



# Discrimination claims in the workplace

As an employer with a growing business, you need to be knowledgeable of what constitutes discrimination claims in the workplace and how to minimize the risk of such claims springing up in your enterprise. This is particularly so given that insurance policies frequently afford no coverage for these types of claims. Armed with just a little ammunition in the form of a rudimentary working knowledge of these types of claims, it is not difficult to head them off at the pass and avoid a major battle, something which can be very destructive as far as overall company morale.

Major progress was made via the Civil Rights Act of 1964 as far as leveling the playing field. This was in response to years of racial conflict and significant prejudice against African Americans. President Lyndon Johnson stated that "those who are equal before God shall now also be equal in the polling booths, in the classroom, in the factories, in the hotels, restaurants, movie theaters and other places that provide service to the public". The Act was amended in 1972 via the Equal Employment Opportunity Act and included coverage to governmental entities. It became unlawful to discriminate as to hiring, firing, compensation, terms, privileges, and conditions of employment on the basis of sex, religion, race, or national origin. The Americans with Disabilities Act (ADA) added discrimination based on disability into the picture. Applicability is to employers with 15 or more employees that engage in interstate commerce.

New York State has more disability categories than the Americans with Disabilities Act. Under the New York State Executive Law, an employee can establish a valid disability claim if the employee can establish that he or she can still perform the essential functions of the job with reasonable accommodation, if necessary. There is a duty to provide a requested reasonable accommodation. Is the job description adequately defined by you as an employer? Can you tolerate an employee essentially working from home if the employee can demonstrate that that would allow the employee to adequately perform the job function? A valid cause of action is stated if the employer covered by

the statute had notice of the disability, and with a reasonable accommodation, the complainant could perform the essential functions of the job at issue, but the employer refused the same.

Racial discrimination claims apply to any race, no longer just a "protected class." An employer must demonstrate sound business and/or educational policies in turning down someone for a job. This could include lack of references, discrepancy in the job history or poor performance during the job interview. This all needs to be documented. Again, a very clear job description also needs to be documented. For a prima facie complaint to be established based on race discrimination, the complainant demonstrates that she is a member of racial minority, that she has applied for a job for which an employer was seeking applicants, that despite her qualifications she was rejected and that after her rejection, the job remained open and the employer continued to seek applicants having her qualifications.

Age discrimination is anyone over 40 years old under the Age Discrimination and Employment Act. Under the New York Human Rights Law age discrimination may occur at age 18 or above. Yet it is not just hiring issues and whether there is a claim that the person is either too old or too young for the job. Employers also have to watch out for retirement type claims. For example, retirement incentives cannot withhold or reduce benefits to older retiree plan participants while continuing to make them available to young retiree plan participants. Many cases along these lines have erupted in the last several years. Also, a plaintiff does not have to show any type of malice or ill intent if he can merely show that a racially neutral employment decision adversely impacted members of a protected minority group, such as elderly people.

Gender discrimination includes sexual harassment claims. Originating as men abusing women in the workforce, including women in typically male dominated arenas, these cases can also include females harassing other females or males harassing other males. In 1978 pregnancy was added to gender discrimination. A leave of absence for pregnancy must be the same as for any other temporary disability policy provided by the company and must include health insurance if the temporary disability policy also include health insurance.

Sexual harassment can be established through a hostile work environment: the claimant shows that the work place was so ridden with discriminatory intimidation, ridicule and insult sufficiently severe or pervasive so as to alter the conditions of the victim's employment and to thus create an abusive work environment. Considerations include the frequency of discriminatory conduct and its severity, whether it is physically threatening or humiliating or whether it unreasonably interferes with the employee's work performance. This emphasizes the need for company policies, defining inappropriate conduct and responding to the allegations. If a report of inappropriate behavior is given to you, as an employer, you need to take immediate action: investigate and appropriately discipline the offender, if appropriate. Keep records in your files. Policies should not only be in place, they should be posted. This would include having new employees read and sign for the policies. Many employers even have their employees take a true and false type test when they start work to verify that they have some knowledge of the fundamentals in this regard. You should have a point person, perhaps the human resources director, who can receive complaints and address them. It is a failure to address complaints that gets the employer into difficulty. Also you want to make sure that there is a well laid out complaint policy and that the complainant follows that policy. This must include a requirement of formal notification. Too often complaints are made "off the cuff" with it being unclear if responsive action was actually requested. If the employer is not notified, the employer is not liable for workplace harassment. If the offender either stops via employer discipline or is removed, then there also can be no harassment attributable to the employer. Finally, employers need to be very careful that there is no appearance of retaliation towards the complainant as this will, no doubt, become part of a cause of action.

When dealing with discriminatory issues, the employer must be able to articulate legitimate and non-discriminatory rationales for its personnel decisions. Representing employers, the most typical difficulty that I see is a failure of documentation along these lines. Next, many small employers simply have not taken the time to develop an adequate employee handbook and posting of policies. Finally, many employers are simply too lax as far as tolerating inappropriate conduct among employees.