

Discrimination in Employment

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ABSTRACT

The United States Constitution and various civil rights laws protect employees from discrimination in employment based on race, sex, age, religion, and disability. Employees can gain relief under Title VII for sexual harassment that results in the loss of employment benefits or creates a hostile work environment. An otherwise qualified person cannot be excluded from employment solely on the basis of a disability; employers are required to provide reasonable accommodations for employees with disabilities. The Age Discrimination in Employment Act precludes mandatory retirement based on age. Employers must make reasonable accommodations to enable employees to practice their religious beliefs, as long as the accommodations do not result in undue hardship to the employer. Pregnancy must be treated the same as other temporary disabilities in medical or leave policies.

Recent federal laws intended to remove discrimination in employment have had a direct impact on school board employment practices. Such legislation includes Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Rehabilitation Act of 1973, the Equal Pay Act of 1963, the Age Discrimination Act of 1986, the Pregnancy Discrimination Act of 1978, and the Americans with Disabilities Act of 1990 (ADA). In addition, guidelines and policies from such federal agencies as the Equal Employment Opportunities Commission (EEOC), the Office of Economic Opportunity (OEC), and 42 U.S.C. Section 1983, in particular, have been applied in claims of employment discrimination. In this article, I will discuss briefly race and gender discrimination, sexual harassment, discrimination based on disabilities, age, religion, and maternity discrimination.

Race and Gender Discrimination

Beginning in the early 1970s, the federal courts heard several cases challenging discrimination. In 1971 the U.S. Supreme Court, in *Griggs v. Duke Power Company* (1971), determined that Title VII of the Civil Rights Act of 1964 (pertaining to hiring, promotion, salary, and retention) covered not only overt discrimination but also practices that are discriminatory in operation. The court held that an employment practice is

prohibited if the exclusion of minorities cannot be shown to be related to job performance. The case involved requiring job applicants to possess a high school diploma and make a satisfactory score on a general intelligence test as criteria for employment. The practice was shown to discriminate against black applicants. During the same year, the Court, in *Phillips v. Martin Marietta Corporation* (1971), handed down a decision relative to the disparate treatment of the sexes in the workplace. The Court ruled that discriminatory treatment of the sexes, by employment practices not necessary to the efficient and purposeful operation of an organization, is prohibited by the same federal legislation.

The effect of these two landmark decisions was to force employers to remove “artificial, arbitrary, and unnecessary” barriers to employment that discriminate on the basis of race and gender classification. In 1972, the coverage of these provisions of title VII, which previously had applied only to private employment, were extended to discriminatory employment practices in educational institutions. Subsequent to *Griggs and Phillips*, lower courts have applied these same legal standards to Fourteenth Amendment, Section 1983, and title VII equal protection cases.

Procedural Steps to File a Title VII Lawsuit

To establish a constitutional violation of equal protection, aggrieved individuals must prove that they have been victims of discrimination. In 1981, the Supreme Court, in *Texas Department of Community Affairs v. Burdine* (1981), set forth the procedural steps to file a Title VII suit. The plaintiff has the initial burden of establishing a prima facie case of discrimination by showing the existence of five factors: (1) member in a protected group (e.g., minorities, women, aged, handicapped), (2) application for the position, (3) qualification for the position, (4) rejection for the position, and (5) employer’s continued pursuit of applicants with the plaintiff’s qualifications for the position. These factors constitute an initial, or prima facie, case of discrimination in any type of personnel decision. Once a prima facie case of discrimination is established, the defendant (employer) must articulate a nondiscriminatory reason for the action. If this is accomplished, the plaintiff (employee or applicant) then must prove that the explanation is a pretext for discrimination, the real reason for the personnel decision being based on the consideration of “impermissible factors” in employment (see, e.g., *McDonnell Douglas Corp. v. Green*, 1973).

In 1993, the Supreme Court, in *St. Mary’s Honor Center v. Hicks* (1993), reiterated that the ultimate burden of proof in a discrimination suit lies with the plaintiff. The legal standards emanating from *Griggs*, *Phillips*, and *Hicks* in claims of discriminatory employment practices under title VII have been applied also under civil rights legislation barring discrimination based on age. Title VII does not cover discrimination based on disabilities. Employees with disabilities in public institutions must look to the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act of 1990 (ADA).

Sexual Harassment

Charges of sexual harassment in the workplace have been litigated under Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. The regulations implementing Title VII define sexual harassment as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment (29 C.F.R., Sec. 1604.11(a), 1991).

In *Meritor Savings Bank v. Vinson* (1986), the Supreme Court initiated this definition by identifying two different forms of sexual harassment: *quid pro quo* harassment and hostile environment harassment. *Quid pro quo sexual harassment* involves conditioning tangible employment benefits (e.g., promotion, demotion, termination) on sexual favors. *Hostile environment sexual harassment* involves a pattern of unwelcome and offensive conduct that unreasonably interferes with an individual's work performance or creates an intimidating or offensive work environment. The Court warned that "for sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of (the victim's) employment and create an abusive working environment." The Supreme Court, in *Harris v. Forklift Systems, Inc* (1993) elaborated further on the concept of the hostile environment form of sexual harassment, which creates a more difficult task for the courts to interpret than *quid pro quo*. In reaffirming the standard set in *Meritor*, the Court said that for sexual harassment to be actionable the conduct must cause "tangible psychological injury" rather than conduct that is "merely offensive." Courts determine this by examining such factors as frequency of the conduct, severity of the conduct, whether it is physically threatening or humiliating, and whether it unreasonably interferes with the employee's work performance.

Five kinds of sexual harassment include: sexual bribery, sexual imposition, gender harassment, sexual coercion, and sexual behavior.

- **Sexual Bribery.** *Sexual bribery* is solicitation of sexual activity or other sex-linked behaviors by promise of rewards; the proposition may be either overt or subtle.
- **Sexual Imposition.** Examples of gross *sexual imposition* are forceful touching, feeling, grabbing, or sexual assault.
- **Gender Harassment.** *Gender harassment* means generalized sexist statements and behaviors that convey insulting or degrading attitudes about women. Examples include insulting remarks, offensive graffiti, obscene jokes, or humor about sex or women in general.

- **Sexual Coercion.** *Sexual coercion* means coercion of sexual activity or other sex-linked behavior by threat of punishment; examples include negative performance evaluations, withholding of promotions, threat of termination.
- **Sexual Behavior.** *Sexual behavior* means unwanted, inappropriate, and offensive sexual advances. Examples include repeated unwanted sexual invitations, insistent requests for dinner, drinks, or dates, persistent letters, phone calls, and other invitations (Lowe & Strnadell, 1999).

School leaders are strictly liable for quid pro quo sexual harassment under both Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendment of 1972. Therefore, school administrators need to take positive steps to prevent sexual harassment in the workplace.

There are several positive approaches to sexual harassment that school leaders can take to maintain a positive work environment (Lunenborg & Ornstein, 2012).

Establish a No Tolerance Policy

Declare that the employer will not stand for sexual harassment, discrimination, or retaliation in the workplace. Under the law, the employer has the affirmative duty to rid the workplace of sexual harassment and discrimination. All employees should know their employer's policy that forbids sexual harassment, discrimination, and retaliation. Widely Disseminate the Policy. Everyone should have the policy readily available. This is important for both employer and employee.

Make It Easy for Employees to File Complaints

Employees should be able to complain to someone other than their immediate superior. Someone outside the employee's chain of command, such as a human resource staff member, should be available to hear the complaint.

Investigate Complaints Promptly and Objectively

Promptness and objectivity should be the standard response. If management has knowledge of discrimination or sexual harassment happening, an investigation should be conducted. Prompt and objective investigation says to everyone that the complaint is serious.

Take Appropriate Remedial Action to Prevent a Reoccurrence

Actions might include informal resolution between parties and disciplinary action against harassers. Offer the victim free counseling, if appropriate. Most importantly, provide training to all employees periodically.

Discrimination Based on Disabilities

The principal federal statutes that affect persons with disabilities are Section 504 of the Rehabilitation Act of 1973, 29 U.S.C., Sec. 794 (2002) and the Americans with Disabilities Act of 1990 (ADA) 42 U.S.C., Sec. 12101 *et seq* (2003). These statutes prohibit discrimination based on disabilities against persons who are “otherwise qualified” for employment. These laws extend to all stages of employment, from recruiting and screening to hiring, promotion, and dismissal.

Section 504 and the ADA define a disabled person as one who has a physical or mental impairment which substantially limits one or more of such person’s major life activities, has a record of such impairment, or is regarded as having such an impairment. The ADA and Section 504, as recently amended, specifically exclude from the coverage of either law persons currently using illegal drugs and alcoholics, whose use of alcohol interferes with job performance. But those in drug rehabilitation programs or who have successfully completed a program may be considered disabled.

The statutory definitions of a disabled person seem to include those with communicable diseases who are qualified to perform the job and whose condition does not threaten the health and safety of others. For example, the Supreme Court has ruled that the definition of a disabled person includes those with an infectious disease such as tuberculosis (*Sch. Bd. of Nassau County, FL v. Arline*, 1987). A lower court has extended coverage to teachers with AIDS (*Chalk v. U.S. District Court*, 1988).

The Supreme Court has said that an otherwise qualified disabled person is one who can meet all of the essential requirements of a job in spite of the disability. In determining whether a person with a disability is qualified to do a job, the central factors to consider are the nature of the disability in relation to the demands of the job. However, when a disabled person cannot meet all of the requirements of a job, an employer must provide “reasonable accommodation” that permits a qualified individual with a disability to perform the “essential functions” of a position. Furthermore, courts have ruled that Section 504 and the ADA protect otherwise qualified disabled individuals but do not require accommodations for persons who are not qualified for the positions sought (*Southeastern Community College v. Davis*, 1979; *Beck v. James*, 1990; *DeVargas v. Mason & Hanger-Silas Mason Co.*, 1990, 1991)

Age Discrimination

The Age Discrimination in Employment Act (ADEA) (2002) was enacted to promote employment of older persons based on their ability and to prohibit arbitrary age discrimination in the terms and conditions of employment. The law covers public employees, including teachers and school administrators. Thus mandatory retirement for teachers is prohibited by law.

The act parallels Title VII in its application and operation. Thus, litigation under ADEA follows the disparate treatment standard used for race and gender discrimination cases. An organization charged with age discrimination may defend itself by articulating

nondiscriminatory reasons for the adverse employment decision, such as inferior qualifications or poor performance rather than age.

Religious Discrimination

Citizens' free exercise of religion is protected under the religion clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. These clauses prohibit discrimination against any public school employee on the basis of religious beliefs. In addition to constitutional safeguards, public school employees are protected from religious discrimination under Title VII. In Title VII, as amended, Congress requires accommodation of "all aspects of religious observances and practices as well as belief, unless an employer demonstrates that he is unable to accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." (U.S.C., Sec. 2000e(j), 2002). The Equal Employment Opportunity Commission (EEOC) has developed guidelines with suggested accommodations for religious observance, such as assignment exchanges, flexible scheduling, job assignment changes, and using voluntary substitutes.

Pregnancy Discrimination

According to the *Pregnancy Discrimination Act (PDA)* (2002), an amendment to Title VII enacted in 1978, employers may not discriminate based on pregnancy, childbirth, or related medical conditions. Mandatory maternity leave policies have been the subject of litigation. In *Cleveland Board of Education v. LaFleur*, the Supreme Court held that a school board policy which required all pregnant teachers regardless of circumstances to take mandatory maternity leave for specified periods before and after childbirth was unconstitutional. The Court stated that it had long recognized that freedom of personal choice in matters of marriage and family choice liberties were protected under the due process clause of the Fourteenth Amendment. "By acting to penalize the pregnant teacher for deciding to bear a child... can constitute a heavy burden on the exercise of these protected freedoms."

The U.S. Constitution still permits school boards to implement maternity leave policies that are not arbitrary and fulfill a legitimate goal of maintaining continuity of instruction in a school system. For example, a mandatory maternity leave beginning date for teachers set at the beginning of the ninth month of pregnancy was upheld on "business necessity" grounds by the Court of Appeals, Ninth Circuit (*deLaurier v. San Diego Unified Sch. Dist.*, 1978)). A New Jersey court has sustained a period of child-bearing disability of four weeks before expected birth and four weeks following the actual date of birth for purposes of sick leave benefits (*Hynes v. Bd. of Educ. of Tp. of Bloomfield, Essex County*, 1983). A court found a male teacher not entitled to paid maternity leave for the purpose of caring for his disabled pregnant wife (*Ackerman v. Bd. of Educ.*, 1974). However, child-rearing leave must not be made available only to

females. Such a provision in a collective bargaining agreement was declared to violate Title VII (*Shafer v. Bd. of Educ. of Sch. Dist. of Pittsburgh, PA*, 1990).

A federal law, the *Family and Medical Leave Act of 1993 (FMLA)* PL 103-3, requires state and local government employers to provide up to twelve work weeks of unpaid leave during any twelve-month period for the birth or adoption of a child. Upon return from FMLA leave, an employee must be restored to his or her original job, or to an equivalent job with equivalent pay and benefits. Other provisions of the act are requirements to provide thirty days' notice of leave, medical certifications supporting the need for leave and reports regarding the employee's intention to return to work. Employees can bring civil action for employer violations of the provisions of the act.

Conclusion

The United States Constitution and various civil rights laws protect employees from discrimination in employment based on race, sex, age, religion, and disability. Employees can gain relief under Title VII for sexual harassment that results in the loss of employment benefits or creates a hostile work environment. An otherwise qualified person cannot be excluded from employment solely on the basis of a disability; employers are required to provide reasonable accommodations for employees with disabilities. The Age Discrimination in Employment Act precludes mandatory retirement based on age. Employers must make reasonable accommodations to enable employees to practice their religious beliefs, as long as the accommodations do not result in undue hardship to the employer. Pregnancy must be treated the same as other temporary disabilities in medical or leave policies.

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