

Employment Discrimination

ABA Skype Session
Cassandra Melton
Spring 2015



Definitions

- **Employee** – a person hired to do work
- **Employer** – a person or entity that hires someone else
- **Stereotype** – an assumption about a person based on her physical or other characteristics

What is employment discrimination?

“It is illegal for an employer to **discriminate** against an employee because of the employee’s **[protected class or status]**.”

Protected class or status (1)

- Race
 - physical characteristics, actual or perceived
 - E.g. white, black, Hispanic, Asian
- Sex
 - gender (man, woman)
 - pregnancy
 - sexual orientation
 - gender identity
- Religion
 - includes “non-traditional” and non-organized religions
 - sincerely held political, moral, ethical beliefs
 - practices
- National origin
 - a particular country or part of the world
 - ethnicity or accent
 - citizenship/immigration status

Protected class or status (2)

- Disability
 - physical or mental lasting longer than six months
 - history of disability
- Age
 - “old age” 40 and older
- Other considerations:
 - employee can **appear** to be a member of a protected class
 - employee and employer can belong to the **same** protected class

Adverse employment action (1)

- Hiring, esp. pre-employment inquiries
 - Economic status
 - Arrest and conviction record
 - Security and background checks
- Terms & conditions of employment
 - Pay and benefits
 - Assignments
 - Promotions and discipline
- Firing: termination or discharge
 - **Constructive discharge**: employer creates a work environment so hostile that the employee quits

Adverse employment action (2)

- Harassment
 - Slurs, offensive or derogatory comments, physical conduct
 - **Sexual harassment:** advances, requests for sexual favors
 - Must be **severe or pervasive** enough to create a hostile work environment
- Failure to accommodate
 - Religious: flex schedule, dress and grooming policies
 - Disability: wheelchair ramps, readers and interpreters
- Retaliation
 - Employer takes an adverse employment action because employee filed a discrimination claim

The Equal Employment Opportunity Commission (EEOC)

- The administrative agency that implements federal anti-discrimination laws in the workplace (<http://eeoc.gov/laws/index.cfm>)
 - Issues regulations that interpret federal statutes
 - Issues policy guidance and best practices
 - Investigates employee discrimination claims

How to pursue a claim (1)

- File a **Charge of Discrimination** with the EEOC within 180 days
 - Allege that her employer took an adverse employment action based on the employee's protected status; and,
 - State facts to support her allegations

How to pursue a claim (2)

- The EEOC investigates the complaint, then reaches a finding:
 - No discrimination: case closed
 - Discrimination:
 - EEOC grants the employee a **Right to Sue Letter**, within 90 days employee must file case in federal court; or,
 - EEOC litigates the case for the employee

How to pursue a claim (3)

Courts use the *McDonnell-Douglas* framework

- The employee states her claim (*prima facie* case)
 - She is a member of a **protected class**
 - She was qualified or performing at expectations
 - She suffered an **adverse employment action**
 - Different treatment for similarly situated persons
- The employer gives a **non-discriminatory reason** for the adverse employment action
- The employee shows that the non-discriminatory reason is a **pretext**

How to pursue a claim (4)

- *McDonnell-Douglas* is not a rigid test
 - “inference of discrimination”
- Numerous employer defenses, available depending on the type of claim
 - bona fide occupational requirement
 - undue hardship
 - essential job function