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# Elements of Proving Employment Discrimination

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# Do you agree?

- ▶ Diversity is increasing within organizations
- ▶ There is greater expectation of equality within the workplace
- ▶ More companies are incorporating policies against discrimination and retaliation
- ▶ More companies are incorporating diversity and inclusion training for their employees
- ▶ There is greater knowledge of resources to enforce equality within the workplace
- ▶ More employees are using resources to fight inequality in the workplace

## Title VII - the Law

- ▶ Under Title VII, an employer may not “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.” [U.S.C. § 2000e-2\(a\)\(1\)](#)

# Do you still Agree?

- ▶ Employees are still discriminated against based on their race
- ▶ Employees are still discriminated against based on their sex
- ▶ Discrimination still exists
- ▶ Retaliation still exists
- ▶ Someone who has harassed, discriminated against or retaliated against someone else is still employed...somewhere

# Common Types of Employment Discrimination

- ▶ Age
- ▶ Disability
- ▶ Equal Pay/Compensation
- ▶ Genetic Information
- ▶ Harassment
- ▶ National Origin
- ▶ Pregnancy
- ▶ Race/Color
- ▶ Religion
- ▶ Retaliation
- ▶ Sex
- ▶ Sexual Harassment
- ▶ Sexual Orientation and Gender Identity

# Brief Legal Standard

“[The] legal standard ... is simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action.”

*Lanahan v. Cnty. of Cook*, No. 16 C 11723, 2022 WL 3026910, at \*7 (N.D. Ill. July 29, 2022)

# Proving Discrimination

## *McDonnell Douglas Framework – Step 1*

An employee must first show employee:

- ▶ (1) belongs to a protected class,
- ▶ (2) was qualified for the job,
- ▶ (3) suffered an adverse employment action, and
- ▶ (4) was treated less favorably than **similarly-situated** employees outside of her protected class.

[McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802– 04](#)

# Proving Discrimination, cont'd

## *McDonnell Douglas Framework – Step 1, cont'd*

Similarly-situated:

- ▶ need not be identical in every conceivable way
- ▶ must be ‘directly comparable’ to the plaintiff ‘in all material respects’
- ▶ the most relevant similarities:
  - alleged misconduct
  - performance standards, and
  - disciplining supervisor



# Proving Discrimination, cont'd

## *McDonnell Douglas Framework – Step 2*

Burden shifts to employer to show legitimate, nondiscriminatory reasons for the employment decision:

- Reasonable, consistent discipline
- No adverse employment action
- No knowledge of protected class or activity

# Proving Discrimination, cont'd

## *McDonnell Douglas Framework – Step 3*

Burden shifts to back to employee to disprove employer's claim(s) as pretextual (false)

- Same policy, but not consistently enforced

# Proving Discrimination, cont'd

In recent years, courts have ruled using more basic logic...

What matters most is that employee show that employee “would have kept h[er] job if [s]he had a different [**sex**], and everything else had remained the same.”

[Ortiz v. Warner Enterprises, Inc., 834 F.3d 760, 764 \(7th Cir. 2016\)](#)

# Retaliation

Title VII's anti-retaliation provision “prohibits retaliation against employees who engage in statutorily protected activity by opposing an unlawful employment practice or participating in the investigation of one.”

42 U.S.C. § 2000e-3(a)

# Proving Retaliation

To prevail on retaliation claim, an employee must prove:

- (1) [s]he engaged in a statutorily **protected activity**,
- (2) h[er] employer took a materially **adverse action** against h[er], and
- (3) there is a **causal link** between the protected activity and the adverse action.”

Rodriguez v. Town of Cicero, No. 20 C 7608, 2022 WL 1773715, at \*5 (N.D. Ill. June 1, 2022)

# Proving Retaliation, cont'd

## Protected Activity:

- Not general complaint; must be complaint about discrimination or retaliation
- Participating in investigation, proceeding, or hearing

## Adverse Employment Action:

- Unpaid suspension
- Dangerous assignment
- Demotion/Termination

## Causal Link:

- Decision-maker *knows* of protected activity (not should have known)
- Protected activity is the cause for the adverse action; does not have to be only cause

# Equal Pay Act

Similar to Title VII, the Equal Pay Act (“EPA”) “prohibits employers from paying employees different wages based on gender.

For an employee to prevail under the Equal Pay Act, employee must prove:

- (1) different wages were paid to employees of the opposite sex,
- (2) the employees do equal work that requires equal skill, effort, and responsibility, (job title does not matter), and
- (3) the employees have similar working conditions.

\* Employee does not have to prove sex discrimination is reason for pay differential

Wollenburg v. Comtech Mfg. Co., 201 F.3d 973, 975 (7th Cir.2000); Mayden v. Superior Ambulance Serv., Inc., 647 F. Supp. 2d 1014, 1018 (N.D. Ind. 2009)

# Equal Pay Act, cont'd

An employer may defend itself against Equal Pay Act claims by proving pay differential was based on any of the following:

- (1) a seniority system,
- (2) a merit system,
- (3) a system that measures earnings by quantity or quality of production, or
- (4) any factor other than sex.

[Boumehti v. Plastag Holdings, LLC, 489 F.3d 781, 793–794 \(7th Cir.2007\)](#)



## Equal Pay Act, cont'd

If employer can prove a legitimate reason for the pay differential, then the burden shifts back to employee to prove employer's reason(s) was pretextual (false)

# Sex Discrimination



In “9 to 5,” Dolly Parton, Jane Fonda, and Lily Tomlin star as a trio of women who set out to get even with their “sexist, egotistical, lying, hypocritical bigot” of a boss. Throughout the early portions of the movie, the ladies’ boss (Dabney Coleman) calls them dumb, demands they perform trivial tasks on his behalf, is sexually inappropriate, and promotes an underqualified male employee over one of them, so the trio orchestrates a twist of fate that leaves their boss incapacitated and the three of them in charge of the company.

# How to mitigate discrimination/retaliation complaints?

1. Regular diversity and inclusion training
2. Anti-discrimination and retaliation policies
3. Consistent enforcement of procedures and policies
4. Open door policy - discuss issues before they escalate
5. Investigate every claim of discrimination/retaliation; follow-up with complainant about findings

Questions?

Comments?