Recognizing & Responding to Workplace Discrimination

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Introduction

People are treated unfairly at work every day. That’s not a crime. The real question is when does unfairness cross the line into discrimination? Many federal and state laws have been enacted over the years in an effort to answer that question. In short, employers may not discriminate against employees or job applicants merely because they possess a certain immutable characteristic, such as their race, sex, or other trait that is protected from discrimination under Title VII of the Civil Rights Act of 1964 and other federal employment laws.1

The list of protected characteristics has grown slowly but surely over the last few decades. It includes the familiar Title VII classes (race and color, sex, religion, and national origin) as well as disability, age, citizenship, and military service. In some states, the list has grown even longer, extending protection to employees who experience discrimination because of their sexual orientation, gender identity, marital or familial status, and a variety of other characteristics.

Employers need to be equipped to prevent and address all types of discrimination, regardless of whether it arises under federal or state law, and regardless of whether it’s the kind that occurs most often. In this report, we make an effort to talk about as many of the nooks and crannies of employment discrimination as possible. We will, of course, give a good overview of the most common types of discrimination laws and claims. But we’re going to assume a certain level of familiarity with those and try to zero in on the types of discrimination that get less “press.” In the final sections, we’ll take a quick look at how to investigate and resolve discrimination complaints and respond to Equal Employment Opportunity Commission (EEOC) charges.
Defining Discrimination

The major protected classes under federal law are race, color, religion, sex, national origin, age, and disability. We’ll talk about each of those types of claim individually in Sections 2 through 5 of this report. However, because certain concepts apply regardless of which type of discrimination you’re talking about, it makes sense to introduce these common concepts up front. That’s what this section is for. We will have a chance in later sections to discuss the specific problem areas that tend to arise under the different types of discrimination claims.

ADVERSE EMPLOYMENT ACTIONS

In general, discrimination occurs when an employee is subjected to an adverse employment action because of a protected characteristic. An “adverse employment action” is something that detrimentally affects the terms, conditions, or privileges of employment. It does not include minor events such as lateral job transfers or changes of title and reporting relationships. Nor does every unpleasant occurrence constitute an adverse employment action. The action must have actually caused the employee some material harm, not simply made him frustrated or unhappy.²

Example

When Angela learned that she had cancer, she asked her employer for a six-month leave of absence to receive medical treatment. Her employer granted her request as a reasonable accommodation of a disability under the Americans with Disabilities Act (ADA). When she returned to work at the end of her leave, she experienced the following situations, which she claimed were adverse employment actions:

• Not being returned to the same position as before she took leave (but the new position came with substantially similar responsibilities and a salary increase);
• Being denied a training session that she requested (but she was able to attend several other training sessions); and
• Being given a lower score on her performance evaluation than she had generally received before taking leave (but she was
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given “satisfactory” ratings and the evaluation was not used as a basis to detrimentally alter the terms or conditions of her employment).

None of these events constituted an adverse employment action.\(^3\)

However, the following are generally accepted to be adverse employment actions:

- Refusal to hire;
- Denial of raise or promotion;
- Pay cut or demotion;
- Changes to benefits;
- Reassignment to less desirable position;
- Other disciplinary action, including termination; and
- Bad references.

One court even found that punching an employee in the chest could be an adverse employment action when it resulted in the employee’s death.\(^4\)

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**DISPARATE TREATMENT VS. DISPARATE IMPACT**

Regardless of the type of protected characteristic involved, there are two broad categories of discrimination claims: **disparate treatment** and **disparate impact**.

“Disparate treatment” is just a fancy term for when an employer intentionally discriminates against an employee or job applicant because of his race, religion, national origin, age, sex, disability, or other protected characteristic. This type of discrimination can arise at any time in the employment relationship, from the interview process to the setting of salary, granting of raises and promotions, and decisions regarding discipline and discharge.

A few examples of disparate treatment include:

- Outright bias against employees based on a protected characteristic (a Christian who dislikes Jews);
- Giving preference to one group over another based on a protected characteristic (an African American who insists on hiring other African Americans even if they aren’t the best qualified for the job);
- Making decisions based on subtle stereotypes (a young manager who thinks older employees are out of touch with technology);
- Assuming that disabled employees or job applicants can’t perform the job’s essential duties without even trying to find an accommodation;
- Discriminating against “the majority” in a misguided attempt at diversity or affirmative action;\(^5\) and
- Harassment based on any of the protected characteristics, including sex, race and color, religion, national origin, age, and disability.\(^6\)

**Harassment.** A hostile work environment arises when conduct has the purpose or effect of unreasonably interfering with an employee’s work performance or creating an intimidating, hostile, or offensive working environment.
The abusive or harassing conduct must be the result of or motivated by the employee’s protected characteristic. For example, it’s not harassment if all employees are treated the same way, regardless of whether they are black or white, male or female, and so on.

**Disparate Impact**

“Disparate impact” is a fancy term for — you guessed it — *unintentional* discrimination. It arises when an employer’s apparently neutral policies or procedures have an unexpectedly discriminatory effect. Disparate impact claims can arise out of employment policies that govern all stages of the employment process, such as:

- Recruiting policies and procedures;
- Hiring and promotion criteria, including preemployment testing;
- Layoff and termination criteria;
- Appearance and grooming standards; and
- Education and experience requirements.

For example, a policy requiring all employees to be able to read English is not discriminatory on the surface. In fact, it seems like a perfectly logical and reasonable business requirement. But if you add in the fact that the literacy requirement is applied to all jobs regardless of whether any reading is involved, then the apparently neutral policy could actually be discriminatory.

Even if a neutral policy or practice has a disparate impact on a protected class, the employer may still avoid liability if it can show that: 1) the challenged policy or practice is job-related and consistent with business necessity; and 2) there is no less discriminatory alternative. For example, requiring certain employees to be at least five feet seven inches tall would probably have a disparate impact on women, who are far less likely to be that tall than men. If an employer has such a policy, it must show that it is truly job-related and consistent with business necessity and there is no less discriminatory alternative available.

**Statistics.** Because disparate impact focuses on a policy’s discriminatory *effect* rather than the employer’s motives, statistical evidence usually plays a key role. For example, an employee may produce evidence that African Americans are significantly underrepresented in the employer’s workplace compared to their availability in the qualified labor market. However, those types of statistics by themselves are not enough to prove discrimination.

For example, some employers could probably be shown, statistically, to pay black employees less than Caucasians for the same work. But in order to make the link between the statistics and proof of disparate impact, the employee must be able to point to a specific policy that causes the discrepancy. An example of that would be if the employer has a policy of basing employees’ starting salaries on what they were making at their previous job rather than on what the employer pays other (i.e., Caucasian) employees in equivalent positions. In that situation, the rationale would be that since African Americans are more likely than Caucasians to have been underpaid at their previous jobs, the policy has the effect of perpetuating that discrimination in their new jobs.
Discriminatory Pattern or Practice

Even when there is no direct evidence of discrimination, it is possible to use statistical evidence to show that discrimination is the employer’s “standard procedure.” For example, a pattern or practice of discrimination would be established if an employer hired no black employees in a five-year period even though 25 percent of its job applicants were black. In this type of case, the employer could try to disprove the statistics by offering a nondiscriminatory explanation for them. Employees may, on the other hand, offer other direct evidence of discrimination to back up the statistics. But if the statistics are strong enough, they may be adequate to prove discrimination without any other evidence and despite any explanations offered by the employer.

Note that “pattern or practice” claims may appear similar to disparate impact claims, but they are not the same thing. In the former, statistics are used to show that an employer’s policy had the effect of discriminating against a protected class of employees or applicants, regardless of intent. In disparate impact cases, however, statistics are used to show discrimination when there is not direct evidence of it.

Neutral Policies with Discriminatory Intent

It’s also possible for an employer to adopt or have an apparently neutral policy that it expects to have a disproportionate effect on a protected class. Is that disparate treatment or disparate impact? It’s probably disparate treatment. For example, having a literacy requirement may be intentional discrimination if the employer adopts it for the purpose of discouraging protected classes from applying.

FAILURE TO ACCOMMODATE

Most employers are well aware of the requirement that they provide reasonable accommodations to allow qualified employees with a disability to do their jobs. That obligation will be discussed in more detail in Section 5.

But the ADA is not the only law that requires employers to accommodate employees on the basis of a protected characteristic. Title VII requires employers to accommodate employees’ religious beliefs unless doing so would cause the employer an undue hardship in its business operations. Both types of accommodations will be addressed later in this report.

REVERSE DISCRIMINATION

It’s important to keep in mind that discrimination can be directed at anyone, even a Caucasian male, if he is discriminated against or harassed because of a protected characteristic (such as race, sex, or religion). For example, the
EEOC recently announced that it is proceeding with a sex discrimination lawsuit against L.A. Weight Loss Centers in which it alleges that the company denied jobs to male applicants because of their gender.7

Similar claims can arise out of an employer's affirmative action or diversity programs and in any number of other situations when the “majority” class is treated less favorably than the minority.

Reverse discrimination is theoretically possible under any of the Title VII protected classes and the Equal Pay Act (EPA). Note, however, that the U.S. Supreme Court has held that the Age Discrimination in Employment Act (ADEA) does not prohibit discriminating against the young in favor of the old.8 Nor is it possible to discriminate against employees because they aren’t disabled under the ADA.9

**BONA FIDE OCCUPATIONAL QUALIFICATIONS**

Title VII allows employers to discriminate on the basis of religion, sex, or national origin if they are a bona fide occupational qualification (BFOQ). This exception is applied very narrowly. It can also be used to justify certain types of discriminatory policies under the ADEA.

Basically, the BFOQ exception allows employers to use discriminatory criteria in hiring for certain positions, but only if that criteria is necessary to the normal operation of the particular business. This is a narrow exception that applies in very limited circumstances. For example, a fire department may require firefighter applicants to pass a hearing test without the use of hearing aids because of the risk that the conditions encountered in fighting fires would cause them to malfunction. The same hearing requirement would violate the ADA, however, if the department applied it to non-firefighting personnel.

**INTERSECTIONAL DISCRIMINATION**

Federal law prohibits discrimination not just because of one protected trait (e.g., race), but also because of the intersection of two or more protected bases (e.g., race and sex). For example, Title VII prohibits discrimination against African-American women even if the employer does not discriminate against white women or African-American men. The law also prohibits individuals from being subjected to discrimination because of the intersection of their race and a trait covered by another federal discrimination statute — such as the ADA or ADEA.

**Protected Characteristic Plus Another Factor.** Similarly, Title VII prohibits discrimination against members of a protected class who bear certain other characteristics that may not be protected on their own. For example, there is no federal law prohibiting employers from discriminating against parents (although some states have such a law). But it is illegal for an employer to
discriminate against only those parents who are members of a protected class (or only those members of the protected class who are parents). For example, it is illegal to reject African-American job applicants who have preschool-age children while not rejecting applicants of other races who have preschool-age children.

### RETALIATION

All of the federal discrimination laws contain separate provisions that, in general, prohibit employers from retaliating against employees who complain about or oppose discrimination. The specifics of retaliation claims are addressed further in Section 7.

### STATE DISCRIMINATION LAWS

Employers that have enough employees to be covered by both federal and state discrimination laws must comply with whichever law provides more protection for employees. For example, the ADA takes precedence over any state law that provides less protection than it does. But if a state law provides greater protection than the ADA — for example, a law that defines “disability” more broadly than the ADA — the employer must comply with both laws to the extent that they both apply in the specific circumstances.
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