

# Public Safety: Employment Discrimination



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# Age Discrimination in Employment Act

- Covers employees 40 years of age or older.
- Prohibits statements or specifications in job notices or advertisements of age preferences or limitations.
- Age (entry and exit) may ONLY be specified in rare circumstances where age has been proven to be a BFOQ.
- Example: hiring and retirement in law enforcement positions.

# Age Discrimination In Employment Act

- Prohibits discrimination based on age in apprenticeship programs.
- Prohibits denial of benefits to older employees if the cost is the same as to other employees.

# ADEA vs. Wrongful Discharge

- McKennon v. Nashville Banner Publishing Co. No. 93-1543 (January 23, 1995) An employee was discharged in violation of ADEA.
- Employee is not barred from all relief when, after discharge, the employer discovers evidence of wrongdoing sufficient by itself to permit the termination of the employee.

# Americans with Disabilities Act (ADA)

- 42 USC 12101
- Prohibits discrimination on the basis of disability in employment, State and local government activities, public accommodations, commercial facilities, transportation, and telecommunications.

# ADA Requirements

- Person Must be “**Disabled.**”
- Capable of performing with or without “reasonable accommodation” the “**essential job functions**” of the position (Meaning person otherwise meets the skill, experiences, education, or other requirements of the job).
- If accommodations are required, they are “**reasonable accommodations.**”
- Do the accommodations impose an “**undue hardship**” on the agency?

# Defining “Disabled”

- When a person has:
- 1) A physical or mental impairment that substantially limits one or more “major life activity”; or
- 2) Has a record of such impairment; or
- 3) Is regarded as having such an impairment.

# Requires Substantial Impairment

- Not minor impairment (not sprains or infections) - not current drug use - alcoholic protected if can perform job function while not intoxicated on job.
- “Major Life Activity” – seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, self care.
- G/R - Not general obesity – but morbid obesity (twice normal body weight) some courts say ADA protected - See Cook v. Rock Island 10 F.3d 17 (1<sup>st</sup> Cir. 1993) - other courts say NO.

# Essential Job Function Defined

- The primary duties of the job considering the time spent performing those duties, the skill requirements, and the necessary work experience.
- The “essential” requirement assures a person will not be eliminated simply because of failure to perform marginal or incidental job functions.

# Essential Job Function Defined

- If the person is qualified to perform the Essential Job Functions EXCEPT for the limitations caused by the disability, employer MUST consider whether the person could perform these functions with a reasonable accommodation
- Previously prepared job description is evidence of essential job functions

# Essential Job Functions: Law Enforcement

- Making forcible arrests
- Driving under emergency circumstances
- Firearms qualifications
- Collecting evidence
- Preparing reports
- Communicating to the public

# Reasonable Accommodations

- Making exiting facilities used by employees readily accessible to and usable by a person with disabilities.
- Job restructuring, modifying work schedules, reassignment to a vacant position.
- Acquiring or modifying equipment or devices, adjusting examinations, training materials and policies, providing readers or interpreters.

# Reasonable Accommodation Does Not Require

- Re-allocation of essential job functions.
- Converting TEMPORARY light duty jobs into Permanent jobs.
- Bumping others out of or creating light duty jobs.
- Promotion to accommodate the disability.

# Defense - Undue Hardship

- Agency is NOT required to make accommodations IF it would impose an ‘undue hardship’ on the operation of the agency.
- Undue hardship requires significant difficulty or expense when considered in light of a number of factors; nature and cost in relation to the size, resources, nature, and structure of the agency.
- The larger the agency, higher the obligation.

# Medical Exams Under ADA

- **Pre-Offer Medical Exam Defined** - When applicant is required to submit to a medical examination OR is asked questions to determine if the applicant has a disability PRIOR to being given a “conditional offer of employment.”
- See Section 102c (3) For Pre and Post offer medical examinations.

# Conditional Offer of Employment

- **Conditional Offer of Employment Defined** – the ability of employer to lawfully CONDITION the offer of employment on the results of a medical exam or inquiry.
- Requires ALL new employees in same category take medical regardless of a disability – information is kept confidential

# Pre-Offer Rule

- **Rule:** No medical examination and no inquiries of job applicant about disabilities (physical or psychological) or the nature or severity of any disability prior to a conditional offer of employment.
- **Can Ask:** Are you capable of doing the tasks required as part of the essential job functions?  
Example: lift, run, type?

# Post Offer Medical Exams

- **Post Offer Medical Exam Defined** – When an applicant is required to submit to a medical exam OR answer questions to determine if there is a disability **AFTER** the applicant has been a conditional offer of employment.

# Post-Offer Rule

- **Rule:** After a conditional offer of employment, the employer can require a broad medical exam.
- The exam need NOT be job related BUT the screening criteria MUST be job related and consistent with business necessity and the essential job functions, and not subject to reasonable accommodation

# Medical Testing

- 1<sup>st</sup> medical can signal need for additional testing – permitted by ADA.
- Employer CAN reject biased medical exam.
- Employer must be prepared to defend to avoid accusations that rejection was based on the disability alone.

# Medical Rejections Defenses

1. Rejection based on job related criteria.
2. Criteria consistent with business necessity.
3. Cannot do essential functions even if reasonable accommodation.
4. If safety considerations – applicant must have posed a **DIRECT** and **SIGNIFICANT** threat – objective – facts – not speculation and the risk could not be reduced through reasonable accommodations.

# DRUG USE

- Employer does NOT have to accept drug use from applicants or employees.
- Employer can ban drugs and alcohol in work place and require the employee is not under the influence.

# Racial Discrimination

Two Legal Theories Utilized in Employment Cases:

- 1) **Constitutional Theory** - available to public employees.
- 2) **Statutory Theory** - available to public and private sector employees.

# Constitutional Theory

## The Claim:

**There Has Been A Violation of the Equal Protection Clause of the 14th Amendment Of U.S. Constitution**

# 14th Amendment

- “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; **nor deny to any person within its jurisdiction, the equal protection of the laws.**”

# 14th Proof Requirement

- Equal protection requires proof of Intentional Discrimination.
- 14th Amendment Equal Protection Clause does not require all persons be treated equally under the law at all times - but only to insure that a classification made in a statute or by action is **REASONABLE**.

# Equal Protection Tests

- Three different tests used to determine if a classification or discrimination is reasonable/permissible under the Equal Protection Clause:
  - 1) **Suspect Classification**
  - 2) **Quasi-Suspect Classification**
  - 3) **Not Suspect/Not Quasi Suspect**

# Suspect Classification Test

- High Review (Strict Scrutiny) by Court.
- Practice presumed Unconstitutional.
- Sustained ONLY if classification is rationale, serves a **compelling government purpose**, all persons in class treated equally, class is narrowly tailored, and no less onerous alternative is available.
- Race – Alien Status - National Origin

# Quasi-Suspect Classification

- Intermediate Review by Court - will be sustained if the employer can justify by factors which are substantially related to a **legitimate and important state interest**.
- Gender or Sex classifications

# Not Suspect/Not Quasi Suspect

- Lowest Review by Court - Rational basis - reflects a high judicial deference.
- Policy presumed OK.
- It is up to plaintiff to show policy is arbitrary.
- Age - Sexual Orientation

# Statutory Theory

## The Claim:

- There Has Been A Violation of a Particular Federal Statute Prohibiting Some Form of Job Discrimination.
- Most States have State Statutes Prohibiting Job Discrimination.

# Title VII of the Civil Rights Act

- Based on race, color, religion, sex, or national origin.
- Differs from Constitutional Claim in that it does not require Intentional discrimination.
- Covers both Intentional and Unintentional discrimination cases.

# Title VII

- “It shall be an unlawful employment practice for an employer...1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion sex, or national origin; or 2) to limit, segregate, or classify his employees or applicants for employment in any way in which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”

# Prohibitions Under Title VII

- Covers all aspects of employment including: application – hiring – promotion – firing
- Harassment on basis of race, color, religion, sex, or national origin.
- Retaliation for filing a charge, participating in an investigation, or opposing discriminatory employer practices.
- Employment decisions based on stereotypes about abilities based on prohibited factors.

# Title VII: 2 Types of Discrimination

## 1) DISPARATE TREATMENT CASES

- When a employee is singled out and treated more or less favorably than others similarly situated on account of race or any other protected characteristic.
- Must prove Intentional Discrimination.
- Employer Defense – was a Bona Fide Occupational Qualification (BFOQ).

# Bona Fide Occupational Qualification

Title VII (42 USC Section 2000e-(2)(e))  
EXCLUDES from being unlawful the hiring or employment based on religion, sex, or national origin in those CERTAIN instances where religion, sex, or national origin is a BFOQ reasonably necessary to the normal operation of that particular business or enterprise.

# Bona Fide Occupational Qualification

- RACE can NEVER be a BFOQ
- If a employer offers a BFOQ defense, the employer must show the members of the excluded class cannot perform the essential job function.
- BFOQ cannot be based on preferences of other employees, clients, or customers.

# Title VII: 2 Types of Discrimination

- 2) DISPARATE IMPACT CASES - When employment practices are NEUTRAL on their face as to the treatment of different groups but impact one group more than another and the treatment cannot be justified by a business necessity or a BFOQ.
- Intent of the employer not important – focus on the result of practice

# Title VII Burden Shifting

- 1st Burden on Employee - establish a Prima Facie Case of discrimination.
- 2nd Burden on Employer – show policy & practice not intentionally discriminatory, or serves a valid business purpose/job related, or decision not related to discrimination.
- Then Burden Back on Employee – show by a preponderance of evidence that other selection criteria would have served purpose without a discriminatory impact, or defense was pretext.

# Sex Harassment Under Title VII

- Sexual Harassment: unwelcome sex advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature where the submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, their work performance.
- Hostile Work Environment: creates an intimidating, hostile, or offensive work environment.

# Sex Harassment

- Offender can be supervisor, agent of agency, co-worker, non-employee.
- Victim need NOT be the one harassed – need only be affected by conduct.
- Conduct must be unwelcome.
- Victim should inform offender conduct is unwelcome.
- Victim should utilize complaint procedure to inform employer of conduct.

# Vicarious Liability

- Defined: Indirect legal responsibility for the actions of others.
- Liability against an employer for the acts of an employee even if employer did not know of the actions.
- Based on 2 principles:
  - 1) The employer is responsible for the acts of supervisors; and
  - 2) Employers should be encouraged to prevent harassment.

# Vicarious Liability

- Faragher v. City of Boca Raton 118 S.Ct. 2275 (1998)
  - female life guard subject to touching by supervisors
  - complained to another supervisor but no action.
- Court says: employer vicariously liable for actions of supervisor, subject to an affirmative defense based on reasonableness of employer's and the plaintiff's conduct.

# Vicarious Liability Rule

- An employer is **ALWAYS** liable for a supervisor's harassment **IF** it results in a tangible employment action against the victim.
- Significant change in employment status usually causing economic harm.
- Unfulfilled threats not enough.
- Employer can avoid liability or limit damages via an affirmative defense that has 3 necessary elements.

# Employer's Affirmative Defenses

- 1) No tangible job action is claimed, AND
- 2) The employer exercised reasonable care to prevent and promptly correct any harassing behavior, AND
- 3) The employee failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid the harm.

# I Knew Nothing About It!

- Burlington Industries Inc. v. Ellerth 118 S.Ct. 2257 (1998) – Female subject to supervisor’s gropes, innuendoes, and propositions for a year. Resigned and sued.
- No tangible job action claimed. Employer said female never complained therefore not liable.
- Court says: To avoid liability employee must show reasonable care to prevent or correct harassment in workplace.

# Affirmative Action

1<sup>st</sup> Question: If state action, was the discrimination intentional? An intent to aid minorities can be as bad as an intent to discriminate

2<sup>nd</sup> Question: Strict Scrutiny required on race issue – Is there a compelling state interest in order to make the plan constitutional?

3<sup>rd</sup> Question: Are the means chosen narrowly tailored to achieve the aim?

# Compelling State Interests

- Mere insistence that a public plan serves a compelling interest is not enough.
- Plan must in fact serve that interest – must be strong basis to conclude that affirmative action plan is vital.
- Discrimination in the general society not sufficient grounds (even for role models).

# Decline of Affirmative Action

- Affirmative Action Plans – both voluntary and court imposed programs intended to increase the number of minorities in work groups through a process of preference based on race in hiring, promotion, firing.
- Courts have found these plans troubling in that race is a suspect class requiring strict scrutiny review.

# Impact On Affirmative Action

- A judicial shift away from approving race based affirmative action programs.
- Agency response – more aggressive job information programs – targeted recruitment efforts are key.

# Affirmative Action Program Suggestions

- Avoid setting a quota based on race, gender, or national origin.
- Courts are not supporting programs intended to mirror the demographics of society.
- Goals are best measured by qualified applicant flow than general workforce statistics.
- Limit program in time/duration.

# QUESTIONS



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