

## DISABILITY EMPLOYMENT DISCRIMINATION LAW IN MICHIGAN

by

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This article discusses the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101, *et seq*; MSA 3.550(101), *et seq*, as it applies to private sector employment in Michigan. The article also identifies differences between the PWDCRA and the federal Americans with Disabilities Act (ADA), 42 USC 12101, *et seq*.

The PWDCRA provides that the opportunity to obtain employment free of discrimination because of a disability is a guaranteed civil right. An employer has to accommodate a person with a disability unless the employer can demonstrate that the accommodation would impose an undue hardship.

The PWDCRA is applicable to employers with at least one employee. The ADA is applicable to employers with at least fifteen employees.

The purpose of the PWDCRA is to mandate employment of those with disabilities to the fullest extent reasonably possible. The PWDCRA is remedial. It is to be liberally construed by the courts. In interpreting the PWDCRA, federal precedents may be persuasive, but are not binding.

In order to establish a *prima facie* case of disability discrimination, a plaintiff must demonstrate that (1) she is disabled, (2) the disability is unrelated to her ability to perform the duties of the job, and (3) she was discriminated against.

In addition, the PWDCRA prohibits retaliation because a person has opposed a violation of the Act or exercised her rights under the PWDCRA. To establish a prima facie case of retaliation, a plaintiff must show (1) that she was engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an adverse employment action against the plaintiff, and (4) that there was a casual connection between the protected activity and the adverse employment action.

The PWDCRA defines a disability in three ways. First, a disability is a determinable physical or mental characteristic of an individual which substantially limits one or more major life activities and is unrelated to the individual's ability to perform the duties of the job in question. Second, there is a history of such a determinable physical or mental characteristic. Third, the person is regarded as having such a characteristic. If the employer acts on the belief that the employee has a disability, and discharges or otherwise discriminates against the employee because of that belief, it is irrelevant whether the employee actually has the disability. This is because in either situation the employer has undertaken the kind of discrimination prohibited by the PWDCRA.

Whether a characteristic substantially limits a major life activity is determined by looking at (1) the nature and severity of the characteristic, (2) its duration or expected duration, and (3) its permanent or long-term effect. Major life activities may include functions such as breathing, caring for oneself, hearing, learning, lifting, performing manual tasks, seeing, speaking, walking, and working.

Disability does not include a characteristic caused by the use of alcoholic liquor, if the characteristic prevents the person from performing the duties of her job, nor does it include the current illegal use of a controlled substance.

In determining whether a person has a disability within the meaning of the PWDCRA, the person's condition is considered as it presently exists with the aid of medication or other mitigating measures. The courts evaluate the physical or mental characteristic either (1) as it actually existed at the time of the person's employment, or (2) as it was regarded at the time of the employment decision. A condition that will become worse in the future such as multiple sclerosis might not qualify as a disability at the time of the earlier adverse employment action. A person with AIDS can be found to have a disability.

Pregnancy, by itself, is not a disability under the PWDCRA. This is because it is not a substantial limitation of a major life activity. A restriction limiting a person's lifting abilities to twenty-five pounds is usually not a substantial impairment of a major life activity.

On the other hand, when an employee is willing to continue to work, but is advised by her doctor not to work because of a temporary medical condition, the employee has not voluntarily quit her employment by following the doctor's advice. If the employer refuses to permit the employee to return to work when medically possible, the employee is entitled to unemployment compensation benefits.

A store clerk's Tourette Syndrome, which caused the employee to involuntarily articulate offensive language at work to customers, made him unqualified for his job. In addition, a court has permitted an employer to discharge an employee because the employee's psychological disorder caused her to express homicidal ideation regarding her supervisor to a psychiatrist.

Unrelated to the person's disability means, with or without accommodation, that the disability does not prevent the individual from performing the duties of the job in question. A person meets the PWDCRA's definition of being disabled even if some accommodation is necessary to allow that person to perform the duties of the job. A person otherwise qualified for a job is entitled to some accommodation if needed.

An employer's duty to accommodate a person with a disability does not include the duty to transfer the employee to a different job. In addition, the PWDCRA does not require that an employer allow a disabled employee to take a reasonable time off from work to heal. The ADA accommodation requirements, however, include possible transfer to a vacant non-promotion job and the consideration of possible short-term leave.

The PWDCRA provides that it is illegal for an employer to discriminate against a person because of a disability or genetic information. In addition, an employer cannot take action against a person because of a physical or mental examination that is not directly related to the specific job requirements. An employer cannot require a genetic test or the providing of genetic information as a condition of employment. The ADA does not contain explicit provisions proscribing genetic considerations.

A labor organization cannot try to get an employer to violate the PWDCRA or fail to adequately represent a person because of the person's disability.

In a failure to accommodate case, the employee has the initial burden of proving an employer violated the PWDCRA's accommodation mandates. If there is a prima facie case of failure to accommodate, the employer has the burden of proving that an accommodation would impose an undue hardship on the business. The PWDCRA provides some detailed guidelines,

including costs factors, concerning a private sector employer's accommodation obligations. The ADA does not contain express cost provisions concerning accommodation expenses.

The PWDCRA permits an employer to establish uniform policies concerning alcoholic liquor or illegal drug use. The PWDCRA also permits employers to establish uniform policies requiring employees returning from illness or injury absences to provide evidence of their ability to return to work.

It has been held that where a food-service employer has a reasonable suspicion that an employee has AIDS, the employer may ask the employee to undergo testing to determine whether an opportunistic infection in a communicable form is present.

An aggrieved person can bring a PWDCRA action in circuit court for appropriate injunctive relief and damages. There are no administrative exhaustion requirements prior to filing a PWDCRA action. An ADA plaintiff has to exhaust Equal Employment Opportunity Commission administrative requirements prior to filing a court case. Damages include reasonable attorneys' fees. Generally a PWDCRA civil action for failure to accommodate cannot be brought unless the person has previously requested accommodation.

The statute of limitations for a PWDCRA court case is three years. Under the ADA, an employee has to file a discrimination charge with the EEOC within 300 days of the alleged violation. An employer being sued for PWDCRA discrimination based on the terms of a collective bargaining agreement may seek contribution from a union that was a party to the agreement. There is probably no such contribution right in an ADA action.

An employee has an obligation to make mitigation efforts that are reasonable under the circumstances to find employment. The plaintiff is obligated to accept, if offered, substantially similar employment to that from which she was discharged.

The receipt of disability insurance payments does not necessarily stop or limit the back pay remedy. A disability may exist where there is a possibility of some physical capacity for work.

The trial court has discretion to grant front pay where reinstatement is impracticable or impossible.

Pre-dispute arbitration agreements are valid if the arbitration agreement does not waive substantive rights and remedies and the arbitration procedures are fair so that the employee may effectively maintain her statutory rights. Never-the-less, a PWDCRA claim is not barred by a prior arbitration decision under a collective bargaining agreement.

Furthermore, liability under the PWDCRA is not dependent on the actual existence of an employer-employee relationship. What is important is the ability of the defendant to adversely affect the terms and conditions of the person's employment.

In conclusion, the PWDCRA and ADA provide comprehensive provisions concerning the rights and responsibilities of employees and employers in the disability context. When used in tandem, the PWDCRA and ADA can be important tools for Michigan attorneys involved in the employment field.

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