

GREATER NEW ORLEANS
FOUNDATION

For a vibrant region.

**HUMAN RESOURCES:
RISK MANAGEMENT**
PRESENTED BY TORI CHENEVERT
OF GILLIS, ELLIS, AND BAKER
AND
THE GREATER NEW ORLEANS
FOUNDATION

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DISCLAIMERS

- Not a lawyer
- Not an advertisement
- Available for the asking

OBJECTIVES

- To provide an overview of:
 - The definition of key employment laws
 - Federal, state, & local protected classes
 - How the burden of proof works in discrimination cases
 - The definition of sexual harassment

KEY FEDERAL EMPLOYMENT DISCRIMINATION LAWS

- Cannot discriminate against members of a protected class
- Federal protected classes:
 - Race
 - Color
 - Religion
 - National origin
 - Sex
 - Pregnancy
 - Age (40 & over)
 - Disability
 - Genetic predisposition
 - Military status

STATE & LOCAL PROTECTED CLASSES

○ Additional protected classes in LA:

- Sickle cell trait
- Off-premise/off-duty smoking



○ Additional protected classes in New Orleans:

- Sexual orientation
- Gender identification
- Marital status



KEY FEDERAL EMPLOYMENT DISCRIMINATION LAWS



Federal Law	Employment-Related Prohibition	Employers Subject to the Law
Title VII, Civil Rights Act of 1964	Race, color, religion, sex, national origin	15 or more employees
Age Discrimination in Employment Act (ADEA)	Age 40 years or older	20 or more employees
Pregnancy Discrimination Act (PDA)	Pregnancy or related conditions	15 or more employees
Americans with Disabilities Act (ADA)	Disability	15 or more employees
Immigration Reform & Control Act (IRCA)	National origin or citizenship	4 or more employees

<http://www.eeoc.gov/>

KEY FEDERAL EMPLOYMENT DISCRIMINATION LAWS (CONT'D)

Federal Law	Employment-Related Prohibition	Employers Subject to the Law
Equal Pay Act (EPA)	Women must be paid the same as men for equal work	1 or more employees
Genetic Information Nondiscrimination Act (GINA)	Genetic information	15 or more employees
Uniformed Services Employment & Reemployment Rights Act (USERRA)	Military status/obligation	1 or more employees

<http://www.eeoc.gov/>

DISCRIMINATION/HARASSMENT IN THE NEWS

- No company is immune
 - From Fortune 500 to small non-profits

The Google logo is displayed in its characteristic multi-colored font (blue, red, yellow, green, red) with a trademark symbol (TM) at the end.

RACE & COLOR

- Immutable characteristic associated with race (e.g., skin color, hair texture, certain facial features)
- Marriage to or association with an individual of a different race
- Membership in or association with ethnic-based organizations or groups
- Attendance or participation in schools or places of worship generally associated with certain minority groups
- A condition that predominantly affects one race (e.g., sickle-cell anemia)

RELIGION

- Discrimination based on an employee's religious beliefs
- *Religion* is broadly defined
- Reasonable accommodations



EEOC V. ABERCROMBIE & FITCH STORES, INC.

- Lower court awarded plaintiff \$20,000 in damages
- Court of Appeals reversed
 - Employer cannot be liable until applicant actually informs of need for accommodation

SCOTUS DECISION

- Ruled against Abercrombie
- **An applicant need only show that the need for accommodation was a motivating factor in the decision not to hire**
- **Religious practices must be accommodated & failing to do so will not be acceptable because the failure is due to an otherwise-neutral policy**

NATIONAL ORIGIN



- Place of origin of an individual or his/her ancestors
- Physical, cultural, or linguistic characteristics of a national origin group
- Marriage to or association with persons of a national origin group
- Membership in or association with an organization identified with or seeking to promote the interests of national origin groups
- Attendance or participation in schools, churches, temples, or mosques generally used by persons of a national origin group
- An individual's name or spouse's name being associated with a national origin group

ACCENT & ENGLISH FLUENCY

- Employer cannot take an adverse action against a worker solely based on the employee's accent
- Lawful if accent materially interferes with ability to perform job duties
- Avoid fluency requirements that apply uniformly to a broad range of dissimilar positions



SPEAK ENGLISH-ONLY RULES

- Allowed to adopt English-only rules when it is for legitimate, work-related business reasons
- Consider alternatives & whether rules apply when employees are off-duty



SEX/GENDER

- May or may not include sexual orientation & gender identity
- Disadvantages women or men because of gender
- Sexual harassment is a form of sex discrimination



PREGNANCY

- PDA forbids treating a pregnant worker or applicant less favorably than non-pregnant employees/applicants
- Disabilities caused by pregnancy, childbirth, or related medical conditions



EPA

- Equal work on jobs that require equal skill, effort, & responsibility in the same working conditions
- Cannot reduce the wage rate of any employee in order to comply
- **Job content**, not title
- Immediate predecessors or successors
- Claims are hard to prove



AGE DISCRIMINATION

- Applicants/employees who are 40 & older
 - Discrimination in favor of older workers is not prohibited
- Claimant must show that s/he was replaced by someone who is 7 or more years younger



JOB NOTICES & ADVERTISEMENTS

- Unlawful to include age preferences, limitations, or specifications in job notices or advertisements



MILITARY STATUS

- USERRA (Uniformed Services Employment & Reemployment Rights Act)
- Protects reemployment rights



AMERICANS WITH DISABILITIES ACT

- *Qualified individual with a disability*
 - Meets the skill, experience, education, & other job-related requirements of a position held or desired
 - With or without reasonable accommodation, can perform the essential functions of a job



ADA-PROTECTED INDIVIDUALS

- Qualified individuals...
 - With physical or mental impairment that substantially limits 1 or more major life activities
 - With a record of such impairment
 - Who are regarded as having such an impairment



ADA AMENDMENTS ACT

- Makes it clear that ADA is intended to provide broad coverage
- “Major life activities” = caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, working, operation of major bodily functions
- Prohibits consideration of mitigating measures



INDIVIDUALS SPECIFICALLY NOT COVERED BY THE ADA

- Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders
- Compulsive gambling, kleptomania, or pyromania
- Those who currently use drugs illegally
- Psychoactive substance use disorders resulting from current illegal use of drugs

RECORD OF A SUBSTANTIALLY LIMITING CONDITION

- Protects people who have a history of a disability, whether or not they currently are substantially limited in a major life activity
- Protects people with a history of mental illness
- Protects people who may have been misclassified or misdiagnosed

REGARDED AS SUBSTANTIALLY LIMITED

- Protects people who are not substantially limited in a major life activity but are perceived as having a limitation
- The individual may have an impairment that is not substantially limiting but s/he is treated by the employer as having such an impairment
- Individual has an impairment that is substantially limiting because of attitudes of others toward condition
- Individual may have no impairment at all but is regarded as having one

REASONABLE ACCOMMODATIONS

- When an individual requests an accommodation, the employer must make a reasonable effort to provide an accommodation that is effective
- For assistance with reasonable accommodations, you can contact, without cost, the Job Accommodation Network at www.askjan.org



GENETIC INFORMATION NONDISCRIMINATION ACT (GINA)



- Prohibits discrimination against individuals on the basis of their genetic information in both employment & health care
- Prohibits discrimination based on genetic information of an individual's family members
- Employers may not request, require, or purchase genetic info on an individual or family member
- Requires that disclosure of genetic info be governed by HIPAA

MARITAL STATUS

- Protected in New Orleans
- Example: assigning longer hours to single workers
- Most courts will still allow a company to have an anti-nepotism policy barring spouses from working for one another in a direct superior-subordinate reporting relationship



SEXUAL ORIENTATION

- Protected in New Orleans
- Refers to heterosexuality, homosexuality, & bisexuality
 - Does not refer to gender identity





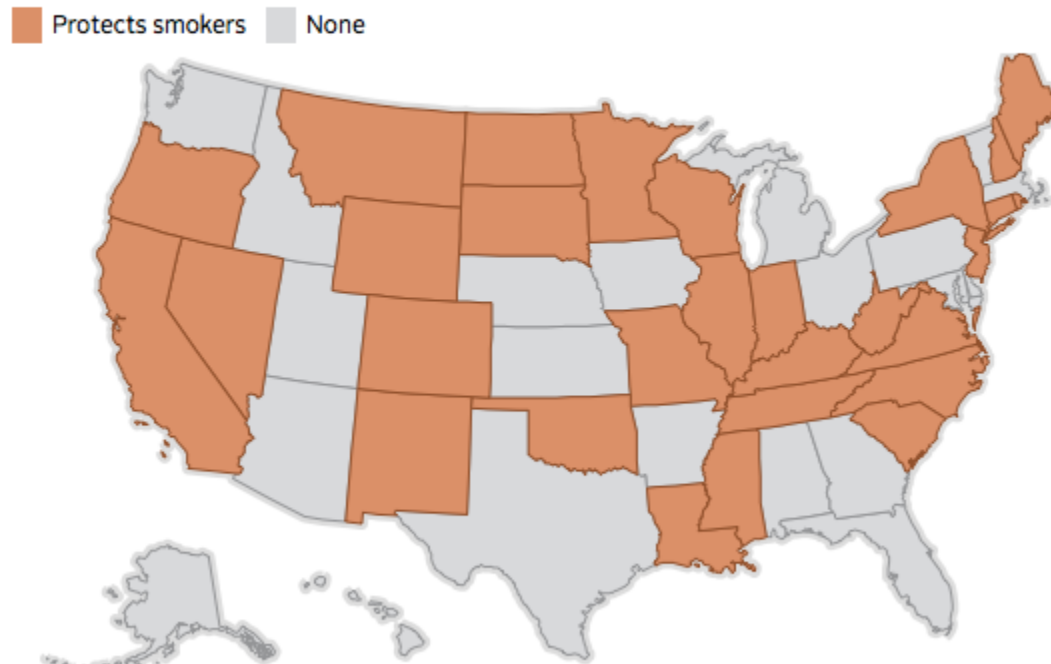
GENDER IDENTITY

- Protected in New Orleans
- *Transgender* is an umbrella term used to describe people whose gender identity or gender expression differs from that usually associated with their birth sex
- An area of litigation in this area surrounds the issue of a transgender individual wishing to use the restroom of the gender with which s/he identifies

LIFESTYLE LAWS

- Louisiana has a lifestyle law protecting off-premise/off-duty smoking

Status of workplace protections for tobacco smokers



Source: National Conference of State Legislatures

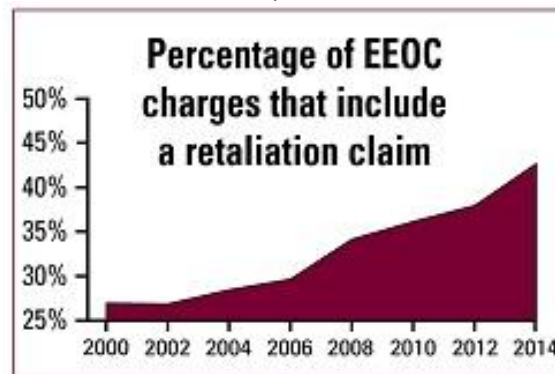


HARASSMENT

- Harassment so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive
- Examples: slurs, workplace graffiti, or other offensive conduct directed toward an individual's membership in a protected class
- Can be created by actions of supervisors, coworkers, or non-employees
- Relevant factors to consider:
 - Whether conduct was physically threatening or intimidating
 - How frequently conduct was repeated
 - Whether conduct was hostile and/or patently offensive
 - Context in which harassment occurred
 - Whether management responded appropriately when it learned of the harassment

RETALIATION

- **Retaliation** is defined as an adverse action taken against an employee because s/he complained of harassment or discrimination
- Anti-discrimination laws prohibit employers from taking adverse action against employees for asserting their rights
- Employees have lost a harassment claim but still won the retaliation claim for the same incident



<http://www.leap2015.com/>

AVOIDING RETALIATION CHARGES

- Document the reason for any adverse employment action against an employee
- Do NOT take any adverse action against an employee who has complained of harassment without discussing with & receiving approval from legal counsel

LOUISIANA DISCRIMINATION STATISTICS 2014 (FROM EEOC)

- 1,795 total charges
- 846 race charges
 - 47.1%
- 480 sex charges
 - 26.7%
- 65 national origin charges
 - 3.6%
- 59 religion charges
 - 3.3%
- 69 color charges
 - 3.8%
- 764 retaliation charges
 - 42.6%
- 304 age charges
 - 16.9%
- 375 disability charges
 - 20.9%
- 9 Equal Pay Act charges
 - 0.5%
- 12 genetic information charges
 - 0.7%



PROOF OF DISCRIMINATION

- Burden of proof begins with plaintiff
- 2 primary forms of discrimination:
 - Disparate treatment
 - Disparate impact



DISPARATE TREATMENT

- Treating applicants/employees differently because of membership in a protected class
- The issue is whether employer's actions were motivated by discriminatory intent



THE *MCDONNELL DOUGLAS* TRIPARTITE BURDEN-SHIFTING ANALYSIS

- Burden-shifting procedure
 - Begins with plaintiff having to prove a prima facie case of discrimination
 - Then defendant has to prove that it acted for a legitimate nondiscriminatory reason &
 - Then plaintiff has to prove that the defendant's stated reason is a pretext & that it actually acted with the intent to discriminate



LEGAL DISCRIMINATION – BFOQs

- Bona Fide Occupational Qualifications
- BFOQ = employment practice that usually would qualify as discrimination but the otherwise illegal discrimination is a qualification for the normal performance of duties
- Religious organizations & schools are allowed to hire only members of that religion even if religion is not a BFOQ for that position
- A BFOQ cannot be based on preferences of customers or coworkers

DISPARATE IMPACT

- Practice that is neutral on its face but has an unjustified adverse impact on members of a protected class – intent does not matter
- Compensatory/punitive damages & trial by jury are not available
- Types of practices where disparate impact challenges may arise:
 - Pre-employment tests
 - Height & weight requirements
 - Educational requirements
 - No facial hair policies
 - Subjective procedures, such as interviews
 - Referrals from current workforce if current workforce is predominantly of one race, gender, etc.

PLAINTIFF'S PRIMA FACIE CASE

- Plaintiff must prove, generally through statistical comparisons, that practice had an adverse impact



BUSINESS NECESSITY

- If plaintiff establishes disparate impact, employer must prove that the challenged practice is job-related for the position in question & consistent with business necessity

ALTERNATIVE PRACTICE WITH LESSER IMPACT

- Employer must adopt an alternative employment practice that would satisfy their interests without having a disparate impact on a protected class

ARREST & CONVICTION RECORDS

- Use of arrest records as an absolute bar to employment has a disparate impact on some protected groups
- Can exclude someone from employment if the conduct for which s/he was arrested is job-related & relatively recent



LIMITS ON DAMAGES (FROM EEOC)

Number of Employees	Maximum Total of Compensatory & Punitive Damages
15-100	\$50,000
101-200	\$100,000
201-500	\$200,000
501 or more	\$300,000



SEXUAL HARASSMENT OVERVIEW

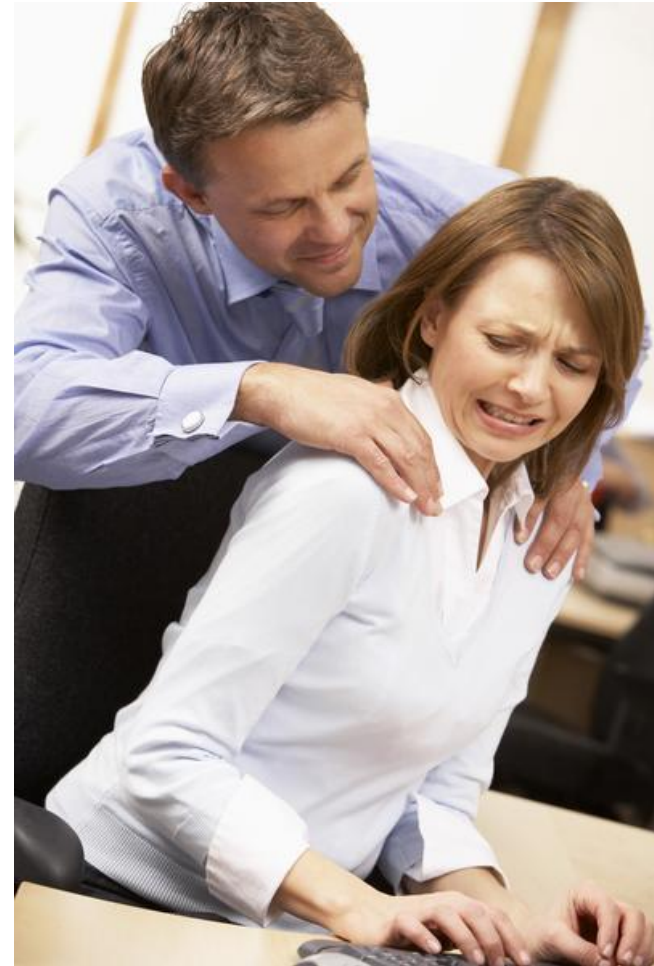
- Costs businesses approximately \$50 million per year (<http://www.eeoc.gov/>)
- Common misperceptions:
 - Innocent flirtation, horseplay, & other forms of social interaction are actionable sexual harassment if the victim does not like the harasser's words or actions
 - Isolated incidents of inappropriate conduct are enough to constitute sexual harassment
- Is not limited to men → women or women → men situations

DEFINITION

- Unwelcome sexual advances, requests for sexual favors, & other verbal or physical conduct of a sexual nature that explicitly or implicitly affects an individual's employment, unreasonably interferes with work performance, or creates an intimidating, hostile, or offensive work environment
- 2 basic types: *quid pro quo* & *hostile environment*

QUID PRO QUO (“THIS FOR THAT” OR “SOMETHING FOR SOMETHING”) SEXUAL HARASSMENT

- Supervisor requires some sort of sexual trade-off from an employee as a condition for job benefits
- Submission to or rejection of such conduct is a basis for employment decisions affecting the worker



HOSTILE ENVIRONMENT SEXUAL HARASSMENT

- Work environment is hostile, intimidating, or offensive due to sexual harassment
- Conduct must unreasonably interfere with plaintiff's ability to do his/her job
- Burden of proof is heavier than in quid pro quo cases
- Some criteria the courts have used:
 - Totality of physical environment of plaintiff's work area
 - Lexicon (vocab) of obscenity that pervaded environment
 - Reasonable expectation of plaintiff on entering environment
 - Nature of unwelcome sexual acts or words
 - Frequency of offensive encounters
 - Total number of days over which offensive meetings occurred
 - Context in which sexual harassment occurred
 - *Whether conduct unreasonably interferes with employee's work performance*

CONDUCT MUST BE UNWELCOME

- If everyone in a working environment continually uses foul & vulgar language & no one cares, then no one cares & it's not a hostile environment
- Conduct must be unwelcome “in the sense that the employee did not solicit or incite it, & in the sense that the employee regarded the conduct as undesirable or offensive”
- Conduct must also be unwelcome through the eyes of a reasonable person

REASONABLE PERSON STANDARD

- *Reasonable person* test is not & cannot be mathematically precise
- Some factors that could be part of the circumstances of the case:
 - Frequency of discriminatory conduct
 - Severity of conduct
 - Whether it is physically threatening or humiliating or a mere offensive utterance
 - Whether it unreasonably interferes with an employee's work performance

EMPLOYER LIABILITY

- Tangible job action → employer is strictly liable & has no defense
- No tangible job action → employer is vicariously liable but may assert an affirmative defense



AFFIRMATIVE DEFENSE

- *Burlington Industries, Inc. v. Ellerth & Faragher v. City of Boca Raton*
- 2 necessary elements:
 - Employer exercised reasonable care to prevent & promptly correct any harassment
 - Employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer or to avoid harm otherwise



EMPLOYER'S DUTY TO EXERCISE REASONABLE CARE

- Employer must establish, disseminate, & enforce an **anti-harassment policy & complaint procedure**
- Additional actions employer can take:
 - Redistribute the policy & complaint procedure periodically
 - Post the policy & complaint procedure in central locations
 - Provide training to all employees to ensure that they understand their rights & responsibilities

EMPLOYER'S DISCRIMINATION/HARASSMENT POLICY COMPONENTS

- Clear explanation of prohibited conduct
- Protection against retaliation
- Clearly described complaint process that provides accessible avenues of complaint
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible
- Complaint process that provides a prompt, thorough, & impartial investigation
- Assurance that the employer will take immediate & appropriate corrective action when it determines that harassment has occurred

FOR MORE INFORMATION...

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