

Employment Law Basics for HR Professionals Series

Discrimination, Harassment, and Retaliation

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The Limits of “Employment at Will”



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Key Federal Laws

- 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 employee
- National Labor Relations Act (NLRA) – virtually all employers

Key State Laws

- 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 (Discrimination)

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), familial status
(in ME)

Genetic information

Legally Protected Conduct

(Retaliation)

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

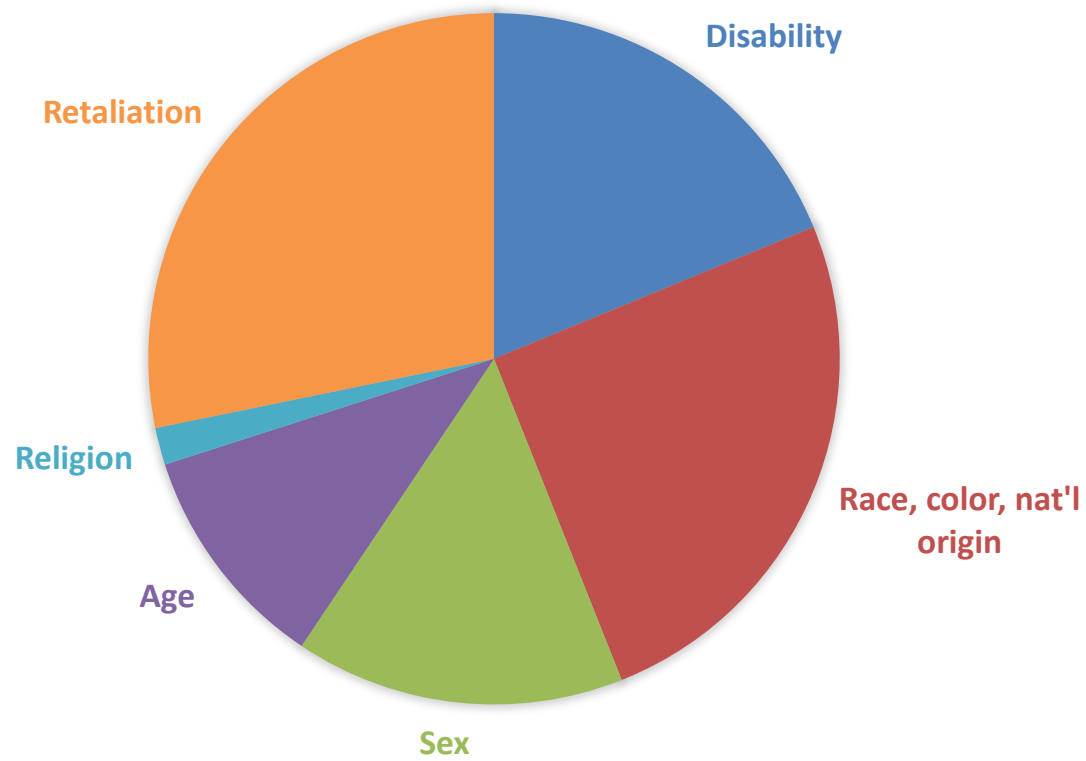
Report of violation of law

Workers' compensation claim (including with prior employer)

Request for FMLA or other legally protected leave

EEOC Charge Statistics

FY 2021



Forms of Discrimination / Retaliation

Disparate Impact

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

Disparate Treatment

- Termination
- Failure to hire or promote
- Other tangible adverse employment action

Harassment / Hostile Work Environment

- Work environment is offensive, abusive, and hostile to members of protected class
- Requires proof of severe or pervasive conduct

Failure to Accommodate

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

Disparate Impact

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Treatment v. Impact: Illustration

- Disparate Treatment: Employer will not hire Black employees with a drug conviction but hires White employees with the same conviction.
- Disparate Impact: Employer has a policy that any individual with a drug conviction is ineligible for employment.



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.

Griggs v. Duke Power Co. (1971)

- North Carolina power plan historically excluded Black employees from certain departments.
- Following passage of Title VII, company changed policy, requiring high school diploma for these departments.
- Statistics revealed that 34% of White men and only 12% of Black men had a HS degree.
- HS degree not essential to the jobs in question, so qualification standard held unlawful.

Criminal Convictions

- If neutral policy disproportionately excludes candidates of a particular race or national origin, employer must show that the exclusion is “job related and consistent with business necessity”
 - › Must consider:
 - Nature of the crime
 - Nature of the job
 - Time elapsed since criminal conduct
 - Candidate’s explanation as to why conviction should not bar employment
- Side note: Ban the box – no inquiry on application

Layoffs / Reductions in Force

- Before implementing, must review the process / selection criteria to determine whether certain protected groups are disproportionately selected for layoff.
- If identify a disparate impact (*e.g.* on women, older employees, employees of color), consider adjusting layoff criteria to eliminate disparate impact while still meeting business need.

Avoiding Disparate Impact Claims

- Whenever a generally applicable qualification standard or policy results in a denied opportunity to an individual in a protected class, reflect on the reason the qualification / policy exists.
 - › Is the standard / policy necessary and serving its purpose?
 - › Is the standard / policy the only or best way to achieve that purpose?
- Review mandatory educational qualifications in job descriptions / postings.
- Seek counsel in connection with RIFs.

Disparate Treatment

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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.
 - › “You’re too old to keep up; we have to let you go.”
 - › “This is why I don’t like hiring women.”
- Express classifications – *e.g.* conditioning the receipt of benefits or burdens on a protected characteristic.
 - › Paid parental leave for women only.

Proving Disparate Treatment

Method # 2: Circumstantial Evidence

- Employee's "prima facie case":
 - › I am [insert protected characteristic]
 - › I was [insert adverse employment action]
 - › 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.

Common Methods of Proving Pretext

Comparator
evidence

Implausibility of
employer's
articulated basis
for adverse action

Shifting rationale
for adverse action

Absence of
contemporaneous
documentation

Failure to
investigate

Failure to follow
policies (*e.g.*
progressive
discipline policy)

Other indicia of
unfairness

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.”
 - › “John’s out again. When will he run out of FMLA?!?”

Conscientious Documentation

- Scope of discovery in litigation is broad: e-mails, text messages, direct message / chats, included deleted ones.
- Every single communication about an employee must be written with understanding it will later be seen by the employee, their lawyer, a Fair Employment Practices agency, a jury.



“Plus” Discrimination

- Discrimination against an employee because of a protected characteristic, *e.g.* sex, plus another factor.
 - › Discrimination against women with small children (but not women generally and not men with small children).
- Beware of benevolent sexism.
 - › Assuming female does not want to do “dirty work,” cannot lift heavy items, etc.



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.



Bona Fide Occupational Qualification Defense

- Discrimination based on certain characteristics is permissible if a “BFOQ.”
- Customer preference is not 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 women 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.

Common Challenges

- Inflated performance evaluations
- Absence of progressive discipline
 - › Supervisor comes to HR for advice when they've "had it"
- Failure to obtain and investigate the employee's side of the story
- Misapplication of employer's policy
- Absence of documentation or inconsistent documentation
- Stray remarks in emails from supervisor to HR

Business Judgment

- Test is not whether the employer's decision was correct, wise, or fair.
- Test is whether employer in fact exercised business judgment or is instead offering a false excuse to cover up discrimination / retaliation.



HR's Role -- Avoiding Disparate Treatment Claims

- Before approving an adverse action, gather documentation of performance / conduct issues and applicable policy.
- Ensure individual recommending termination can articulate specific and objective grounds.
 - › Not, “it’s not a good fit” or “they have a poor attitude.”
- Investigate – make sure the explanation holds.
 - › Review comparators
 - › Review emails or other writings
 - › Ask yourself, “was this employee given notice of the deficiency and a meaningful opportunity to improve”?

Retaliation

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Broad Sources of Protection

State laws

SOX

Title VII

ADEA

ADA

FMLA

False
Claims Act

OSHA

FLSA

ERISA

USERRA

More...

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

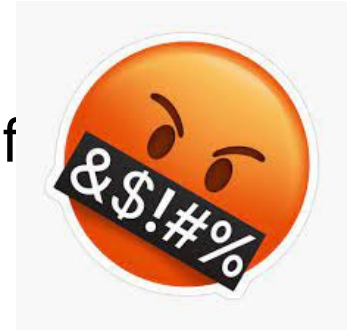
- Nurse complains to supervisor that coworkers are using their cell phones too much.
- Employee complains of bird poop on the loading dock.
- Food service employee reports residents' food is not warm enough.
- Employee reports a coworker is smoking cannabis on break.
- *Note:* In some industries (e.g. healthcare), 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; or
 - › Working conditions.
- To be “concerted,” conduct must be engaged in by:
 - › 2 or more employees;
 - › 1 employee authorized to act / speak on coworker’s behalf;
 - › 1 employee seeking to induce or prepare for group action; or
 - › 1 employee raising group concerns.

Abusive Language / Behavior Protected

- Employee's use of profanity, abusive or offensive behavior may not be a lawful basis for discipline if intertwined with protected concerted activity.



- › Found protected:
 - Employee's social media post that manager was a "nasty M...F....!!!! F... his mother and his entire f...ing family!!!" Employee calling the owner a "f...ing mother f...ing," and "f...ing crook," an "a..hole," and "stupid."
- Anything short of violence or unambiguous threats of violence is potentially protected.

Proving Retaliation

- “Temporal proximity” – adverse employment action follows relatively closely on the heels of adverse employment action.
- Gives rise to an inference of causation.
- Inference weakens and evaporates with passage of time.



Common Challenges

- The “dog whistle,” not heard until the charge is filed
 - › Perhaps because complaint made to supervisor, rather than appropriate channel like Compliance?
- Convergence of protected activity and legitimate performance issues
 - › “Bad attitude”
 - › “Pot stirrer”
- Temporal proximity by design
 - › Employee “blows the whistle” when the writing is on the wall

HR's Role – Avoiding Retaliation Claims

- Ensure there is a clear reporting policy.
 - › Encouraging reports
 - › Directing reports to individuals trained to receive them
- Keep protected reports as confidential as possible – need to know basis.
- Investigate and respond to all reports.
 - › Even when the reporter is a chronic reporter / complainer.
- Recognize risk of temporal proximity and slow management down when that risk is more than your Company wants to bear.

Harassment / Hostile Work Environment

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Understanding the Theory

- The conditions of employment extend beyond retention and compensation and include the psychological and emotional work environment.
- If work environment is sufficiently discriminatory / retaliatory, the plaintiff can recover for discrimination even if they cannot prove any tangible economic injury.

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.
- 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 / conduct or directed to an individual because of their membership in a protected class / protected conduct.
 - › Frequency, severity, whether physically threatening or humiliating, whether it unreasonably interferes with employee's work performance.
 - › Something more than "mere offensive utterances."
- Reasonable person would consider the conduct intimidating, hostile or abusive; and claimant subjectively experienced it as such.
- HWE is not the same thing as bullying – HWE is discriminatory behavior.

“Severe or Pervasive” Standard Under Attack

- High threshold, applied inconsistently by the courts.
- Criticized by some as out of touch with current societal norms.
- NY has lowered the bar.
- Will other states follow?

Microaggressions:

Everyday, subtle, intentional or unintentional interactions or behaviors that communicate some sort of bias toward historically marginalized groups.

ON OUR SLEEVES[®]

Examples - Verbal

"Your English is strong."

"I have Black / gay / etc. friends"

"As a woman, I know what you go through as a person of color."

"Can I touch your hair?"

"Ok, but where are you really from?"

"When I look at people, I don't see color."

Do you have a boyfriend?

Examples - Behavioral

Giving someone a nickname without permission because uncomfortable saying full name

Scheduling meetings or events that conflict with religious observances

Excluding someone from an afterwork event based on assumptions about childcare responsibilities

Assuming an older person isn't able to use or learn technology

Refusing to use someone's pronouns because it's "too confusing" or "ungrammatical"

Gendered uniforms / dress codes

“Microaggressions are more similar to ‘mere offensive utterances’ than ‘physically threatening or humiliating statements,’ and are insufficient to support a hostile work environment claim.” *Chambers v. City of Lakeland*, 2022 WL 2356818 (M.D. Fla. 2022) *citing* 2015 case.

“Regardless of whether an aggression is micro or macro, the Court considers the evidence of hostility in totality. Whether the sum comes from a large number of small incidents, or a small number of large incidents, the result is the same.” *Chen v. Yellen*, 2021 WL 4226202, n. 4 (Sept. 16, 2021)

Circuit Split

- Is a single use of the N-word or similar slur sufficient to establish hostile work environment?
 - › Some circuits (3d, 4th, and DC) says yes.
 - Judge Kavanaugh, then on DC Circuit: “No other word in the English language so powerfully or instantly calls to mind our country’s long and brutal struggle to overcome racism and discrimination”
 - › Others (8th, 6th, 7th, 10th, 5th) have said no.
 - *Armstrong v. Whirlpool Corp.* (6th Cir. 2010): “handful of uses of the n-word and its derivatives,” “some racist jokes” and “a few references to the” KKK insufficient to establish HWE.
 - › In 2021, SCOTUS declined to decide.

Harassment – Things to Remember

- Harassers can be anyone, including customer / patients / clients.
- Harassment that occurs entirely outside the workplace can nonetheless have effects in the workplace and must be addressed.
- While bullying (equal opportunity harassment) is not yet unlawful, disputes about motive are at the heart of most employment claims.

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.

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.

HR's Role -- Avoiding Harassment Claims

- Maintain robust harassment policy and provide regular training.
 - › Separate training for managers, to understand their role in recognizing and preventing harassment.
 - › If a supervisor learns of possible harassment, they must act. No “just venting” here.
 - › Trained supervisors who fail to respond appropriately to reports or behavior should face consequences.
- All reports of harassment must be investigated.
- Be prepared to advocate for very difficult termination decisions.
 - › Cannot apply different levels of tolerance based on performance or contributions.

Miscellaneous Topics

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“Reverse” Discrimination

- Discrimination against non-minority groups in favor of minority candidates is unlawful.
- *Runkel v. City of Springfield* (7th Cir. 2022):
 - › Plaintiff (White) worked as City’s assistant purchasing agent.
 - › Denied promotion, which was given to a Black individual.
 - › Court found Runkel presented sufficient evidence of pretext to get to a jury.

Runkel – Pretext in Action

- Decision-maker made a statement, patting himself on the back for hiring a Black woman for the role.
- Evidence the successful candidate's resume was sent to decision-maker after he offered her the job.
- When rationalizing the decision to the EEOC, City cited (in part) Runkel's unprofessional reaction to not getting the job (an "after-the-fact rationalization").
- Decision-maker testified he didn't compare the two candidates, but to EEOC, City said candidate was selected because she had stronger qualifications than Runkel.

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 is lawfully accomplished by expanding the pool of qualified candidates

Transgender Employees

- Emerging best practices:
 - › Employees permitted to use restroom of sex with which they identify.
 - Not “birth sex” and not single stall restroom if multi-stall restrooms are available.
 - › Respect pronouns.
 - Repeated and deliberate “mis-pronouncing” may give rise to hostile work environment.
 - › Accommodate religious views without discriminating on the basis of gender identity or expression.

Parental Leave

- Voluntary paid leave programs cannot discriminate on the basis of sex.
- Distinguish paid disability leave from paid parental (bonding) leave.
- Each benefit, if paid, should be offered on a non-discriminatory basis.



Presenters

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