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EMPLOYMENT DISCRIMINATION

“I can try a lawsuit as well as other men, but the most important thing is to prevent lawsuits.”

—Confucius, Analects, Bk. xii., (c. 500 B.C.)

OVERVIEW

It is virtually impossible for an employer to ever actually “win” an employment discrimination lawsuit when all the costs involved are considered. Such suits are disruptive to the ongoing life of a business, expensive to defend, and an unpleasant experience for everyone involved—from employees to supervisors to owners and executives. The only practical way to win is to conduct your business in a way that makes claims obviously frivolous in the first place.

Many people in management do not acquire a working knowledge of the law governing employment discrimination until a charge is filed with the EEOC (Equal Employment Opportunity Commission) or their company (and sometimes they themselves) is sued.

The horse is out of the corral at this point. The key to minimizing legal troubles with discrimination is a pervasive knowledge of the law, a steady, even compliance across an organization over time, and thorough documentation. This can be accomplished by knowing the law, following the law, and committing your personnel-related activities to paper to create an evidence trail of your knowledge of, and adherence to, the law. There are two other chapters in this book that relate to employment issues, namely, Chapter 2 on Workplace Sexual Harassment and Chapter 8 on Employee Handbooks.

THE LAW OF THE LAND

The law pertaining to employment discrimination is complex. It differs from one federal circuit (geographic area) to another, from state to state, and from city to city. Therefore, there are potentially at least three overlapping laws (federal, state, and city) that may apply to any given employer in a particular circumstance. This chapter will provide you with a general overview of the law with a special emphasis on federal law because it applies to most businesses across the country and is the law on which most state and local laws are modeled.

At-Will Employment

The general rule in the United States is that employees who do not have written employment contracts are considered “at-will” employees. With at-will employees, an employer can terminate, demote, promote, or change the terms and conditions of the employment, with or without notice, and with or without cause. **The laws**

prohibiting employment discrimination constitute a major exception to the doctrine of at-will employment. Under laws enacted by Congress and virtually every state in the United States, *it is unlawful for an employer to take adverse action against an applicant or employee that is motivated by the applicant's or employee's status as a member of a protected class.* Examples of adverse action can include termination of a longtime employee, refusal to hire an applicant, and less favorable treatment of an employee with regard to pay, bonuses, promotions, or other terms and conditions of employment.

Protected Classes

What are the protected classes? They are identified by federal statutes, state statutes, and local ordinances. Under Title VII of the Civil Rights Act of 1964, it is an unlawful *employment practice for an employer...to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, or sex.* Under the Age Discrimination in Employment Act of 1967, most individuals who are at least 40 years of age are designated as a protected class. The Americans with Disabilities Act of 1990 protects individuals with disabilities (including HIV+ status, and people recovering from alcohol or drug addiction) who *can perform the essential functions of the employment position that such individual holds or desires...with or without reasonable accommodation.* Other federal acts protect people who have had difficulties with debts or who are in the armed forces. Some state statutes and local ordinances include sexual orientation and marital status as protected classes. The laws against employment discrimination do not protect only minorities. For example, Caucasians receive the same protection from Title VII as racial minorities, and, absent a legitimate affirmative action program, they may sue if race was a motivating factor in an employ-

ment decision. In summary, business people should be careful that they do not make employment decisions based on a person's...

Race

Color

Pregnancy

Religion

National Origin

Sex

Age

Disability (in certain instances)

Membership in the armed forces

Past history with debts or bankruptcy

Jurisdictional Limits

Most federal anti-discrimination laws do not apply to small employers. Under Title VII and in the Americans with Disabilities Act, an employer must have **at least fifteen employees** for the statutes to apply. Under the Age Discrimination in Employment Act, the employer must have **twenty employees**. State and local versions of the federal anti-discrimination laws have their own jurisdictional limits. For example, the threshold in the State of Washington is eight employees; in Seattle the number is four.

Damages

Prior to legislative amendments in 1991, the remedies that a successful, aggrieved party (plaintiff) could obtain for a proven violation of Title VII were equitable in nature. For example, the plaintiff might receive back pay, reinstatement to a lost position, front pay if reinstatement was not available or appropriate, and the payment of reasonable attorney's fees and costs. In addition, the Age Discrimination in Employment Act provides for liquidated dam-

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ages if the employer's violation was found by a jury to be "willful." (Liquidated damages are quasi-punative; they are usually calculated by doubling actual damages.) It was, and is, also possible for a court to impose other types of injunctive relief such as requiring a company to instruct all managers or employees in non-discriminatory employment practices.

In 1991, Congress amended the anti-discrimination statutes to authorize a broader range of remedies. Today successful plaintiffs are entitled to all the remedies identified above, plus the full range of compensatory damages previously available in personal injury litigation. This means that courts may require employers to pay for lost future earning capacity, emotional distress and suffering, inconvenience, mental anguish, and loss of enjoyment of life. Plaintiffs may also request punitive damages when the conduct of the defendant is sufficiently egregious to warrant them. Unlike compensatory damages, which are intended to compensate the plaintiff for any emotional or financial loss, the purpose of punitive damages is to punish the defendant and to make the defendant serve as an example for others. Under the federal employment discrimination laws, the total of compensatory and punitive damages are limited as follows:

<u>Number of Employees</u>	<u>Damage Limit (Per Plaintiff)</u>
15-100	\$50,000
100-200	\$100,000
200-500	\$200,000
500+	\$300,000

State and local versions of Title VII vary widely from the federal law. For example, in the State of Washington punitive damages are not allowed, but there is no limit on compensatory damages.

Individual Liability

It is common for plaintiffs to name owners, managers, and supervisors as separate defendants in employment discrimination cases. Most, but not all, federal courts that have addressed the issue have ruled that only the corporation/employing entity is subject to suit for employment discrimination. The state counterparts of the federal legislation may authorize individual liability, depending on the language of the statute and the interpretation of that language by the state courts. Needless to say, the stress of a lawsuit is compounded when managers and supervisors have to worry about their individual assets being at risk.

In summary on the law of the land, and repeating the point made at the start of this chapter, it is difficult to ever really win a suit involving employment discrimination. There are a variety of costs even when an employer is found not to have discriminated. It is far better to prevent claims and suits.

EMPLOYMENT DISCRIMINATION CLAIMS

There are four major issues pertaining to claims:

- Disparate Treatment
- Disparate Impact
- Reasonable Accommodation
- Retaliation

Disparate Treatment

The most common claim made against businesses is for dissimilar (disparate) *treatment*. An employee or potential employee claims that an employer treated her or him unfavorably or less favorably because of her or his membership in a protected class. For example, a male employee might allege that his employer promoted others over him because of dislike for his religion. Disparate treatment claims can be made by individuals, groups of people, or via a class action in which one person or a small group presumes to speak for a larger group as a whole.

In a disparate treatment case, the ultimate question is whether the claimant's membership in a protected class was a factor in the adverse employment decision. Under federal law, the question that would be put to the jury is whether or not the person's membership in a protected class was a "determining factor" in the adverse decision. Some states use a lower standard than the federal law. Such states say an employer is liable if the person's membership in a protected class was a "substantial factor," rather than a determining factor. In these kinds of cases, an employer defends itself by demonstrating a legitimate, non-discriminatory reason for the adverse decision, e.g., why the person was fired, or not hired, or demoted, or not promoted. **Solid documentation regarding substandard performance or qualifications** is the best way to demonstrate non-discriminatory reasons for adverse decisions involving an employee.

Disparate Impact

In a disparate *impact* case, a person challenges a presumably neutral policy or requirement by alleging that the effect of the policy or requirement has an adverse impact on a protected class and that **the policy or requirement is unnecessary for effective performance of the job**.

For example, the employment requirement of a minimum height for police officers was challenged in 1980 in one federal court case to the effect that the policy (at least 5'-8") enforced by the City of Pontiac, Michigan excluded a disproportionate number of women because they tend to be shorter than men. Further, the challenge included material to show that the height requirement was and is not necessary for effective performance of the job. Although the height policy or requirement appeared neutral on its face, the requirement was deemed unlawful by the courts because its effect was discriminatory against a protected class.

As a practical matter, disparate impact claims are quite rare in recent years.

Reasonable Accommodation

Employers have a legal obligation to show some flexibility with regard to a person's religious beliefs or practices or her or his disabilities. If an employee or potential employee can perform the "essential functions" of a job with "reasonable accommodation," then it is unlawful to discriminate against the person because of these factors. Determining what is an essential function and what constitutes reasonable accommodation are job-specific inquiries. An accommodation is not reasonable if it involves undue hardship such as significant difficulty or expense. A court in Oklahoma held that a diabetic truck driver *could* be accommodated in a situation where there were no passengers or hazardous materials involved, and food was always within reach. On the other hand, a court in Alabama found that a police department did *not* need to accommodate an officer who could not effect a stance necessary to complete a state-mandated, handgun training program because he had restricted use of his right arm and hand.

Retaliation

Federal law and most state laws prohibit an employer from retaliating against an employee who complains about discriminatory employment practices or cooperates in the investigation of a charge or lawsuit. Forms of retaliation include termination, demotion, suspension, isolation, etc. Also, it is important to note that a person can still seek (and win) recovery for retaliation even if it is found that the person's original complaint (that precipitated the retaliation) was without merit.

In summary on claims, disparate treatment is the most common claim made against businesses. However, although a particular claim may be made on the basis of employment discrimination, aggrieved, at-will employees also regularly include other issues such as breach of oral contract, breach of promise, wrongful discharge, violation of public policy, and intentional or negligent infliction of emotional distress. These subjects are usually governed by state law.

THE EEOC (EQUAL EMPLOYMENT OPPORTUNITY COMMISSION)

In order to pursue a claim based upon most federal anti-discrimination statutes, the initiating party must first file a formal charge with the EEOC. The deadline for filing a charge is 180 days after the last occurrence of alleged discrimination.

The deadline date is relatively easy to calculate in the case of a job termination or the non-issuance of a job offer; it is more diffi-

cult to calculate when it involves a continuing violation of some kind. Once a charge is filed, the EEOC may or may not investigate. Sometimes it will; other times it will wait 180 days and issue a right-to-sue letter to the initiating party if the party requests it. That party cannot file a lawsuit alleging a violation of a federal anti-discrimination law until after it has filed a timely charge with the EEOC and received a notice of her or his right to sue. If the person suing goes to court without having received such a notice, there are grounds for a dismissal of the claim by the court.

If the EEOC decides to investigate, the intensity and timing of its investigation will vary dramatically depending on the assigned investigator's workload and the publicity appeal of the claim. **It is difficult to predict what the EEOC will do.** An employer will be given the opportunity to respond in writing to a specific charge and provide documentation in support of its position on the matter at hand. The EEOC may then contact witnesses and subpoena documents.

Should an employer use an attorney or a human resource professional during the time a charge is pending before the EEOC? It depends. An employer needs someone knowledgeable about employment discrimination law to draft a response to the charge and otherwise cooperate with the EEOC's investigation if there is one. The key is to work with the EEOC in such a way as to avoid prejudice in any subsequent litigation or otherwise limit the range of solutions you have to the charges.

Individual states may have their own agencies which have their own requirements. Such agencies, if they exist, will often work in conjunction with the EEOC to process and investigate claims.

HOW TO MINIMIZE YOUR LEGAL TROUBLES

The intent of the law is to make people who employ other people base their decisions about employees and potential employees on performance considerations, not membership in a class of people. Separating on-the-job performance, potential or actual, from other human factors (e.g. effort, interest, appearance, compatibility, etc.) is not an easy task in many, if not most, business situations. Informed, vigilant managers are required, as is documentation of performance and decisions.



1. **Stick to job-related inquiries when evaluating applicants.**

Make sure both your application forms and interviewers avoid asking questions or inviting answers that have the effect of identifying applicants who are members of a protected class. For example, a question that leads to the disclosure of the club(s) to which an applicant belongs can lead to a later claim. The general test should be: **Is the information requested necessary to judge an applicant's competence or job qualifications?**

Here are the basic guidelines about what can and cannot be pursued during an interview or on a job application:

- Do not seek information on an applicant's marital or family status, including family planning decisions, child care arrangements, or people to contact in event of an emergency. You can ask if the applicant was ever known by another name (so you can do reference checks), or whether the applicant has a relative who is employed by the company (if you have an anti-nepotism policy). You can ask how long the applicant plans to stay on the job and about his or her attendance record in past jobs.

- Do not pursue information regarding religion, religious holidays or practices, national origin, parents' national origin, appearance, foreign language proficiency (unless it is necessary for the position), any disability, or any handicap. A spirited debate on religion might be very stimulating, but it is definitely forbidden territory in an employment interview setting.
- You can describe the requirements of a subject job (days, hours, duties) and inquire generally whether the applicant can perform the job “with or without reasonable accommodation.” The EEOC recommends that the issue of accommodation not be addressed until after you have decided to offer the applicant a position. At that point the EEOC suggests that you make an offer conditional on the candidate’s ability to perform the essential functions of the job.

In essence, to minimize legal troubles connected with hiring, you are well advised to stick to an applicant’s ability to perform the duties of the job in question.



2. Establish and use a probationary period for all new employees.

While the laws against employment discrimination protect employees during a probationary period, such a period provides an opportunity for managers to systematically evaluate actual performance in the workplace. Appropriate action can then be taken early in the employment relationship with employees who do not meet the standards for the position. Moreover, an employee who is terminated during a probationary period is less likely to file a claim

than one who has been employed for an extended time. When you have a probationary period, it is important that *all* new employees be subject to it and that a record be kept of each person's progress and evaluations while on probation.



3. Maintain and use a comprehensive employee handbook.

Experience indicates that both employees *and juries* respond positively to the presence of manuals that spell out key processes affecting employees. For example, when managers and supervisors follow a system of progressive discipline that is in writing for everyone to see, it is more likely an employee can correct minor problems before they boil over into major ones and termination. A proper employee handbook should set forth expectations regarding job performance and provide for recourse when those expectations are not met. A handbook should also set forth a procedure by which complaints of discrimination can be investigated and handled internally in a fair and impartial manner. **Because some states will enforce as written the terms of an employee handbook, the particular language used should be chosen with great care.** Employee handbooks are discussed in detail in Chapter 8.



4. Conduct and document regular performance reviews.

To minimize your legal troubles, your company should have a formal process of employee evaluation. It should *require* supervisors, managers, and executives to honestly and objectively appraise each of their people in terms of job-related strengths and weaknesses. The process should also help evaluators identify ways in which individuals can improve their performance. This is simply good business, and many organizations do conduct periodic assessments. Where many companies fall down, however, is in documentation, particularly documentation about poor performers.

The importance of putting performance problems down on paper can not be over-emphasized.

For example, suppose a company must lay off employees in a reduction of staff. When this happens, the door is opened to mass litigation against the company because those selected for layoff will often believe (or, at least, claim) they have been singled out for reasons unrelated to their performance, e.g., age. If you have documentation that shows that the people who were selected for layoff were the less accomplished performers in the company, you will have a positive case to present to the EEOC (and perhaps, later, to a jury), or it will allow you to avoid litigation altogether. You will have evidence that your employment decisions were based on performance and merit, rather than on membership in a protected class.

Here is another example. Suppose you terminate a member of a protected class and he or she seeks help from an attorney. It has been known to happen. The first thing most plaintiff attorneys will do is ask to see their potential clients' personnel files. They will often do this before agreeing to take a discrimination case. If there is no file for the employee in question, the attorney knows the odds of winning the case are improved. Juries tend to believe that problems warranting termination should be a matter of record. If there is a file and it contains only positive performance evaluations, the attorney will know that you may well have a difficult time persuading either the EEOC or a jury that the terminated employee deserved to be terminated based on lack of performance. On the other hand, if there is a file and it identifies weak performance and/or other work-related problems over time, the attorney may well decline to take the case.

Start documenting a performance problem as soon as it arises.



5. Use severance agreements selectively.

Sometimes it becomes necessary to terminate an employee who is a member of a protected class and who is a borderline or gray-area case in terms of adequate performance. You recognize that the employee has the potential to make a troublesome claim. The person may even have threatened, either expressly or implicitly, to file suit. In this case, you should consider negotiating a severance agreement with the employee that will offer him or her “consideration” (see Chapter 7 on Contracts) in exchange for a release agreement. In a typical severance agreement, the employee agrees not to pursue any claims of discrimination against you. While you may blanch at the thought of paying severance to a borderline performer, you may wish to at least look at the economics. The cost of defending a claim in this circumstance may well be much greater than the cost of obtaining a severance agreement and release at the time of the termination.

In this regard, employees over the age of 40 have special rights when it comes to severance agreements. Under the Age Discrimination in Employment Act, any release agreement must include an express reference to the Act, a 21-day period in which to review the agreement before signing it, and a 7-day period to revoke the agreement after signing it.



6. Consider insurance to cover your employment practices.

Some insurance companies now sell policies that cover the costs involved in claims and lawsuits alleging employment discrimination. This type of insurance is relatively new, and, if available, it is a way for you to pass off some of your risk of being in business to a third party, the insurer. Since insurance companies deal with many claims from a variety of sources, they should have broader experience with employment claims than any specific operating company. Their potential participation with you may justify the cost of the

premium involved. In some cases you may have or be able to obtain employment practices coverage under your Comprehensive General Liability, Errors and Omissions, Umbrella, or Homeowner's policies. As suggested in Chapter 9 on Risk Management, it is important to know what your existing policies do and do not do for you.



7. Check your employee headcount.

Whenever an employment discrimination claim is filed or threatened, you should determine whether you have the minimum number of employees required in the statutes that are alleged to have been violated. The earlier this issue is checked, the quicker the claim may be shown to be invalid.

CONCLUSION

There is no ironclad way to ensure that your company—and perhaps, you—will not be sued for employment discrimination. However, there are steps you can take to reduce the chances it will happen. Under the law of our land, employers retain the discretion to hire or fire at-will employees for any reason or no reason at all provided there is no discrimination involved in the decision. The EEOC and juries do not accept that employers will use that discretion capriciously, however. Policies and practices such as those outlined above will help you prevent or defuse employment discrimination and claims thereof by employees—past, present, and potential.

