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The Basics of Discrimination and
Retaliation: The Five Ws (and One H)
of Workplace Discrimination Law

Discrimination



- Employment at Will
 - Good reason, bad reason, no reason
 - But not an unlawful reason
 - Most common unlawful reasons are those protected under federal and state employment discrimination statutes
 - ✦ Title VII, ADEA, ADA, TCHRA

The First W: Why?



- Legislatures usually gives us the purposes
- Title VII was enacted in 1964 to prohibit discrimination based on race, color, religion, sex, or national origin and to establish a “Commission on Equal Opportunity” – the EEOC
- Age Discrimination in Employment Act (ADEA) was enacted in 1967 “to promote employment of older persons based on their ability rather than age”
- Americans with Disabilities Act (ADA) was enacted in 1990 “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”

The Second W: Who?



- Who is covered?
 - Private employers (Title VII, ADA and TCHRA – 15 or more employees (except for sexual harassment, only 1 employee); ADEA – 20 or more employees)
 - Government employers – state sovereign immunity is waived as to federal anti-discrimination statutes; TCHRA waives immunity against state employers if a plaintiff pleads sufficient facts to establish statutory discrimination
 - Labor organizations and employment agencies

The Second W: Who?



- Special rules for religious employers
 - Religious employers (churches, schools) are protected from employment-related discrimination lawsuits by the First Amendment's ministerial (or ecclesiastical) exception when the employees asserting claims perform religious or ministerial duties

What about individual employees?

Under federal discrimination statutes, generally no individual liability

No individual liability under TCHRA (except in sexual harassment claims)

The Third W: What?



- What is prohibited?
- Title VII
 - Race and color
 - ✦ Race includes ancestry and ethnic characteristics (skin color, race-linked characteristics such as sickle cell anemia, dress and grooming standards, and others)
 - ✦ Color can include tone of one's skin (light, dark)
 - National Origin
 - ✦ Place of origin of individual or ancestors
 - ✦ Physical, cultural or linguistic characteristics of a national origin group
 - ✦ Does not include citizenship discrimination (but IRCA does prohibit)
 - ✦ Special issues: language fluency, English-only, accents

The Third W: What?



- Title VII

- Sex

- ✦ Last minute addition to Title VII
- ✦ BFOQ defense to justify certain differential treatment
- ✦ Sexual harassment was first recognized in 1976 under a quid pro quo theory
- ✦ Hostile environment was first recognized in 1986
- ✦ Same-sex harassment in 1998
- ✦ Pregnancy Discrimination Act in 1978 added pregnancy as a protected status
- ✦ *Bostock* decision in 2020 – cannot discriminate against someone based on homosexual or transgender status

The Third W: What?



- Title VII

- Religion

- ✦ All aspects of religious observance and practice, as well as belief
- ✦ EEOC: “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views”
- ✦ Reasonable Accommodation obligation unless it would result in undue hardship
- ✦ Undue hardship must be greater than de minimis costs or negative effects on other employees
- ✦ Vaccine mandates are shining the light on religious accommodation issues

The Third W: What?



- Section 1981 – race discrimination
- ADEA
 - Over 40
 - BFOQ, RFOA or action is taken to observe the terms of bona fide seniority system or employment benefit plan

The Third W: What?



- ADA, ADAAA and Rehabilitation Act
 - Qualified individual with a disability
 - Disability is a physical or mental impairment that substantially limits one or more major life activities
 - Reasonable accommodation obligation unless undue hardship
 - Rehabilitation Act was enacted in 1973, preceding the ADA by almost 20 years – applies to programs or activities receiving federal financial assistance

The Fourth W: When?



- Hiring
- Discharge
- Constructive discharge
- Compensation
- Terms, conditions, privileges of employment
- Promotions
- Testing or selection criteria
- Employee benefits
- Training and work assignments

The Fifth W: Where?



- Most EEO statutes require administrative exhaustion
- Must file first with EEOC or with state agency within 300 or 180 days respectively (with exceptions)
- To pursue a federal claim, must obtain a right to sue from EEOC and file lawsuit within 90 days
- To pursue a state claim under TCHRA, no right to sue needed, but must file within 2 years (but if a right to sue is obtained from TCHR, must file within 60 days)

The Fifth W: Where?



- State v. federal
- Venue
- Limitations
- Statutory caps

The One H: How (to prove)?



- Disparate Treatment – intentional discrimination
- Direct v. indirect proof
 - *McDonnell Douglas* methodology
 - ✦ Employee must establish prima facie case
 - Member of a protected class
 - Suffered an adverse employment action
 - Others not in protected class were treated more favorably
 - ✦ Employer must articulate legitimate, nondiscriminatory reason
 - ✦ Employee must prove that articulated reason is a pretext for unlawful discrimination

The One H: How?



- Disparate Impact
 - No discriminatory intent, but a facially neutral policy or practice that discriminatorily impacts a protected group
 - Similar burden of proof
 - ✦ Plaintiff must establish – usually through statistical evidence – that a policy has a substantial disparate impact on a protected group
 - ✦ Employer has burden to prove that the policy is job-related and consistent with business necessity
 - ✦ Plaintiff can rebut by showing that the employer refused to implement an effective alternate practice that would have had lesser disparate impact

The One H: How?



- Pattern or Practice
 - Class action
 - Plaintiff bears burden to prove discrimination is employer's standard operating procedure
 - Can be through statistical or anecdotal evidence
 - Employer usually challenges based on alternative statistical analysis
 - If Plaintiff prevails, class members are presumed to be victims of the pattern or practice, and employer must rebut that presumption

The One H: How?



- Harassment
 - Quid pro quo
 - Hostile environment
 - Theories were merged in 1998 in two Supreme Court decisions (*Ellerth* and *Farragher*)
 - ✦ Employer is vicariously liable for hostile environment harassment created by the employee's supervisor
 - ✦ If there is no tangible employment action, the employer can raise an affirmative defense that (1) it exercised reasonable care to prevent and correct sexually harassing behavior, and (2) employee unreasonably failed to take advantage of an preventive or corrective opportunities to avoid harm
 - ✦ If tangible action is taken, there is strict liability

The One H: How?



- Sexual harassment
 - When the claim does not involve supervisory conduct, the plaintiff must prove:
 - ✦ Conduct based on sex
 - ✦ Conduct that is severe or pervasive
 - ✦ Conduct that is unwelcome
 - ✦ The employer knew or should have known of the alleged conduct
 - ✦ The employer failed to take prompt remedial action

The One H: How?



- Reasonable accommodation
 - Employee has burden to provide reasonable accommodation was denied
 - Employer has burden to provide undue hardship

Retaliation

The First W: Why?



- Title VII, ADA, ADEA, etc. all also prohibit retaliation
- Why?
 - To prevent an employer from interfering with an employee's efforts to secure the law's basic guarantees

The Second W: Who?



- Employees who engage in protected activity
 - The employee opposed any practice made unlawful by Title VII (or other statutes) or
 - The employee made a charge, testified, assisted or participate in any manner
 - Opposition is based on reasonable belief, even if mistaken, that conduct violates or may violate the applicable statute

The Third W: What?



- Retaliation occurs when an employer takes a materially adverse action because of an employee's protected activity
- It is not limited to employment decisions but from actions that would dissuade a reasonable worker from engaging in protected activity

The Fourth W: When?



- Retaliation can occur during employment
- And after employment – e.g., bad reference because of protected activity
- It also can include conduct that occurs outside the workplace

The Fifth W: Where?



- Same considerations as for discrimination claims
- Except that not all retaliation claims must be preceded by a discrimination/retaliation charge – if the retaliation flows out of a prior discrimination charge, most courts do not require a new charge specific for the retaliation

The One H: How (to prove)?



- Direct or indirect
- Burden shifting:
 - Prima facie case
 - ✦ Protected activity
 - ✦ A materially adverse action
 - ✦ Causation
 - Legitimate, nonretaliatory reason
 - But-for causation (more stringent than prima facie causation)

Remedies



- Why? To make victims whole and to prevent further discrimination
- Who? The employee or class of employees
- What?
 - Equitable relief – back pay and front pay
 - Common law damages: compensatory and punitive damages
 - In ADEA claims: liquidated damages, but no compensatory or punitive damages
 - Attorneys' fees
 - Pre and post-judgment interest

Remedies



- When?
 - Settlement or jury verdict or Court-ordered relief
- How?
 - Expert witnesses
 - Testimony from lay witnesses
 - Special issues such as mitigation

THE END



THANK YOU!!