

Employment Law Basics for HR Professionals Series

Discrimination, Harassment, and Retaliation

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Federal Law

- Title VII of the Civil Rights Act of 1964 (Title VII) – applies to employers with 15 or more employees
- Americans with Disabilities Act (ADA) – 15 or more employees
- Age Discrimination in Employment Act (ADEA) – 20 or more employees
- National Labor Relations Act (NLRA) – virtually all employers

State Law

- Maine Human Rights Act – all employers
- MGL c. 151B (Massachusetts) – 6 or more employees
- New Hampshire Law Against Discrimination – 6 or more employees
- NH and ME statutes prohibiting retaliation by private employers against whistleblowers –all employers.

Legally Protected Characteristics

Race, color, ethnicity,
national origin,
ancestry

Disability

Age
(40 and above,
except in ME and NH,
which protect all
ages)

Religion, religious
creed

Sex

Pregnancy or
condition related to
pregnancy

Need to express
breast milk for
nursing child

Sexual orientation,
gender identity and
expression

Veteran status /
active military
personnel /
application for
military personnel

Marital status (in NH)

Genetic information

Sex Stereotyping

- *Price Waterhouse v. Hopkins*, U.S. Supreme Court (1989):
 - › Harassment and discrimination directed at a person because that person does not conform to traditional sex stereotypes is a form of sex discrimination prohibited by Title VII.

“Plus” Discrimination

- Discrimination against an employee because of a protected characteristic, *e.g.* sex, plus another factor.
 - › Treating women with small children differently than women without small children.
 - › Hiring younger women and men of all ages, but not older women.
- Beware of benevolent stereotyping.

“Reverse” Discrimination

- *Duvall v. Novant Health, Inc.* (W.D.N.C. Oct. 26, 2021)
 - › Company adopted DEI plan that included the use of a diversity “lens” in decision-making and financial incentives for diverse hiring.
 - › High performing white male terminated and replaced by two women, one of whom was Black.
 - › Plaintiff showed that by 2019, all white male senior leaders had been let go, and all female or minority senior leaders had been promoted.
 - › \$10 mm verdict against employer.

Voluntary Affirmative Action

- Legally permissible voluntary affirmative action programs are difficult to establish.
 - › Analysis reveals employment practices causing or likely to cause adverse impact;
 - › Comparison between workforce and labor pool reveals disparity;
 - › Limited labor pool of qualified minorities and women due to historical restrictions.
- Improving diversity otherwise lawfully accomplished by expanding the pool of qualified candidates

Bona Fide Occupational Qualification Defense

- Under federal law, discrimination based on certain characteristics is permissible if a “BFOQ.”
- Analysis focuses on
 - › Whether a particular qualification is reasonably necessary to the essence of the employer’s business; and
 - › Whether employer can justify its use of, *e.g.*, sex as a proxy for that characteristic.

BFOQ Defense Limited

- The following will not fly:
 - › We tried a few females and they couldn't do the work.
 - › The work was too dangerous or unpleasant for women.
 - › Customers prefer women / men.
 - › It is too expensive to determine who the few qualified females are.
- Utility likely limited to:
 - › Authenticity (*e.g.* actors)
 - › Legitimate privacy concerns

Legally Protected Conduct

Report of
potential
workplace
safety issue

Request to be
paid for hours
worked

Request for
reasonable
accommodation

Complaint of
discrimination
or harassment

Participating in
an investigation

Report of
violation of law

Having a
workers'
compensation
claim

Request for
FMLA or other
legally
protected leave

NH / ME Whistleblower Statutes

- Protect reports to employer or public body of what employee has cause to believe is an employment condition or practice that threatens health / safety or is in violation of the law.
- Employee does not need to be correct in order for the report to be protected.
- For report to public body to be protected, employee must generally have first brought report to the employer, unless employee can establish legitimate reasons for failing to do so:
 - › Futility, condition already known, fear for physical safety

Some Whistles Are Hard to Hear

- Nurse complains to supervisor that coworkers are using their cell phones too much.
- Employee complains of bird poop on the loading dock.
- Food service employee reports residents' food is not warm enough.
- Employee reports a coworker is smoking cannabis on break.
- *Note:* In the healthcare industry, nearly every report can be characterized as implicating safety or patient care.

National Labor Relations Act

- Employee (union and non-union) have the right to engage in “protected concerted activity”: the right to communicate with one another (even very disparagingly) about
 - › Wages
 - › Hours
 - › Working Conditions
- Disparagement of product or service generally unprotected

NLRB Advice Memo

Employee went home after complaining to management about her work load and posted on Facebook:

A bad manager can take a good staff and destroy it, causing the best employees to flee and the remainder to lose all motivation. Employees don't leave companies, they leave managers.

Prompting coworker comments:

YESS. Freaking YESSSS!!

NLRB – Civility Not Required

- *NLRB v. Pier Sixty* (April 21, 2017) – Server vents about boss on Facebook:

*Bob is such a NASTY MOTHER F***ER don't know how to talk to people!!!! F*** his mother and his entire f***ing family!!!! What a LOSER!!! Vote YES for the UNION!!!!*

NLRB – But “Abuse” Not Tolerated?

- In 2020, NLRB announced new standard, less tolerant of profane language or sexually or racially offensive speech.
- Employee must prove they engaged in Section 7 activity, employer knew it, and employer had animus against their Section 7 activity.
- Employee may then prove they would have taken the same action even in the absence of the protected activity.

Forms of Discrimination / Retaliation

Disparate Treatment

- Termination
- Failure to hire or promote
- Other tangible adverse employment action based on protected status

Disparate Impact

- Facially neutral policy disproportionately and adversely impacts members of a protected class

Harassment / Hostile Work Environment

- Work environment is offensive, abusive, and hostile to members of protected class

Failure to Accommodate

- Failing to make reasonable changes to accommodate individual's religious beliefs or disability

Proving Disparate Treatment

Method # 1: Direct Evidence

- Statements by the decision-maker, relating to the protected class, made close in time to the employment decision at issue, and relating to the employment decision at issue.
- Express classifications – *e.g.* conditioning the receipt of benefits or burdens on a protected characteristic.

Proving Disparate Treatment

Method # 2: Circumstantial Evidence

- Employee's "prima facie case":
 - › I am [insert protected characteristic]
 - › I was [insert adverse employment action]
 - › I believe a causal connection between these things exists because
- Employer articulates legitimate, lawful, reason for adverse employment action
 - › Poor attendance, policy violation, position elimination, misconduct.
- Employee introduces evidence of "pretext" –*i.e.* articulated reason isn't the real reason.

Stray Remarks

- Discriminatory comments made by non-decision-makers or by decision-makers, but unconnected to the decision at issue.
- Not direct evidence, but can be powerful circumstantial evidence useful in proving disparate treatment.
 - › Decision-maker refers to a female coworker as “too emotional.”
 - › Younger employee comments about older employee having “no clue about social media.”

Causation - Temporal Proximity

- Means employer took adverse action against an employee shortly after they engaged in protected conduct.
- Temporal proximity will give rise to an inference of causation.

Other Evidence Demonstrating Causation or Pretext

Similarly situated employees treated more favorably

Discriminatory comments by decision-maker

Failure to follow progressive discipline policy

Shifting reasons given for the adverse employment action

Employer's reason is implausible / contradicted by other evidence (performance reviews)

Cat's Paw

- Unbiased decision-maker relies on information provided or acts taken by a biased non-decision-maker.
- To avoid cat's paw liability, HR must probe / investigate facts asserted by managers / supervisors, to ensure they are adequately supported.

HR's Role: Independent & Objective Review

- Gather documentation of performance / conduct issues
- Ensure individual recommending termination can articulate specific grounds
 - › Not, “it’s not a good fit” or “they have a poor attitude”
- Question the supervisor, to make sure the explanation holds
 - › Review comparators
 - › Review policy, etc.

Termination Assessment: Protected Class Test

- Is employee a member of a protected class?
- Have they engaged in protected activity?
- How recently did decision-maker become aware of employee's protected class / activity status?

Termination Assessment: Contractual / Policy Review

- Is there an applicable collective bargaining agreement?
- Is there an employment agreement?
 - › If so, have the steps in the contract been followed?
- Have the written disciplinary / performance management policies been followed?
- Have any oral representations or promises been made?

Termination Assessment: Fairness Test

- Have the employer's expectations / employee's shortcomings been clearly communicated?
- Has the employee been given adequate time to improve?
- Have similarly situated employees been treated the same?
- Does the punishment "fit the crime"?

“Due Process” in Misconduct Cases

- Where appropriate, suspend employee pending investigation.
- Interview witnesses.
 - › Both to understand what happened *and* to lock down what they may say later.
- Employee being terminated should be apprised of the allegations against them and given an opportunity to respond.
 - › Again, both to understand what the employee says happened *and* to limit what they can say later.

Termination Meeting

- If possible, in person (or Zoom), not over email or text.
 - › Earlier in the day / week where possible.
 - › Not right before holiday or planned medical leave.
- Be thoughtful about who will attend.
- Be thoughtful about privacy.
- Be thoughtful about physical exit, making it as graceful as possible.
 - › Physically escorting an employee in front of their peers is humiliating.
 - › While sometimes necessary, avoid where feasible.

Communicating Termination

- Be thoughtful about articulation of reason for termination.
 - › Do not sugar coat.
 - › But do not be exceedingly detailed (*i.e.* going through every example of poor performance over time).
- Put yourself in their shoes.
 - › Exhibit empathy, sensitivity, respect.
- This is not a discussion or a debate.
- Focus the employee on moving forward.

What Not To Say

It's not a good fit

You're an employee at will.
I don't need a reason to fire you.

You complain too much.

You're the worst performer we've ever had.

Your family obligations are interfering with your work.

I don't agree with the decision to let you go, but it was out of my hands.

What To Say

Unfortunately, we haven't seen the kind of progress we hoped we would see since placing you on the PIP.

There's no easy way to say this, so I'll be direct. We have decided to eliminate your position. [If true.]

We have completed our investigation and concluded that you violated some important company policies.

Given your performance, we have concluded this job is not a good fit for your skills and abilities.

We've both worked hard to try to make this relationship work, and we've both been frustrated and disappointed.

Proving Disparate Impact

- Employee offers evidence that a facially neutral policy or practice has a statistically disparate impact on member of a protected group.
- Employer explains why practice is job-related and consistent with business necessity.
- Employee must then show there are other ways to achieve the employer's end that do not cause disparate impact.

Disparate Impact Examples

Strength
tests

Criminal
background
checks

Personality
and integrity
tests

Cognitive
tests

Credit
checks

Criteria used
in context of
lay off

Sexual Harassment

- Two types: (1) Quid Pro Quo; (2) Hostile Work Environment.
- Quid Pro Quo means a benefit or privilege of employment is conditioned upon submission to unwelcome and sexually offensive conduct.
- Hostile Work Environment concept is not limited to sexual harassment (see next slides).
- ME requires most employers to provide sexual harassment training to new hires, and customized harassment training to managers. Recommended for all.

Hostile Work Environment

- Severe or pervasive conduct relating to a protected characteristic or directed to an individual because of their membership in a protected class.
- Reasonable person would consider the conduct intimidating, hostile or abusive.
- HWE is not the same thing as bullying – HWE is discriminatory behavior.

Harassers Can Be Anyone in the Workplace

Coworkers

Supervisors

Customers /
clients /
patients /
consumers

Vendors

Contractors

Visitors

Workplace Romance Risk

- Private affairs become public knowledge
- Potential for quid pro quo claims
- Consensual affairs go sour, with one party citing power differential
- Impact on third parties, including claims of favoritism

Employer Liability for Harassment

Perpetrated by a supervisor

- Employer is strictly liable.
- But in NH and ME, defense available if employer can prove it took reasonable steps to prevent and correct harassment and the victim failed to take advantage of its policy.

Perpetrated by coworker or other

- Employer is liable if it knew or should have known and failed to take appropriate corrective action.

Avoiding Liability for Harassment

- Maintain robust harassment policy and provide regular training.
- If a supervisor learns of possible harassment, they must act. No “just venting” here.
- All reports of harassment must be investigated.
- If harassment is found to have occurred, is the only “appropriate action” termination?
 - › Not necessarily, but if harassment continues or perpetrator picks a new victim, the next claim will be difficult to defend.

Administrative Processes

- Equal Employment Opportunity Commission
- Massachusetts Commission Against Discrimination
- Maine Human Rights Commission
- New Hampshire Commission for Human Rights
- 300 day filing deadline; 180 days in NH.
- Varied processes.

Damages

- Back pay
- Front pay or reinstatement
- Compensatory damages (*e.g.* emotional distress, humiliation, loss of enjoyment of life)
 - › Garden variety emotional distress v. medically supported emotional distress.
- Punitive damages upon showing of malice or reckless indifference.
 - › In Maine, compensatory / punitive damages capped at \$500K; federal law, at \$300K.
- Attorney's fees.

Personnel File Requests / Hold Notices

- Frequently, first notice of a potential claim.
- Consider whether to notify EPLI carrier.
- Consider notifying counsel, particularly if inexperienced with claims.
- Initiate litigation hold, suspending record retention policies and ensuring potentially relevant evidence (to the claim or your defense) is preserved.



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