

Title VII Checklist

By David N. Rechenberg
FRANKS & RECHENBERG, P.C.
1301 Pyott, Road Suite 200
Lake in the Hills, Illinois 60156
847.854.7700

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I. WHAT IS TITLE VII?

Title VII of the Civil Rights Act of 1964 prohibits discrimination in hiring, promotion, termination, compensation, and other terms and conditions of employment because of race, color, sex, natural origin, or religion. The Civil Rights Act of 1991 expanded the Civil Rights Act of 1964 and is codified at 42 U.S.C.A. 2000-e, et seq. (see Exhibit A for relevant portions of the Statute).

II. WHAT ARE THE PROTECTED CLASSES OF EMPLOYEES?

A. Race or Color

This category of protected individuals is normally associated solely with African Americans. However, the court have included Caucasians, Latinos, and Asians, along with Indigenous Americans, Eskimos, Native Hawaiians, Native Americans. The courts have also held that this prohibition on discrimination based on “color” to mean that a light skinned Black worker could pursue a discrimination case based on the actions of her darker skinned supervisor, *Walker v. Secretary of Treasury*, 742 F.Supp. 670, 506 U.S. 853 (1992).

B. Sex

This protected class of individuals prohibits discrimination based on gender and is normally associated where the protection of woman, but may apply in certain circumstances to men. This provision also prohibits discrimination based on pregnancy as set forth in the Statute at 42 U.S.C.A. 2000e(k) which states in its pertinent part “that it is an unlawful employment practice to discriminate against a person on the basis of pregnancy, child birth, or related medical conditions, and women affected by pregnancy, child birth, or related medical conditions shall be treated the same for all employment related purposes.” The courts have held that an employer’s rules or policies that apply only to one gender, violate Title VII, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

Not all employment policies and procedures violate Title VII if they apply only to one gender if the policies and procedures are based on a bona fide occupational qualification (BFOQ) for the job in question.

C. Religion

An employer may not discriminate against an employee on the basis of the employee’s religious beliefs. Religion is defined in Title VII “all aspects of religious observance and practice, as well as belief”, 42 U.S.C. §2000e(j). The Equal Employment Opportunity Commission (EEOC) has issued various guidelines and interpreted regulations which state that religious practices “include moral or ethical beliefs as to what is right and wrong and which are sincerely held with the strength of traditional religious views, 29 C.F.R §1605.1.

Title VII imposes a duty to “reasonably accommodate to an employees’ or perspective employees’ religious observance or practice” unless doing so would impose an “undue hardship on

the conduct of the employer's business, 42 U.S.C. §2000e(j). The EEOC has determined that the definition of "religion" includes established and organized faiths such as Roman Catholic, Baptist, Lutheran, Presbyterian, Judaism or Islam.

The courts do distinguish religion from a person's social or political views, or views that are not part of a moral or ethical system. The court in *Seshadri v. Kasraian*, 130 F.3d. 798 held that a professor who described his religion as a "creed requiring scrupulous honesty in the pursuit of scientific knowledge" was not a religion as defined by Title VII. The proclaimed views racist and anti-Semitic ideology of the Ku Klux Klan was not defined as religion the case of *Bellany v. Mason Stores, Inc.*, 368 F.Supp. 1025 also a belief in the freedom to have extra-marital relationships is not a "religious belief" protected by Title VII, *McCrorry v. Rapides Regional Medical Center*, 635 F.Supp. 975 and the "personal religious creed" requiring someone to eat cat food is not a religious practice but merely a personal preference and not protected under Title VII in the case of *Brown v. Pena*, 441 F.Supp. 1382.

D. Natural Origin

The Supreme Court has defined and interpreted natural origin as referring to "the country where a person was born, or, more broadly, the country for which his or her ancestors came," *Espinoza v. Farah Manufacturing Company*, 414 U.S. 86 (1973). The Seventh Circuit in the case of *Fortino v. Quazar*, 950 F.2d 389 held that the term natural origin does not include discrimination based solely on a person's citizenship.

Natural origin cases generally arise when an employee is required to speak only English at work. The EEOC has held at 29 C.F.R. §1606.7(a) that requiring bi-lingual employees only to speak English at work is a "burdensome term and condition of employment" that presumably violates Title VII and should be closely scrutinized.

The Federal courts have ruled that requiring employees to speak in English only does not violate Title VII, *Garcia v. Spunstak Company*, 998 F.2d 1480 (9th Cir.). This is in direct conflict with the EEOC's position.

III. EMPLOYERS WHO ARE COVERED

A covered employer must be a “person” which includes corporations, partnerships, or any other legal entity that as 15 or more employees for each working day for 20 or more calendar weeks in the current or preceding year, 42 U.S.C. §2000e(b). Any employer that employs less than 15 employees is exempt from Title VII requirements. A small employer, under 15 employees may discriminate against individuals on the basis of their race, natural origin, and religion, but discrimination based on sex or sexual harassment is prohibited in Illinois pursuant to the Illinois Human Rights Act.

There are also certain types of employers that are exempt from Title VII's coverage, those being bona fide private membership clubs, elected officials, certain federal employees, Indian tribes, certain religious organizations and certain organizations involve national security.

IV. THEORIES OF DISCRIMINATION

A. Disparate Treatment

Title VII prohibits employers from treating employees differently because of their classification in a protected class. In a disparate treatment case proving whether an employee's conduct was discriminatory can be done in one of two ways, the direct method or to the McDonald Douglas Burden Shifting Method.

The Direct Method - Usually, direct evidence of discrimination is not available to an employee as most employers do not openly admit that they discriminate. A plaintiff may attempt to prove his case using the direct method by offering circumstantial evidence. Circumstantial evidence has been found to be “suspicious timing”, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected class, and other bits and pieces from which an inference of discriminatory intent made by drawn, *Troupe v. May Department Store*, 20 F.3d 734.

Another type of circumstantial evidence is where other similarly situated employees not in the protected class received systematically better treatment or when the employee in the protected class was treated more harshly than employees outside of the protected class, *Marshall v. American Hospital Association*, 157 F.3d 520.

McDonald Douglas Burden Shifting Method - The vast majority of Title VII cases are proven through the McDonald Douglas Burden Shifting Method. The Supreme Court in the case of *McDonald Douglas v. Green*, 411 U.S. 792 (1973) had established that a plaintiff prove a Title VIII case of discrimination by the following method. First, the plaintiff must establish a prima fascia case of discrimination. This is done if the plaintiff is a member of the protected class, that the plaintiff was qualified for the position and/or was qualified for the job, the plaintiff's job application was rejected, or the plaintiff was terminated and lastly the position remained open after the rejection or was given to a member of the non-protected class.

After the plaintiff establishes a prima fascia case the employer may articulate, a legitimate,

non-discriminatory reason for its actions. The employer does not have to prove through admissible evidence that it had a legitimate, non-discriminatory reason for its actions, only that it had a legitimate, non-discriminatory reason for its actions.

Then the plaintiff must prove that the employer's stated reason was pretextual and that the employer's real reason for the adverse job action was unlawful discrimination.

Many Federal Court of Appeals have held that for an employee to prevail he must not only show that the articulated reason given for the employer's action was pretextual, but also he was required to produce additional evidence of intentional discrimination. The United States Supreme Court in the case of *Reeves v. Sanderson*, 120 S.C. 297, (a copy of which is attached to the materials as Exhibit B), held for an employer to prevail in a discrimination case based on indirect proof via the McDonald Douglas Burden Shifting analysis, the employer need only prove that the employer's stated or articulated reason for the adverse employment action was untrue or pretextual. This decision is detrimental to employers and has made prevailing in an employment discrimination case by plaintiff easier than it had been before the decision in *Reeves v. Sanderson*.

B. Disparate Impact

Title VII prohibits an employer from using a facially neutral employment policy or practice that has an unjustified adverse impact on members of a protected class. These cases usually involve some type of testing for promotion or employment. The Supreme Court in the case of *Griggs v. Duke Power Company*, 401 U.S. 424 (1971) first described the disparate impact theory in a Title VII case when the court held good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as built-in head winds from minority groups and are unrelated to measuring job capability.

Examples of employment practices that may subject employers to a Title VII disparate impact litigation include written tests, educational requirements, height and weight requirements, and subjective procedures during interviews for promotions.

Generally for plaintiff to succeed in a disparate impact case, he must prove, usually through statistical comparisons, that the challenge practice or selection device has a substantial adverse impact on a protected group, 42 U.S.C. §2000e-2(k)(1)(A)(i).

The EEOC's uniform guidelines on employee selection criteria states that an adverse impact occurs if members of a protected class are selected for a job or promotion at a rate less than 4/5 (80%) of that of another group. An example of a Title VII disparate impact violation is set forth in the Code of Federal Regulations at 29 C.F.R. §1607.4(D) is that if 50% of white applicants received a passing score on a test but only 30% of African Americans passed the relevant ratio would be 30 over 50 or 60% which violate the 80% rule, then the test would have a disparate impact on the African American applicants.

If the plaintiff employee can establish through statistical evidence that there was a disparate impact, the employer still may prevail if they can prove that the challenge practice or test is "job related for the position in question and consistent with a business necessity," 42 U.S.C. §2000e-2(k)(1)(A)(i).

C. Harassment

Sexual harassment has been defined as unwelcomed sexual advances, acts of gender based animosity, sexually charged workplace behavior, conduct that is offensive on the basis of gender whether or not the person is or is not a target of the harassment.

There are two types of theories of recovery under sexual harassment and hostile work environment.

4) Quid pro quo - Quid pro quo sexual harassment is the theory that is most familiar to general public, and has been defined as unwelcomed sexual advances, request for sexual favors, and other verbal or physical contact of a sexual nature when:

- a. Submission to such conduct is made either explicitly or implicitly as a term or condition of an individual's employment; or
- b. Submission to or rejection of such conduct by an employee is used as a basis for employment decisions affecting such employee. EEOC Guidelines on Discrimination Based on Sex, 29 C.F.R. §1604-11(a)(1) and (2).

2) Hostile work environment - The EEOC Guidelines on Discrimination Because of Sex at 29 C.F.R. §1604-11(a)(3) defines a sexually hostile work environment as "unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constituting sexual harassment when such conduct has a purpose or effect to unreasonably interfere with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

The Supreme Court, in *Harris v. Forklift Systems*, 510 U.S. 17 (1993), set forth several factors to consider in determining whether or not the conduct of supervisor or co-employee rises to the level of a hostile work environment, those factors being: the severity of the conduct, whether the conduct was physically threatening or humiliating as opposed to mere offensive utterances, and whether it unreasonably interfered with an employee's work performance.

The courts have drawn distinctions between when the sexual harassment is caused by a co-worker as opposed to a supervisor. When the harasser is a co-worker, the courts have held the employer is only liable if they knew or should have known of the harassment and failed to take reasonable corrective action, *McKenzi v. Idot*, 92 F.3d 473. If an employee is being sexually harassed by a co-employee and the offensive conduct is reported to their supervisor and/or management and management takes corrective actions then, the plaintiff would not prevail in a Title VII case based on sexual harassment under the hostile work environment theory.

The Supreme Court has held an employer is liable for sexual harassment based on hostile work environment if the harasser was the employee's immediate or higher supervisor and if the supervisor's harassments culminate in a tangible adverse employment action, that being

discharged, demotion, or undesirable reassignment, *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257 and *Farrager v. City of Boca Raton*, 188 S.Ct. 2275 (1998).

When there has been no tangible adverse employment action against the employee resulting from the sexual harassment, the employer may plead and prove an affirmative defense.

The affirmative defense has two elements, both of which may be proven: First, that the employer exercise reasonable care to prevent and correct promptly any sexually harassing behavior and second, the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities offered. Basically, the affirmative defense is that an employer has a written anti-sexual harassment policy stating they do not tolerate sexual harassment and that any complaints of sexual harassment and that any complaints of sexual harassment will be taken seriously and corrective measures will be taken.

3) Racially hostile work environment - Employees who are subjected to racial jokes, insults, graffiti may establish a violation of Title VII based on a hostile work environment by proving that the incidents harassment adversely effect the working environment. In the case of *Nelson v. Forester Wheeler Constructors Inc.*, 97 C. 4658, the court held that a construction employee stated a Title VII cause of action when he was subjected to a racially hostile work environment when there was a racial graffiti on the walls and the portable toilets, the employee was subjected to racial comments from co-workers, subjected to disparate criticism by his white foreman and a co-employee left a noose hanging from the construction site where the plaintiff would view it everyday.

D. Retaliation

Title VII prohibits discrimination against a current employee, former employee, or applicant "because he made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII," 42 U.S.C. §2000(e)(3)(a). Title VII also prohibits discrimination against a current or former employee or applicant "because he has opposed any practice made in unlawful practice by Title VII," 42 U.S.C. §2000e-3(a) the courts have held that an employee is protected if he or she had a reasonable and good faith belief that the practice they opposed constituted a Title VII violation even if it turned out that the practice they opposed was not a violation of Title VII, *Dee v. Colt Construction and Delivery Company*, 28 F.3d 1446 (7th Cir.)(1994).

V. REMEDIES

A) Reinstatement - If the court finds that a defendant has intentionally engaged in an unlawful employment practice, the court may enjoin the defendant from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, including but not limited to reinstatement or hiring of employees, with or without back pay, or any other equitable relief the court deems appropriate, 42 U.S.C. §2000e-5(g)(1).

B) Back Pay - Back pay may be awarded as far back as two years prior to the filing of the charge with the EEOC, 42 U.S.C. §2000e-5(j)(1).

C) Compensatory and Punitive Damages - A Title VII case are compensatory and punitive damages are capped based on the number of employees the employer had in the preceding calendar year. An employer that has between 15 and 101 employees the current cap is \$50,000, an employer that has more than 500 employees the current cap is \$300,000.

D) Front Pay - Front pay and loss of future earnings are both remedies available to a successful litigant under Title VII. Front pay is an equitable remedy and is a substitute for reinstatement when reinstatement is not possible. The loss of future earnings is an injury to professional standing or injury to character and reputation. The courts have held that award for front pay and lost future earnings is not duplicative.

E) Attorney's Fees - Title VII cases, the court may allow the prevailing party, reasonable attorney's fees and reasonable expert witness fees, 42 U.S.C. §2000e-5(k). The courts have held in a mixed motive case when the plaintiff is not entitled to compensatory damages but the court may award attorney's fees.

VI. ADMINISTRATIVE PROCEDURES PRIOR TO FILING A LAWSUIT

A. Charge of Discrimination - Attached to the materials is a sample charge of discrimination form, Exhibit C. This form must be filled out and filed with the EEOC prior to the EEOC issuing a right to sue letter.

B. Right to Sue Letter - Title VII claims may not be brought in Federal or State court until they have been filed with the EEOC, and the EEOC has issued a right to sue letter, 42 U.S.C. §2000e-5(f)(1). The EEOC will issue a right to sue letter for various reasons: 1) That it does not have jurisdiction over the charge, 2) Where the charging party does not cooperate, 3) Where the charging party requests a right to sue letter, 4) The EEOC determines there is no reasonable cause, 5) The EEOC has found reasonable cause and conciliation has failed.

C. Time Requirements - In Illinois, because there exists the Illinois Department of Human Rights, a charging party has 300 days from the date of the alleged discrimination to file a charge of discrimination with the EEOC. In states that do not have state agencies that have the power to investigate claims of discrimination the claimant has only 180 days to file his charge in discrimination. The time limitation begins to run when the discriminatory act occurs and not when the last discriminatory effects are felt.

VII. DEFENSES TO TITLE VII COMPLAINTS

A. Statute of Limitations - The complainant must file a lawsuit within 90 days of receipt of the right to sue letter from the EEOC, 42 U.S.C. §2000e-5(f)(1). Thus there are two Statutes of Limitations employers should be aware of: First, did the complaining employee file the original charge within 300 days of the alleged act of discrimination and second, did the complaining employee file a lawsuit within 90 days of receipt of the right to sue letter.

B. Discrimination Beyond the Scope of the Charge - An employee may not file

suit based on a claim that has not been specifically included in the charge of discrimination that was filed with the EEOC. Thus if an employee has a Title VII claim based on race and sex and files of the charge of discrimination regarding solely on the race case, any allegation regarding discrimination based on sex will be dismissed by the District Court.

C. Mixed Motive Cases - If an employer proves that it had another reason in addition to the discriminatory reason, for adverse employment action against an employee i.e. that it would have made the same employment action regardless of the discrimination, the employee may not be awarded monetary damages, reinstatement, or promotion. The courts still may grant in their discretion a declaratory relief, injunctive relief and attorney's fees and costs, 42 U.S. §2000e-5(g)(2)(B)(i).

In a retaliation case, where the employer proves that it had mixed motives, the plaintiff is not entitled to attorney's fees, declaratory relief or injunctive relief because "retaliation" was not specifically listed in the mixed motive provision of the Civil Rights Act of 1991.

REFERENCES

EEOC
Chicago District Office
500 W. Madison Street, Suite 2800
Chicago, IL 60661-2511
(312) 886-5973

Illinois Department of Human Rights
100 W. Randolph Street, Suite 10-100
Chicago, IL 60601
(312) 814-6200

Illinois Department of Labor
(312) 814-2800

Internet:

EEOC Website
www.eeoc.gov/

Illinois Department of Human Rights Website
www.state.il.us/dhr

Americans with Disabilities Act Website
www.usdoj.gov/crt/ada/adahom1.htm