

## **EMPLOYMENT DISCRIMINATION**

### **GENERAL LEGAL PRINCIPLES**

In 1963, Congress passed the Equal Pay Act. Federal law has forbidden sex, race, religion or age discrimination in employment generally since July 1, 1965. Title VII, as originally proposed was designed to prevent discrimination only on the basis of race, ethnicity, and religion. Many Southern senators vigorously opposed Title VII, the Equal Employment Opportunity Act and believed that racial segregation was not only legal, but divinely mandated. In a last ditch, desperate move to prevent passage of the bill, one of those Southern senators sought to amend the bill to include the word "sex" among the factors that employers could not use to differentiate among workers. He and others felt that the idea that women should be treated equally in the work place was so outrageous, that if he succeeded in amending the bill, it would be defeated. The amendment passed. So did the bill. Shortly after Congress created the Equal Employment Opportunity Commission to enforce the law, its chair assured the country that no one seriously intended to try to prevent discrimination on the basis of sex.

In general, treating men and women differently because of their gender violates the law. Treating people differently because of race, religion or age is also a violation of the law. Saying it is easy. Proving it is hard. There are generally two ways to go about it. One is direct evidence, which is extremely rare. It requires for example that the person who treated the woman differently virtually confess that he did so because she was a woman. No one who has lived

outside of a cave in the last two decades will likely admit such conduct based on gender, race or religion.

Some courts accept statements like, “women are too dumb to be managers,” or “I can’t imagine that a woman could boss around a bunch of men,” as direct evidence of discrimination. People who believe women are “dumb” or can’t be bosses usually act on their beliefs. They are, therefore, unlikely to give women a fair chance in the work place. Most courts refuse to understand that simple fact, and some have even refused to admit such statements into evidence.

The second and more common way to prove discrimination is called the McDonnell Douglas method, after the United States Supreme Court’s decision in the case *McDonnell Douglas Corp. v. Green*,<sup>1</sup> which first set it out in 1973. It applies to all types of illegal discrimination. It requires that the worker prove first, that something bad happened to her that significantly affected her work place (such as transfer, demotion, or discharge) and that it was probably due to her sex or race. That can be shown by a variety of evidence, such as the same thing happening to other women or African Americans or white people but not to men. The initial proof doesn’t have to be very strong to make the company come forward with a “legitimate non-discriminatory reason” for doing what it did. This legitimate reason can be such things as poor performance, bad conduct, absenteeism, general layoff, or any other reason they can think up. Then, the plaintiff must prove the reasons given by the company are false. She can do that by showing that her performance was actually very good; or that she never committed the conduct she is accused of; or that other workers were absent more than she was and they suffered no

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<sup>1</sup> 411 U.S. 792 (1973)

adverse consequences, or that there really was no lay off because shortly after she was “laid off”, the company hired someone else to do her job.

Sometimes, just showing that the company lied about why they treated her badly is enough to prove discrimination. This is based on the common sense notion that if the company has to lie about why it did something, the real reason is probably the illegal one: discrimination. There are many different ways to seek to prove discrimination, but doing it is always very difficult.

### **GENERAL PRINCIPLES ABOUT SEXUAL HARASSMENT**

Sexual harassment is a form of sex discrimination. It can and does happen to both women and men, but the vast majority of victims, close to ninety-five percent, are women. The things a woman must prove in a sexual harassment case are:

1. Plaintiff was subject to harassment in her work environment.
2. The conduct was based on gender.
3. The conduct was unwelcome.
4. The conduct was sufficiently severe or pervasive that a reasonable person in her position would find the environment hostile or abusive.
5. She actually found the environment hostile or abusive.
6. Defendant knew or should have known, of the harassment.
7. Defendant failed to take prompt appropriate corrective action.

Defendants can sometimes escape liability for sexual harassment if they can show that, as soon as they knew about it, they took prompt action that fixed the problem. Sometimes, they can also avoid liability if they can show that they had a good anti-harassment policy in place and that the victim unreasonably failed to use it.

### **GENERAL PRINCIPLES ABOUT RETALIATION**

Retaliation occurs when an employee reports harassment or tries to correct discrimination and then is punished for it. It is illegal. Juries are particularly appalled at such conduct because the victim has done exactly what the company said she should do and then has suffered for doing the right thing. Retaliation is also a very common problem. It is why women endure sex discrimination and sexual harassment sometimes for years without complaining. They fear that they will lose their jobs. Unfortunately, that fear is often well founded.

### **CAPS ON DAMAGES IN TITLE VII CASES**

In 1991, Congress amended federal law prohibiting sex discrimination and harassment, to permit recovery of damages for emotional distress and to punish Defendants. Then President Bush vetoed the original bill. To secure his approval, supporters of equal employment opportunities for women were forced to accept monetary caps on those kind of damages. The amount of the caps was based on the size of the employer:

15 – 100 employees - \$50,000

101-200 employees - \$100,000

201 – 500 employees - \$200,000

More than 500 employees - \$300,000

These caps limit the amount a victim of sex discrimination or sexual harassment can recover for compensatory damages and punitive damages.

Employees who are victims of race or ethnic discrimination have access to adequate and uncapped damages because they are covered by other laws. Not only do the laws designed to

prevent discrimination discriminate against women, the law specifically prevents the jury from knowing about the damage caps. In effect, judges and attorneys are forced to lie by omission

For a large corporation, the \$300,000 in punitive damages is not a deterrent. It is probably less than what the CEO spends on entertainment annually. For many company's, their CEO's earn more than \$300,000 per week. To limit the amount available to punish scofflaw corporations encourages the continuation of sex discrimination and harassment. The amount is so relatively small that it does not amount to any serious detriment. Congress should correct this inequity.

### **WHAT TO DO ABOUT SEXUAL HARASSMENT BEFORE CALLING A LAWYER**

Here are some common sense approaches to establishing and maintaining a good work history.

1. Do your very best to meet your employer's expectations, even when those expectations are not reasonable.
2. Use the internal complaint process—IN WRITING. Write specific memos to superiors about particular offensive conduct and about blatant discrimination. The memos should be straightforward, factual and nonaccusatory. Simply state what happened and ask for help.
3. Get a copy of your personnel file or files, or whatever your company calls the documents it keeps about you. Most states permit you to have access to those documents. You should check those records periodically. If you think there is a possibility of making a complaint, either internal or external, you should get a complete copy. Some employers will not permit employees to copy their personnel documents. If you work for such an employer, take careful

notes of the entire content of your file, number the pages in ink at the **BOTTOM LEFT** side of each page, including the reverse side of all two-sided documents. This will prevent additions or subtractions.

4. Do not participate in sexual comments and innuendoes. Many women in male-dominated professions, believe that in order to be accepted by their coworkers, they have to tell dirty jokes, use curse words, and even put other women down. This tactic may work on a very short-term basis, but as a long-term solution, it can never be successful. Being “just one of the guys” is simply not possible for any woman. That should not be our goal. You don’t need to be a prude, but keep your work language and work conduct above reproach. If you don’t, Defendants will use it against you. This is how defendants try to prove that the sexual harassment was “welcome” and therefore not illegal. It is very confusing to juries when they learn that the woman complaining of sexual harassment was herself a participant in sexually oriented conduct. While often women participate only because of their desire for acceptance, that is always harmful in the long run, both to the woman herself and to the case.