

# Employment Discrimination & Harassment

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# Types of Discrimination

- Disparate treatment: employer treats an employee differently on the basis of a protected characteristic.
- Failure to accommodate: disability or religious beliefs.
- Harassment/hostile work environment: based on any protected status.

# Protected Characteristics

- In Minnesota, an employer may not discriminate against employees based on the following characteristics:

• Age	• National Origin
• Color	• Race
• Creed	• Religion
• Disability	• Sex
• Familial Status	• Sexual Orientation
• Marital Status	• Status re: Public Assistance
• Membership or activity in local commission	

- Federal Counterparts
  - Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin.
  - Americans with Disabilities Act prohibits discrimination on the basis of disability.
  - Age Discrimination in Employment Act prohibits discrimination on the basis of age.

# The law does not protect against ...

- Personal conflicts
- Unfairness
- Rude or unprofessional behavior
- Procedural discrepancies (unless public employee)

unless the behavior or treatment is motivated by a protected trait.

# Making a Case of Discrimination

1. Plaintiff was a member of a protected class;
2. Plaintiff was qualified for her job/performing satisfactorily in her job;
3. Employer took an adverse action against Plaintiff; and
4. Adverse action occurred under circumstances giving rise to an inference of discrimination (more favorable treatment to or replacement by individual not in employee's protected class).

# Adverse Actions

- Termination
- Demotion, transfer with reduction in pay or hours
- Denial of overtime, promotion, or benefits
- Disciplinary actions
- Intimidation or harassment
- Failure to hire

# Employee Must Show Employer's Reason for Action is Pretext

- Comparators—other employees outside protected class treated differently for same or similar conduct
- Shifting reasons for termination
- Deviation from established practices
- Statistics
- Other evidence that the proffered reason is not truthful

# Harassment/ Hostile Work Environment



# Harassment

- The MHRA also provides a cause of action for harassment or a hostile work environment that was created based on a protected trait.
- Sexual Harassment includes “unwelcome sexual advances, requests for sexual favors, sexually motivated conduct or communication of a sexual nature when:
  - Submission is made a term or condition of employment;
  - Submission to or rejection is used as a factor in decisions affecting employment; or
  - The conduct or communication has the purpose or effect of substantially interfering with employment (hostile work environment)

# The Harassment Analysis Differs Based on Who is the Harasser ...

# Coworker Sexual Harassment – Hostile Environment Traditional Analysis

- Plaintiff is a member of a protected group
- He/She was subjected to unwelcome harassment
  - Must be severe or pervasive
- The harassment was based on his/her protected status
- The harassment affected a term, condition or privilege of his/her employment

## Employer Must Have Actual or Constructive Notice of Coworker's Harassment

- Actual notice: sufficient information either comes to the attention of someone who has the power to terminate the harassment, or it comes to someone who can reasonably be expected to report or refer a complaint to someone who can put an end to it
- Constructive notice is established when the harassment was so severe and pervasive that management reasonably should have known of it.

# There is a Heightened Standard Where Supervisor is the Harasser

- There is heightened liability in these cases because the acts of supervisors have greater power to alter the environment than acts of co-employees generally.
- **In Minnesota:** An individual qualifies as an employee's supervisor if the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or* the individual has authority to direct the employee's daily work activities.
- **Under Title VII:** an employee is a supervisor only if he or she is empowered by the employer to take tangible employment actions against the victim.

# Tangible Employment Actions

- Hiring and firing
- Promotion and failure to promote
- Demotion
- Undesirable reassignment
- A decision causing a significant change in benefits
- Compensation decisions
- Work assignment
- Constructive discharge

# Employer's Affirmative Defense

If there has not been a tangible employment action, the employer can raise an affirmative defense by establishing the following two elements:

1. the employer exercised reasonable care to prevent any sexually harassing behavior; the employer exercised reasonable care to correct promptly any sexually harassing behavior;
2. the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer; or, the plaintiff unreasonably failed to avoid harm otherwise.

# An Employer's Reasonable Care to Correct Promptly

An employer's remedial action is appropriate when it "fully remedies the conduct without adversely affecting the terms and conditions of the charging party's employment in some manner."



# Questions