

OVERVIEW OF WORKPLACE DISCRIMINATION 2021 AAND WORKSHOP

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Summary

- What is Discrimination
- Age Discrimination in Employment Act (Federal and State)
 - *Age*
- Americans with Disabilities Act
 - *Disability*
- Title VII of the Civil Rights Act of 1964
 - *Color/Race, Religion, Gender, Pregnancy, Gender Identity, Sexual Orientation, and National Origin*

What is Discrimination

- Discrimination is treating people differently on the basis of a protected characteristic.
- An "adverse employment action" is a negative change in the compensation, privileges, terms or conditions of employment. *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855 (11th Cir. 2020).

Must be substantial (e.g., termination; demotion; suspension without pay; pay cut; slightly less favorable evaluation that results in lower raise

Trivial slights not actionable.

Discrimination – Protected Classes

- May not discriminate against an employee because of the employee's
 - *Age*
 - *Disability*
 - *Gender, including pregnancy*
 - *Gender Identity*
 - *Sexual Orientation*
 - *Race/Color*
 - *Religion*
 - *National Origin*

Age Discrimination in Employment Act (ADEA)

- The Federal ADEA prohibits an employer from discriminating against persons 40 or older because of their age
 - *The ADEA is enforced by the Equal Employment Opportunity Commission (“EEOC”).*
 - *Applies to Employers employing at least 20 employees on a regular basis.*
- Alabama ADEA prohibits employers with 20 or more employees from discriminating against employees and applicants who are 40 years of age or older (Ala. Code § 25-1-20, et seq.).
- Proof - Direct or Circumstantial
 - *Direct –Only the most blatant remarks whose intent could mean nothing by an intent to discriminate*
 - *E.g., “I refuse to hire anyone over 50 years old.”*
 - *Uncommon*
 - *Does not include stray remarks in the workplace; by nondecisionmakers; and statements by decisionmakers that are not related to the decisional process itself.*

ADEA

- Circumstantial - Prima Facie Case: (Presumption of Discrimination)
 1. At least 40 years of age
 2. Subject to adverse employment action
 3. A substantially younger person filled the position (not necessarily under 40)
 4. Was qualified for job from which discharged (longevity, skills, background, awards)
- Employer must rebut with legitimate, nondiscriminatory reason
- Burden shifts back to employee to show pretext. *The inquiry into pretext requires the court to determine, in view of all the evidence, "whether the plaintiff has cast sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable factfinder to conclude that the employer's proffered legitimate reasons were not what actually motivated its conduct."* Crawford v. Carrol, 529 F.3d 961 (11th Cir. Civ. App. 2008).
- i.e., show it cannot be believed due to inherent weaknesses, implausibility, inconsistencies, incoherencies or contradictions
- If show pretext, claim goes to the jury to decide

Americans with Disabilities Act (ADA)

- ADA prohibits employers from discriminating against a qualified individual who has a disability as defined under the ADA.
- The ADA covers employers with 15 or more employees, including state and local governments.
- ADA is enforced by the EEOC.
- Discrimination claims – Direct or Circumstantial evidence
- Circumstantial - Prima Facie Case
- (1) Physical or mental impairment that substantially limits one or more of the major life activities of the individual;
- (2) otherwise qualified to perform job;
- (3) subject to unlawful discrimination (adverse employment action) because of his disability.
- Same Burden shifting analysis

ADA

Qualified Employee

- A qualified individual with a disability is:
 - a. *One who meets all minimum job requirements such as level of:*
 - Skill level
 - Experience
 - Education
 - Licensure
 - b. *One who is able to perform the **ESSENTIAL JOB FUNCTIONS** with or without reasonable accommodations. If cannot perform the job, even with a reasonable accommodation, person is not a qualified individual under the Act.*

ADA

Qualified Employee/Essential Job Function

- To be able to determine whether something is an essential function of the job the employer has to know what the essential functions of the job are. Current and accurate job descriptions including the duties, licenses required, etc. are absolutely necessary!
- How much time is the employee actually performing the essential function?
- Are they actually performing the essential function?
- The task must be in the employee's job description to be essential.

ADA

Essential Job Function

- Attendance
- Punctuality
- Regular Work Schedule
- Vision
- Consciousness
- Speaking
- Standing/Walking

ADA

What is a Disability

- A disability is:

- *Physical or Mental Impairment that substantially limits **ONE OR MORE** major life activities. (E.g., working, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working) or*
- *Having a record of such an impairment; (history of impairment even if no longer disabled) or*
- *Being regarded as having such an impairment. (no impairment, but is regarded as being impaired)*
- *Must be a substantially permanent condition (not conditions that are transitory and minor)*

Examples of Disabilities

Fact Intensive

Cerebral palsy

Hearing impairments

Certain visual impairments

Heart Disease

Diabetes

Drug Addiction, Alcoholism

Some Orthopedic conditions

Cancer

Epilepsy

Crohn's Disease

Mental retardation

ADA – Failure to Accommodate

- Employer must provide a reasonable accommodation unless employer can demonstrate undue hardship.
- Examples – shifted schedules; specialty equipment
- Burden is generally on the employee to request accommodation

Has the Employee Asked for an Accommodation?

- My back is too sore to come to work.
 - No
- My back hurts I need a better chair with lumbar support.
 - Yes
- I'm really sleepy because I have sleep apnea.
 - No
- I need to come to work 30 minutes late each day because of my sleep apnea.
 - Yes
- Sally's perfume is so strong. I have a headache.
 - No
- I have migraine headaches that are often brought on by strong smell or odors. I need my co-worker to refrain from wearing perfume or cologne to work.
 - Yes
- I need a leave of absence to have kidney surgery.
 - Yes

Title VII

- Title VII prohibits employment discrimination based on
 - *Race/Color*
 - *Religion*
 - *Gender – including pregnancy*
 - *Gender identity*
 - *Sexual Orientation*
 - *National Origin*

Title VII

- Title VII only applies to employers with over 15 employees
 - *Lyes v. City of Riviera Beach, Fla.*, 166 F.3d 1332 (11th Cir. 1999)
- In general, you need to file a charge with the EEOC within 180 calendar days from the day the discrimination took place.
- Only require proof that discriminatory intent was a motivating factor.

Title VII

Race/color

- Direct or Circumstantial Evidence
- Circumstantial - To make out a *prima facie* case of racial discrimination a plaintiff must show:
 - (1) employee belongs to a protected class;
 - (2) was qualified to do the job, or for the raise, etc.,
 - (3) was subjected to adverse employment action; and
 - (4) employer treated similarly situated employees outside employee's class more favorably.
- *McDonnell Douglas's burden-shifting framework.*

Title VII Religion

- Title VII prohibits an employer from discriminating against an employee solely because of his religious beliefs. Section 703(a)(1), codified as 42 U.S.C. § 2000e-2(a)(1), provides that “[i]t shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of [among other things] such individual's ... religion....” *Id.*
- In addition, Title VII imposes an affirmative obligation on an employer to attempt to reasonably accommodate an employee's religious observances or practices unless it would cause undue hardship on the employer's business.
- Thus, a plaintiff in a Title VII religious discrimination action has two legal theories available for the prosecution of his claims: “disparate treatment” and “failure to accommodate.”

Title VII – Religion

Disparate Treatment

- Direct or Circumstantial Evidence
- If circumstantial - Prima facie case:
 - (1) Member of protected class
 - (2) qualified for position
 - (3) adverse employment decision (termination, no promotion)
 - (4) other equally or less qualified employee outside protected class was hired or promoted.
- Burden shifting framework

Title VII – Religion

Failure to Accommodate

- “Title VII requires that an employer ‘make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship.’ ” A plaintiff demonstrates a *prima facie* case of religious discrimination for failure to accommodate religious beliefs by showing:
 - (1) he had a *bona fide* religious belief that conflicted with an employment requirement;
 - (2) he informed his employer of his belief; and
 - (3) he was discharged or disciplined for not complying with the conflicting employment requirement.
- Burden shifts to Employer to show it offered a reasonable accommodation, or it would be an undue hardship to do so.)
- *Inquiry ends when Employer offers a reasonable accommodation, even if it is not the one asked for*

Title VII

Gender – pregnancy

- Title VII prohibits employers from discriminating against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's SEX.
- Direct or circumstantial evidence
- Pregnancy discrimination
- Prima facie case
 - (1) pregnant female
 - (2) qualified for her position
 - (3) suffered adverse employment action
 - (4) suffered from "a differential application of work or disciplinary rules." Must show the employer treated similarly situated nonpregnant employees more favorably when they did the same thing, or that employer violated its own policy in terminating or disciplining pregnant female.



Title VII

Gender Identity and Sexual Orientation

- An employer violates Title VII, which makes it unlawful to discriminate against an individual “because of” the individual's sex, by firing an individual for being homosexual or being a transgender person when an employer fires a person for traits or actions that the employer would not have questioned in members of a different sex, then sex plays a necessary and undisguisable role in the decision, which is exactly what Title VII forbids. Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).
- Gay county employee brought Title VII action against county, alleging sexual orientation discrimination in termination of employment as child welfare advocate. Plaintiff was fired for conduct “unbecoming” a county employee shortly after he began participating in a gay recreational softball league.
- Gay Skydiving instructor fired after he mentioned he was gay.
- Funeral home employee presented as male when hired; six years later advised employer that she would be living and working full-time as a woman; and was fired.

Title VII

National Origin

- National origin refers to the country a person was born in or where his/her ancestors lived.
- Thus, being an outsider from a different state or region in the same country will not give rise to this type of claim.

In Summary

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Questions

