

Discrimination - Supervisor Briefing

Introduction

This Supervisor Briefing examines the laws and best practices regarding discrimination in the workplace. It covers:

- Definition of Discrimination
- Harassment as a Form of Discrimination
- Retaliation
- Relevant Laws That Prohibit Discrimination
- Employer Liability for Discrimination
- Preemployment Inquiries
- Disciplining Employees in Protected Classes
- Test Yourself

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Question

An employee claims her supervisor did not offer her a promotion because she was pregnant. If her allegation is true, is the supervisor's action illegal?

- a. Yes
- b. No

Answer

Yes. If the reason why the supervisor did not award the promotion to the employee was because of her pregnancy, the action is illegal. Pregnancy is protected under the Pregnancy Disability Act, which amended Title VII of the Civil Rights Act of 1964.

Objectives of This Briefing

This Supervisor Briefing examines the laws and best practices regarding discrimination in the workplace. It covers:

1. Definition of Discrimination
2. Harassment as a Form of Discrimination
3. Retaliation
4. Relevant Laws That Prohibit Discrimination

Objectives of This Briefing (con't.)

- 5. Employer Liability for Discrimination
- 6. Preemployment Inquiries
- 7. Disciplining Employees in a Protected Class

Definition of Discrimination

A number of laws at the federal, state and local levels prohibit discrimination in employment because of membership in a protected class.

Definition of Discrimination (con't.)

A protected class is a group of individuals who are protected from discrimination because they share certain immutable characteristics.

Definition of Discrimination (con't.)

Under federal law, protected classes include:

- Age (over 40);
- Sex (including pregnancy);
- Race;
- National origin;

Definition of Discrimination (con't.)

- Disability status;
- Creed;
- Religion; and
- Genetic information.

Definition of Discrimination (con't.)

Under some state and local ordinances, protected class may also include:

- Family status;
- Educational status;
- Marital status; and
- Sexual orientation.

Definition of Discrimination (con't.)

At every level of the law, the goal of the law is to provide equal opportunity for everyone in virtually every aspect of employment.

Definition of Discrimination (con't.)

Two types (or theories) of discrimination are the basis for all discrimination laws:

- Disparate treatment;
- Disparate impact.

Definition of Discrimination (con't.)

- Disparate treatment claims are the most frequent kind of discrimination claim.
- Occurs when an employer (or supervisor) treats certain applicants or employees less favorably than those outside of the protected class, because of the former's protected characteristics;

Definition of Discrimination (con't.)

Under disparate treatment discrimination, the complainant must establish a discriminatory motive by the employer for an adverse employment action.

Definition of Discrimination (con't.)

An adverse employment action is an action by the employer that negatively affects the employee or applicant, such as:

- Termination;
- Suspension;
- Reduction in hours;

Definition of Discrimination (con't.)

- Placement in involuntary or unpaid leave;
- Refusal to impose discipline on the employee's supervisor;
- Negative statements about an employee affecting his or her reputation;

Definition of Discrimination (con't.)

- Refusal to hire;
- Denial of promotion;
- Increased surveillance; and
- Threats of any kind.

Definition of Discrimination (con't.)

Disparate impact claims involve employer policies and practices that negatively impact a protected class.

Definition of Discrimination (con't.)

Policies or practices that have a disparate impact affect protected classes more harshly than individuals outside of the protected class. They have a discriminatory *impact* although not necessarily a discriminatory *motive*.

Definition of Discrimination (con't.)

Examples of frequently challenged criteria for hiring or promotion that may have a disparate impact include:

- Height and weight requirements;
- Written test requirements;
- Educational standards; and
- Subjective procedures.

Definition of Discrimination (con't.)

The existence of a disparity does not mean that the policy itself void. Instead, the employer must show that the policy is based on a valid business necessity.

Harassment as a Form of Discrimination

Harassment is unwelcome conduct that becomes unlawful when dealing with it becomes a condition of employment or when the conduct creates a hostile work environment.

Harassment as a Form of Discrimination (con't.)

Harassment is not limited to sexual harassment. An individual can be harassed based on any protected characteristic: race, color, religion, sex (including pregnancy), national origin, age (40+), disability, or genetic information.

Did You Know?

Harassment can occur between two parties of the same protected class.

Retaliation

Retaliation occurs when an employer takes an adverse employment action against an individual due to that individual's participation in a protected activity.

Retaliation (con't.)

Protected activities include:

- Filing a charge of discrimination;
- Participating in a discrimination proceeding; or
- Other activity of opposing employer behavior that violates the law.

Retaliation (con't.)

An employer can be held liable for retaliating against an employee, even if the underlying claim of discrimination is unfounded.

Relevant Laws That Prohibit Discrimination

Federal statutes that prohibit discrimination include:

- Title VII of the Civil Rights Act of 1964;
- Equal Pay Act;
- Age Discrimination in Employment Act (ADEA);

Relevant Laws That Prohibit Discrimination (con't.)

- Americans with Disabilities Act (ADA);
- Genetic Information Nondiscrimination Act (GINA);
- Family and Medical Leave Act (FMLA); and
- Uniformed Services Employment and Reemployment Rights Act (USERRA).

Relevant Laws That Prohibit Discrimination (con't.)

Title VII of the Civil Rights Act of 1964 prohibits the employer from discriminating against employees and applicants because of race, color, religion, sex, or national origin.

Relevant Laws That Prohibit Discrimination (con't.)

Title VII bans discrimination in:

- Hiring;
- Discipline;
- Compensation (wages and bonuses);
- Termination;

Relevant Laws That Prohibit Discrimination (con't.)

- Promotion;
- Job assignments;
- Benefits; and
- Training.

Relevant Laws That Prohibit Discrimination (con't.)

Under Title VII, discrimination is prohibited for:

- Sex. Sex discrimination involves treating someone unfavorably because of gender. It may also involve treating an individual less favorably because of a connection with a group associated with people of a certain sex.

Relevant Laws That Prohibit Discrimination (con't.)

- Pregnancy. The Pregnancy Discrimination Act (PDA) amended Title VII to ban all forms of discrimination based on pregnancy, childbirth, or related medical conditions.
- Race or color. Discrimination because of race or color involves treating people less favorably because of characteristics associated with race.

Did You Know?

- Discrimination for race or color can occur between parties of the same race or color.
- Race or color discrimination also covers treating an individual unfavorably due to that person's association with a person of a certain race or color (for example, by marriage).

Relevant Laws That Prohibit Discrimination (con't.)

- National origin and citizenship. This broad category prohibits unfavorable treatment of an employee or applicant based on ethnicity or accent, country of origin, or appearance of a certain ethnic background—or because of association with an individual of a certain national origin or citizenship.

Relevant Laws That Prohibit Discrimination (con't.)

- Religion. An employer cannot treat an employee or applicant unfavorably because of sincerely held religious beliefs.

Relevant Laws That Prohibit Discrimination (con't.)

Title VII requires the employer to reasonably accommodate an individual's religious practices or beliefs. Examples of accommodations include:

- Flexible scheduling;
- Job reassignments;

Relevant Laws That Prohibit Discrimination (con't.)

- Voluntary shift substitutions or swaps;
- Modifications to workplace policies or practices; and
- Allowing particular dress or grooming practices.

Relevant Laws That Prohibit Discrimination (con't.)

The Equal Pay Act requires equal pay for equal work. The jobs do not have to be identical; they must only be substantially equal.

Relevant Laws That Prohibit Discrimination (con't.)

Age Discrimination in Employment Act (ADEA):

- Prohibits treating an applicant or employee less favorably because of age;
- Does not protect anyone under age 40.

Relevant Laws That Prohibit Discrimination (con't.)

Americans with Disabilities Act (ADA) protects individuals with disabilities. To be protected, the individual must show:

- He or she is disabled;
- Had a history of being disabled; and/or
- Was regarded by the employer as being disabled.

Relevant Laws That Prohibit Discrimination (con't.)

ADA also requires the employer to provide reasonable accommodations to employees or applicants qualified as disabled under the ADA, unless providing such accommodation would cause undue hardship to the employer.

Relevant Laws That Prohibit Discrimination (con't.)

Some examples of reasonable accommodations include:

- Altering existing facilities;
- Job restructuring;
- Part-time/modified work schedules;
- Reassignment to vacant position;
- Acquisition or modification of equipment.

| ADA Dos and Don'ts | |
|---|--|
| Do | Don't |
| Take a positive approach toward supporting an individual with a disability by assessing what accommodations could be reasonably made. | View the individual with a disability as a cost and liability. |
| Engage in the interactive process and seek the individual's views on what changes, alterations and accommodations to the workplace of the job would be helpful. | Make assumptions about the individual's abilities or about what the individual would find helpful. |
| Make a full and proper assessment of the individual's abilities. | Rush into any decision without properly considering all of the circumstances. |

| Do | Don't |
|---|--|
| Seek medical advice about the effects of the individual's condition and his or her abilities. | Overlook the individual's skills, experience and general positive qualities. |
| Give full and fair consideration to all reasonable possibilities. | |

Relevant Laws That Prohibit Discrimination (con't.)

The Genetic Information
Nondiscrimination Act (GINA) makes it
illegal to discriminate against
employees or applicants because of
genetic information.

Relevant Laws That Prohibit Discrimination (con't.)

Under GINA, the employer cannot request, require or purchase genetic information and is strictly limited on disclosing genetic information.

Relevant Laws That Prohibit Discrimination (con't.)

The Family and Medical Leave Act (FMLA) provides eligible employees up to 12 weeks of family leave in a 12-month period.

Relevant Laws That Prohibit Discrimination (con't.)

Under FMLA, an eligible employee can take leave for:

- His or her own serious health condition;
- Serious health condition of a family member; or
- The birth of a child or placement of a child for adoption or foster care.

Relevant Laws That Prohibit Discrimination (con't.)

FMLA prohibits discriminating or retaliating against or harassing an employee who has requested or utilized FMLA leave time.

Relevant Laws That Prohibit Discrimination (con't.)

The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits employment discrimination against employees or applicants based on prior or current military service or an intention to serve in the future.

Relevant Laws That Prohibit Discrimination (con't.)

USERRA applies to service in the Army, Navy, Marine Corps, Air Force, Coast Guard and Public Health Service commissioned corps, and includes the reserve portions of those entities.

Employer Liability for Discrimination

The employer typically bears responsibility for the discriminatory actions of supervisors and managers.

Employer Liability for Discrimination (con't.)

A supervisor may also be held personally liable for his or her discriminatory actions.

Employer Liability for Discrimination (con't.)

Because the supervisor is an agent of the employer and because the supervisor can be held personally liable, he or she should learn about discrimination, employer expectations and how to spot red flags that can lead to potential claims of discrimination.

Employer Liability for Discrimination (con't.)

The employer can be held liable for discriminatory actions of a co-worker—if an individual can show the employer knew or should have reasonably known about the actions but did nothing to stop them.

Employer Liability for Discrimination (con't.)

The supervisor should bring any complaints or reports of alleged discrimination or harassment to the attention of HR or the appropriate employer representative.

Employer Liability for Discrimination (con't.)

The employer may also be responsible for the acts of third parties, such as clients or contractors, who discriminate or harass employees in the workplace.

Employer Liability for Discrimination (con't.)

The supervisor should be on notice when any third party allegedly discriminates against or harasses an employee and should immediately notify the proper authority so that corrective action can be taken.

Preemployment Inquiries

A supervisor who is involved in hiring must be aware of how to avoid discrimination in job advertisements and interviewing.

Preemployment Inquiries (con't.)

Title VII explicitly bans any form of advertising for jobs that indicates any preference, limitation, specification or discrimination based on race, color, religion, sex, or national origin.

Preemployment Inquiries (con't.)

The only exception—which is *very* limited—is for a bona fide occupational qualification (BFOQ) that relates to the essence of the employer's business. For example, a ladies swimwear company may advertise for a female model.

Preemployment Inquiries (con't.)

Questions asked in an interview must not be discriminatory. The most difficult challenge for an interviewer is to refrain from asking questions that may have a disparate impact on protected classes. Such questions may invite a discrimination suit.

Preemployment Inquiries (con't.)

The supervisor should not ask questions that indicate a preference against a protected class. It is a best practice to stick with job-related questions.

| Subject | Lawful Inquiry | Unlawful Inquiry |
|-------------------|------------------------------------|---|
| Race or color | No inquiry permitted under the law | Complexion, color of skin, coloring |
| Religion or creed | No inquiry permitted under the law | Religious denomination, religious affiliations, parish or church, religious holidays observed. Applicant may not be told "This is a (Catholic, protestant, Jewish, Muslim...) organization." |
| National origin | No inquiry permitted under the law | Lineage, ancestry, national origin, descent, parentage, nationality. Nationality of applicant's parents, spouse. |

| Subject | Lawful Inquiry | Unlawful Inquiry |
|----------------|--|--|
| Sex | No inquiry permitted under the law | Inquiry about gender |
| Marital status | An interviewer may ask whether the applicant has any commitments that preclude him or her from meeting job schedules. If such questions are asked, they must be asked of both sexes. | Do you wish to be addressed as Miss? Mrs.? Ms.? Are you married? Single? Divorced? Separated? Information about spouse. |
| Age | An interviewer may ask, "Are you 18 years or age or older? If not, state your age." | How old are you? What is your birth date? What are the ages of your children? Inquired designed to discover age, such as "When did you graduate?" |

| Subject | Lawful Inquiry | Unlawful Inquiry |
|------------|--|---|
| Disability | An interviewer may ask , “Is there any reason why you cannot perform the essential functions of this job?” | <p>Do you have a disability? Do you have any impairment—physical, mental or medical—that would interfere with reasonable job performance?</p> <p>Have you ever been treated for any of the following diseases...? Do you have now or have you had a drug or alcohol problem?</p> <p>If there are any positions or duties you can’t do because of a disability, please describe.</p> |

| Subject | Lawful Inquiry | Unlawful Inquiry |
|---------------|---|---|
| Citizenship | An interviewer may tell the applicant that proof of citizenship or permanent immigration visa will be required at time of employment. | Requirement to produce naturalization or ask if native-born. Date of citizenship acquired. |
| Language | An interviewer may ask about languages spoken or written fluently, when the position requires such an ability. | What is your native language? How did you acquire your ability to read, write or speak a foreign language? |
| Organizations | Membership relevant to the job. | List all clubs, societies or lodges to which you belong. |

Disciplining Employees in Protected Classes

The supervisor must follow all the employer's written standards for disciplining employees and apply those standards uniformly—across all classes of employees.

Disciplining Employees in Protected Classes (con't.)

If an employee who brings a discrimination suit is able to show that employees outside of a protected class receive more favorable treatment than employees in the class, the employer—as well as the supervisor—may be liable for discrimination.

Disciplining Employees in Protected Classes (con't.)

The supervisor should have a legitimate and nondiscriminatory reason for imposing discipline or taking adverse action against any employee.

Disciplining Employees in Protected Classes (con't.)

Best practice: The supervisor should engage in frequent and early communication with employees who are violating employer policy; discuss the infraction; and explain in clear terms the violation and the employer's expectations.

Disciplining Employees in Protected Classes (con't.)

All disciplinary conversations should be:

- Documented, including discipline imposed and remedial actions taken;
- Consistent, according to policy, regardless of the employee.

Disciplining Employees in Protected Classes (con't.)

All discipline must be documented. Written documentation of disciplinary proceedings is the backbone of a good defense against a claim of discrimination.

Disciplining Employees in Protected Classes (con't.)

The supervisor should prepare documents that:

- Are accurate, complete, and readable;
- Provide written guidance to correct behavior.

Disciplining Employees in Protected Classes (con't.)

Documentation should show a court that:

- Discipline was fair;
- The employee knew how to comply;
- The employee knew the penalties for noncompliance.

Test Yourself

Question 1

All of the following are protected classes under federal law except:

- a. Sex.
- b. Sexual orientation.
- c. Religion.
- d. National origin.

Test Yourself

Question 1: Answer

All of the following are protected classes under federal law except:

- a. Sex.
- b. Sexual orientation.**
- c. Religion.
- d. National origin.

Test Yourself

Question 1: Rationale

b. Currently sexual orientation is not a protected class under federal law, although many state laws recognize it. Sex, national origin and religion are all protected classes under Title VII of the Civil Rights Act.

Test Yourself

Question 2

An employer can be held liable for sexual harassment of an employee committed by:

- a. A supervisor.
- b. A co-worker.
- c. A third party.
- d. All of the above.

Test Yourself

Question 2: Answer

An employer can be held liable for sexual harassment of an employee committed by:

- a. A supervisor.
- b. A co-worker.
- c. A third party.
- d. All of the above.**

Test Yourself

Question 2: Rationale

d. Sexual harassment can be committed by a supervisor, a co-worker and a third-party. An employer can be liable for the harassment if it was aware of the conduct (or should have reasonably been aware of the conduct) and did nothing to prevent or correct the behavior.

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