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The Legal Environment: Basics of Employment Law: Part One

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OVERVIEW OF EMPLOYMENT DISCRIMINATION

Discrimination is prohibited in the workplace. There are, however, several types of discrimination that are prohibited by federal statutes. These are:

- pregnancy discrimination;
- age discrimination;
- race discrimination;
- sex discrimination;
- national origin discrimination; and
- disability discrimination.

While a detailed discussion of each of these types of discrimination could fill volumes, following is a brief discussion of each type of discrimination and practical tips in addressing discrimination in the workplace.

The central theme of the employment discrimination laws in the United States is that similarly situated employees or prospective employees should receive equal treatment by employers. These laws are an effort to equalize treatment in the employment relationship for groups or individuals who are different in some respect. Age, race, color, religion, sex, national origin and disability are all protected characteristics under the various employment discrimination statutes. These statutes include the Age Discrimination in Employment Act of 1967 (ADEA), the Americans With Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII). While these laws generally protect different traits, they operate in a similar manner. Nevertheless, there are some important differences. This section will outline the basics of the ADEA, the ADA and Title VII.

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (ADEA)

The Age Discrimination in Employment Act of 1967, found at 29 U.S.C.A. § 623(a)(1)-(d), protects employees from discrimination in the workplace based on an employee's age. The policy behind the ADEA is to protect older workers from the stereotype that they are inefficient or cannot perform the same work that younger workers can perform. The protected class of employees includes workers 40 years of age and older.

An employer is prohibited from taking an adverse employment action against a protected employee "because of" his or her age. Adverse

actions might include but are not limited to the following: firing, refusing to hire, demotions, transfer, reprimand or discipline. Essentially, employers are prohibited from using age as a "determinative factor" in an employment decision concerning a protected worker (*i.e.*, a worker 40 years of age or older). Employees who file suit claiming age discrimination will depend heavily on employment statistics. Employers violate the ADEA when they take an adverse employment action against a protected employee, and the replacement employee is "substantially younger" than the displaced employee.

An employer, however, may be able to justify the adverse employment action because of some legitimate, non-discriminatory reason for the adverse action. Good cause and reasonable factors other than age are mentioned in the statutory provisions of the ADEA. Additionally, for example, airline pilots may be required to retire at a certain age because of the safety concerns involved in flying an airplane. This "bona fide occupational qualification" must be reasonably necessary to the normal operation of the employer's business. Since the essence of the airline business is the safe transportation of passengers, the employer's concern about an employee's age and the safety of the airplane and passengers is justified by business necessity.

A significant difference between Title VII and the ADEA is when a discharged employee can show "direct" evidence of discrimination. For instance, "direct" evidence might be when a supervisor says to a discharged employee that "old guys just can't work like the young folks can." Statistics that indicate, for example, that a large percentage of employees 40 years of age or older are terminated in a reduction in force would be "indirect" evidence. When direct evidence is involved, an employer must be able to show that even though age was considered illegally, the employer would have made the same employment decision anyway. Going back to the example from above, even though the supervisor made the comment concerning older workers, if the employer can show that the older employee would have been fired for a legitimate non-discriminatory reason, the employer can avoid liability under the ADEA.

This difference between Title VII and the ADEA applies only when there is direct evidence of discrimination and that the illegal consideration of age in the employment decision was a motivating factor in the adverse employment decision. To point out this distinction between Title VII and the ADEA, consider a female candidate for partner in an accounting firm. Assume that a partnership committee member tells the female candidate that "she needs to be more feminine and less aggressive in the workplace." Thereafter, the female candidate is not elected partner. The female employee might be able to show a connection between the

comment and the adverse employment action. Under the ADEA, however, if the employer were able to show that even though age was a motivating factor in the employment decision, the employer would have made the same decision anyway, the employer can totally escape liability. Under Title VII, however, if the employee shows that sex was a motivating factor in the employment decision and the employer shows that it would have made the same decision regardless of the consideration of sex, the employer may still be liable for some damages to the employee.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964, found at 42 U.S.C.A. §§ 2000e-2000e-17, generally prohibits intentional and unintentional discrimination based on an employee's race, color, religion, sex or national origin. Title VII applies to employers with 15 or more employees in at least 20 consecutive weeks during the previous year. Title VII cases generally involve situations in which an employee claims to have been treated differently from other similar employees in the workplace "because of" a protected trait. Protected traits are those listed in the statute: race, color, religion, sex and national origin. The discharged employee must show that the protected trait played a role in the employer's decision and that the protected trait had a determinative influence on the outcome of the employment decision.

Title VII also prohibits employers from using an employment practice that has a discriminatory impact on a protected group. The employer cannot use employment practices that are facially discriminatory. The employer is also prohibited from using employment policies that, although neutral in their treatment of different groups, in fact fall more harshly on a protected group and cannot be justified by business necessity. The classic example of a discriminatory practice is an employment test which has an adverse effect on a protected group and serves no legitimate business purpose. A general aptitude test which has a disproportionate impact on men is discriminatory when the test is unrelated to job performance.

On the other hand, a legitimate test would be one which is a strong indicator of success on the job. Employers must validate any testing instrument prior to using the test results in the employment decision. Essentially, employers must prove that applicants performing well on the test will perform well on the job. The Equal Employment Opportunity Commission (EEOC) has established guidelines for determining whether the results of a particular test have a discriminatory impact. Those guidelines provide that a selection rate for a protected group that is less than 80% of the rate for the group with the highest passage rate will

generally be considered as evidence of adverse impact. The test or selection process must have a manifest relationship to the position in question. For instance, a test that measures typing speed would have an manifest relationship for an open typist position. Professionally developed tests are generally acceptable to the EEOC as long as the test is not administered in a discriminatory manner. This prohibition includes subjective employment practices which may have discriminatory adverse impacts on a protected group of employees.

For example, consider a City Fire Department policy concerning facial hair. The City Fire Department has a policy that firefighters must be clean-shaven so that the air breathing apparatus the firefighters use on the job will form a tight seal on their faces and prevent toxic fumes from entering the breathing unit. A small number of African-American men, however, in the Fire Department have a skin disease which is aggravated by shaving. Since this disease is rare in white men, the Fire Department's policy has a disparate impact on African-American men in the Fire Department. Nevertheless, the Fire Department would be able to justify the policy based on the business necessity of safety in the workplace.

Employers must be conscious of minority statistics concerning the workplace. A Title VII lawsuit will be successful if the plaintiff can show a high statistical correlation between the challenged employer policy and a low number of minorities in the workplace. Generally, Title VII is based on the assumption that non-discriminatory practices will, over time, result in a workforce more or less representative of the racial or ethnic composition of the community from which the employer's hiring is done.

If the Title VII plaintiff does show that the differences between the racial profile of the community and the employer's workplace are statistically significant, the employer may be able to justify the difference by pointing to a "bona fide occupational qualification" for the position. For example, a Baptist church is justified in hiring only Baptists to be ministers in the church. The qualification must be "reasonably necessary to the normal operation of that particular business." In other words, the qualification must go to the essence of the employer's business. This exception is primarily related to safety issues related to the position.

Sex (or Gender) Discrimination

Title VII prohibits an employer from discrimination based on an employee's sex or gender. While gender discrimination may take many forms, discrimination based on sex falls into four general categories:

pregnancy discrimination, sexual harassment, grooming and dress codes, and sexual orientation discrimination.

Pregnancy

Pregnancy clearly affects a woman's ability to work. Most women who deliver a baby will require several weeks of recovery time before returning to the workplace. Women who are pregnant may have physical activities constrained by their medical condition. In the Pregnancy Discrimination Act of 1978 (PDA), Congress amended Title VII to include pregnancy discrimination in the definition of discrimination "based on sex."

The Pregnancy Discrimination Act outlaws all types of employment discrimination based upon pregnancy or pregnancy-related conditions. A woman cannot be denied a job because of (1) pregnancy or (2) the fact that she obtained an abortion. Pregnant women cannot be forced to take a leave of absence except when they are unable to effectively perform their job duties. A woman who is unable to work because of pregnancy is entitled to the same medical and leave benefits the employer gives to employees with temporary medical disabilities. If an employer offers health insurance benefits, it must cover pregnancy under the same conditions as other medical problems; however, the employer-provided insurance is not required to cover the expenses of abortion unless it is to save the life of the mother or where the charges cover medical complications resulting from an abortion. An employer cannot discriminate against a woman because she has had an abortion.

An employer cannot single out pregnancy for special treatment or procedures for determining ability to work. If the employer requires its employees to submit a doctor's statement concerning their ability to work, or their need for a leave of absence in cases of sickness or accident, the employer can require the same when pregnancy is at issue. If the employer offers paid or unpaid disability leave, it must be provided to pregnant employees on the same basis as to sick or injured employees.

An employer cannot refuse to hire a job applicant because she is pregnant, unless the pregnancy will cause the applicant to be unable to complete a formal training program. Employees must be allowed to work while pregnant, unless the pregnancy causes the employee to be unable to meet reasonable performance standards.

No uniform rule requiring pregnancy leave at a certain number of weeks of pregnancy is valid. All cases must be handled on a case-by-case basis by determining the individual's ability to do the job. Additionally, Title VII and the PDA do not require an employer to offer health insurance

coverage or other benefits for pregnancy if the employer does not offer the benefits for sick or injured employees or their dependents.

Grooming and Dress Codes-Sex Discrimination?

Employer grooming and dress codes usually contain different standards for workplace appearance for men and women. Generally, when an employer's standard of appearance in the workplace makes a minimal impact on the employee, the employer's preference of dress code will be honored. Title VII is primarily concerned with granting men and women equal opportunity to access the job market. Distinctions between men and women that are not based on protected or immutable characteristics do not violate Title VII's mandate of equal opportunity; however, if an employer required women to dress provocatively, such a dress code might result in liability for discrimination based on sex.

Sexual Orientation

Sexual orientation is not considered to be part of the definition of "sex" under Title VII. Thus, while discrimination against employees because of their sexual orientation is not prohibited by Title VII, the law does protect employees from being sexually harassed because of their sex, even if the harassing employee is a of the same sex as the victim.

Religious Discrimination

Under Title VII, employers have a duty to reasonably accommodate an employee's religious practice unless accommodating the practice would cause an undue hardship on the employer's business. Consider a worker who religious practice does not allow her to work on Saturdays. If the employer cannot modify the shift schedule to accommodate the employee's request without undue hardship on the employer's business, the employer does not have to accommodate the employee. Undue hardship is measured primarily in terms of cost to the employer. In the example above, the employer would have incurred costs in providing a replacement worker for the Saturday shift modification and thus such a modification would be an undue hardship on the employer. The employer's duty is to accommodate employee religious practices when the accommodation does not require a costly modification in the workplace.

National Origin and Alienage Discrimination

One of Title VII's protected traits is national origin. Employers are prohibited from making employment decisions "because of" an individual's national origin. The term national origin refers to the

country from which a person or his ancestors came, not a person's citizenship. It should be noted, however, in the Immigration Reform and Control Act of 1986 (IRCA), employers are prevented from discriminating against aliens who are lawfully authorized to work in the United States. 8 U.S.C. § 1324a.

Retaliation

Title VII prohibits retaliation against employees who have participated in or exercised their Title VII rights. The purpose of the anti-retaliation provision is to protect employees who assert Title VII violations and to encourage employees to report Title VII violations. The provision prevents employers from retaliating against employees who have opposed unlawful employer conduct under Title VII. The section also prevents employers from retaliating against employees who have made a charge of discrimination, testified, or assisted in an investigation, proceeding or hearing concerning a Title VII violation.

SEXUAL HARASSMENT: THE POLICY

Most public employers have specific policies against sexual harassment. The majority of these policies, adapted from suggested EEOC guidelines, are similar to the sexual harassment policy referenced below:

It is the City's policy that all employees are responsible for ensuring that the workplace is free of sexual harassment. Sexual harassment of any kind is expressly prohibited and will not be tolerated. Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
2. Submission or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
3. Such conduct has the purpose and effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Sexual harassment of any type, including jokes, the exhibition of pictures, diagrams, and cartoons, is strictly prohibited and will not be tolerated. Supervisory personnel are required to take immediate and positive steps to eliminate any form of sexual harassment when it comes to their attention. Because of the City's strong disapproval of offensive or

inappropriate behavior at work, including any of the foregoing, all employees must avoid any action, conduct, or behavior which could be viewed as sexual harassment, including, but not limited to, unwelcome sexual advances, requests for sexual acts or favors, and other verbal or physical conduct of a sexual nature.

Any employee who believes he or she has been subjected to sexual harassment at work by *anyone*, including supervisors, coworkers, contractors, or visitors, is strongly encouraged to report the matter promptly to his or her immediate supervisor or manager. If the immediate supervisor or manager is involved, the employee should report the matter to the Human Resources Department or to any other City official. It is important that employees report such incidents because without employees' assistance, violations may go undetected.

The Human Resources Department will promptly investigate all complaints, and appropriate privacy safeguards will be applied. Confidentiality will be maintained to the greatest extent allowed by law. The Human Resources Department will be required to report its findings to the City Manager or the City Manager's designee. The City will take appropriate corrective action to remedy all violations of this policy. No employee who brings a sexual harassment complaint to the attention of the City will suffer any retaliation or adverse employment decisions as a consequence.

Any sexual harassment or sexually harassing behavior is considered to be a violation of City policy and will be dealt with accordingly by corrective counseling and/or suspension or termination, depending upon the severity of the violation. It is a violation of City policy, however, to file a false accusation of harassment or to provide false or misleading information or obstruct the City's investigation of harassment. Such improper conduct will result in discipline, up to and including discharge.

The following types of conduct may be viewed as sexually harassing behavior by a City employee:

Verbal: Unwelcome sexual innuendo, suggesting comments, insults, threats, jokes about gender-specific traits, sexual propositions.

Nonverbal: Unwelcome suggestive or insulting noises, leering, whistling, or making obscene gestures.

Physical: Unwelcome touching, pinching, exhibition of pictures, diagrams, and cartoons, brushing of the body, coercing sexual intercourse, or assault.

OVERVIEW OF THE LAW REGARDING SEXUAL HARASSMENT

There are two types of sexual harassment: (1) *quid pro quo* sexual harassment and (2) hostile work environment sexual harassment. *Quid pro quo* is a Latin phrase meaning "this for that." *Quid pro quo* harassment occurs when a supervisor grants an employee a work benefit in exchange for sexual favors from the employee. When this type of harassment occurs in the workplace, the harassing supervisor either conditions work-related benefits or withholds work-related benefits based on the performance or non-performance of sexual favors by the subordinate employee. In other words, the supervisor tells the employee that to receive an employment benefit, he or she must give sexual favors. Literally, this may entail statements or actions implying "sex for getting the promotion" or "sex for not getting fired" or "sex for a good evaluation," etc. If a supervisor conditions work-related actions on sexual behavior, the employer is vicariously liable for the supervisor's conduct.

A sexually discriminatory hostile environment is created if an employee is subjected to "sexual advances, requests for sexual favors and verbal or physical conduct of a sexual nature." Graffiti or openly displayed pictures of sexual content are included, as well as jokes aimed at one sex even though the jokes were not sexual in nature. The actions and environment must be "unwelcome." If an employee participates in creating a hostile environment, there is no Title VII violation; however, tolerating the behavior does not establish that the conduct was welcome. The harassing behavior must reach the level of unreasonable interference with the victim's work or creating an intimidating, hostile or offensive environment. One incident of sexually offensive conduct will not rise to the level of interfering with the workplace.

Defenses to these types of sexual harassment, however, are the same. The United States Supreme Court over the years has struggled with the issue of who is responsible when a supervisor engages in sexually harassing behavior. In 1998 the Supreme Court took a "middle road" approach and held as follows:

- An employer is automatically liable for a supervisor's sexual harassment only if the employee suffers a "tangible employment action" such as discharge, a demotion, or an undesirable reassignment.
- If no tangible job action occurs, an employer is not automatically liable for the supervisor's sexual harassment, but the employee is also not required to prove that top management knew about it or was negligent in

failing to prevent it. Instead, an employer is liable unless it can prove:

- the employer "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and
- the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

This is known as an "affirmative defense" because an employer has the burden of proof on these points.

Based upon the foregoing, the United States Supreme Court reached different conclusions in two of the major sexual harassment lawsuits it considered in 1998. In *Farragher v. City of Boca Raton*, the Supreme Court held the City liable for the sexual harassment of a female lifeguard by her supervisors. The City had no affirmative defense because it "failed to disseminate its policy against sexual harassment among beach employees," it "made no attempt to keep track of the conduct of supervisors" and did not inform employees "that the harassing supervisors could be bypassed in registering complaints." Under these circumstances, the Supreme Court said the City did not exercise reasonable care to prevent the supervisors' harassing conduct.

In contrast, in *Burlington Industries, Inc. v. Ellerth*, the Supreme Court sent the case back to the trial court. In this case the employee admitted she knew Burlington had a policy against sexually harassment and that she nonetheless failed to tell anyone with authority over her supervisor about his allegedly harassing behavior. The Supreme Court said the employee should have an opportunity to prove to the trial court that her supervisor sexually harassed her and that Burlington should have an opportunity to prove its affirmative defense to liability.

INVESTIGATING SEXUAL HARASSMENT COMPLAINTS

A City employee who believes that he or she has been the subject of sexual harassment should speak with a supervisor or the Human Resources Department. As a general rule, the Human Resources

Department will investigate the complaint. General guidelines to follow in investigating sexual harassment complaints are as follows:

1. **Interviews** - An investigation should begin immediately after an allegation of sexual harassment is made. You need answers to the "who, what, when, where, why and how" questions.

(a) **Witness Interviews**

- Do them separately, one at a time, and confidentially.
- Remember that you are gathering facts, not making judgments. Avoid statements like "that sounds like a compliment" or "he always does things like that" or "you are overreacting." Do not ask witnesses questions such as "did you see Bill touch Jane?" Rather, ask "have you seen anyone touch Jane in a manner that made her feel uncomfortable?"
- Do not disseminate allegations. Also, tell any and all witnesses to discuss the facts only with authorized management personnel and not to discuss the facts with co-workers or others.
- Witnesses are often reluctant to come forward with statements concerning the alleged behavior for fear of retaliation. Assure the witnesses that the employer will not tolerate any retaliation against them.

(b) **Alleged Victim Interview**

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    - Have the alleged victim write out the facts and notarize the statement. Explain that such allegations are serious and the employer will investigate the claim quickly. Tell the complaining employee that the procedure for handling the complaint requires the victim to write out the

facts and that the document must be notarized.

- Try to put the complaining employee at ease, acknowledge that coming forward with the complaint is difficult, but maintain a professional attitude about the situation.
- Tell the complaining employee that they will not be retaliated against for making the complaint.
- Obtain specific details concerning the alleged harassment.
- Have the complaining employee describe the type of conduct, the frequency of the conduct, where it occurred, how long it has been going on, whether they believe it has happened to other employees, and on what they base that knowledge.
- Find out if the conduct occurred during work or after hours, at a work-related function, or outside of the work place.
- Find out if the conduct was unwelcome, not whether the complaining employee voluntarily complied with the conduct.
- Note that even if the complaining employee voluntarily submitted to a supervisor's sexual demands, that does not mean that the conduct was welcomed. It might be that the victim thought that saying “no” would result in

employment-related consequences.

- Find out if others were subjected to similar treatment by the alleged harasser.
- If there was a significant period of time between the conduct and the complaining employee's report, find out why the report was delayed.
- Prepare a detailed chronology of events.
- Determine whether there may be any ulterior motives on the part of the alleged victim, such as a recent demotion, denial of a pay raise, or other adverse employment action.
- Find out what the complaining employee wants. Can the alleged victim continue to work with the alleged harasser? Can the alleged victim be productive working with the alleged harasser?
- Ask if the complaining employee is afraid of retaliation.
- Ask what the complaining employee sees as the resolution of the problem.
- Examine the alleged victim's job description, and put a copy in the investigative file.

(c) **Alleged Harasser's Interview**

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- Have the alleged harasser write out the facts and notarize the statement.
- Find out whether a prior consensual romantic relationship has existed between the parties.
- Find out how long they have known each other. Indicate in the statement the job title of the alleged harasser and the business relationship (*e.g.*, supervisor/subordinate) of the alleged harasser to the alleged victim.
- Find out whether they have a history of socializing with each other, either alone or in groups.
- Examine the alleged harasser's job description, and put a copy in the investigative file.
- The accused will often deny the accusations. Make note of the accused's reaction to the allegation.
- Find out if the alleged victim may have ulterior motives in bringing the complaint.
- Determine whether the alleged harasser has supervisory authority over or could fire and/or promote the alleged victim.

(d) **Interview the Accused's Supervisor**

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- Find out whether the accused's supervisor knows of any discipline problems or changes in

  - behavior of the accused or the complaining employee.
  - Find out whether the accused's supervisor has any knowledge of any relationship between the parties and if any rumors have been circulating.
  - Have any written memoranda been made concerning the parties' behavior?

2. **Confidentiality** - While the employer cannot be totally confidential with the allegations, the employer should be aware of possible defamation suits.

- Tell the witnesses to keep quiet about the incident. Do not tell people about the incident. People should be told on a "need to know" basis only.
- Emphasize to all persons involved in the investigation (including the complaining employee, witnesses, and the accused) the need for strict confidentiality, and let them know, if necessary, that failure to maintain confidentiality will result in discipline.

3. **Involve Attorneys in the Process**

- Do not make any conclusory reports as to whether or not harassment occurred.

4. **Do Not Transfer the Complaining Employee since this could be seen as retaliation.**

- An employer may tell the alleged victim that if there is some other job available while the investigation is pending and the complaining employee wants the job, the alleged victim may have the job.
- If the complaining employee is assigned to a less desirable position or to a position with a lower potential for advancement, the EEOC and/or a jury may see this as retaliation against the victim.

5. **Discipline Harasser - Swift, effective remedial action is crucial.**

- Use general progressive discipline.

- Consider such things as the severity of the conduct, the frequency of the conduct, and any prior conduct of the alleged harasser.

6. **Get the Victim to Agree that discipline was appropriate.**

7. **Follow Up With the Victim**

- Conduct interviews with the complaining party to see if the harassment has ended, and also if the employee has been retaliated against by other employees or supervisors.
- Managers and supervisors should pay close attention to insure that the employer's policy is followed.

8. **Open a Separate File For Sexual Harassment Cases**

- Keep the separate file outside the employee's personnel file.

9. **Document Everything**

- The more aggressively the employer moves against sexual harassment, the better the record will look to a jury, and the less likely it is that a plaintiff's attorney will take a sexual harassment case against the City.