82]

Merely having a medical condition is not sufficient. The employee must show that the medical condition substantially limits him or her in performing a major life function.[83] Any of the mentioned conditions could constitute a disability if it substantially limits *that* employee from performing a major life function.

An employer may not discriminate against an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position. The protection extends to all facets of employment including:

- Job application procedures;
- Hiring;
- Firing;
- Advancement;
- Compensation;
- Job training; and
- Other terms, conditions and privileges of employment.[84]

An employer may legitimately refuse to hire an applicant despite his or her disability if that individual poses a direct threat to the health or safety of other individuals in the workplace and cannot perform the job safely even with a reasonable accommodation.[85]

The employee has a duty to inform the employer of any disability.[86] Until the employee informs the employer of a disability, the employer is not required to offer a reasonable accommodation, unless the disability is obvious.[87]

There are no formal requirements for notice. The notice need only be sufficient to inform the employer that an accommodation is necessary due to a limitation from a disability.[88] Once the employer knows of the disability, then the employer and the employee must work together to determine any reasonable accommodation that must be made.[89] Reasonable accommodations include:

- Providing time off from work or a modified work schedule;[90]
- Adjusting physical barriers between workspaces;
- Modifying workplace policies;[91]
- Adjusting supervisory methods;
- Acquisition or modification of equipment or devices;[92]
- Reassigning the individual to another position;[93] and
- Provision of a qualified reader or interpreter.[94]

Accommodations which:

- Modify essential job requirements;[95]
- Conflict with seniority systems;[96]
- Seek to create new jobs;[97]
- Displace existing employees;[98]
- Place an employee in a job for which the employee is not qualified;[99] or
- Place the employee on indefinite leave[100]

are not reasonable accommodations. Further, an employer cannot monitor the employee's medication as a condition of employment.

When more than one accommodation is reasonable, the employer is entitled to choose between the possible accommodations.[101] The employee is guaranteed a right to a *reasonable* accommodation, not the accommodation of the employee's *choice*.[102] The employee may reject the reasonable accommodation offered by the employer, but this rejection prevents the employee from claiming disability discrimination.[103]

Undue Hardship

An employer is not required to make a reasonable accommodation if that accommodation will work an undue hardship on the employer.[104] An undue hardship is one that causes significant difficulty or expense.[105] When determining if an undue hardship exists, the following considerations are relevant:

- The nature and net cost of the accommodation, taking into consideration the availability of tax credits and deductions, and/or outside funding;

- The overall financial resources of the facility involved, the number of persons employed at such facility, and the effect on expenses and resources;
- The overall financial resources of the business, the overall size of the business with respect to the number of its employees, and the number, type and location of its facilities;
- The type of operation of the business, including the composition, structure and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility in question to the business; and
- The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.[106]

A request that a nightclub be brightly lit to accommodate an employee with a disability that makes it difficult to see in dim lighting would impose an undue hardship on the nightclub if a brightly lit club destroys the ambiance or makes it difficult for customers to see the stage.[107]

Discrimination under Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination against people with disabilities. A claim for discrimination under this section is analyzed in the same manner as the other protected groups. The employee must:

- Be a disabled individual;
- Suffer an adverse employment action;
- Because of the disability; and
- Either by replaced by a nondisabled employee or be treated differently from similarly situated nondisabled employees.[108]

An employee is not replaced when another employee is assigned to do the disabled employee's tasks in addition to other tasks, or when the employer redistributes work among other employees already performing similar tasks. Replacement requires that another employee either be hired or reassigned to do the disabled employee's job.

State Law

Ohio Revised Code Chapter 4112 prohibits discrimination based upon disability. To qualify under the statute, a disability must substantially limit the employee. A disability substantially limits the employee if:

- The employee is unable to perform a major life activity that the average person in the general population can perform; or
- The employee is significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to average person in the general population.[109]

To state a claim for disability discrimination under Ohio law, the employee must show that:

- He or she was disabled within the meaning of the statute;
- The employer took adverse employment action; and
- He or she could safely and substantially perform the essential functions of the position.[110]

Discipline

An employer may discipline a disabled employee for violations of workplace standards, provided that the standard is job-related and consistent with a business necessity. The discipline must be the same as that for non-disabled employees. A reasonable accommodation must be made to allow the disabled employee to meet the standard in the future.

An employer may discipline an employee for misconduct, even if the misconduct is caused by the disability.[111] For example, the employer properly terminated the employee for failing to meet the "unit expectation" standards, even after they were reduced numerous times. An employer appropriately reduced the employee's "unit expectation" during the time the employee was placed on restricted duty by her physician. The reduction in the "unit expectation" was a reasonable accommodation. The termination was due to the employee's inability to perform the job, not the employee's disability.

Harassment

There is some disagreement over whether the ADA permits a cause of action for creating a hostile work environment based upon the employee's disability. To the extent that a suit may be brought for creating a hostile work environment, the elements are the same as those for other protected classes:

- The employee is a qualified individual with a disability;
- Who was subjected to unwelcome harassment;
- Which was based upon the employee's disability;
- And was sufficiently severe and pervasive enough to alter a term, condition or privilege of employment; and
- Some basis exists for imputing liability to the employer.[112]

When considering whether the comments were severe and pervasive, the court will consider the effect of the comments from both the employee's view and the view of a "reasonable person." The court will also consider:

- The frequency of the conduct;
- The severity of the conduct;
- Whether the conduct is physically threatening or humiliating; and
- Whether the conduct unreasonably interferes with the victim's work performance.[113]

Defenses

In general, the employer may deny that the conduct occurred, offer a nondiscriminatory justification for the conduct, assert that the employer did not know, or did not have reason to know, of the disability, the employee rejected the proposed reasonable accommodation, the policy is justified based upon a legitimate business necessity, the employee could not perform the essential job functions with reasonable accommodation, or allege that the proposed accommodation would have been an undue hardship on the employer. Since the employee is under a duty to work with the employer to determine a reasonable accommodation, the employer may also defend on the grounds that the employee failed to work with the employer to determine a reasonable accommodation that would help the employee perform the essential job functions.

Where an employer uses reasonable care to prevent and correct any harassing behavior and the employee unreasonably fails to take advantage of any protective or corrective opportunities offered by the employer, the employer would not likely be liable for creating a hostile work environment.[114]

Further, conduct that is not unwelcome is not harassment. If the employee routinely participates in the banter now complained of as harassment, the conduct may not be unwelcome. Regardless of past participation in the conduct, if an employee indicates that a certain subject or behavior is offensive, the employee may still state a claim for disability discrimination.

E. Religious Discrimination

Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Section 4112.02 prohibit an employer from discriminating against an employee or applicant based upon religion. The law protects employees from requirements for religious conformity as well as protects employees from discrimination based upon belonging to a particular religious faith.[115] Religion includes all aspects of religious observance, practice and belief.[116] Religious beliefs need not be acceptable, logical, consistent or comprehensible to others; however, the employee must hold a sincere religious belief.[117] Certain religious beliefs entitled to protection include:

- The Black Muslim faith;
- Judaism; and
- Atheism.

Activities may be deemed religious activities, even if not required by religious doctrine. For example, attendance at monthly business meetings of a church and teaching weekly bible study classes were found to be religious activities.[118]

Undue Hardship

An employer is required to reasonably accommodate an employee's religious practices, unless doing so would cause an undue hardship on the employer.[119] An undue hardship is one that imposes more than a de minimis cost on the employer.[120] A de minimis amount is an amount roughly equal to the payment of wages to one employee to cover another employee's shift.[121] Payment of administrative costs associated with offering a reasonable accommodation is de minimis.[122]

An accommodation that requires the variance of a bona fide seniority system places an undue hardship on the employer.[123] Such a situation could arise where an employer offers employees their choice of shifts based upon seniority.[124] In this case, permitting the employee to choose his shift first, regardless of seniority, could impose an undue hardship on the employer.

Reasonable Accommodations

Like accommodations for disabilities, the employer is only required to offer a reasonable accommodation, not necessarily the employee's preferred accommodation. Where more than one reasonable accommodation is possible, the employer may choose the one that poses the least hardship to the employer.[125] If one option disadvantages the employee with respect to his or her employment opportunities, such as compensation or privileges of employment, the employer must select the accommodation which least disadvantages the employee.[126] Reasonable accommodations may be necessary to accommodate:

- Observance of the Sabbath or religious holidays;
- A need for prayer break during work hours;
- The practice of following certain dietary requirements;
- The practice of not working during a mourning period for a deceased relatives;

- A prohibition against medical examinations;
- A prohibition against membership in labor and other organizations; and
- Practices concerning dress and personal grooming requirements.[127]

Options for a reasonable accommodation include:

- Voluntary substitutes and "swaps" with other employees;
- Flexible work schedules; and
- Lateral transfer and change of job assignments.[128]

If the accommodation requires the employee to perform an act that violates his or her religious beliefs, then the accommodation is not reasonable. For example, if the employee truly believes that it is morally wrong to work on a particular day and that it is a sin to induce another to work on the employee's behalf on that same day, then the employer may not require the employee to find his own replacement.[129]

To prove a claim for religious discrimination, the employee must show that:

- The employee is a member of a particular religious faith;
- The employee suffered an adverse employment action;
- Due to the employee's religion; and
- The employee was either replaced by a member outside of the protected class or was treated differently from similarly situated members of the unprotected class.

An adverse employment action must actually disrupt employment rather than inconvenience the employee or alter the employee's job responsibilities.[130] Reassigning an employee to a new position equal to the employee's abilities and salary level, without decreasing compensation, job title, level of responsibility, or opportunity for promotion is not an adverse employment action.[131] Adverse employment action includes:

- Termination of employment;
- Demotion evidenced by a decrease in wage or salary or a less distinguished title;
- Material loss of benefits; and
- Significantly diminished material responsibilities.[132]

Discipline for poor performance, violation of workplace rules and regulations or the like will not constitute an adverse employment action provided that there is a *legitimate* reason for the discipline.

An employer must ensure that all employees who violate the same rules are similarly disciplined. The discipline may vary depending upon the employee's job classification, number of violations, etc. as long as all employees of the same job type with a similar employment record are disciplined in the same fashion. Any complaints made regarding the employee and the action taken by the employer regarding those complaints should be documented. Any meetings with the employee regarding the complaint should also be documented, as well as what was discussed in the meeting. The employer should clearly inform the employee of what

behavior is expected and, to the extent possible, set objective goals, such as completing a set amount of reports in a particular time period. The precise terms of the discipline and the goals set for the employee should be placed in the file.

Harassment

An employee is protected from harassment based upon religion. Harassment becomes actionable once it creates a hostile work environment. Isolated incidents, unless extremely serious, do not create a hostile work environment. Rather, the discriminatory conduct must be severe and pervasive when viewed by both the employee and a "reasonable person."[133] When determining whether harassment is severe and pervasive, the court considers:

- The frequency of the conduct;
- The severity of the conduct;
- Whether the conduct is physically threatening or humiliating; and
- Whether the conduct unreasonably interferes with the victim's work performance.[134]

Religious harassment exists where:

- The employee belongs to a particular religion;
- The employee was subjected to unwelcome harassment;
- Based upon the employee's religion;
- Which has interfered with the employee's work performance or created a severe and pervasive hostile or offensive work environment; and
- The employer knew or should have known of the conduct and failed to take prompt and appropriate action.[135]

Where an employer uses reasonable care to prevent and correct any harassing behavior and the employee unreasonably fails to take advantage of any protective or corrective opportunities offered by the employer, the employer would not likely be liable for creating a hostile work environment.[136]

Defenses

In general, the employer may deny that the conduct occurred, offer a nondiscriminatory justification for the conduct or adverse employment action, or attempt to characterize the conduct as "jokes" rather than discrimination or harassment. A nondiscriminatory justification may include showing a violation of a workplace rule that is routinely enforced, poor performance on the part of the employee or offering an alternative reason for the employee's termination.

If the employer offers a nondiscriminatory justification, the employee is entitled to attempt to disprove the justification. In other words, the employee may assert an "I am a good employee" argument, where the employee alleges that there was no basis other than religion for the adverse employment action. The employee may also show that this rule was not routinely enforced. The employer must be able to show routine enforcement. A list of other employees who have been disciplined for a violation of the same rule, the terms of the discipline and each

employee's religion, if known, will greatly aid in showing routine nondiscriminatory enforcement. Additionally, any accommodations which have been given to the employee should be shown, as well as accommodations offered to other employees due to their religion.

Further, conduct that is not unwelcome is not harassment. If the employee routinely participates in the banter now complained of as harassment, the conduct may not be unwelcome. Regardless of past participation in the conduct, if an employee indicates that a certain subject or behavior is offensive, the employee may still state a claim for religious discrimination.

F. National Origin Discrimination

Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Section 4112.02 prohibit an employer from discriminating against an employee based upon the employee's national origin.

To show discrimination based on national origin the employee must show that:

- The employee was subject to adverse employment action;
- Due to his national origin; and
- The employee was either replaced with a person outside of the protected class or was treated differently than similarly situated employees outside of the protected class.

Discrimination extends to cover rules that require employees to speak only English at all times at the workplace.[137] An employer may require employees to speak English at certain times, if there is a legitimate business necessity, such as a concern for workplace safety.[138] The employer must notify employees of any "English only" rule and the consequences for violating the rule.[139] If the employer fails to notify its employees, any discipline for not speaking English will be considered national origin discrimination.[140]

National Origin

National origin refers to the country where the employee was born or from which his ancestors came.[141] Under this broad definition, employees born in the United States are protected from discrimination based upon their ancestry. While an employee is protected from discrimination based upon place of birth or ancestry, there is no protection from discrimination based upon citizenship.[142]

An employer also cannot discriminate against an employee because the employee has the physical, cultural or linguistic characteristics of a national origin group.[143] Hispanics, Cajuns and gypsies are protected under this definition. A national origin group must be distinguishable from other national origins. For example, Appalachians are not considered a national origin, as they are not distinct from others of U.S. origin.[144]

An employee need not be of a particular national origin to bring a claim for national origin discrimination, if the employee was dismissed for a reason related to national origin, such as:

- Marriage to or association with persons of a national origin group;
- Membership in, or association with an organization identified with or seeking to promote the interests of national origin groups;
- Attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; or
- Because an individual's name or spouse's name is associated with a national origin group.[145]

Harassment

An employee is entitled to protection from a hostile work environment created because of the employee's national origin. Isolated incidents, unless extremely serious, will not amount to a hostile work environment.[146] A hostile work environment exists where the discriminatory conduct is severe and pervasive when considered from both the employee's perspective and that of a "reasonable person."[147] When determining whether harassment is severe and pervasive, the court will consider:

- The frequency of the conduct;
- The severity of the conduct;
- Whether the conduct is physically threatening or humiliating; and
- Whether the conduct unreasonably interferes with the victim's work performance.[148]

A hostile work environment exists where:

- The employee was subjected to unwelcome harassment, such as ethnic slurs;
- The harassment was based upon the employee's national origin;
- The harassment either interfered with the employee's work performance or created a severe and pervasive hostile or offensive work environment; and
- The employer knew or should have known of the conduct and failed to take prompt and appropriate action.[149]

Where an employer uses reasonable care to prevent and correct any harassing behavior and the employee unreasonably fails to take advantage of any protective or corrective opportunities offered by the employer, the employer would not likely be liable for creating a hostile work environment.[150]

Defenses

In general, the employer may deny that the conduct occurred, offer a nondiscriminatory justification for the conduct, or attempt to characterize the conduct as "jokes" rather than discrimination or harassment.

If the employer offers a nondiscriminatory justification, the employee is entitled to attempt to disprove the justification. In other words, the employee may assert an "I am a good employee" argument, where the employee alleges that there was no basis other than national origin for the adverse employment action. The employee may also show that this rule was not routinely enforced. The employer must be able to show routine enforcement. A list of other employees who have been disciplined for a violation of the same rule, the terms of the discipline and each employee's national origin, if known, will greatly aid in showing routine nondiscriminatory enforcement.

Further, conduct that is not unwelcome is not harassment. If the employee routinely participates in the banter now complained of as harassment, the conduct may not be unwelcome.

Regardless of past participation in the conduct, if an employee indicates that a certain subject or behavior is offensive, the employee may still state a claim for national origin discrimination.

III. PUBLIC EMPLOYEE DUE PROCESS RIGHTS

Classified public employees (employees who may only be discharged "for cause" or who are entitled to maintain their positions "during good behavior") have a property interest in continued employment.[151] Because of this interest, the employee may not be summarily discharged without reason. To provide an initial check that there are grounds for the discharge, a public employer generally is required to have pre-termination hearing. A pre-termination hearing is not required if the employee is being terminated due to a reduction in the workforce, as long as a post-termination procedure is available.

There are no formal requirements for a pre-termination hearing. The purpose of the hearing is to determine if there are reasonable grounds to believe that the charges against the employee are true and support the proposed decision.[152] The employee must be given notice, verbally or in writing, of the charges, an explanation of the employer's evidence and an opportunity to respond to the charges.[153] There is no requirement that the hearing be held before an impartial tribunal.[154] Once the adverse employment decision has been made at the pre-termination hearing, the employer must advise the employee, in writing, of the post-termination hearing procedures.

Unlike the pre-termination hearing, the post-termination hearing must be held before an impartial tribunal.[155] The post-termination hearing must also provide the employee with an opportunity to present and cross-examine witnesses.[156]

Best Practices for Post-Termination Hearings

- The employee should be given written notice of the charges against him or her. The notice should be in detail sufficient to enable the employee to prove any error.
- The employee should be provided with the names of all witnesses who will be called and a short description of their anticipated testimony.
- The post-termination hearing must be held within a reasonable time after the adverse employment action.
- The employee must be provided with an opportunity to present evidence on his or her behalf.
- The employee must be given an opportunity to be heard at the hearing.
- A court reporter should be present to record the evidence presented.
- The employee must be permitted to cross-examine the accusers in the presence of the tribunal.
- The employee must be permitted to have a lawyer present to assist him.[157]

While there are no formal requirements for advising the employee of the charges against him or her, the notice should be provided far enough in advance to permit the employee to prepare for the hearing. [158]

Effect of Public Employee's Resignation

A public employee is entitled to a hearing and notice if the employee is terminated, but if the employee voluntarily resigns employment, then the employee gives up any right to a hearing.[159] If the employee involuntarily resigns (is constructively discharged), then the employee retains his or her right to a post-termination hearing.[160]

Since all resignations are presumed to be voluntary, the employee must show that he or she was constructively discharged.[161] In determining constructive discharge, the court will consider whether a reasonable person, under all of the circumstances, would feel compelled to resign.[162] In general, the mere fact that an employee is forced to choose between resignation and termination is not sufficient to show that the employee was constructively discharged, as long as the employer had good cause to believe that the employee could be terminated.[163] Such a choice will be considered constructive discharge if the employee is not provided sufficient time to make a decision.[164] For example, an employee voluntarily resigned where the employer provided her approximately seven hours to decide between termination and resignation after she tested positive for drugs.[165]

Suspension

A public employee has no right to a hearing prior to being suspended, even if the suspension is without pay.[166] The employee is entitled to a prompt post-suspension hearing.[167]

Unclassified Public Employees

Unclassified, or "at will," employees do not have a protected interest in continued employment. Since no protected interest exists, the employee may be discharged at any time and is not entitled to either a pre-termination or post-termination hearing.[168]

Name-Clearing Hearings

In some instances, an unclassified employee can request a hearing to clear his or her name.[169] An employee has this right when the employer made a false statement of a stigmatizing nature that was closely related in time to the employee's discharge and the statement was voluntarily made public by the employer.[170] If the employee voluntarily leaves the government's employ, then the employee is not entitled to a name-clearing hearing.[171]

Statements that are considered to be of a stigmatizing nature include allegations of dishonesty, criminal activity, immorality or attacks on the employee's integrity, honor or character. Comments about the employee's inefficiency, improper or inadequate performance or neglect of duty are not normally statements that would entitle the employee to a hearing to clear his or her name.[172] For instance, statements to a newspaper that there were recurring problems with the management of a grant because basic policies were not followed and that the employer had decided to change leadership of the program were not considered stigmatizing as these statements merely focused on job performance.[173] If the statements prevent or make it significantly more difficult for the employee to continue to practice in his or her profession, then the employee is entitled to a hearing.[174]

Further, the statements must be made around the same time the employee was discharged. Statements that are made a week or more after the employee was discharged are generally held to be too remote to require a hearing.[175]

If a hearing to clear the employee's name is held, the hearing is limited to providing the employee an opportunity to clear his or her name.[176] The issue of whether or not to terminate the employee is not relevant. Further, there is no requirement that the employer inform the employee of his or her right to a name-clearing hearing.[177]

There is some question as to the formal requirements necessary to request a name-clearing hearing. An employee may need to specifically request a "name-clearing hearing."[178] A statement by the employee that he is innocent of the charges against him and would like a review of the decision has been held to invoke an employee's rights to a name-clearing hearing.[179] Despite the formal requirements, if the request is sufficient for the employer to determine that the employee is requesting a name-clearing hearing, then one should be granted.

Defenses to Claims of Due Process Violations

If an employee fails to participate in the pre-termination or post-termination proceedings, then the employee may not bring a claim for a due process violation.

As an employee is only entitled to a name-clearing hearing upon request, the employee's failure to request such a hearing is a complete defense to a charge of a due process violation based on a failure to provide a name-clearing hearing.[180]

IV. THE FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act of 1993 ("FMLA") permits an eligible employee to take job-protected unpaid leave for up to twelve weeks in any twelve-month period for:

- The birth and care of the newborn child of the employee;
- Placement of a child with the employee for adoption or foster case;
- Caring for a spouse, child, or parent with a serious health condition; or
- The employee's own serious health condition that makes the employee unable to perform the functions of the job.[181]

Recently, the National Defense Authorization Act was enacted which permits a spouse, son, daughter, parent or next of kin to take up to 26 workweeks of leave to care for a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, otherwise in outpatient status or on the temporary disability retired list. The leave must be taken to care for a member of the Armed Forces who has sustained an injury or illness in the line of duty that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating.

The National Defense Authorization Act also permits an employee to take FMLA leave for any qualifying exigency arising out of the fact that a spouse, son, daughter or parent of the employee is on active duty in the Armed Forces. This provision will not be effective until the Department of Labor promulgates regulations which define a "qualifying exigency." To date, no such regulations have been enacted.

In addition to job protection, the employee is entitled to have health benefits maintained while on FMLA leave.[182]

Types of Leave

An employee may take FMLA leave in:

- A single block of time for up to 12 weeks;
- Separate blocks of time from an hour to several weeks for a single illness or injury (known as intermittent leave); or
- A reduced leave schedule under which the employee's regular work hours are reduced.

Even though the FMLA provides for these different types of leave, not every type of leave is an available option to the employee. Provided that the leave is for a permissible reason, and the employee has not already used twelve weeks of leave in the twelve month period, an employee may elect to take leave in a single block of time. If the leave is for the birth or care of a newborn or due to the placement of a child, an employee may only take intermittent leave or work a reduced schedule if the employer agrees.[183] If the leave is for a serious health condition, intermittent or reduced leave is available if medically necessary.[184] If intermittent or reduced leave is taken, the employer may require the employee to transfer to an alternative position with equivalent pay and benefits.[185] The alternative position need not have equivalent duties.[186]

Twelve-Month Period

An employee is entitled to up to twelve weeks of unpaid leave in a twelve-month period. The employer determines how to calculate the twelve-month period, but the chosen method must be applied consistently and uniformly to all employees.[187] The employer may use:

- A calendar year;
- A "leave year" which coincides with an event such as the fiscal year or employee's anniversary date;
- A 12-month period measured from the date of the employee's first FMLA leave; or
- A "rolling" 12-month period measured backwards from the date an employee uses any FMLA leave.[188]

Twelve Weeks of Leave

In the case of intermittent or reduced leave, only the time actually taken off counts towards the twelve weeks of available leave.[189]

An employee is entitled to twelve weeks of unpaid leave, but the employer is not required to approve an employee's request for the entire twelve week period. If the employer determines that the condition for which leave is sought does not require the employee to take the entire time requested, the employer may approve the leave for the time determined to be necessary. When the employer requests medical certification, the amount of leave necessary is determined with the assistance of the certifying doctor. If there is a change in circumstances, the employee may request additional time.[190]

In the case of leave to care for a member of the Armed Forces, an employee is permitted to take up to 26 workweeks total of leave. When calculating the amount of leave available, the employer includes all FMLA leave taken during the applicable 12-month period, even if the leave was not taken to care for a member of the Armed Forces. For example, assume an employee takes 6 weeks off due to the birth of a child. If the employee then wishes to take time off to care for a family member in the Armed Forces, the employee may take 20 weeks of leave. The 6 weeks of leave taken for the birth of the child is deducted from the 26 weeks of leave granted to care for a member of the Armed Forces.

Substitution of Paid Leave

Paid vacation or paid time off may be substituted for qualifying FMLA leave at the option of either the employee or the employer.[191] Paid sick leave may be substituted, if available.[192] If the employee chooses to take sick leave and the illness is not a "serious health condition," then the sick leave does not count towards the twelve weeks of FMLA leave.[193]

If the employer requires an employee to substitute paid leave for unpaid FMLA leave, then the employer must inform the employee within two business days after receiving notice that the employee intends to take FMLA leave or within two business days of determining eligibility

for FMLA leave, if the employer does not initially have sufficient information to determine eligibility for FMLA leave.[194]

Eligible Employee

In order to be eligible for FMLA leave, the employee must have:

- Worked for the employer for a twelve-month period; and
- Worked 1,250 hours during the twelve-month period immediately preceding the commencement of the requested leave.

Vacation days and holidays do not count as hours worked for purposes of determining if 1,250 hours were worked. Vacation days, holidays and sick time count for purposes of determining whether the employee has worked for the employer for a twelve-month period, provided that the employer provided benefits or compensation during these periods.[195]

An employee is entitled to FMLA even if he or she is not an "eligible employee" at the time leave was requested, but would be an "eligible employee" as of the first day of the requested leave.[196] If an employer determines that an employee is not eligible for FMLA leave, the employer must notify the employee within two business days of determining ineligibility of the date when the employee will be eligible for FMLA leave. An employer cannot challenge an employee's eligibility for leave after:

- Determining that the employee is an eligible employee;
- Failing to notify an otherwise ineligible employee of the date at which the employee will be an "eligible employee" within two business days of determining ineligibility;
- Failing to advise an employee of ineligibility more than two business days before the requested leave commences; or
- Failing to advise an employee of ineligibility within two business days of receiving notice, if notice is given less than two business days prior to the requested leave.[197]

Birth and Care of Newborn

Both male and female employees are entitled to FMLA leave for the birth and care of a newborn, if the criterion for being an "eligible employee" is met.[198] Additionally, an expectant mother may take FMLA leave for prenatal care or if she is unable to work due to her pregnancy.[199]

Placement of a Child for Adoption

As with the birth of a newborn, the employer must grant FMLA leave prior to the placement of the child if an absence from work is necessary for the adoption or placement to proceed.[200] Examples include appearing at court, attending counseling sessions or consulting with the attorneys and doctors for the birth parent(s).[201] An employee is only entitled to FMLA leave for the first twelve months of placement or after adoption.[202]

Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves:

- Inpatient care in a hospital, hospice or residential medical care facility or any subsequent treatment in connection with the inpatient care.
- Continuing treatment by a health care provider for a condition that results in more than a three-day period of incapacity and involves treatment two or more times by a health care provider or a regimen of continuing treatment.
    - Treatment is not a routine physical, eye or dental exam.
    - A regimen of continuing treatment includes a course of prescription medicine or therapy that requires special equipment.
    - Any regimen that may be initiated without a visit to the doctor, such as bed rest, drinking fluids and taking over-the-counter medications, is not treatment for purposes of FMLA leave. [203]
- Any period of incapacity for a chronic serious health condition that requires periodic visits to a health care provider and continues over an extended period.
    - Examples: asthma, diabetes, or epilepsy
- Permanent or long-term incapacity due to a condition for which treatment may not be effective.
    - Examples: Alzheimer's disease, or a severe stroke
- Any period of absence to receive multiple treatments by a health care provider for a condition that, if left untreated, could result in a more than three-day incapacity.
    - Examples: cancer, severe arthritis, or kidney disease[204]

Unless complications develop, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, or periodontal disease, do not meet the definition of a serious health condition and do not qualify for FMLA leave.[205]

Notice

The employee must provide notice to the appropriate person and state the reason for the requested leave.[206] The notice may be oral or written.[207] Any oral notice must be confirmed in writing.[208] The employee does not have to expressly state that FMLA leave is being requested.[209] In order to invoke the protections of the FMLA, however, the employee must state sufficient detail for the employer to determine if the leave is requested for a qualifying reason.[210] For example, the employee may state that time off is needed for the birth of a child or to care for a relative.[211] The employer must inquire further if more information is needed to determine eligibility for FMLA leave.[212] An employer must notify the employee within two business days of receiving the notice whether or not the employee qualifies for FMLA leave.[213]

If the leave is foreseeable, the employee should give notice of the intent to take leave 30 days prior to the first day of the requested FMLA leave.[214] If leave is not foreseeable, notice should be given as soon as practicable.[215] In these circumstances, notice should be given at least verbally one to two business days after the employee knows of the need for leave.[216]

Medical Certification

Before approving FMLA leave, the employer may require medical certification from the employee that documents either the employee's or the family member's serious health condition.[217] The Department of Labor provides a sample certification.[218] The employer is not required to use this form, but may not request more information than what is provided on this form.[219] If the certification is incomplete, then the employer may request the employee to fully complete the certification.

The employer may also require the employee to obtain a second opinion from a provider paid for and chosen by the employer.[220] If the second opinion conflicts with the initial certification, the employer may require a third opinion.[221] A statement by one doctor that an employee is needed to care for his spouse and a statement by a second doctor that the employee is only necessary to offer "psychological comfort" is a sufficient difference for the employer to request a third opinion. On the other hand, the opinions do not conflict where two doctors agree that leave is not necessary for the basis sought by the employee but believe that leave may be permissible for differing reasons not cited by the employee.

If a third exam is requested, it is paid for by the employer, but the employer and employee choose the provider jointly.[222] The decision of the third provider is final and binding.[223]

An employer may request recertification of the medical condition.[224] The employer's ability to request a recertification varies depending on the reason for the FMLA leave, but in most circumstances, the recertification may not be requested more often than once every 30 days.

Discipline

An employer retains the right to discipline an employee, even if the employee has requested to FMLA leave. An employee may be terminated prior to exercising any rights under FMLA, provided the disciplinary action *would have occurred regardless* of the attempted FMLA leave. The employer must show that the disciplinary action was unrelated to the employee's request for FMLA leave.

Return to Work

An employee is entitled to return to either the same position, or an equivalent position with equivalent pay, benefits and working conditions after returning from FMLA leave.[225] The employer may require a certificate of fitness from the employee's health care provider prior to permitting the employee to return to work.[226] The employer may also require an employee to periodically advise the employer of the employee's intent to return to work while on leave.[227] If the employee gives an unequivocal notice that he or she is not intending to return to work, then the employer's obligations under the FMLA cease.[228] The employee's *ability* to return to work is not relevant as long as the employee *intends* to return to work.[229]

There is no right to restoration under the FMLA if the employee is unable to perform the essential job functions upon returning from leave.[230] Other laws, such as the ADA, may govern the employer's responsibilities.

Damages

If an employer is found to have violated the FMLA, the employer may be liable for any wages, salary or employment benefits denied to the employee or lost due to the FMLA violation. The court may also award an amount equal to this sum for liquidated damages (effectively awarding the employee twice any lost compensation). The employee may also be awarded attorney's fees and any costs, including the cost for expert witnesses. Finally, the court may require action on the part of the employer, such as reinstating the employee. In lieu of this, the court may order "front pay" which would compensate the employee for lost future earnings.

ENDNOTES

[1] 42 U.S.C. §1981a(a)(1)
[2] *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998).
[3] *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 538-39 (6th Cir. 2002.
[4] *Hilt-Dyson v. City of Chicago*, 282 F.3d 456 (7th Cir. 2002).
[5] *Kipnis v. Baram*, 949 F.Supp. 618 (N.D.Ill. 1996).
[6] Id.
[7] *Tomkins v. Public Service Electric & Gas, Co.*, 568 F.2d 1044 (3rd Cir. 1977).
[8] *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 762 (6th Cir. 2006).
[9] 29 CFR §1604.2(a)(1)(ii)
[10] 29 CFR §1604.2(a)(1)(iii)
[11] *Johnson v. Kroger Co.*, 319 F.3d 858 (6th Cir. 2003).
[12] *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180 (7th Cir. 1986).
[13] Id.
[14] *Heller v. Columbia Edgewater Country Club*, 195 F.Supp.2d 1212 (D.Or. 2002) and *Centola v. Potter*, 183 F.Supp.2d 403 (D.Mass. 2002).
[15] *Gupta v. Florida Board of Regents*, 212 F.3d 571 (11th Cir. 2000).
[16] *Bowman v. Shawnee State University*, 220 F.3d 456, 463 (6th Cir. 2000).
[17] Id. At 462-63.
[18] Id.
[19] Id.
[20] *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).
[21] Id. at 80-81.
[22] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 228 (1989).
[23] *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 762-63 (6th Cir. 2006).
[24] Id.
[25] 29 CFR §1604.11(a)
[26] 29 CFR §1604.2(a)(2)
[27] *Crawford v. Medina General Hospital*, 96 F.3d 830, 835 (6th Cir. 1996).
[28] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).
[29] *Labit v. Akzo-Nobel Salt, Inc.*, 209 F.3d 719, 3 (5th Cir. 2000).
[30] *DiCarlo v. Potter*, 358 F.3d 408, 415 (6th Cir. 2004).
[31] *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).
[32] *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).
[33] *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).
[34] *Hilt-Dyson v. City of Chicago*, 282 F.3d 456 (7th Cir. 2002).
[35] *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999).
[36] *Kipnis v. Baram*, 949 F.Supp. 618 (N.D.Ill. 1996).
[37] *Clay v. United Parcel Service, Inc.*, 501 F.3d 695, 710 (6th Cir. 2007).
[38] *Halfacre v. Home Depot USA, Inc.*, 221 Fed.Appx. 424 (6th Cir. 2007).
[39] *Sutherland v. Michigan Department of the Treasury*, 344 F.3d 603 (6th Cir. 2003).
[40] *Shield Club v. City of Cleveland*, 370 F.Supp. 251, 253-55 (N.D.Ohio 1972).
[41] *Rutherford v. City of Cleveland*, 179 Fed.Appx. 366 (6th Cir. 2006).
[42] *Johnson v. Kroger Co.*, 319 F.3d 858 (6th Cir. 2003).
[43] *Michael v. Caterpillar Financial Services Corp.*, 496 F.3d 584, 594 (6th Cir. 2007).
[44] *Bowman v. Shawnee State University*, 220 F.3d 456, 463 (6th Cir. 2000).
[45] Id.
[46] Id.
[47] Id.
[48] *Jordan v. City of Cleveland*, 464 F.3d 584, 598 (6th Cir. 2006).
[49] *Clay v. United Parcel Service, Inc.*, 501 F.3d 695, 707 (6th Cir. 2007).
[50] *Crawford v. Medina General Hospital*, 96 F.3d 830, 835 (6th Cir. 1996).
[51] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).
[52] Ohio Revised Code Section 4112.14 prohibits discrimination against employees based upon age. Claims under

Ohio law are presented and analyzed the same as those under federal law.
[53] *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).
[54] Id.
[55] Id.
[56] *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1159-60 (6th Cir. 1990), *Clayton v. Meijer, Inc.*, 281 F.3d 605, 610 (6th Cir.2002)
[57] *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570-72 (6th Cir. 2003).
[58] *Dorsey v. WalMart Stores, Inc.*, 28 Fed.Appx. 468, 469 (6th Cir. 2002).
[59] *Tuttle v. Metropolitan Government of Nashville*, 474 F.3d 307, 319-20 (6th Cir. 2007).
[60] *Brennan v. Tractor Supply Co.*, 237 Fed.Appx. 9, 13 (6th Cir. 2007).
[61] 29 CFR §1625.6
[62] 29 CFR §1625.8
[63] 29 CFR §1625.10
[64] 29 USC §623(j)
[65] *Cooney v. Union Pacific Railroad Co.*, 258 F.3d 731, 735-36 (8th Cir. 2001).
[66] *Blair v. Henry Filters, Inc.*, ___F.3d___, 2007 WL 2983158 (6th Cir.)
[67] *Peecook v. Northwestern National Insurance Group*, 156 F.3d 1231, 3 (6th Cir. 2000).
[68] *Crawford v. Medina General Hospital*, 96 F.3d 830, 835 (6th Cir. 1996).
[69] *Coorigan v. U.S. Steel, Corp*., 478 F.3d 718, 728 (6th Cir. 2007).
[70] *Coburn v. Rockwell Automation, Inc.*, 238 Fed.Appx. 112, 16-17 (6th Cir. 2007).
[71] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).
[72] 42 U.S.C. §12102(2)
[73] *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002).
[74] *Novak v. MetroHealth Medical Center*, 503 F.3d 572, 582 (6th Cir. 2007).
[75] *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 475 (1999).
[76] Id.
[77] *Cotter v. Ajilon Services, Inc.*, 287 F.3d 593, 598 (6th Cir. 2002).
[78] *Moore v. J.B. Hunt Transport, Inc.*, 221 F.3d 944 (7th Cir. 2000).
[79] *E.E.O.C. v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 443 (6th Cir. 2006).
[80] *Lawson v. CSX Transportation, Inc.*, 245 F.3d 916 (7th Cir. 2001).
[81] *Atwell v. Hart County, Kentucky*, 122 Fed.Appx.215 (6th Cir. 2005).
[82] *Ventura v. City of Independence*, 108 F.3d 1378 (6th Cir. 1997).
[83] 42 U.S.C. §12102(2)
[84] *See* 42 U.S.C. §12113(a)
[85] 42 U.S.C. §12113(b)
[86] 29 CFR §1630.9
[87] Id.
[88] *Reed v. LePage Bakeries*, 244 F.3d 254, 260 (1st Cir. 2001).
[89] *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999).
[90] 42 U.S.C. §12111(9)(B)
[91] 42 U.S.C. §12111(9)(B)
[92] 42 U.S.C. §12111(9)(B)
[93] 42 U.S.C. §12111(9)(B)
[94] 42 U.S.C. §12111(9)(B)
[95] *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-13 (8th Cir. 1995).
[96] *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 403 (2000).
[97] *Kleiber v. Honda of America Manufacturing, Inc.*, 485 F.3d 862, 869 (6th Cir. 2007).
[98] Id.
[99] *Hedrick v. Western Reserve Care System*, 355 F.3d 444 (6th Cir. 2004).
[100] *Walsh v. United Parcel Service*, 201 F.3d 718, 725-28 (6th Cir. 2000).
[101] *Black v. Wayne Center*, 225 F.3d 658, 4 (6th Cir. 2000).
[102] Id.
[103] 29 CFR §1630.9(d)
[104] 29 CFR §1630.9(a)
[105] 29 CFR §1630.2(p)(1)

[106] 29 CFR §1630.2(p)(2)
[107] 29 CFR §1630, App.
[108] *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 538-39 (6th Cir. 2002.
[109] ORC §4112.01(A)(13)
[110] *Hood v. Diamond Products, Inc.* (1996) 74 Ohio St.3d 298
[111] *Martin v. Barnesville Exempted Village School District Board of Education*, 209 F.3d 931, 934 (6th Cir. 2000).
[112] *Gentry v. Summit Behavioral Healthcare*, 197 Fed.Appx. 434, 437 (6th Cir. 2006).
[113] Id.
[114] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).
[115] *Shapolia v. Los Alamos National Laboratory*, 992 F.2d 1033 (10th Cir.1993).
[116] 42 USC §2000e(j)
[117] *E.E.O.C. v. Union Independiente De La Autoridad De Acueductos Y Alcantarillados De Puerto Rico*, 279 F.3d 49 (1st Cir. 2002).
[118] *Weitkenaut v. Goodyear Tire & Rubber Co.*, 381 F.Supp 1284 (D.Vt. 1974), *Redmond v. GAF Corp.*, 574 F.2d 897 (7th Cir. 1978).
[119] 42 USC §2000e(j)
[120] 29 CFR §1605.2(e)(1)
[121] Id.
[122] Id.
[123] 29 CFR §1605.2(e)(2)
[124] Id.
[125] *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987).
[126] 29 CFR §1605.2(c)(2)
[127] 29 CFR Part 1605, App. A.
[128] 29 CFR §1605.2(d)(1)
[129] *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987).
[130] *Hilt-Dyson v. City of Chicago*, 282 F.3d 456 (7th Cir. 2002).
[131] *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999).
[132] *Kipnis v. Baram*, 949 F.Supp. 618 (N.D.Ill. 1996).
[133] *Bowman v. Shawnee State University*, 220 F.3d 456, 463 (6th Cir. 2000).
[134] Id.
[135] Id.
[136] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).
[137] 29 CFR §1606.7
[138] Id.
[139] Id.
[140] Id.
[141] *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 88 (1973).
[142] Id.
[143] 29 CFR §1606.1
[144] *Bronson v. Board of Education of City School District of Cincinnati*, 550 F.Supp. 941 (S.D.Ohio 1982).
[145] 29 CFR §1606.1
[146] *Bowman v. Shawnee State University*, 220 F.3d 456, 463 (6th Cir. 2000).
[147] Id.
[148] Id.
[149] Id. At 462-63.
[150] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).
[151] *Gilbert v. Homar*, 520 U.S. 924, 928 (1997). The interest is limited to continued employment in general, not continued employment as a classified employee. A classified employee is not entitled to a hearing where the classified position is being made unclassified. *Feeney v. Shipley*, 164 F.3d 311, 313 (6th Cir. 1999).
[152] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545-46 (1985).
[153] Id. at 546.
[154] *Farhat v. Jopke*, 370 F.3d 580, 595 (6th Cir. 2004).
[155] Id. at 596.
[156] *Mitchell v. Fankhauser*, 375 F.3d 477, 480-81 (6th Cir. 2004).

[157] Id.
[158] *Morrison v. Warren*, 375 F.3d 468, 473-74 (6th Cir. 2004)
[159] *Rhoads v. Board of Education of Mad River Local School District*, 103 Fed.Appx. 888, 894 (6th Cir. 2004).
[160] Id.
[161] Id. at 895.
[162] Id.
[163] Id.
[164] Id.
[165] Id.
[166] *Gilbert v. Homar*, 520 U.S. 924, 934-35 (1997).
[167] Id.
[168] *Waters v. Churchill*, 511 U.S. 661, 688 (1994).
[169] *Brown v. City of Niota*, 214 F.3d 718, 723 (6th Cir. 2000)
[170] *Ludwig v. Board of Trustees of Ferris State University*, 123 F.3d 404, 410 (6th Cir. 1997).
[171] *Seigert v. Gilley*, 501 U.S. 1265 (1991).
[172] *Ludwig, supra.*
[173] *Bessent v. Dyersburg State Community College*, 224 Fed.Appx. 476 (6th Cir. 2007).
[174] *Ludwig, supra*.
[175] *Patterson v. City of Utica*, 370 F.3d 322, 335 (2nd Cir. 2004).
[176] *Ludwig, supra.*
[177] *Quinn v. Shirey*, 293 F.3d 315, 323 (6th Cir. 2002).
[178] *Ludwig, supra* at 411.
[179] *Rosenstein v. City of Dallas*, 876 F.2d 392 (5th Cir. 1989).
[180] *Quinn, supra* at 321.
[181] 29 CFR §825.100(a)
[182] 29 CFR §825.100(b)
[183] 29 CFR §825.203(b)
[184] 29 CFR §825.203(c)
[185] 29 CFR §825.204(a)
[186] 29 CFR §825.204(c)
[187] 29 CFR §825.200(b)
[188] 29 CFR §825.200(b)
[189] 29 CFR §825.205(a)
[190] 29 CFR §829.305(c)
[191] 29 CFR §825.207(f)
[192] 29 CFR §825.207(c)
[193] 29 CFR §825.207(g)
[194] 29 CFR §825.208(c)
[195] 29 CFR §825.110(b)
[196] 29 CFR §825.110(d)
[197] 29 CFR §825.110(d)
[198] 29 CFR §825.112(b)
[199] 29 CFR §825.112(c)
[200] 29 CFR §825.112(d)
[201] 29 CFR §825.112(d)
[202] 29 CFR §825.201
[203] 29 CFR §825.114(b)
[204] 29 CFR §825.114(a)
[205] 29 CFR §825.114(c)
[206] 29 CFR §825.208(a)(1)
[207] 29 CFR §825.208(b)(2)
[208] 29 CFR §825.208(b)(2)
[209] 29 §825.208(a)(2)
[210] 29 CFR §825.208(a)(2)
[211] 29 CFR §825.302(c)

[212] 29 CFR §825.302(c)
[213] 29 CFR §825.208(b)(1)
[214] 29 CFR §825.100(d)
[215] 29 CFR §825.302(a)
[216] 29 CFR §825.302(b)
[217] 29 CFR §825.100(d)
[218] 29 CFR §825.306(a)
[219] 29 CFR §825.306(b)
[220] 29 CFR §825.307(a)(2)
[221] 29 CFR §825.307(c)
[222] 29 CFR §825.307(c)
[223] 29 CFR §825.307(c)
[224] 29 CFR §825.308
[225] 29 CFR §825.100(c)
[226] 29 CFR §825.100(d)
[227] 29 CFR §825.309(a)
[228] 29 CFR §825.309(b)
[229] 29 CFR §825.309(b)
[230] 29 CFR §825.214(b)