

MICHIGAN

Courtney Nichols
PLUNKETT COONEY
38505 Woodward, Suite 100
Bloomfield Hills, Michigan 48226
Phone: (248) 594-6360
Fax: (248) 901-4040
Web: www.plunkettcooney.com
Email: cnichols@plunkettcooney.com

I. AT-WILL EMPLOYMENT

A. Statute

There is not a specific statute in Michigan pertaining to at-will employment.

B. Case Law

In *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980), the court stated that “contracts for permanent employment or for life have been construed by the court on many occasions. In general, it may be said that in the absence of distinguishing features, or provisions, or a consideration in addition to the services to be rendered such contracts are indefinite hirings, terminable at the will of either party.” *Id.* at 883; *Lynas v. Maxwell Farms*, 273 N.W. 315 (Mich. 1937).

To overcome the presumption of employment at-will a party must present sufficient proof of either a contractual provision for a definite term or a provision forbidding discharge in the absence of just cause. *Rowe v. Montgomery Ward & Company, Inc.*, 473 N.W.2d 268 (Mich. 1991).

Employment contracts for an indefinite duration are presumptively terminable at the will of either party for any reason or for no reason at all. *Rood v. Gen. Dynamics Corp.*, 507 N.W.2d 591 (Mich. 1993), *citing Lynas*, 273 N.W. 315. This presumption is not, however, “a substantive limitation on the enforceability of employment contracts but merely a rule of construction.” *Toussaint*, 292 N.W.2d 880. The presumption of employment at-will can be rebutted so that contractual obligations and limitations are imposed on the employer’s right to terminate. *Highstone v. Westin Eng’g, Inc.*, 187 F.3d 548 (6th Cir. 1999). “The presumption does not prevent proof of actual intent and should not be employed to permit unjustified evasion or promissory liability.” *Rowe*, 473 N.W.2d at 280 n.14 (Boyle, J., concurring). However, when an employment agreement is silent regarding the type of employment relationship, at-will, not just cause, employment is presumed. *Franzel v. Kerr Mfg. Co.*, 600 N.W.2d 66, 72 (Mich. Ct. App. 1999); *Rood*, 507 N.W.2d at 597.

Any at-will contract, whether an employment contract or not, will be permitted to recover more than nominal damages. *Everton v. Williams*, 715 N.W.2d 320, 323 (Mich. Ct. App. 2006). See also *Health Call Of Detroit v. Atrium Home & Health Care Services, Inc.*, 706 N.W.2d 843 (Mich. Ct. App. 2006).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

A provision in an employment contract providing that an employee shall not be discharged except for cause is legally enforceable whether by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements. *Renny v. Port Huron Hosp.*, 398 N.W.2d 327, 334 (Mich. 1986), citing *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980).

Although the termination of an employee due to economically motivated reductions in force ordinarily does not give rise to a wrongful discharge claim, a wrongful discharge claim may arise where an employer establishes procedures for the reduction of its work force and fails to comply with those procedures in terminating an employee. *King v. Michigan Consol. Gas Co.*, 442 N.W.2d 714 (Mich. Ct. App. 1989).

When the parties agree to leave the just-cause decision in the hands of the employer subject to certain procedural guarantees, there is no room for judicial second-guessing of the merits of the employer's determination, and the only question for a court in such a case is whether the employer actually decided good cause in accord with the contractually provided procedures, not whether the employer's decision was correct, sensible, or beneficial in the abstract. *Branham v. Thomas M. Cooley Law Sch.*, 2010 U.S. Dist. LEXIS 92558 (W.D. Mich. Sept. 7, 2010).

In *Rood v. General Dynamics Corp.*, 507 N.W.2d 591 (Mich. 1993), the court stated the following:

As recognized in *Toussaint* . . . employer policies and procedures may also become a legally enforceable part of an employment relationship if such policies and procedures instill 'legitimate expectations' of job security in employees.

* * *

While the [contract theory] is grounded solely on contract principles 'relative to the employment setting,' the [legitimate expectations theory] is grounded solely on public policy consideration.

* * *

The first step in analyzing a legitimate expectations claim under *Toussaint*, is to determine, what, if anything, the employer has promised.

* * *

As is readily apparent, not all policy statements will rise to the level of a promise. For instance, an employer's policy to act or refrain from acting in a specified way if the employer chooses is not a promise at all. Also apparent in the definition of promise is a need for specificity. The more indefinite the terms, the less likely it is that a promise has been made. And, if no promise is made, there is nothing to enforce.

Once it is determined that a promise has been made, the second step is to determine whether the promise is reasonably capable of instilling a legitimate expectation of just cause employment in the employer's employees. In this regard, we note that only policies and procedures reasonably related to employee termination are capable of instilling such expectations.

* * *

[W]e therefore hold, in all claims brought under the legitimate expectations theory of *Toussaint*, the trial court should examine employer policy statements, concerning employee discharge, if any, to determine, as a threshold matter, whether such policies are reasonably capable of being interpreted as promises of just cause employment. If the employer policies are incapable of such interpretation, then the court should dismiss the plaintiff's complaint on defendant's motion for summary disposition. MCR 2.111(C)(10). If, however, the employer's policies relating to employee discharge are capable of two reasonable interpretations, the issue is for the jury.

Rood, 507 N.W.2d at 597-98; 606-607. *See also Schippers v. SPX Corp.*, 507 N.W.2d 591 (Mich. 1993) (companion case to *Rood*).

Thus, a probationary period and a list of prohibited conduct could not create a legitimate expectation of just cause employment. The court ruled that the employer's handbook did not contain mandatory provisions or specific procedures regarding employee discharge. *Id.*

In *Manning v. City of Hazel Park*, 509 N.W.2d 874 (Mich. Ct. App. 1993), the plaintiff claimed that a conflict between the city code, imposing just cause, and the city charter, providing that the city manager was an employee at-will, created a legitimate expectation of job security. The court ruled that the combined statements did not create a legitimate expectation of job security. *Id.* at 878.

In *Nieves v. Bell Industries, Inc.*, 517 N.W.2d 235 (Mich. Ct. App. 1994), the plaintiff claimed the employer's policies and procedures created a legitimate expectation of just cause employment. However, the plaintiff's job application, handbook and compensation agreement all provided for at-will employment. Thus, the plaintiff could not maintain a wrongful discharge claim based upon a legitimate expectation of just cause employment.

A progressive discipline system does not create a legitimate expectation of just cause employment. *Coleman-Nichols v. Tixon, Inc.*, 513 N.W.2d 441, 448 (Mich. Ct. App. 1994), *citing Snell v. UACC Midwest, Inc.*, 487 N.W.2d 772 (Mich. Ct. App. 1992); *Kostello v. Rockwell Intern. Co.*, 472 N.W.2d 71 (Mich. Ct. App. 1991).

In *Meagher v. Wayne State University*, 565 N.W.2d 401 (Mich. Ct. App. 1997), the plaintiff alleged that she had a legitimate expectation of employment. Her contract stated that the “continuation of the assignment [was] dependent on satisfactory performance.” *Id.* The court stated a satisfaction contract is not a just cause or good cause contract. *Id.* “An employer may discharge under a satisfaction contract as long as the employer in good faith is dissatisfied with the employee’s performance or behavior.” *Id.* The employer is the sole judge of whether the person’s job performance is satisfactory. *Id.* However, the contract also read that renewal of the contract was “subject to the pleasure of the President or his or her designee.” *Id.* This statement can clearly be interpreted as an at-will contract with the right to terminate reserved by the university. *Id.* at 415.

Where a plaintiff knowingly violates defendant’s express policy, the grant of summary judgment for a breach of contract claim is proper. A non-exclusive list of common sense rules of behavior that leads to disciplinary action or discharge clearly reserves the right of an employer to

discharge the employee at-will. *Dolan v. Continental Airlines/Continental Exp.*, 563 N.W.2d 23, 30 (Mich. 1997).

In *Lytle v. Malady*, 579 N.W.2d 906, 458 Mich. 153 (Mich. 1998), on rehearing, the plaintiff relied on an employee handbook statement that “[n]o employee will be terminated without proper cause or reason and not until management has made a careful review of the facts” as evidence of a legitimate expectation of just cause employment. Sometime later, the employer added a provision that the employer reserved the right to terminate without cause, although the employer advised plaintiff that this provision only applied to new employees. *Id.* The court held that the policy, alone, was insufficient to overcome the presumption of at-will employment. *Id.* at 166.

To bring a legitimate expectations claim, an employee must point to an employer’s promises to the work force in general, not on a promise made to the individual employee. *Novak v Nationwide Mut. Ins. Co.*, 599 N.W.2d 546 (Mich. Ct. App. 1999).

2. Provisions Regarding Fair Treatment

In *Schippers v. SPX Corp.*, 507 N.W.2d 591 (Mich. 1993) (companion case to *Rood*, 507 N.W.2d 591), the plaintiff had been employed with the defendant for over 12 years when he was asked to transfer to their hy-lift division to drive their truck. Approximately one year after the transfer, plaintiff was placed on probation due to accidents. *Id.* Plaintiff was terminated following further investigation which revealed that he had been involved in accidents prior to his transfer in addition to the three following his transfer. *Id.*

Plaintiff commenced action challenging his termination based on a provision contained in the employee information handbook. The provision stated in relevant part:

Seal Power has adopted overall policies of employment and standards of conduct which are fair to all employees and in the best interest of the company. These policies and standards spell out your responsibilities to the company and the company’s obligations to you.

Id. at 599.

According to plaintiff, the handbook provision, in addition to statements made by supervisors, were supportive of his interpretation that he could only be terminated for just cause. *Id.* The Michigan Supreme Court rejected plaintiff’s argument that the written statements contained in the employee information handbook provided objective support for his interpretations of the supervisor’s statement. *Id.* While the handbook may promise fairness and contain policies designed “to maintain a spirit of goodwill, loyalty and harmony among all persons in the organization, such promises and policies are not inconsistent with employment at-will.” *Id.* at 599-602.

It is a question for the jury whether a policy manual, and defendant’s practice of putting displaced employees in new positions within the company, created an employment contract for just cause as well as a legitimate expectation of placement in another position for which plaintiff was qualified. *Foehr v. Republic Auto. Parts*, 538 N.W.2d 420, 421-22 (Mich. Ct. App. 1995).

3. Disclaimers

Once a disclaimer providing at-will employment is signed by an employee, excepting any subsequent modification, the employee may be terminated for any or no reason. *Scholz v. Montgomery Ward & Co., Inc.*, 468 N.W.2d 845, 849 (Mich. 1991).

According to *Lytle v. Malady*, 566 N.W.2d 582, 609 (Mich. 1997), the Michigan Supreme Court in *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980), created an exception to the general rule that employment relationships are terminable at the will of either party. The court suggested that a company could protect itself from liability by expressly disclaiming its intent to create anything but an at-will employment relationship.

In *Clement-Rowe v. Michigan Healthcare Corp.*, 538 N.W.2d 20 (Mich. Ct. App. 1995), the plaintiff signed a form stating that she was an at-will employee. She also testified that the clause allowed defendant to terminate her at any time and for any reason. *Id.* However, this disclaimer did not bar her claim for silent fraud, in which she alleged that the defendant had a duty to disclose its adverse financial conditions to her, failed to do so, and intended to induce her to rely on nondisclosure in accepting employment. *Id.* at 22-23.

4. Implied Covenants of Good Faith and Fair Dealing

In *Hammond v. United of Oakland, Inc.*, 483 N.W.2d 652 (Mich. Ct. App. 1992), the plaintiff pled multiple theories of liability after he alleged that he was forced to resign. On appeal, the court of appeals reversed the lower court's holding that plaintiff had properly stated a cause of action for bad faith under MCR 2.116(C)(8). *Id.* The court acknowledged that a covenant of good faith and fair dealing is an implied promise contained in every contract "that neither party shall do anything which will have the effect of destroying or injuring the rights of the other party to receive the fruits of the contract." *Id.* at 655 (citations omitted). Although recognizing the existence of such covenants, the court went on to say:

Michigan courts have been unwilling to recognize a cause of action for breach of an implied covenant of good faith and fair dealing in cases involving at-will or just cause employment relationships.

Id., citing *Cockels v. Int'l Bus. Expositions*, 406 N.W.2d 465, 468 (Mich. App. 1987); see also *Dahlman v. Oakland Univ.*, 432 N.W.2d 304, 306 (Mich. Ct. App. 1988).

However, an employer's attempt to injure an employee's rights may be highly relevant in a breach of contract action. *Hammond*, 483 N.W.2d at 655. The court in *Hammond* reasoned that "[a] promise to act in good faith may be encompassed by a just cause contract." *Id.*

Where the employee has secured a promise not to be discharged except for good cause, he has contracted for more than the employer's promise to act in good faith or not to be unreasonable In addition to deciding questions of fact and determining the employer's true motive for discharge, the jury should, where such a promise was made, decide whether the reasons for discharge amounts to good cause: Is it the kind

of thing that justifies terminating the employment relationship? Does it demonstrate that the employee was no longer doing the job?

483 N.W.2d at 655, quoting *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 882. (Mich. 1980).

Thus, if an employer does not act in good faith, the plaintiff may be entitled to damages for breach of contract. *Hammond*, 483 N.W.2d at 653. The court remanded the case for determination of whether a just cause employment contract existed. *Id.*

B. Public Policy Exceptions

1. General

Even though an employer may have grounds to discharge an employee, it "may not decide which employees to lay off on the basis of considerations that are prohibited by law, such as race, gender, or age." *Lytle v. Malady*, 566 N.W.2d 582, 594 (Mich. 1997).

Likewise, an at-will employee may not be discharged in violation of a clearly articulated, well-accepted public policy. *Edelberg v. Leco Corp.*, 599 N.W.2d 785 (Mich. Ct. App. 1999); *Meury v. Connie Kalitta Servs.*, 181 F.3d 102 (6th Cir. 1999).

Specifically, the discharge of an employee is contrary to public policy where: (1) there are explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty; (2) the alleged reason for discharge was the employee's failure or refusal to violate the law in the course of employment; or (3) the reason for the discharge was the employee's exercise of a right conferred by a well-established legislative enactment. *Suchodolski v. Michigan Consolidated Gas Co.*, 412 Mich 692, 695-95 (1982); see also *Vagts v. Perry Drug Store, Inc.*, 516 N.W.2d 102, 103 (Mich. Ct. App. 1994).

In *Suchodolski*, 316 N.W.2d 710, the plaintiff alleged that his discharge was motivated by his complaints to management regarding internal accounting irregularities. Although courts recognize an exception to the at-will employment relationship when grounds for terminating an employee are grossly contrary to public policy, the corporate management dispute at issue was not a violation of a "clearly mandated public policy that would support an action for retaliatory discharge." *Id.* at 712.

Although public policy can be construed very broadly, the effect of *Suchodolski*, 316 N.W.2d 710, and subsequent decisions is to limit the scope of termination in violation of public policy to those situations that fall within the examples provided in *Suchodolski* or those closely related. *Whiting v. Allstate Ins. Co.*, 2010 U.S. Dist. LEXIS 23442 (E.D. Mich. Mar. 15, 2010).

Further, a public policy claim is sustainable only where there is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue. *Dudewicz v. Norris-Schmid, Inc.*, 503 N.W.2d 645, 647 (Mich. 1993). For example, in *Dudewicz*, the court held that

the existence of the specific prohibition against retaliatory discharge in the Whistleblowers' Protection Act ("WPA") was determinative of the viability of a public policy claim. *Id.*

In *Harper v. AutoAlliance International, Inc.*, 392 F.3d 195 (6th Cir. 2004), the plaintiff contended that his discharge for allegedly stealing a coworker's cell phone was a pretext for discharging him for filing a worker's compensation claim and an EEOC charge. Although the court affirmed the district court's denial of the plaintiff's remand motion, the court recognized a common law exception to at-will employment and held that under Michigan law, the cause of action for retaliatory discharge in violation of public policy is not a worker's compensation claim but a common law tort that applies to many situations in the employment setting. *Id.*

In *Humenny v. Genex Corp., Inc.*, 390 F.3d 901, 902 (6th Cir. 2005), the plaintiff alleged retaliation after defendant employer discharged him for having been on sick leave for three months. The court noted that Michigan courts have recognized a public policy exception to the general rule that an at-will employee may be terminated at any time for any reason. *Id.* Michigan courts, however, have limited this public policy exception by holding that as a general rule, the remedies provided by statute for violation of a right having no common law counterpart are exclusive, not cumulative. *Id.* at 907. Furthermore, the court held that in a public policy claim, the first issue is whether a plaintiff has identified a well-established legislative enactment that addresses the particular conduct at issue. *Id.* If not, a court should never reach the question of whether the particular statute provides a remedy to plaintiffs who allege violations of the statute. *Id.* at 907.

See also statutes cited in Section X.V. below.

2. Exercising a Legal Right

In *Phillips v. Butterball Farms Co., Inc.*, 531 N.W.2d 144 (Mich. 1995), the plaintiff alleged that she was terminated for filing a worker's compensation claim. The trial court held that because her employment was terminable at-will and she had no reasonable expectation of continued employment, her damages were limited. *Id.* Although the court of appeals affirmed, the Michigan Supreme Court ultimately reversed, holding that:

[Plaintiff] had a reasonable expectation that she would not be terminated for filing a worker's compensation claim, despite the at-will nature of her employment relationship. Recovery under the public policy exceptions to the employment at-will doctrine arises independently of the employment contract.

Id. at 150.

In *Edelberg v. Leco Corp.*, 599 N.W.2d 785 (Mich. Ct. App. 1999), after plaintiff was suspended for sleeping on the job, and in lieu of discharge, defendant offered to suspend plaintiff without pay if he signed a "Last Chance Agreement" which waived and released any future claims against defendant. Plaintiff alleged that he was terminated, in contravention of public policy, after refusing to sign the agreement; plaintiff claimed that signing the agreement would have waived his rights under the Worker's Disability Compensation Act ("WDCA") and the

Michigan Employment Security Act ("MESA"). *Id.* Because the statutory rights conferred under the WDCA and MESA cannot be waived, the court held that plaintiff was not exercising a statutorily-provided right when he refused to sign the agreement. *Id.* Accordingly, plaintiff was not discharged in violation of public policy. *Id.* at 787.

3. Refusing to Violate the Law

In *Trombetta v. Detroit Toledo and Ironton Railroad*, 265 N.W.2d 385 (Mich. Ct. App. 1978), plaintiff commenced an action against the railroad for wrongful discharge. He alleged that he was terminated for refusing to alter pollution control reports in violation of state law. *Id.* The trial court granted the railroad's motion for accelerated judgment and plaintiff appealed. *Id.*

The Court of Appeals of Michigan held that plaintiff stated a valid cause of action:

It is without question that the public policy of this state does not condone attempts to violate its duly enacted laws.

Plaintiff's claim that defendants discharged him from their employ when he refused to manipulate and adjust sampling results used for pollution control reports which were filed with the state pursuant to [Michigan statutes]. Such action would clearly violate the law of the state.

Id. at 388 (citations omitted). The court held that the trial court erroneously granted the railroad's motion for summary judgment and reversed the decision.

In *Piasecki v. City of Hamtramck*, 640 N.W.2d 885 (Mich. Ct. App. 2001), the plaintiff alleged that she was terminated in violation of public policy after she refused to produce a status report for the new mayor regarding the previous mayor's individual back taxes. Because all city tax information was considered "confidential" pursuant to a local ordinance, plaintiff alleged that her disclosure would have violated the law. *Id.* The court of appeals held that summary disposition for defendant was proper where an express exception to the ordinance provided for official disclosure of such information for purposes of enforcing the ordinance. *Id.* at 43.

In *Serrin-Brandel v. Pier I Imports (U.S.), Inc.*, 2004 U.S. Dist. LEXIS 10379 (E.D. Mich. May 19, 2004), the court held that an employee has a right to complain of violations of the law by an employer or a co-worker, and discharging an employee for engaging in such conduct violates Michigan public policy. However, the Michigan Supreme Court has held that when an employee's complaint to authorities falls within the scope of the WPA, the public policy claim is preempted and the claim must proceed on the Whistleblowers' Protection Act claim alone. *Id.* at *17.

When there is no direct evidence that an employer's adverse action against an employee was motivated by retaliation for engaging in the protected activity, Michigan courts utilize a burden shifting framework to determine if a plaintiff has shown retaliatory motive by circumstantial evidence. Under this framework, to prevail, a plaintiff must present a prima facie case, at which point the defendant must come forward with a legitimate, non-discriminatory

reason for its action. If the defendant is able to offer such a reason for the adverse employment action, the plaintiff must offer evidence that the defendant's justification is a pretext that masks its true retaliatory intent. *Id.* at *24.

4. Exposing Illegal Activity (Whistleblower Issues)

In *Chandler v. Dowell Schlumberger Inc.*, 572 N.W.2d 210 (Mich. 1998), defendant was cited by the Michigan Department of Transportation for transporting hydrochloric acid in an uncertified trailer. Plaintiff alleged that he was terminated because of the employer's suspicion that plaintiff was the person who reported the violation. *Id.* The Michigan Court of Appeals affirmed the lower court's dismissal of plaintiff's action under the Whistleblowers' Protection Act ("WPA"), which provides in relevant part:

[A]n employer shall not discharge, threaten, or otherwise discriminate against an employee because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of the state, or the United States to a public body, unless the employee knows that the report is false

Mich. Comp. Laws § 15.362.

The court in *Chandler* held that plaintiff could not establish a prima facie case because he did not allege that he reported, or attempted to report, violation of a law, regulation, or rule. The WPA does not cover those employees perceived to be whistleblowers, only those persons who have engaged in protected activity as defined by the Act. *Chandler*, 572 N.W.2d at 216.

In *Whitman v. City of Burton*, 831 N.W.2d 223 (Mich. 2013), the Michigan Supreme Court held that a plaintiff's motivation is not relevant to the issue of whether a plaintiff has engaged in a protected activity under the WPA, and proof of a primary motivation is not a prerequisite to bringing a whistleblowers' claim. The court noted that nothing in the statutory language of the WPA addresses an employee's motivation for engaging in protected conduct, nor does the WPA mandate that an employee's primary motivation be a desire to inform the public of matters of public concern. *Id.* at 226.

In *Nair v. Oakland County Community Mental Health Authority*, 443 F.3d 469 (6th Cir. 2006), the plaintiff's letter to a county-appointed Board of Authority regarding reducing his position from full-time to half-time in order to trim administrative expenses, provided no evidence for a WPA claim. Plaintiff's burden was to show that he had reported or imminently was going to report a violation of law to a public body. *Id.* The court found that nowhere in the letter did plaintiff state he was going to report such a violation. *Id.* at 480. Rather, he generically mentioned "my legal, ethical, and moral obligations" in the letter and did not show that he had the intent to report a violation to the Board of Authority under the WPA.

In *Lewandowski v. Nuclear Management Company, LLC*, 724 N.W.2d 718 (Mich. Ct. App. 2006), plaintiff's claim under the WPA was properly dismissed because the Nuclear Regulatory Commission, the entity plaintiff accused of regulatory violations, was not a "public

body” under the statute. The court of appeals determined that the Nuclear Regulatory Commission was a federal agency, and that the WPA definition of “public body” did not include federal agencies. *Id.* The court defined “public body” under the Michigan statute as state and local government, and federal law enforcement agencies. *Id.* at 123, 124.

In *Brown v. Mayor of Detroit*, 723 N.W.2d 464, (Mich. Ct. App. 2006), the Michigan Court of Appeals held that triable issues existed regarding the conduct of Mayor Kilpatrick’s allegedly slanderous public statements made about the plaintiff, a Detroit police officer. The statements accused the police officer of lying about an investigation into the mayor’s administration, and exposed plaintiff as a whistleblower. *Id.*

The court also rejected the mayor’s argument that plaintiff was not covered by the WPA. *Id.* The mayor argued that plaintiff did not suffer an adverse employment action, and therefore had no WPA claim. *Id.* The court held that the mayor’s statements about, and exposure of, plaintiff and his family, were not only threatening, but enough to undermine plaintiff’s ability to continue working as a Detroit police officer. *Id.* Thus, a reasonable juror could have found that plaintiff was constructively discharged, and suffered an adverse employment action as required by the WPA. *Id.*

Following this decision, the Michigan Supreme Court reviewed the issue of reporting to a “public body,” and overturned the Michigan Court of Appeals on this issue. Specifically, the court held that the WPA does not require an employee of a public body to report violations or suspected violations to an outside agency or higher authority to receive the protections of the WPA, nor does it limit its protection to those employees who are acting outside the scope of their job duties when reporting violations or suspected violations. *See Brown v. Mayor of Detroit*, 734 N.W.2d 514 (Mich. 2007).

In *Dolan v. Continental Airlines/Continental Express*, 563 N.W.2d 23 (Mich. 1997), the plaintiff was terminated after she failed to obtain the approval of her supervisors prior to contacting drug enforcement officers regarding suspected drug trafficking or terrorist activities. The plaintiff filed an action under the WPA. *Id.* The court granted the defendant’s motion for summary disposition. *Id.* Plaintiff amended her complaint adding a new charge of wrongful termination in violation of public policy. *Id.* The plaintiff’s claims were dismissed and she appealed. The court of appeals affirmed the dismissal. *Id.* The Michigan Supreme Court granted certiorari and held that the WPA applied to protect third party violators who had no connection to the business. *Id.* The court declined to limit the applicability of the WPA to violations reported to only the employer, the reported violation in this case was sufficiently related to the employment setting to be protected under the WPA. *Id.* at 25-28.

In *Henry v. City of Detroit*, 594 N.W.2d 107 (Mich. Ct. App. 1999), the plaintiff was terminated after he testified regarding violations of the board of review’s rules, and the board’s general inability to perform its duties. The court designated plaintiff a “type 2 whistleblower.” *Id.* at 412. A “type 2 whistleblower” is an employee whose participation in a court action is requested by a public body. *Id.* The court read the WPA literally and concluded that plaintiff’s participation was requested and that a law enforcement agency is a public body. *Id.* at 111-12. Therefore, the plaintiff’s discharge was retaliatory and improper under the WPA. *Id.*

III. CONSTRUCTIVE DISCHARGE

A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntarily resignation. *Hammond v. United of Oakland, Inc.*, 483 N.W.2d 652 (Mich. Ct. App. 1992).

A constructive discharge is the legal equivalent of a firing. As the Michigan Supreme Court explained in *Champion v Nationwide Security, Inc.*, 545 N.W.2d 596 (Mich. 1996) reversed on other grounds by *Hamed v. Wayne County*, 803 N.W.2d 237 (Mich. 2011).

It is well established that the law does not differentiate between employees who are actually discharged and those who are constructively discharged. In other words, once individuals establish their constructive discharge, they are treated as if their employer had actually fired them. The decision to terminate in a constructive discharge case, therefore, is imputed to the employer.

Id. at 610 (citation omitted)

This principle was reaffirmed by the Michigan Supreme Court in *Jacobson v Parada Fed Credit Union*, 577 N.W.2d 881 (Mich. 1998), overruled in part on other grounds by *Joliet v Pitoniak*, 715 N.W.2d 60 (Mich. 2006).

In *Joliet*, 715 N.W.2d 60, the Michigan Supreme Court held that "a constructive discharge is not a cause of action, but simply the culmination of alleged wrongful actions that would cause a reasonable person to quit employment." *Id.* at 68. Further, the court said that constructive discharge is not a separate action by itself, rather it is a defense that a plaintiff can use to preclude the defendant from claiming that the plaintiff voluntarily left his employment. *Id.* at 68.

According to the *Joliet* court, in a constructive discharge it is the employer's wrongful acts that start the period of limitations by causing the employee to feel compelled to quit, it is not the employee's response that triggers the period of limitations. *Id.* at 68.

The *Joliet* court thereby overruled the holding in *Jacobson*, 577 N.W.2d 881, which had stated that the statute of limitations ran from the time the plaintiff resigned. *Id.* The *Joliet* court held:

[W]e hold that a claim of discrimination accrues when the adverse *discriminatory acts* occur. Thus, if a plaintiff's complaint does not make out a claim of *discriminatory discharge*, a claim of constructive discharge for a separation from employment occurring after the alleged discriminatory acts cannot serve to extend the period of limitations for discriminatory acts committed before the termination.

Id. at 63.

A finding of constructive discharge depends on the facts of each case. In *Wolff v. Automobile of Michigan*, 486 N.W.2d 75 (Mich. Ct. App. 1992), whether or not a plaintiff was constructively discharged was a question of fact for the jury, where the plaintiff was terminated from one position and then offered a less desirable job, which paid less and stripped the plaintiff of responsibility.

In *Radtke v. Everett*, 501 N.W.2d 155 (Mich. Ct. App. 1993), a veterinary technician brought suit against the hospital she worked at for constructive discharge based on sex after a supervising doctor at the hospital sexually harassed the technician and physically restrained her on a couch. The Michigan Court of Appeals found that a single incident of sexual harassment, if sufficiently severe, may constitute a hostile work environment and serve as a basis for a constructive discharge claim. *Id.* at 160.

In *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446 (6th Cir. 2005), an employee who found extreme difficulty in obtaining maternity leave was threatened with demotion for having left work on maternity leave upon doctor's orders. The court held that although a threat of demotion alone does not constitute constructive discharge, a threat of demotion coupled with other factors is sufficient to establish constructive discharge. *Id.* In order to demonstrate constructive discharge, a plaintiff must adduce evidence to show that (1) the employer deliberately created intolerable working conditions, as perceived by a reasonable person, and (2) the employer did so with the intention of forcing the employee to quit. *Id.* at 451.

In *Myers v. Todd's Hydroseeding & Landscape, L.L.C.*, 368 F. Supp. 2d 808 (E.D. Mich. 2005), an employee plaintiff sued defendant employer alleging federal and state law hostile work environment, among other claims. The court held that a constructive discharge requires a determination that working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. *Id.* at 811.

In *Manning v. City of Hazel Park*, 509 N.W.2d 874 (Mich. Ct. App. 1993), plaintiff was asked to resign after the mayor and mayor pro tempore informed plaintiff that the city council was planning to remove plaintiff from her position. Plaintiff allegedly resigned to protect her pension and retirement benefits, but she subsequently filed suit alleging sex and age discrimination. *Id.* Defendants argued that plaintiff was asked to resign because her work performance was unsatisfactory and because she had awarded herself unauthorized pay increases. *Id.* However, the court found that defendant's legitimate nondiscriminatory reasons for the discharge were merely pretext. *Id.* at 696.

Although one of defendant's complaints was the plaintiff's salary, the plaintiff's replacement, a 30-year-old male, received a starting salary that was more than plaintiff's final salary. *Id.* In fact, all of the 16 applicants who were interviewed were male. *Id.* Furthermore, defendants were soliciting applicants for plaintiff's position prior to their alleged discovery of plaintiff's unauthorized salary increases. *Id.* Based on the above-mentioned factors, the court found that a juror could reasonably believe that plaintiff was constructively discharged by defendants despite the fact that she officially retired.

In *Vagts v. Perry Drug Stores, Inc.*, 516 N.W.2d 102 (Mich. Ct. App. 1994), where a plaintiff's resignation and refusal to commit an illegal act occurred at the same time, plaintiff did not give defendant an opportunity to act appropriately or inappropriately in reaction to her refusal. Therefore, plaintiff was not constructively discharged because the defendant did not have an opportunity to make plaintiff's working conditions so intolerable that she was forced to involuntarily resign. *Id.* at 104-105.

Most recently, the Michigan courts have responded by limiting constructive discharge claims. *Chambers v. Trettco, Inc.*, 614 N.W.2d 910 (Mich. 2000); *Plumb v. Abbott Labs.*, 60 F. Supp. 2d 642 (E.D. Mich. 1999). In *Chambers*, the court stated that *Champion* did not "extend unlimited liability to employers whose supervisors rape subordinates;" rather, it merely clarified that "a constructive discharge, like an active discharge, may constitute a decision affecting employment." *Chambers*, 614 N.W.2d at 322.

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Termination

A just cause employment relationship may be based on express written promises. A plaintiff must show a clear and unequivocal written statement that a reasonable person in the position of the promisee would interpret as a promise to terminate only for just cause. For example, in *Toussaint v Blue Cross & Blue Shield*, 292 N.W.2d 880, 884 (Mich. 1980), the employee handbook given to the plaintiff during the hiring process expressly provided that employees could not be terminated except for just cause.

Just cause has been defined to include voluntary acts of the employee. However, the parameters of just cause are best defined through case-by-case adjudication. *Calvert v. Gen. Motors Corp., Buick Motor Division*, 327 N.W.2d 542, 547 (Mich. Ct. App. 1982).

In a wrongful discharge case, a plaintiff establishes a prima facie case by: (1) proving the existence of a contract, (2) producing testimony that he or she performed it up to the time of discharge, and (3) providing proof of damages. The defendant then has to prove that plaintiff breached the contract and that the discharge was legal. *Rasch v. City of East Jordan*, 367 N.W.2d 856 (Mich. Ct. App. 1985). In *Rasch*, plaintiff appealed a no cause of action based on the court's failure to instruct the jury that defendant had the burden of proving that just cause existed for dismissing plaintiff. The court held that the trial court erred in failing to inform the jury regarding defendant's burden of proof. *Id.* at 858.

Just cause may be defined as misfeasance, nonfeasance, or malfeasance in the performance of one's duties. *City of Hazel Park v. Potter*, 426 N.W.2d 789, 790 (Mich. Ct. App. 1988).

The existence of a just cause contract and whether defendant's actions breached the contract are questions for the jury to determine. *Mourad v. Auto. Club Ins. Ass'n*, 465 N.W.2d 395, 398 (Mich. Ct. App. 1991).

B. Status of Arbitration Clauses

In *Simon v. Pfizer Inc.*, 398 F.3d 765 (6th Cir. 2005), the Sixth Circuit held that when an employment agreement contains an arbitration clause, the court should apply a presumption of arbitrability, resolve any doubts in favor of arbitration, and should not deny an order to arbitrate unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Id.*

Pre-dispute agreements to arbitrate statutory employment discrimination claims are valid if: the parties have agreed to arbitrate the claims (there must be a valid, binding, contract); (2) the statute itself does not prohibit such agreements; and (3) the arbitration agreement does not waive the substantive right and remedies of the statute and the arbitration procedures are fair so that the employee may effectively vindicate his statutory rights. *Rembert v. Ryan's Family Steakhouse, Inc.*, 596 N.W.2d 208, 226 (Mich. Ct. App. 1999).

In *Wold Architects and Engineers v. Strat*, 713 N.W.2d 750 (Mich. 2006), the Michigan Supreme Court held that the Michigan legislature did not preempt common law arbitration when it enacted the Michigan Arbitration Act ("MAA").

In *Strat*, the plaintiff, an architectural engineering firm, entered into an agreement to purchase the defendant's assets under an agreement that did not include an arbitration provision. *Id.* The plaintiff also entered into an agreement to hire the owner of the defendant company; however, this employment agreement contained an arbitration provision which provided: "the parties agree to submit any disputes arising from this Agreement to binding arbitration . . . under the Voluntary Labor Arbitration Rules." *Id.* When a dispute arose, the defendant filed a demand for arbitration, plaintiff complied, and proceedings began. *Id.* At the same time, the plaintiff also began to question the scope of the arbitration, and ultimately revoked its agreement to arbitrate on the basis that defendant had asserted claims that fell under the purchase agreement, which did not contain an arbitration clause. *Id.* The plaintiff then sought a declaratory judgment that (1) the pending arbitration was invalid and that the employment contract arbitration provision was unilaterally revocable because it lacked the requisite language to be a statutory agreement. *Id.*

The Michigan Supreme Court, in holding for the plaintiff, reasoned that the arbitration agreement in the employment contract was not enforceable under the MAA because it specifically provided that the arbitration was "under the Voluntary Labor Arbitration Rules," rather the Commercial Dispute Resolution procedures, which would actually govern. *Id.* Since the arbitration agreement did not comply with the MAA the parties were found to have agreed to common law arbitration under Michigan law. *Id.* Common law arbitration, unlike statutory arbitration, is characterized by its unilateral revocation rule which allows either party to terminate the arbitration at any time before the rendering of the award. *Id.* at 231.

The court held that the legislature did not intend to preempt common law arbitration when it enacted the MAA, and that common law will act as a default to statutory arbitration. *Id.* They also added that if parties wish to conform their agreements to provisions of the MAA, they "must put it in writing and require that a circuit court render judgment upon the award made

pursuant to the agreement.” *Id.* at 235. Otherwise, the agreement will be treated as an agreement for common law arbitration and the unilateral revocation rule will apply. *Id.*

An arbitration agreement is unenforceable if it is not a binding contract. In *Heurtebise v. Reliable Bus. Computers*, 550 N.W.2d 243 (Mich. 1996), the plaintiff was discharged due to her regular practice of taking lunch breaks past the established one-hour period. The defendant terminated plaintiff, but not her lunch partner, who was male. *Id.* The plaintiff filed a claim alleging gender discrimination. *Id.* The defendant brought a motion to dismiss and in the alternative to compel arbitration. *Id.* The defendant relied on its employee handbook which provided that all disputes involving money damages would go to a final and binding arbitration. *Id.* at 245.

The court stated that there was “no public policy” prohibition against the enforcement of a valid arbitration agreement that provides meaningful arbitration in matters involving civil rights questions. *Id.* However, the arbitration agreement in the instant case was not binding because there was no binding contract. The handbook provided:

This document is intended to establish and clarify certain employment policies, practices, rules and regulations (hereinafter collectively referred to as ‘policies’) of Reliable Business Computers, Inc., (hereinafter referred to as ‘company’). Except as may otherwise be provided, the policies will apply to all company employees and it is each employee’s responsibility to assure that his/her own conduct is in conformity with those policies. *It is important to recognize and clarify that the policies specified herein do not create any employment or personal contract, express or implied*, nor is it intended nor expected that the information provided in this document will provide sufficient detail to answer any and all questions which may arise. **NOTWITHSTANDING ANY OF THE SPECIFIC POLICIES HEREIN, EACH EMPLOYEE HAS THE ABSOLUTE RIGHT TO TERMINATE HIS/HER OWN EMPLOYMENT AT ANY TIME, WITHOUT NOTICE AND FOR ANY REASON WHATSOEVER, AND THE COMPANY HAS THE SAME RIGHT.**

Id. at 247. The Michigan Supreme Court held “that the handbook [had] not created an enforceable arbitration agreement with respect to [the] dispute.” The defendant did not intend to be bound by provisions in the handbook. *Id.* at 246-47.

The *Heurtebise* holding has been examined in numerous Michigan Court of Appeals decisions. Most commonly, courts have examined the express language in the *Heurtebise* employment manual, against their own cases’ express language. *See, e.g., Hicks v. EPI Printers, Inc.*, 702 N.W. 2d 883 (Mich. Ct. App 2005).

For example, in *Hicks*, the court found that the employment manual contained no express language that indicated the contract was not intended to create an enforceable agreement, and a fair reading of the contract “leads to the conclusion that the responsibilities intended were contractual.” *Id.* at 887. This court further held that arbitration provisions in employment manuals are binding, and just because an employer’s manual states that it may be modified in the

future does not indicate that the employer did not intend to be bound by the agreement. *Id.* at 888.

In *Stewart v. Fairlane Cmty. Mental Health Ctr.*, 571 N.W.2d 542 (Mich. Ct. App. 1997), the defendant alleged the plaintiff's acknowledgement that she received a copy of the defendant's revised personnel policies manual which contained an arbitration provision, referred to as a "mutual" agreement, bound the plaintiff to the arbitration agreement. Applying the Michigan Supreme Court's opinion in *Heurtebise*, the Michigan Court of Appeals found that in the absence of an intent to be bound, an arbitration agreement in the personnel policy handbook is unenforceable with regard to a claim under the Whistleblowers' Protection Act. *Id.* at 548.

The Michigan Court of Appeals was directed by the Michigan Supreme Court to reconsider the case of *Rushton v. Meijer, Inc.*, 570 N.W.2d 271 (Mich. Ct. App. 1997), in light of *Heurtebise*. The dissimilarity in the cases is marked. In *Rushton*, 570 N.W.2d at 273, the personnel handbook did not indicate that the defendant did not intend to be bound. Rather than an at-will termination policy, the handbook contained "considerations running to the employee in the form of an express promise of termination from employment only for just cause." *Id.* Therefore, there was an expression of an intent to be bound. *Id.* Although the handbook stated that the employer reserved the right to modify or delete policies, at the time of the cause of action the employer had not implemented any changes, and therefore both parties were bound, and the exclusive alternative dispute resolution procedure for handling grievances was proper. *Id.* at 273-74.

In *Hergenreder v. Bickford Senior Living Group, L.L.C.*, 25 AD Cases 97, No. 10-1474 (6th Cir. 2011), the Sixth Circuit held that a reference to an arbitration requirement contained in an employee handbook did not bind the plaintiff-employee from suing the defendant-employer for violation of the Americans with Disabilities Act. The court concluded that the plaintiff had not agreed to arbitrate her claim merely by continuing to work at the company, despite the fact that the plaintiff acknowledged that she read and understood the provision. *Id.* The handbook merely mentioned the company's Dispute Resolution Procedure (DRP) but never itself used the word "arbitration." *Id.* Although the defendant claimed it generally distributed the DRP to employees, it did not argue, much less prove, that the DRP was made available specifically to the plaintiff. *Id.*

V. ORAL AGREEMENTS

"Parol evidence is not admissible to vary a contract that is clear and unambiguous, but may be admissible to prove existence of ambiguity and to clarify the meaning of an ambiguous contract." *Meagher v. Wayne State Univ.*, 565 N.W.2d 401, 415 (Mich. Ct. App. 1997). "Parol evidence is admissible to show that there was an antecedent oral agreement not intended by the parties to be integrated into [a] writing." *Detroit Edison, Co., v. Zoner*, 163 N.W.2d 496, 503 (Mich. Ct. App. 1968).

Oral statements may be as binding as written statements. *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880 (Mich. 1980). "Oral statements of job security must be clear

and unequivocal to overcome the presumption of employment at-will.” *Rood v. Gen. Dynamics Corp.*, 507 N.W.2d 591 (Mich. 1993).

However, an employee who signs an employment agreement that provides for termination at the will of either the employer or the employee assents to at-will employment and may not maintain an action for wrongful discharge based on a prior oral agreement for termination for just cause only. *Nieves v. Bell Indus., Inc.*, 517 N.W.2d 235 (Mich. Ct. App. 1994).

For example, in *Barber v. SMH (US), Inc.*, 509 N.W.2d 791 (Mich. Ct. App. 1993), the plaintiff was hired by the defendant to sell watches to independent jewelry stores. During pre-employment negotiations, the plaintiff alleged he and the defendant discussed termination from employment. *Id.* The plaintiff stated that the defendant promised to employ him “as long as he was profitable and doing the job.” *Id.* After termination, the plaintiff filed an action claiming breach of contract providing termination for just cause. *Id.* The court in reviewing the oral statement found it insufficient to support an agreement for just cause termination. *Id.* at 795.

A. Promissory Estoppel

In order to state a claim for promissory estoppel, a plaintiff must demonstrate: (1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; (3) which in fact produced reliance or forbearance of that nature; and (4) in circumstances such as the promise must be enforced if injustice is to be avoided. *Ardt v. Titan Ins. Co.*, 593 N.W.2d 215, 219 (Mich. Ct. App. 1999). The doctrine of promissory estoppel is cautiously applied. *Barber v. SMH (US), Inc.*, 509 N.W.2d 791, 797 (Mich. Ct. App. 1993). In determining whether a requisite promise exists, the court will objectively examine the words and actions surrounding the transaction in question as well as the nature of the relationship between the parties and the circumstances surrounding their actions. *State Bank of Standish v. Curry*, 500 N.W.2d 104 (Mich. 1993).

In *Filcek v. Norris-Schmid, Inc.*, 401 N.W.2d 318 (Mich. Ct. App. 1986), the plaintiff was offered a position with defendant on April 17, 1992. He accepted, but stated that he needed to give his present employer one week notice of resignation. *Id.* Both parties agreed that plaintiff would begin working on April 26, and on April 19, the plaintiff resigned from his prior position. *Id.* The next day, the plaintiff was informed by defendant that the position was no longer available. *Id.* The plaintiff was unable to regain his previous job, and he filed suit seeking damages for breach of contract. *Id.* The Michigan Court of Appeals affirmed a verdict for the plaintiff, and held that where a contract of employment to begin at a future time is totally broken by the employer’s refusal to begin such employment at that time, the employee has a single action for his injury, measured by the full amount of salary or wages promised, less what he can earn by reasonable effort in other similar employment. *Id.* at 319.

Unlike the plaintiff in *Filcek*, in *Marrero v. McDowell Douglas Capital Corp.*, 505 N.W.2d 275 (Mich. Ct. App. 1993), the plaintiff could not establish that he relied on a promise of employment from the defendant corporation because the plaintiff’s resignation and relocation preceded the meeting at which an alleged promise of a three-year contract was made. The court further held that resignation from one’s position to assume another and relocation of one’s family

are customary and necessary incidents of changed jobs rather than consideration to support a claim of promissory estoppel. *Marrero*, 505 N.W.2d 275; *Meerman v. Murco, Inc.*, 517 N.W.2d 832 (Mich. Ct. App. 1994).

In addition, an express at-will provision in a written employment contract will trump a subsequent oral statement of job security. In *Novak v. Nationwide Mut. Ins. Co.*, 599 N.W.2d 546 (Mich. Ct. App. 1999), the Michigan Court of Appeals held that an employee who signs an at-will employment contract assents to at-will employment and cannot maintain a cause of action based on the express oral statement or a promissory estoppel theory. *Id.* at 550.

B. Fraud

In order for a plaintiff to maintain a cause of action for fraud in an employment context, evidence of the following elements must be demonstrated: (1) a material representation; (2) that is false; (3) that defendant made knowing it to be false or that was made recklessly without any knowledge of its truth and as a positive assertion; (4) with the intent that it should be acted upon by the plaintiff; (5) that it was acted upon by plaintiff, and (6) resulted in plaintiff's injury. *Higgins v. Lawrence*, 309 N.W.2d 194 (Mich. Ct. App. 1981); *see also Dressler v Cradle of Hope Adoption Ctr., Inc.*, 358 F. Supp. 2d 620 (E.D. Mich. 2005).

Fraud must be proven by clear, satisfactory, and convincing evidence. Each fact must be proven with a reasonable degree of certainty. The absence of any of the facts is fatal to the claim. *Higgins*, 309 N.W.2d at 197.

A statement is a material representation if made and later proved to be false. If defendant made the statement in response to a specific inquiry from plaintiff, he may have known it was untrue or made it without any knowledge. However, if plaintiff relied upon the statement and was injured as a result, all the elements of fraud are present. *Clement-Rowe v. Michigan Healthcare Corp.*, 538 N.W.2d 20 (Mich. Ct. App. 1995).

However, there can be no fraud where the plaintiff has a reasonable means of determining the truth. *Montgomery Ward v. Williams*, 47 N.W.2d 607 (Mich. 1951). If a plaintiff has the information available to him in an employment agreement, he cannot claim fraud merely because he chose to ignore the information. *Nieves v. Bell Indus., Inc.*, 517 N.W.2d 235, 237 (Mich. Ct. App. 1994). A mere broken promise does not constitute fraud, nor is it evidence of fraud; and future promises are contractual and cannot be the basis for a fraud action. *Marrero*, 505 N.W.2d 275.

C. Statute of Frauds

The Statute of Frauds also applies to oral agreements in employment cases. Where an oral agreement is not capable of being performed in one year, then it violates the Michigan Statute of Frauds. Mich. Comp. Laws § 566.132(a). A definite-term employment relationship that is to last for more than one year must be memorialized in a writing sufficient to satisfy the Statute of Frauds. *Kamalnath v. Mercy Mem'l Hosp. Corp.*, 487 N.W.2d 499 (Mich Ct. App. 1992).

However, if there is any possibility that an oral contract is capable of being completed within a year, it is not within the Statute of Frauds, even though it is clear that the parties may have intended and thought it probable that it would extend over a longer period, and even though it does so extend. *Hill v. Gen. Motors Acceptance Corp.*, 525 N.W.2d 905 (Mich. Ct. App. 1994). *See also Dumas v. Auto Club Ins. Ass'n*, 473 N.W.2d 652 (Mich. Ct. App. 1991) (holding that an employer's oral assertion that a compensation program would 'last forever' violated the Statute of Frauds).

VI. DEFAMATION

A. General Rule

The elements of a claim of defamation are (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statements irrespective of special harm, or the existence of special harm caused by the publication. The elements must be specifically plead, including the allegations with respect to the defamatory words, the connection between the plaintiff and the defamatory words, and the publication of the alleged defamatory words. *Gonyea v. Motor Parts Fed. Credit Union*, 480 N.W.2d 297, 299 (Mich. Ct. App. 1991).

1. Libel

Libel is a statement, of and concerning the plaintiff, which is false in some material respect; is communicated to a third person by printed or written material, signs, or pictures, and has a tendency to harm a person's reputation. M. Civ. JI 118.01-118.03.

2. Slander

Slander is a statement, that is of and concerning the plaintiff, that is false in some material respect, is communicated to a third person by words or gestures, and has a tendency to harm a person's reputation. M. Civ. JI 188.02, 118.03.

Under the Government Tort Liability Act, the City of Detroit Mayor, Kwame Kilpatrick, was entitled to absolute immunity from liability for allegedly slanderous statements he made during a television interview in which he was responding to questioning regarding an investigation into his own alleged misconduct. The slanderous statements were regarding a police officer, whom the mayor called a liar among other things. In response to a lawsuit by the police officer for slander, the court found that the mayor was acting within the scope of his employment when he made the statements, and thus entitled to immunity. *Brown v. Mayor of Detroit*, 723 N.W.2d 464, 480-81 (Mich. Ct. App. 2006).

B. References

A defendant's contention that statements made in a reference letter were not defamatory may be overcome by a showing of actual malice. Malice is established if a defamatory statement

was made with “knowledge that it was false or with reckless disregard of whether it was false or not.” *Wynn v. Cole*, 284 N.W.2d 144, 147 (Mich. Ct. App. 1986).

A conclusory allegation that contents of the reference letters were malicious and without basis in fact was insufficient evidence of defamation. The allegations of malice must be supported by any facts from which the existence of malice may be inferred.

Goldman v. Wayne State Univ., 390 N.W.2d 672, 673-74 (Mich. Ct. App. 1986).

C. Privileges

Michigan has long recognized that an employer is qualifiedly privileged to comment on the qualification, morals, and habits of its employees. *Beaumont v. Brown*, 257 N.W.2d 522 (Mich. 1977), overruled in part on other grounds by *Bradley v. Saranac Bd. of Educ.*, 565 N.W.2d 650 (Mich. 1997). The elements of a qualified privilege are: (1) good faith; (2) interest to be upheld; (3) statement limited in its scope to its purpose; (4) proper occasion; and (5) publication to proper parties only. *Prysak v. RL Polk Co.*, 483 N.W.2d 629 (Mich. Ct. App. 1992). An employer may lose his qualified privilege to comment on its employees if the employer abuses the privilege or acts with malice. *Id.* at 636. The qualified privilege carries with it the presumption that the defendant acted in good faith and with proper motive. *Ramand v. Croll*, 206 N.W. 556 (Mich. 1925). The question of whether or not a privilege exists is a question of law. *Stablein v. Schuster*, 455 N.W.2d 315 (Mich. Ct. App. 1990).

In *Gonyea*, the Michigan Court of Appeals recognized that a qualified privilege exists for statements an employer made to “other employees whose duties interest them in the subject” matter of the statements. 480 N.W.2d at 300. There, the defendant employer had told the bookkeeper that the plaintiff employee was a thief, and the court held that the bookkeeper’s position gave her an interest in the accusations against the plaintiff. *Id.*

However, in *Horton v. 48th District Court*, 446 F. Supp.2d 756 (E.D. Mich Aug. 16, 2006), the United States District Court for the Southern Division of the Eastern District of Michigan held that a memorandum from an administrator to an employee’s co-workers, saying that the employee was being terminated for violations of the computer use policy, did not enjoy a qualified privilege with respect to the employee’s defamation claim. An employer will only enjoy this privilege if they can prove that the distribution of the memorandum was limited to those whose duties made them an interested party. *Id.* at 765.

In *Carol v. Owen*, 146 N.W. 168 (Mich. 1914), an employer exceeded the privilege, when writing an unsolicited letter to a perspective employer providing additional reasons for the discharge after orally stating the reason for the employee’s discharge.

In *Shannon v. Taylor AMC/Jeep, Inc.*, 425 N.W.2d 165 (Mich. Ct. App. 1988), a former employee sued his supervisor for making statements to customers of the store that the employee was fired for being involved in the theft of auto parts. The Michigan Court of Appeals found that statements to customers were not qualifiedly privileged. In order to be privileged, the

communication must be: (1) bona fide; (2) made by a party who has an interest, or a duty to communicate the subject matter; and (3) made to a party who has a corresponding interest or duty. *Id.* at 167.

An employer has a qualified privilege to defame employees by making statements to other employees whose duties interest them in the subject matter. Statements made to other employees were not covered where other employees were not supervisors, personnel department representatives, or other company officials, and thus, had no duty that would interest them in knowing the reason for the employee's termination. *Patillo v. Equitable Life Ins.*, 502 N.W.2d 696 (Mich. Ct. App. 1992).

D. Other Defenses

1. Truth

The truth of the publication is a complete defense to an action for defamation. In *Porter v. Royal Oak*, 542 N.W.2d 905 (Mich. Ct. App. 1995), a police officer filed suit against the city for publishing a memorandum illustrating the discipline imposed on him for charges stemming from the failure to properly investigate a 911 call, on the basis that such charges were false. The court affirmed summary disposition on the defamation claims, on the basis that the only discipline listed in the memorandum was based on charges that had been sustained. *Id.* "In other words, the truth of the information contained in the memorandum had been established. *Id.* Because truth is an absolute defense to a defamation claim." *Id.* at 909.

Substantial truth can also be a defense to a claim for defamation. In *Collins v. Detroit Free Press, Inc.*, 627 N.W.2d 5 (Mich. Ct. App. 2001), the court held that "[s]light inaccuracies of expression are immaterial provided that the defamatory charge was true in substance." *Id.* at 9, quoting *Rouch v. Enquirer & News*, 487 N.W.2d 205 (Mich. 1992). The court will evaluate the "sting" of the charge to determine the effect on the reader, and if the literal truth would have produced the same effect, then minor differences are deemed immaterial. *Collins, Id.* at 9. The substantial truth doctrine is frequently invoked to solve minor inaccuracies and technically incorrect or flawed use of legal terminology, but has not been limited to these situations. *Rouch*, 487 N.W.2d at 258-71. Therefore, for the purpose of establishing a prima facie case of discrimination, a statement is not considered false unless it would have a different effect on the mind of the reader from that which the truth would have produced. *Collins*, 627 N.W.2d at 10, citing *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

2. No Publication

The publication of the libelous matter complained of is essential to liability. *Bufalino v. Maxon Bros, Inc.*, 117 N.W.2d 150 (Mich. 1962); *Konkle v. Haven*, 103 N.W. 850 (Mich. 1905).

3. Self-Publication

Compelled self-defamation is a legal theory that may permit suits even against employers who do not comment on responses to requests for information. *Lewis v. Equitable Life Assurance*

Society, 389 N.W.2d 876, 880 (Minn. 1986) cited the Michigan decision of *Grist v. Upjohn Co.*, 168 N.W.2d 389 (Mich. Ct. App. 1969) for the proposition that Michigan courts have recognized the compelled self-defamation cause of action. A later decision in *Merritt v. Detroit Mem'l Hosp.*, 265 N.W.2d 124 (Mich. Ct. App. 1978) seems to indicate otherwise. In *Merritt*, plaintiff filed suit claiming that she was defamed when she told a prospective employer about her termination. *Id.* The court found that if a plaintiff is the only one who discloses the communication, it is privileged and he or she has consented to it. *Id.* at 127. The Michigan Supreme Court has not yet recognized this cause of action either.

4. Invited Libel

The publication of a false or defamatory matter of another is absolutely privileged if the individual consents. In *Schechet v. Kesten*, 141 N.W.2d 641 (Mich. Ct. App. 1966), plaintiff requested that defendant specify the charges which brought about her discipline. Defendant wrote a letter in response, and plaintiff brought a claim alleging the response was defamatory. *Id.* The court found that an absolute privilege applies if the defamatory statements are brought about at plaintiff's request.

However, a party publishing libel may not take advantage of the occasion brought about by invitation or challenge to indulge his or her malice, but in responding must do so in good faith and not go beyond the occasion. *Fortney v. Stephan*, 213 N.W. 172 (Mich. 1927).

See also discussion in Section VI.E. below.

5. Opinion

Libel may consist of a statement of fact or a statement in the form of an opinion, but such a statement is only actionable if it implies the allegation of undisclosed defamatory facts as the basis for the opinion. In *Mino v. Clio School District*, 661 N.W.2d 586 (Mich. Ct. App. 2003), the court evaluated a school board member's statements about a former superintendent regarding his leadership style and his management of the budget. The court held that such statements were subjective opinions, were not provable as false, and therefore could not constitute an actionable claim for defamation. *Id.* at 597. *See also Fisher v. Detroit Free Press, Inc.*, 404 N.W.2d 765, 767-68 (Mich. Ct. App. 1987) (affirming the dismissal of a defamation claim based on an opinion or idea and indicating that if the opinion cannot be reasonably concluded as false, then an action for defamation cannot be substantiated. Honest belief of defamation by plaintiff is not determinative).

E. Job References and Blacklisting Statutes

Mich. Comp. Laws § 423.452 provides that:

An employer may disclose to an employee or that individual's prospective employer information relating to the individual's job performance that is documented in the individual's personnel file upon the request of the individual or his or her prospective employer. An employer who discloses under this section in good faith is immune from civil liability for the disclosure. An employer is

presumed to be acting in good faith at the time of a disclosure under this section unless a preponderance of the evidence establishes 1 or more of the following: (a) That the employer knew the information disclosed was false or misleading. (b) That the employer disclosed the information with a reckless disregard for the truth. (c) That the disclosure was specifically prohibited by a state or federal statute.

F. Non-Disparagement Clauses

In *Mino v. Clio School District*, 661 N.W.2d 586 (Mich. Ct. App. 2003), the Michigan Court of Appeals looked at the issue of a disparagement clause within an employment severance agreement on first impression. The court held that a clause of this nature was void and unenforceable due to Mich. Comp. Laws § 380.1230b(6), as it prohibited a school district or board from “enter[ing] into any contract or agreement that had the effect of suppressing information about unprofessional conduct of an employee or former employee.” *Id.* at 590.

In *Ott v. Jackson*, 1999 U.S. Dist. LEXIS 8913 (W.D. Mich., June 8, 1999), the court examined whether a former employee had a constitutionally protected property right in the provisions and benefits of a separation agreement containing a non-defamation/ disparagement clause. The court held that “the substantive Due Process clause is not concerned with . . . common law contract . . .” *Id.* at *17. Therefore, even where Ott pled that Jackson breached the non-defamation clause with racially motivated speech, plaintiff’s interests in the clause were not entitled to federal constitutional protection. *Id.*

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

The Michigan Supreme Court first considered the issue of intentional infliction of emotional distress in *Roberts v. Auto Owners Ins., Co.*, 374 N.W.2d 905 (Mich. 1985). The court stated that it was “constrained from reaching the issue as to whether this modern tort should be formally adopted into our jurisprudence.” *Id.* at 906. However, the court did outline the necessary standards for bringing such a claim if recognized. *Id.* Plaintiff must establish four elements to make a prima facie case of intentional emotional distress: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Id.* at 908.

Extreme and outrageous conduct must be outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Id.* at 908-09. Intentional infliction of emotional distress must be so severe that no reasonable man could be expected to endure. Bodily injury is not mandatory but an injury more in the way of outrage may be required where a claim is based on emotional injury. *Id.* at 908-09.

The Michigan Supreme Court further stated:

“This liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions or other trivialities. The rough edges of our society are still in need of a good deal of filing down and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone’s feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.”

Id. at 909, quoting RESTATEMENT (SECOND) TORTS, § 46 Comment d, pp. 72-73.

In *Brown v. Cassens Transportation Co.*, 409 F. Supp. 2d 793 (E.D. Mich. 2005), the court held that an insurer’s wrongful, bad faith termination of benefits, by itself, was not sufficiently outrageous to support a claim for intentional infliction of emotional distress.

In *Pratt v. Brown Machine Co.*, 855 F.2d 1225 (6th Cir. 1988), the Sixth Circuit acknowledged the Michigan Supreme Court’s refusal to recognize intentional infliction of emotional distress as a tort. However, the Sixth Circuit also rationalized that “where a state’s highest court has not spoken on a precise issue, . . . a federal court . . . may not disregard a decision of the state appellate court on point, unless it is convinced by other persuasive data that the highest court would decide otherwise.” *Id.* at 1239.

In *Pratt*, the plaintiff brought action against the defendant for wrongful discharge, violation of Michigan public policy, and intentional infliction of emotional distress. *Id.* The court stated that context was an important element in assessing emotional distress claims. *Id.* The extreme and outrageous character of conduct may arise from the position of the actual or apparent authority over the plaintiff or the defendant’s power to affect the plaintiff’s interest. *Id.* Whether the defendant’s acts were sufficiently outrageous depended upon the context in which the defendant committed them. *Id.*

The court found that the defendant’s attempt to silence the plaintiff’s allegation that his supervisor had made obscene and harassing phone calls to the plaintiff’s wife was sufficient to establish a case of extreme and outrageous conduct. *Id.* The plaintiff was in dire financial straits and was forced to plead for his job. *Id.* In order to retain his job, the plaintiff was required to ensure the reputation of his harasser as well as the reputation of the company. *Id.* He was also forced to work directly for, attend church and pray with the harasser although the defendant knew that the plaintiff’s supervisor made the phone calls.

In *Wilson v. Kiss*, 751 F. Supp. 1249 (E.D. Mich. 1990), the defendant–employer’s conduct was extreme and outrageous where the defendant utilized his authoritative position to demand that the plaintiff engage in criminal acts or be at risk of discharge. “Every wrongful termination or employer abuse, alone will not give rise to a claim for intentional infliction of emotional distress. Nor will a criminal act, by itself, generate a tort claim for mental distress. But when both elements combine, . . . , it cannot be said as a matter of law that such conduct is not extreme and outrageous.” *Id.* at 1254. A single incident, in the proper context, is sufficient to be

outrageous and extreme. *Id.* The repeated occurrence of abuse over time is not dispositive. *Id.* at 1252.

B. Negligent Infliction of Emotional Distress

In *Hesse v. Ashland Oil*, 642 N.W.2d 330 (Mich. 2002), the Michigan Supreme Court held that claims for negligent infliction of emotional distress arising out of the employment relationship are barred by the exclusive remedy provision of the Workman's Disability Compensation Act ("WDCA"), Mich. Comp. Laws § 418.131, which states:

(1) The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease.

The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.

(2) As used in this section and section 827, "employee" includes the person injured, his or her personal representatives, and any other person to whom a claim accrues by reason of the injury to, or death of, the employee, and "employer" includes the employer's insurer and a service agent to a self-insured employer insofar as they furnish, or fail to furnish, safety inspections or safety advisory services incident to providing worker's compensation insurance or incident to a self-insured employer's liability servicing contract.

Id.

Through the plain language of the statute, the *Hesse* court reasoned that the exclusive remedy for an employee, including his or her personal representatives, and any other person to whom a claim accrues by reason of the injury to, or death of, the employee, is found in the WDCA. *Hesse*, 642 N.W.2d at 332. *See also* Mich. Comp. Laws § 418.131(2). The court further relied on *Moran v. Nafi Corp.*, 122 N.W.2d 800 (1963) and *Balcer v. Leonard Refineries, Inc.*, 122 N.W.2d 805 (1963), in claims for lost consortium against an employer were also barred by an exclusive remedy provision of the WDCA. *Hesse*, 642 N.W.2d at 332-33.

VIII. PRIVACY RIGHTS

The right of privacy is the right of an individual to be let alone, to live a life of seclusion, to be free from unwarranted publicity, to live without unwarranted interference by the public about matters which the public is not necessarily concerned, or to be protected from any wrongful intrusion into an individual's private life, which would outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. *Earp v. City of Detroit*, 167 N.W.2d 841, 845 (Mich.

Ct. App. 1969). The common-law right of privacy encompasses only four situations; (1) intrusion upon plaintiff's seclusion or solitude or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. Prosser, Torts (3d ed.), s. 112, p. 843.

Intrusion and public disclosure require the invasion of something secret, secluded or private pertaining to the plaintiff. The intrusion must be something, which is objectionable to the reasonable man. Disclosure and false light depend upon publicity. *Earp*, 167 N.W.2d at 845.

A. Generally

An employer has the right to look into the possibility of illegal conduct by an employee. The fact that the conduct turned out to be violative of company policy, but not illegal, does not invalidate the inquiry. Nor does it taint in any way the information received. The information regarding whether an employee engaged in illegal conduct was not of a private nature. Information given to the employer which pertains to matters directly involving the employee's employment and the use of the employer's facilities does not involve a privacy right. The employer had a duty to know whether its equipment was being used for criminal activities, to investigate and stop it. *Earp*, 167 N.W.2d at 848.

In *UAW, Local 1600 v. Winters*, 385 F.3d 1003 (6th Cir. 2004), the Sixth Circuit held that in certain limited circumstances, the government's need to discover such latent or hidden conditions, or to prevent their development, may be sufficiently compelling to justify the intrusion of privacy entailed by conducting such searches without any measure of individualized suspicion. Therefore, a search unsupported by individualized suspicion may nonetheless be reasonable when the government alleges special needs, beyond the normal need for law enforcement, that are both substantial (that is, important enough to override the individual's privacy interest) and sufficiently vital to suppress the normal requirements of individualized suspicion. *Id.* at 1007.

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

Michigan does not have its own specific statute pertaining to eligibility verification & reporting procedures.

2. Background Checks

Under Mich. Comp. Laws § 37.2205a(1):

An employer, employment agency, or labor organization, other than a law enforcement agency of this state or a political subdivision of this state, shall not in connection with an application for employment or membership, or in connection with the terms, conditions, or privileges of employment or membership request, make, or maintain a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result. A person is not guilty of

perjury or otherwise for giving a false statement by failing to recite or acknowledge information the person has a civil right to withhold by this section. This section does not apply to information relative to a felony charge before conviction or dismissal.

C. Other Specific Issues

1. Workplace Searches

Searches of employee offices, lockers, purses, briefcases, and even lunch boxes are generally permissible (absent some form of state action that would invoke the Fourth Amendment to the United States Constitution). But, this rule is not absolute. For example, in *People v. Duvall*, 428 N.W.2d 746 (Mich. Ct. App. 1988), the Michigan Court of Appeals held that an employee did not suffer a Fourth Amendment violation where the employee had no reasonable expectation of privacy in his office, because the plaintiff deputy shared his office with other officers and only work-related papers were taken from a search of his desk.

In *Baggs v. Eagle-Picher Industries, Inc.*, 957 F.2d 268 (6th Cir. 1992), the court held that surprise drug testing of manufacturing plant employees did not constitute actionable invasion of privacy inasmuch as information about whether employees were reporting to work with drugs in their systems was related to employment and therefore non-private.

2. Electronic Monitoring

Generally, the outlining of wiretapping is regulated by federal law. Pursuant to 18 U.S.C. § 2511, wiretapping employees is outlawed if the business establishment is involved in “interstate commerce.”

Michigan’s eavesdropping statute, Mich. Comp. Laws § 750.539a et seq., reaches further than the Federal Wiretapping Act and places stringent restrictions on the use of eavesdropping and surveillance equipment. The Michigan statute prohibits the willful use of a “device” to eavesdrop on a private conversation without the consent of all the parties to the conversation. Mich. Comp. Laws § 750.539c. Further, the statute prohibits the installation of a device, or its use, in any “private place,” without consent, for the purposes of “observing, photographing, or eavesdropping upon the sounds or events in such a place.” Mich. Comp. Laws § 750.539d. Though the limited case law interpreting Michigan’s eavesdropping statute has not dealt with workplace settings, it has consistently applied a plain-language approach to the statutory definition.

3. Social Media

Pursuant to Mich. Comp. Laws § 37.273 (The Internet Privacy Protection Act or “IPPA”), an employer shall not:

- (a) Request an employee or an applicant for employment to grant access to, allow observation of, or disclose information that allows access to or observation of the employee’s or applicant’s personal internet account.

(b) Discharge, discipline, fail to hire, or otherwise penalize an employee or applicant for employment for failure to grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal internet account.

However, Mich. Comp. Laws § 37.275 specifically indicates that an employer is not prohibiting an employer from doing any of the following:

(a) Requesting or requiring an employee to disclose access information to the employer to gain access to or operate any of the following:

(i) An electronic communications device paid for in whole or in part by the employer.

(ii) An account or service provided by the employer, obtained by virtue of the employee's employment relationship with the employer, or used for the employer's business purposes.

(b) Disciplining or discharging an employee for transferring the employer's proprietary or confidential information or financial data to an employee's personal internet account without the employer's authorization.

(c) Conducting an investigation or requiring an employee to cooperate in an investigation in any of the following circumstances:

(i) If there is specific information about activity on the employee's personal internet account, for the purpose of ensuring compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct.

(ii) If the employer has specific information about an unauthorized transfer of the employer's proprietary information, confidential information, or financial data to an employee's personal internet account.

(d) Restricting or prohibiting an employee's access to certain websites while using an electronic communications device paid for in whole or in part by the employer or while using an employer's network or resources, in accordance with state and federal law.

(e) Monitoring, reviewing, or accessing electronic data stored on an electronic communications device paid for in whole or in part by the employer, or traveling through or stored on an employer's network, in accordance with state and federal law.

Furthermore, the IPPA does not prohibit or restrict an employer from complying with a duty to screen employees or applicants prior to hiring or to monitor or retain employee communications that is established under federal law or by a self-regulatory organization, as defined in section 3(a)(26) of the securities and exchange act of 1934, 15 USC 78c(a)(26). *Id.* at § 37.275(2).

In addition, the IPPA does not prohibit or restrict an employer from viewing, accessing, or utilizing information about an employee or applicant that can be obtained without any required access information or that is available in the public domain. *Id.* at § 37.275(3).

4. Taping of Employees

In *Harkey v Abate*, 346 N.W.2d 74, 75-76 (Mich. Ct. App. 1983), the Michigan Court of Appeals reversed the trial court's grant of summary disposition and held that the implementation of secret cameras in restrooms constitutes actionable invasion of privacy. However, in *Saldana v. Kelsey-Hayes Co.*, 443 N.W.2d 382, 384 (Mich. Ct. App. 1989), the court held that an employee could not establish a claim of invasion of privacy premised on employer's surveillance of his house through use of powerful lens to observe interior of home and of subterfuge to enter home because the employer had a legitimate interest in investigating suspicions that employee's claim of work-related disability was pretextual.

5. Release of Personal Information on Employees

Pursuant to Mich. Comp. Laws § 423.508, an employer shall not:

[G]ather or keep a record of an employee's associations, political activities, publications, or communications of nonemployment activities, except if the information is submitted in writing by or authorized to be kept or gathered, in writing, by the employee to the employer. This prohibition on records shall not apply to the activities that occur on the employer's premises or during the employee's working hours with that employer that interfere with the performance of the employee's duties or duties of other employees.

In addition, Mich. Comp. Laws. § 445.84 requires that employers adopt a policy to protect the confidentiality of employee social security numbers. In particular, a person who obtains 1 or more social security numbers in the ordinary course of business "shall create a privacy policy that does at least all of the following concerning the social security numbers the person possesses or obtains":

- (a) Ensures to the extent practicable the confidentiality of the social security numbers.
- (b) Prohibits unlawful disclosure of the social security numbers.
- (c) Limits who has access to information or documents that contain the social security numbers.

(d) Describes how to properly dispose of documents that contain the social security numbers.

(e) Establishes penalties for violation of the privacy policy.

Additionally, “[a] person who creates a privacy policy under subsection (1) shall publish the privacy policy in an employee handbook, in a procedures manual, or in 1 or more similar documents, which may be made available electronically.” *Id.* at § 445.84(3).

6. Medical Information

Under Mich. Comp. Laws § 333.5133 (2001), an employer must obtain written informed consent prior to testing employees for HIV.

The right of an employee to have his medical information remain private or, put another way, the right of an employer to obtain an employee’s medical information is governed by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 45 C.F.R. Parts 160 and 164. Compliance with HIPAA was mandated as of April 14, 2003. HIPAA is a national privacy rule designed to provide wide ranging protection for an individual’s medical and medically-related information.

In 2005, the United States District Court for the Eastern District of Michigan held that HIPAA generally preempts Michigan state law. In *Croskey v. BMW of North America, Inc.*, 2005 WL 1959452 (E.D. Mich. Feb. 16, 2005), affirmed in part and reversed in part on appeal, see *Croskey v. BMW of North America, Inc.*, 2005 U.S. Dist. LEXIS 43442 (E.D. Mich. Nov. 10, 2005), the plaintiff alleged that he suffered burns when the radiator of his automobile exploded. He signed Authorizations for release of such records. *Id.* When the plaintiff’s attorney scheduled the deposition of one of the plaintiff’s treating physicians, defense lawyers scheduled a meeting with the physician prior to the deposition. *Id.* The plaintiff’s lawyer objected to the meeting as a violation of HIPAA and the matter was brought before the court. *Id.*

HIPAA provides that its provisions pre-empt state law governing confidentiality versus disclosure of protected health information (“PHI”) unless the state law is more “stringent” than the HIPAA provisions. *Id.* Although Michigan favors open and informal discovery during litigation, the magistrate judge concluded that Michigan law is not more stringent than HIPAA and, as a result, HIPAA pre-empts Michigan law. *Id.* at *9. HIPAA generally disfavors informal discovery of medical information. *Id.*

It should be noted that *Croskey* is a non-binding decision with little precedential value in Michigan state courts. Michigan state courts are not bound by the decisions of lower federal courts, although *Croskey* may prove to be persuasive.

After *Croskey*, it appears that, at least for the time being, HIPAA pre-empts Michigan state law. Therefore, employers in Michigan should generally govern themselves according to HIPAA.

7. Restrictions on Requesting Salary History

Michigan does not have any statutes dealing with the specific issue of requesting an employee or applicant's salary history.

IX. WORKPLACE SAFETY

A. Negligent Hiring

Charges of negligent hiring have been upheld where the underlying claim was based on common law tort but will not stand where a plaintiff has brought a civil suit under statutory law. *McClements v. Ford Motor Co.*, 702 N.W.2d 166 (Mich. 2005). In *McClements*, the plaintiff brought suit under the Michigan Civil Rights Act alleging that her employer negligently hired and retained a co-worker who sexually harassed her. *Id.* The Michigan Supreme Court held that the plaintiff's claim of negligent supervision was properly dismissed because her lawsuit was governed by the Act, meaning that she was limited to the remedies provided therein. *Id.*

An employer will be held liable for the intentional tort of an employee where the employer knew or should have known that the employee had a propensity to act in the manner giving rise to the tort claim. *Hersch v. Kentfield Builders, Inc.*, 189 N.W.2d 286 (Mich. 1971). An employer, though, need only exercise reasonable care in evaluating a potential employee and is not required to conduct an "in-depth background investigation of his employee," to discover any such propensity. *Tyus v. Booth*, 235 N.W.2d 69, 92 (Mich. Ct. App. 1975). Thus, even where a search of public records would have uncovered an employee's poor driving record, the employer was not negligent in hiring the defendant as a driver. *See Tortora v. Gen. Motors Corp.*, 130 N.W.2d 21 (Mich. 1964); *see also Tyus*, 235 N.W.2d 69 ("The duty is to use reasonable care to assure that the employee known to have violent propensities is not unreasonably exposed to the public.")

B. Negligent Supervision/Retention

A claim of negligent supervision is often the counterpart claim to negligent hiring. A claim of negligent supervision is based on the argument that the employer (whose employee is charged with committing a tort against the plaintiff) has failed to exercise reasonable care in supervising his/her employee(s). Whether an employer has exercised reasonable care is based on the relationship between the employer and the plaintiff, what the employer knew or should have known about his/her employee, and the steps taken by the employer to ensure the plaintiff's safety. *See Poe v. City of Detroit*, 446 N.W.2d 523 (Mich. Ct. App. 1989); *Millross v. Plum Hollow Golf Club*, 413 N.W.2d 17 (Mich. 1987), *Tyus*, 235 N.W.2d 69.

In *Brown v. Brown*, 716 N.W.2d 626 (Mich. Ct. App. 2006), a defendant employer had been warned of the sexually explicit remarks and harassing statements of one of its employees. After an assault occurred, plaintiff sued the defendant employer on theories of vicarious liability

and negligence. *Id.* The court ultimately decided that because the employer knew of the defendant's "impropriety, violence, or disorder" that the employer should have reasonably foreseen the employee's potential violent acts. *Id.* at 663. The court reached this conclusion by looking at a number of factors that included: whether the employee's statements had time certainty associated with them, whether employee had touched the plaintiff before, how often the statements were made, employee's position of power at the employer's company, and the reckless disregard in the words he chose to use. *Id.* These factors point to the fact that the employer sufficiently knew of the employee's propensity for violence, and is thus liable for its acts. *Id.*

However, the Michigan Supreme Court reversed the Court of Appeals' judgment in *Brown v. Brown*, 739 N.W.2d 313 (2007). The Michigan Supreme Court held that an employer was not vicariously liable for the rape of a security guard by one of its employees because the rape was not foreseeable by the employer. *Id.* The court held that where an employee has neither a criminal record nor a history of violent behavior indicating a propensity to rape, an employer is not liable solely on the basis of the employee's lewd comments, of which the employer had knowledge, if the comments fail to convey an unmistakable, particularized threat of rape. *Id.*

In Michigan Supreme Court case, *Zsigo v. Hurley Medical Center*, 716 N.W.2d 220 (Mich. 2006), a nursing assistant employed by the defendant sexually assaulted a patient while left alone in a patient's room during the course of his employment duties. The patient filed suit, and argued that, because the employment relationship created the opportunity for the assault to occur, the employer should be held liable. *Id.* After a trial court jury victory for the plaintiff, the court of appeals and the Michigan Supreme Court agreed to reverse the jury award. *Id.* The court ultimately held that they will not adopt an exception to the doctrine of respondeat superior rule which would make an employer liable for the acts of their employees when the employee was "aided in accomplishing" the tort "by the existence of the agency relationship." *Id.* The court reasoned that such an exception would essentially amount to an imposition of strict liability upon employers. *Id.* at 226-27.

Most recently, the Michigan Supreme Court held in *Hamed v. Wayne County*, 803 N.W.2d 237 (Mich. 2011), that the aided-by-agency exception to the principle that an employer cannot be vicariously liable for the unforeseeable criminal acts of its employees is not a part of Michigan's common law. This decision overruled *Champion v. Nationwide Sec., Inc.*, 545 N.W.2d 596 (Mich. 1996), a case in which the Michigan Supreme Court held that a former employer was liable for quid pro quo sexual harassment where one of its employed supervisors raped a subordinate and thereby caused her constructive discharge. In *Hamed*, the Michigan Supreme Court held that the defendant county and defendant county sheriff's office were not vicariously liable under Michigan Civil Rights Act for quid pro sexual harassment affecting public services in connection with a deputy sheriff's sexual assault on the plaintiff detainee. 803 N.W.2d at 258. The court emphasized the importance of foreseeability, and held that employers, including public-service providers, are not vicariously liable for quid pro quo sexual harassment on the basis of the unforeseeable criminal acts of their employees. *Id.* at 246.

C. Interplay with Worker's Comp. Bar

Mich. Comp. Law § 418.131 provides that the right to recovery of benefits provided in Michigan's Worker's Disability Compensation Act "shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." Moreover,

The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. *Id.*

D. Firearms in the Workplace

Under Michigan's concealed weapons law, specifically Mich. Comp. Law § 28.425n, an employer shall not prohibit an employee from "[c]arrying a concealed pistol in compliance with a license issued under this act." However, employers may prohibit an employee "from carrying a concealed pistol in the course of his or her employment with that employer." *Id.*

E. Use of Mobile Devices

Michigan does not have any statutes dealing with the specific issue of use of mobile devices in the workplace.

X. TORT LIABILITY

A. Respondeat Superior Liability

An employer is vicariously liable for the tortious conduct of an employee when the employee is acting within the scope of employment at the time of negligence. Conduct of an employee is within the scope of employment if it is actuated, at least in part, by a purpose to serve the master. *Backus v. Fajnor-Strong*, 605 N.W.2d 690 (Mich. Ct. App. 1999). "The scope of an employee's authority must always be considered in the light of the particular circumstances of the employment." *Id.* at 695.

B. Tortious Interference with Business/Contractual Relations

In Michigan, to establish a claim for tortious interference with a business relationship the plaintiff must prove: (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy by the defendant, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the plaintiff. A three-year statute of limitation bars the claim. *Blazer Foods, Inc. v. Rest. Props., Inc.*, 673 N.W.2d 805 (Mich. Ct. App. 2003), citing *BPS Clinical Labs v. Blue Cross & Blue Shield*, 552 N.W.2d 919 (Mich. Ct. App. 1996). *See also Corp. Auto Res. Specialists v. Melton Motors, Inc.*, 2005 U.S. Dist. LEXIS 9162 (E.D. Mich. 2005) (statute of limitations for a tortious interference with business relationship action is three years under Michigan law).

To establish that a lawful act was done with malice, and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. Additionally, if the defendant's actions were motivated by legitimate business reasons, its actions do not constitute improper motive or interference. *BPS Clinical Labs*, 552 N.W.2d 919. To qualify this, however, Michigan courts have also held that in order to be tortious, a defendant's interference with business relations or with contract must not only be intentional, but also wrongful, that is, illegal, unethical, or fraudulent. *United Rentals v. Keizer*, 355 F.3d 399 (6th Cir. 2004).

In addition, the plaintiff must show that the defendant was a third party to the contract or relationship. *Dzierwa v. Mich. Oil Co.*, 393 N.W.2d 610 (Mich. Ct. App. 1986). In *Dzierwa*, the court held that because the defendant was the company president and controlling shareholder, he was in essence the company, and was not a third party to the employment contract. *Id.* at 613.

Damages for an employee's potential recovery on his claim against a co-worker for tortious interference with employee's business expectancy of continued employment, is not limited, as a matter of law, to nominal damages. This is true even though employee only had an at-will employment contract. *Everton v. Williams*, 715 N.W.2d 320 (Mich. Ct. App. 2006). And further, any at-will contract, whether employment or not, will be permitted to recover more than nominal damages. *Id.* at 323; *see also Health Call Of Detroit v. Atrium Home & Health Care Services, Inc.*, 706 N.W.2d 843 (Mich. Ct. App. 2006).

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

Covenants not to compete in future employment were not permitted in Michigan until 1987. *Kelsey-Hayes Co. v. Maleki*, 765 F. Supp. 402, 406 vacated pursuant to settlement (E.D. Mich. 1991). Prior to 1987, Mich. Comp. Laws § 445.761 stated that:

All agreements and contracts by which any person, copartnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade profession or business, for the reasonable or unreasonable, partial or general, limited or unlimited are hereby declared to be against public policy and illegal and void.

In 1987, Mich. Comp. Laws § 445.774a(1) was enacted and provides:

An employer may obtain from an employee an agreement or covenant which "protects" an employer's reasonable competitive business interest and expressly prohibits an employee from engaging in employment or a line of business at determination of employment if the agreement or covenant is reasonable as to its duration, geographical area and the type of employment or line of business. To the extent that any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the

circumstances in which it was made as specifically enforced the agreement as limited.

Passage of § 445.774a did not eliminate the court's general disfavor of covenants not to compete. Rather, § 445.774 merely added the condition that such agreements be both "reasonable" and narrowly-tailored. *See also United Rentals, Inc. v. Keizer*, 355 F.3d 399 (6th Cir. 2004).

In *Kelsey-Hayes*, 765 F. Supp. 402, the plaintiff, an electrical engineer, was hired by the defendant to translate mathematical flow charts into a standard national semiconductor chip code. Plaintiff had difficulty understanding the flow chart. As a result, the plaintiff sought employment elsewhere. *Id.* When the plaintiff resigned and attempted to work for one of the defendant's competitors, the defendant sued claiming violation of the plaintiff's right not to compete restriction. *Id.*

The court held the covenant to compete was not reasonable. *Id.* Whatever expertise the defendant developed as a computer is his alone. *Id.* It has been uniformly held that general knowledge, skill, or facility acquired through training or experience while working for an employer appertains exclusively to the employee. *Id.* The fact that they were acquired to develop during the employment does not, by itself, give the employer a sufficient interest to support a restraining covenant, even though the on the job training had been extensive and costly. *Id.* Neither the defendant's salary nor the total lack of job security he was given were sufficient consideration for a promise so onerous nor was it necessary to protect any reasonable business interests of the plaintiff. *Id.* at 407. The defendant learned nothing of the nationally published computer code, and had no contact with customers, lists, prices or any other information, which might furnish him with some unfair advantage over his employer. *Id.* at 405-407.

In *St. Clair Medical P.C., v. Borgiel*, 715 N.W.2d 914 (Mich. Ct. App. 2006), the plaintiff employer filed an action against the defendant, a former doctor, that alleged he was in violation of a restrictive covenant in his employment contract, and requested liquidated damages of \$40,000. The restrictive covenant prohibited the defendant from practicing within seven miles of either of the two medical clinics where he formerly worked for the employer. *Id.* The Michigan Court of Appeals found that the defendant had in fact accepted a new position within the seven mile restriction of his former employer, which was in violation of the restrictive covenant. *Id.*

The court explained that restrictive covenants are designed to protect the employer's "reasonable competitive business interests" in terms of duration, geographical scope, and the type of employment. *Id.* at 919. In order to be reasonable, the covenant must protect against the "employee's gaining some unfair advantage" against his former employer, but must not prohibit the employee from using his skills or general knowledge. *Id.* at 266.

The defendant raised many defenses to the allegation that he was in violation of his restrictive covenant, including that it was an unreasonable restraint of trade in violation of the Michigan Antitrust Reform Act. *Id.* The court responded that "because the prohibition on all competition is in restraint of trade, an employer's business interest in justifying a restrictive

covenant must be greater than merely preventing competition." *Id.* at 266. The employer's business interests were to protect against loss of patients to departing physicians, and protection of investment in specialized training of physicians by employers, among other things. The court found that these interests were reasonably protected by the restrictive covenant, reasonable between the parties, and not specifically injurious to the public. *Id.* at 268.

In another case that dealt with restrictive covenants and the Michigan Antitrust Reform Act, the Michigan Court of Appeals expanded the enforceability of non-compete agreements to apply equally to independent contractors as well as employees. *Bristol Window & Door, Inc. v. Hoogenstyn*, 650 N.W.2d 670 (Mich. Ct. App. 2002). In so holding, the court determined that such agreements are not prohibited by Michigan's Antitrust Reform Act, even though the Act only specifically addresses non-compete agreements in employer-employee relationships. *Id.* at 497-98.

B. Blue Penciling

Michigan law allows for courts to "blue pencil" unreasonable non-compete clauses to make them reasonable. *See Compton v. Joseph Lepak, DDS, PC*, 397 N.W.2d 311 (Mich. Ct. App. 1986) (holding that a covenant not to compete for an unlimited time should be interpreted as having a duration reasonable in time); *Rehmann, Robinson & Co. v. McMahan*, 466 N.W.2d 325 (Mich. Ct. App. 1991) (noting that unreasonable contractual provisions may be enforced by judicial substitution of a reasonable provision).

In addition, Michigan Compiled Laws § 445.774a, enacted in 1997, expressly permits the court to modify an unreasonable non-competition agreement to make it reasonable.

C. Confidentiality Agreements

In Michigan, confidential information is considered the employer's property and may be protected by a contract. *See Follmer, Rudzewicz & Co., P.C. v. Kosco*, 362 N.W.2d 676 (Mich. 1984).

D. Trade Secrets Statute

Michigan's trade secret statute, titled the "Uniform Trade Secrets Act," is located at Mich. Comp. Laws § 445.1901 et seq. The Act allows a court to enjoin actual or threatened misappropriation of trade secrets. *Id.* § 445.1903.

E. Fiduciary Duty and their Considerations

Under Michigan law, the standard of due care for a fiduciary is a flexible one, contingent upon the fiduciary's situation. In general, a fiduciary has the duty to discharge his or her functions with the degree of skill or care that a reasonably prudent person would use in the fiduciary's circumstances. Restatement (Second) of Agency §379; *John v. Shearson/American Express, Inc.*, 732 F.Supp. 728, 736 (E.D. Mich. 1989). As a practical matter, this duty has two dimensions. To the extent that the fiduciary has specialized skills on which his or her principal relies, the fiduciary must exercise those skills according to the standard set by others with the

same skills. Restatement (Second) of Agency §379 comment c (noting that fiduciary must have “at least the skill ... which is standard for that kind of employment in the community”); cf. *Teadt v. St. John’s Evangelical Church*, 603 NW2d 816 (Mich. Ct. App. 1999) (distinguishing between cause of action for breach of fiduciary duty, which involves breach of trust, and cause of action for professional malpractice, which involves breach of standard of care). To the extent that the fiduciary requires specific information to make use of his or her specialized skills or to perform more general functions, the fiduciary has the duty to collect all material information that is reasonably available. Restatement (Second) of Agency §379 comment c, illustration 3.

The fiduciary’s duties end when the relationship giving rise to the duty expires or the principal revokes the fiduciary’s authority to act on its behalf; the agent may not surrender his or her fiduciary duty unilaterally, even in the event of the principal’s breach of the agency agreement. *See First Pub. Corp. v. Parfet*, 631 N.W.2d 735, 742 (Mich. Ct. App. 2001) (holding that fiduciary duty ended with termination of underlying joint enterprise), vacated in part and aff’d in part, 658 N.W.2d 477 (Mich, 2003). Some duties, such as the duty not to disclose confidential information, may survive the end of the relationship. *See, e.g.*, Restatement (Second) of Agency §396. Other duties arise only upon termination. *See, e.g.*, Restatement (Second) of Agency §386 (agent’s duty not to act on behalf of principal).

Additionally, because corporations can only act through their agents, principally their officers and directors, Michigan’s corporate statutes substantially regulate the activities of officers and directors, granting them the authority to carry out the corporation’s most important functions and imposing fundamental duties of care and loyalty upon them. *See, e.g.*, Mich. Comp. Laws 450.1501–.1571 (defining, among other items, the powers and duties of the officers and directors of business corporations).

Section 541a of the Michigan Business Corporation Act (MBCA) echoes the common-law concepts in its statutory definition of fiduciary duty, which describes the standard of conduct to which officers and directors are held.

- (1) A director or officer shall discharge his or her duties as a director or officer including his or her duties as a member of a committee in the following manner:
 - (a) In good faith.
 - (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.
 - (c) In a manner he or she reasonably believes to be in the best interests of the corporation. Mich. Comp. Laws 450.1541a.

Mich. Comp. Laws 450.1541a further notes that an officer and director may fulfill the duty of care by relying upon “information, opinions, reports, or statements, including financial statements and other financial data” if such information is prepared by certain identified persons, including, among others: the corporation’s officers, directors, or corporate committees; and lawyers, accountants, engineers, or other professional experts. Mich. Comp. Laws 450.1541a(2).

The interplay of this provision with MCL 450.1551, was reviewed by the Michigan Court of Appeals in *Scherer v. Buha*, No 230975, 2002 WL 1065609 (Mich. App. Ct. May 24, 2002) (unpublished). Such reliance is only permissible if the officer or director has a reasonable belief that the person providing the information is competent to do so. *Id.* And such reliance is not permissible if the officer or director has some reason to doubt the reliability of that information. Mich. Comp. Laws 450.1541a(3).

There is a presumption under Mich. Comp. Laws 450.1541a “that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company.” *Estate of Detwiler v. Offenbecher*, 728 F.Supp.103, 148 (S.D.N.Y. 1989) (applying Michigan law) (citing *Aronson v. Lewis*, 473 A2d 805, 812 (Del. 1984)) (further citations omitted). This presumption, which applies to officers as well as directors, is commonly known as the “business judgment rule.” As described by the Michigan Supreme Court, the business judgment rule provides that “[i]n the absence of bad faith or fraud, a court should not substitute its judgment for that of corporate directors,” and thus “[a] court should be most reluctant to interfere with the business judgment and discretion of directors in the conduct of corporate affairs.” *In re Butterfield Estate*, 341 NW2d 453 (Mich. 1983).

XII. DRUG TESTING LAWS

A. Public Employers

As a constitutional matter, the Sixth Circuit Court of Appeals noted that government ordered collection and testing of urine samples effects a search within the meaning of the Fourth Amendment, as such tests intrude upon reasonable expectations of privacy that society has long recognized as reasonable. *UAW, Local 1600 v. Winters*, 385 F.3d 1003, 1007 (6th Cir. 2004). Searches under the Fourth Amendment require a court to review a state’s drug testing policy for reasonableness. *Id.* In reviewing the reasonableness of a drug testing policy, a court weighs the extent of the intrusion upon the privacy interest of the individuals being tested against the promotion of the government’s proffered special need in conducting the tests. *Id.*

In *Middlebrooks v. Wayne County*, 521 N.W.2d 774 (Mich. 1994), the Michigan Supreme Court held that mandatory urinalysis drug testing was permissible both under state and federal constitutions in connection with a government position involving driving heavy equipment near and on public highways.

The plaintiff in *Middlebrooks* was a seasonal service worker who applied for a permanent position as a general service worker or laborer, which included operating heavy equipment. Pursuant to the analysis of federal cases interpreting *Skinner v. Ry. Labor Exec. Ass’n*, 489 U.S. 602 (1989) and *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the court found that operation of a riding lawnmower, especially on highway mediums and embankments, and driving front-end loaders, trucks and other equipment between a work site and repair facility might result in serious injury from momentary lapses of attention, a characteristic of illegal drug use. The plaintiff had a reduced expectation of privacy in not being subjected to urinalysis drug screening by the government as a result of his application for a position as a laborer in which

potentially serious accidents might result between the lawnmower and vehicles on the highway often traveling at high rates of speed. *Middlebrooks*, 521 N.W.2d at 780.

There was also no evidence of procedural inadequacies, which suggest due process concerns with a drug testing policy. *Id.* Applicants were given notice that urinalysis testing would be included in the physical examinations. *Id.* The applicants were not arbitrarily selected for urinalysis testing nor was the information from urinalysis testing used for purposes other than determining the suitability of applicants. *Id.* The privacy of the applicants was not intruded upon in the collection of the urine samples and methods used to analyze samples were reliable and unbiased. *Id.* Lastly candidates were given the opportunity to contest the result or submit samples of urine to physicians of their own choice. *Id.* at 779-81.

B. Private Employers

As a general matter, Michigan does not have any laws governing, prohibiting or restricting drug testing of employees. In *Baggs v. Eagle-Picher Industries, Inc.*, 957 F.2d 268 (6th Cir. 1992), employees at a private automobile trim manufacturing plant, who worked with potentially hazardous materials like hot adhesives, were terminated for either refusing to submit to a drug test, or for failing their drug tests, and sued their employer. The employees asserted causes of action for breach of contract, defamation, invasion of privacy, misrepresentation, negligence, and a violation of the Michigan Handicappers' Civil Rights Act. *Id.* The employer argued that mandatory drug testing was valid because it was in the employee's employment contracts, in compliance with the employer's drug-free workplace policy, and that the test was given equally to everyone. *Id.* at 270. The trial court entered summary judgment for the employer, and the employees appealed. *Id.*

The court of appeals, applying Michigan law to the issue of drug testing and invasion of privacy, held that mandatory urine analysis did not violate Michigan common-law privacy rights. *Id.* The court said that surprise drug testing of employees did not amount to an invasion of privacy under Michigan common law, even though a reasonable person may have found mandatory workplace urine testing objectionable, given that the testing did not invade a matter that employees had a right to keep private and information about whether employees were reporting to work with drugs in their systems was related to employment. *Id.*

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

A. Employers/Employees Covered

The Michigan Persons With Disabilities Civil Rights Act ("PDCRA") defines an employer to include a person who has one or more employees and is broader than the traditional coverage under the federal ADA. Mich. Comp. Laws § 37.1201(b). However, the Act makes an exception for the employment of "an individual by his or her parent, spouse, or child," as well as those individuals employed in domestic service. Mich. Comp. Laws § 37.1202(2) and 37.1201(a).

The Elliott-Larsen Civil Rights Act (“ELCRA”) applies to employers with one or more employees. Mich. Comp. Laws § 37.2201(a). Its provisions cover employers in both the private and public sectors. *Barbour v. Dep’t of Soc. Serv.*, 497 N.W.2d 216 (1993).

The Whistleblowers’ Protection Act (“WPA”) applies to an employer with one or more employees and includes an agent of an employer and the state or a political subdivision of the state.

Mich. Comp. Laws § 15.361(b). The State of Michigan is an employer within the definition of the WPA and is not immune from civil suit. *Anzaldua v. Band*, 578 N.W.2d 306 (1998).

The Michigan Polygraph Protection Act of 1981 (“PPA”) applies to all Michigan employers with one or more employees, as well as employment agencies or others who accept applications for employment on behalf of employers. Mich. Comp. Laws § 37.202(b). The PPA defines “employee” as an individual who works for another person for compensation. Mich. Comp. Laws § 37.202(a).

B. Types of Conduct Prohibited

The PDCRA, Mich. Comp. Laws §§ 37.1101 et seq. (1999), prohibits discrimination in the employment of a handicapped individual and prohibits retaliation against employees who assert rights under the Act.

Under the ELCRA, Mich. Comp. Laws §§ 37.2102 (1999), employers may not fail or refuse to hire or recruit, or discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition or privilege of employment based upon religion, race, color, national origin, age, sex, height, weight, familial status or marital status.

These bases also encompass other more specific manifestations of the general categories, such as an employee’s accent. The United States Court of Appeals for the Sixth Circuit held that accent and national origin are intertwined and that the EEOC recognizes linguistic discrimination as national origin discrimination. *In re Rodriguez*, 487 F.3d 1001 (6th Cir. 2007).

Under the WPA, Mich. Comp. Laws §§ 15.361 – 369 (1994), an employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee’s compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

Under the PPA, Mich. Comp. Laws § 37.203, an employer shall not condition employment, promotion or change in status in employment, or as an express or implied condition of a benefit or privilege of employment on the taking of a polygraph examination.

Traditionally, Michigan’s anti-discrimination case law has followed in-step with federal caselaw analyzing similar claims under their federal statutory counterparts. However, the

Michigan Supreme Court has carved out several “quirks” in Michigan law that differs from the federal analytical structure.

In *Garg v. Macomb County Community Mental Health Services*, 696 N.W.2d 646 (Mich. 2005), the court overruled the “continuing violations doctrine” and held that the Elliot-Larsen Civil Rights Act three-year statute of limitations strictly limited claims to events occurring in the previous three years: “That is, three years means three years.”

In *Elezovic v. Ford Motor Co.*, 697 N.W.2d 851 (Mich. 2005), the court raised the bar on a plaintiff’s burden to show that the defendant-employer had notice of the alleged discrimination/harassment to establish liability under the Michigan Civil Rights Act (now known as Elliott-Larsen Civil Rights Act), holding that the plaintiff’s telling two supervisors “in confidence” about her direct supervisor’s improper conduct did not constitute notice.

C. Administrative Requirements

Complaints of discrimination under ELCRA may be filed with the Michigan Department of Civil Rights (“MDCR”) within 180 days of the alleged discrimination, or within 180 days after the Act was or should have been discovered. Mich. Comp. Laws §§ 37.2602 and 37.2605. However, under the ELCRA, an employee may bring a civil action in circuit court, without first exhausting administrative remedies. Mich. Comp. Laws § 37.2801.

Under the PDCRA, an individual has a choice of filing the claim with the MDCR, or with the court for injunctive relief, damages, or both. Both the MDCR and the courts have concurrent jurisdiction over these claims. Mich. Comp. Laws §§ 37.1605-.1607.

Complaints under the WPA must be brought within 90 days after the alleged violations or it is barred regardless of the remedy sought. Mich. Comp. Laws § 5.363(1). An action may be brought in the circuit court of the county where the alleged violation occurred, in which the plaintiff resides, or in which the person against whom the action is filed resides or has his or her principal place of business. Mich. Comp. Laws § 15.363(2). The circuit court has exclusive jurisdiction over actions brought under the WPA, regardless of the amount in controversy. *Driver v. Hanley*, 523 N.W.2d 815 (Mich. Ct. App. 1994).

Violations of the PPA can be brought through a civil suit seeking injunctive relief, monetary damages, or both. Mich. Comp. Laws § 37.207(2).

D. Remedies Available

A person alleging a violation of the ELCRA may bring a civil action for appropriate injunctive relief, monetary damages, or both. Mich. Comp. Laws § 37.2801(1). Damages may include attorney fees, and witness fees. Mich. Comp. Laws § 37.2802.

A civil action may be commenced under the PDCRA for injunctive relief or damages, or both.

Remedies available under the WPA are reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages or any combinations of these remedies. Costs of litigation, including reasonable attorney's fees and witness fees, may also be awarded by the court if deemed appropriate. See §§ 15.361-369.

Damages under the PPA can include reasonable attorney's fees and damages for loss caused by the alleged violation. Mich. Comp. Laws § 37.207(2). An employee who is discharged for refusing to take a polygraph test may recover double the wages lost.

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

Under Mich. Comp. Laws § 600.1348 (1996), no employee may be discharged for serving on jury duty.

Under Mich. Comp. Laws § 780.762 (1998), no employee may be discharged for complying with a subpoena to testify in court.

B. Voting

Michigan does not have a state law that regulates an employee's right to take time off from work to vote.

C. Family/Medical Leave

Michigan does not have its own specific statute pertaining to family and medical leave.

D. Pregnancy/Maternity/Paternity Leave

Michigan does not have its own specific statute pertaining to pregnancy/maternity/paternity leave. However, Michigan's Elliott-Larsen Civil Rights Act prohibits discrimination based on pregnancy, childbirth or a related medical condition. The pertinent statutory provision prohibits an employer from treating:

[A]n individual affected by pregnancy, childbirth, or a related medical condition differently for any employment-related purpose from another individual who is not so affected but similar in ability or inability to work, without regard to the source of any condition affecting the other individual's ability or inability to work. For purposes of this subdivision, a medical condition related to pregnancy or childbirth does not include nontherapeutic abortion not intended to save the life of the mother. Mich. Comp. Laws. § 37.2202(1)(d).

E. Day of Rest Statutes

Michigan does not have a specific "Day of Rest" statute.

F. Military Leave

Mich. Comp. Laws § 35.352 provides that a public employee who leaves a position for military duty may be restored to the same or similar position so long as he was relieved of or discharged from military leave honorably, makes an application for re-employment within 90 days of discharge or from hospitalization after discharge within one year.

G. Sick Leave

On March 29, 2019, the Michigan Paid Medical Leave Act (“PMLA”), Mich. Comp. Laws. § 408.951 et seq., *added by 2018 PA 338, amended by 2019 PA 369*, went into effect. The Act requires covered employers in Michigan to provide eligible employees an opportunity to accrue and use paid leave for certain reasons, primarily related to illness of the employee or the employee’s family member, preventative care, or if the employee or the employee’s family member is a victim of domestic violence or sexual assault. The Act also provides for leave in the event an employee’s place of work or the employee’s child’s school or care facility has been closed by order or a public health official due to a public health emergency, or due to exposure to communicable disease that could jeopardize the health of others.

The term eligible employee is broadly defined under the act as “an individual engaged in service to an employer in the business of the employer and from whom an employer is required to withhold for federal income tax purposes.” However, this definition is limited by a series of 12 exceptions, so that an individual who falls under any of the excepted categories is not eligible for paid medical leave. These include certain exempt employees, temporary workers, part-time employees who worked less than 25 hours per week the preceding calendar year, seasonal employees who work less than 25 weeks in a calendar year for a job scheduled for 25 weeks or less, independent contractors, variable hour employees, flight deck, cabin crew and railroad workers, individuals covered by a collective bargaining agreement and working for a private employer, and individuals employed by the U.S. government.

Employees can take paid leave for:

- The eligible employee’s mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the eligible employee’s mental or physical illness, injury, or health condition; or preventative medical care for the eligible employee.
- The eligible employee’s family member’s mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the eligible employee’s family member’s mental or physical illness, injury, or health condition; or preventative medical care for the eligible employee’s family member.
- If the eligible employee or the eligible employee’s family member is a victim of domestic violence or sexual assault, the medical care or psychological or other counseling for physical or psychological injury or disability; to obtain services from a victim services organization; to relocate due to domestic violence or sexual

assault; to obtain legal services; or to participate in any civil or criminal proceedings related to or resulting from the domestic violence or sexual assault.

- For closure of the eligible employee's primary workplace by order of a public official due to a public health emergency; for an eligible employee's need to care for a child whose school or place of care has been closed in certain circumstances; or in certain circumstances if the eligible employee or a family member has been exposed to a communicable disease.

The Act requires an employer to pay employees at a rate equal to or greater than the normal hourly wage, base wage, or minimum wage. The employer does not have to include overtime, vacation, bonuses, commissions, supplemental pay, price-rate pay or gratuities when calculating the pay rate. Unused leave does not have to be paid out at the time of separation of employment.

If an employer offers a minimum of 40 hours paid leave time to employees in the form of paid vacation time, paid personal time, or paid sick time that employer is presumed to meet the new requirements of the act. If the total amount of paid leave is less than 40 hours, those policies would not be compliant with the act.

Eligible employees earn one hour leave for every 35 hours worked. Accrual begins immediately and can be used after 90 days. An employer is not required to allow an eligible employee to earn more than one hour of sick time in a calendar week regardless of the number of total hours that employee worked. Employees may roll over unused hours into a new year but are not entitled to use more than 40 hours during the year. An employer who chooses to provide all 40 hours of paid leave at the beginning of the year rather than as it is accrued does not have to allow hours to roll over.

Employers must keep records documenting hours worked and paid medical leave taken by employees for at least one year. Those records must be made available for inspection upon request by the Michigan Department of Licensing and Regulatory Affairs. Employers must also display a poster, created and provided by the department, explaining the new law.

H. Domestic Violence Leave

Michigan's PMLA (more fully described above), provides paid leave time for victims of domestic violence.

I. Other Leave Laws

Michigan does not have any additional leave laws beyond those discussed above.

XIV. STATE WAGE AND HOUR LAWS

A. Current Minimum Wage in State

The current minimum wage in Michigan is \$9.45 per hour.

Michigan's minimum wage applies to any company that employs two or more employees over 16 years old. Two notable exceptions allow minors to be paid under the Michigan minimum wage - one allows minors aged 16-17 to be paid 85% of the minimum wage indefinitely, and the second allows any employee under 20 years of age to be paid as little as \$4.25 for the first 90 days of employment at any job.

Additionally, the Michigan Workforce Opportunity Wage Act (“WOWA”) allows employers to take a tip credit on minimum wage under certain conditions for employees whom customarily and regularly receive tips. The minimum hourly rate of pay for a worker subject to tip credit provisions is currently \$3.59 per hour. Deductions from Pay

Wages and fringe benefits paid by Michigan employers are covered under WOWA and Michigan’s Wages and Fringe Benefits Act (“WFBA”), located at Mich. Comp. Laws § 408.471 et seq. The Act defines how employers are to pay wages and fringe benefits to employees and any prohibitions that exist. The act applies to all public and private employers which employ more than one individual. Mich. Comp. Laws § 408.471(d).

In pertinent part, the act provides at Mich. Comp. Laws § 408.477(1) that:

Except for those deductions required or express permitted by law or by a collective bargaining agreement, an employer shall not deduct from the wages of an employee, directly or indirectly, any amount including an employee contribution to a separate segregated fund established by a corporation or labor organization under section 55 of the Michigan campaign finance act, 1976 PA 388, MCL 169.255, without the full, free, and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction. However, an employer that is a public body, as defined in section 11 of the Michigan campaign finance act, 1976 PA 388, MCL 169.211, shall not deduct, directly or indirectly, any amount from an employee's wages for a contribution to a separate segregated fund established under section 55 of the Michigan campaign finance act, 1976 PA 388, MCL 169.255, or a contribution or any payment to any committee established under the federal election campaign act of 1971, Public Law 92-225, 2 USC 431 to 455.

C. Overtime rules

The Michigan’s Youth Employment Standards Act, Mich. Comp. Laws § 409.101, and Michigan’s WOWA are the comparable state laws to The Fair Labor Standards Act, 29 U.S.C. 201, et seq. (“FLSA”), which establishes the federal minimum wage, and requires overtime pay for all hours worked over 40 hours in a week, unless the employee is exempt. The state laws also

set standards regarding the type of work minors can do, and the number of hours, among other requirements.

D. Time of payment upon termination

An employer must pay to an employer voluntarily leaving employment all wages earned and due, as soon as the amount can, with due diligence, be determined. However, an employer must pay all wages earned and due to an employee engaged in any phase of the hand harvesting of crops as soon as the amount can, with due diligence, be determined, but, in any event, not later than three days after the employee's voluntary termination of employment. Mich. Comp. Laws § 408.475(1).

An employer must immediately pay to an employee who has been discharged from employment all wages earned and due, as soon as the amount can, with due diligence, be determined. Mich. Comp. Laws. § 408.475(2).

In addition, where an employee is working under contract and either voluntarily leaves employment or is discharged from employment, and the amount due in wages cannot be determined until the termination of the contract, the employer must pay to the employee all wages earned by the employee as nearly as they can be estimated at the time the employee leaves. Final payment shall be made in full at the termination of the contract. Mich. Comp. Laws § 408.475(3).

E. Breaks and Meal Periods

Michigan does not have any law requiring breaks and/or meal periods for workers eighteen (18) years or older. An employer who chooses to provide a meal, lunch, or break period must completely relieve employees of their work duties for the break period to be unpaid. Employees under eighteen (18) years of age must be provided a thirty (30) minute uninterrupted rest period of scheduled to work more than five (5) continuous hours. Mich. Comp. Laws § 409.112.

F. Employee Scheduling Laws

Michigan does not have its own specific statute pertaining to employee scheduling.

XV. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in the Workplace

The Michigan Clean Indoor Air Act, in pertinent part, prohibits smoking in public places, including all a place of employment that is “an enclosed indoor area that contains 1 or more

work areas for 1 or more persons employed by a public or private employer.” Mich. Comp. Laws. § 333.12601(1)(o).

B. Health Benefit Mandates for Employers

Michigan does not have its own specific statute pertaining to health benefit mandates for employers.

C. Immigration Laws

Michigan does not have its own specific state statute pertaining to immigration and employment law.

D. Right to Work Laws

Michigan’s Right to Work Law became effective on March 27, 2013. The law makes it unlawful to require a worker to pay union dues or agency fees as a condition of employment. By its term, the law applies to all private works, and state and local government workers, except police officers and firefighters. The statutory provision applying to public employees is found at Mich. Comp. Laws § 423.209. The statutory provision applying to private employees is found at Mich. Com. Laws. § 423.14.

In addition, the law has a “grandfather” clause that only applies to any “agreement, contract, understanding, or practice that takes effect or is extended or renewed” after the effective date of the law.

E. Lawful Off-duty Conduct (including lawful marijuana use)

Michigan does not have its own specific statute pertaining to lawful off-duty conduct. In addition, under the Michigan Medical Marijuana Act (MMMA), a defendant-employer was not held liable for discharging an employee after the employee tested positive for marijuana, the use of which was prohibited by company policy. The trial court disagreed with the plaintiff-employee that because his use of the drug was permitted by the MMMA, he could not be discharged for that use. The court found that the MMMA only provides a defense to a criminal prosecution, rather than a defense to a discharge from private employment. The Sixth Circuit affirmed the trial court’s ruling and held that the MMMA does not restrict private employer’s ability to discipline employee for medical marijuana use, and thus, could not support a wrongful discharge claim. *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012).

F. Gender/Transgender Expression

Michigan does not have its own specific statute pertaining to gender/transgender expression.

G. Other Key State Statutes

Under Mich. Comp. Laws § 408.395 (1964) and § 408.483 (1978), no employee may be discharged for protesting violations of or participating in proceedings under the state's minimum wage law, equal pay for equal work law, fringe benefits law or the state Occupational Health and Safety Act.

Under the Workers' Disability Compensation Act, Mich. Comp. Laws § 418.125 (1969), no employee may be subjected to certain kinds of discharges for filing a claim for workers' compensation benefits.

Under Mich. Comp. Laws § 750.556 (1963), an employer is guilty of a misdemeanor if he or she discriminates against employees and their pay simply because of gender, under the Equal Pay Act.

Under Mich. Comp. Laws § 37.2205a (2005) of The Elliott-Larsen Civil Rights Act, an employer shall not, in connection with an application for employment, make or maintain any information regarding a misdemeanor arrest, detention, or disposition that did not result in a conviction. This does not apply to information relative to a felony charge before conviction or dismissal.

Mich. Comp. Laws § 423.201 (1947), the Public Employment Relations Act, recognized the right of most public employees in Michigan to unionize and protect them from retaliation for engaging in union or "concerted" activities.

Under Mich. Comp. Laws § 445.81 (2005), the Michigan Social Security Number Privacy Act, the Michigan legislature made a direct effort to combat identity theft by making access to a person's social security number confidential and restricted. Effective January 1, 2006, all employers were expected to become compliant with the Act. Now, employers may not use all or more than four sequential digits of an employee's social security number on identification badges, membership cards, permits or licenses. They must also limit documents that contain social security numbers and dispose of documents that do. The Act also established penalties for violation.

Under Mich. Comp. Laws § 408.1001 (1974), the Michigan Occupational Safety and Health Act, the Michigan legislature set minimum safety and health standards in the workplace.

Under Mich. Comp. Laws § 123.1381 (2015) the Local Government Labor Regulatory Limitation Act, Michigan local governmental bodies (*e.g.*, cities, villages, townships, and counties) are prohibited from regulating various aspects of employment, including, but not limited to: minimum wage; work stoppages, strike activity, and union organizing efforts; hours and scheduling; fringe benefits; unpaid or paid leave; and information required on an application or employment. This act applies retroactively to any local ordinance, policy, or resolution adopted after December 31, 2014.