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**Disclaimer:** This module is intended to educate IAFF members and affiliate officers as part of the Partnership Education Program. It is intended to serve only as informal guidance on the matters addressed, and should not be relied upon as legal advice. Anyone using this document or information provided in the associated training program should rely on his or her own independent judgment or, as appropriate, seek the advice of a competent professional in determining the exercise of reasonable care in any given circumstances. The IAFF makes no guaranty or warranty as to the accuracy or completeness of any information published herein. The IAFF disclaims liability for any injury or other damages of any nature whatsoever, directly or indirectly, resulting from the use of or reliance on this document or the associated training program.

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Introduction

This manual is a workbook for the International Association of Fire Fighter’s Partnership Education Program Workshop on “Overview of Employment Law.” As you participate in this workshop, you will use it to complete activities and take notes. In addition, the appendix will serve as a useful reference after the workshop is complete.

This workshop will provide union leaders with an overview of the employment laws that affect fire fighters and emergency workers. Union leaders will learn how the courts define harassment and discrimination in the workplace and how to respond to members who believe their rights have been violated. This information will help union leaders better serve the needs of their membership.

Workshop Components
The following symbols are used throughout the workbook to indicate an activity.

- **Individual Activity**
  Indicates an activity to be completed on your own.

- **Class Activity**
  Indicates an activity to be completed as a class.

- **Team Activity**
  Indicates collaborative learning in small groups to encourage you to work and learn as part of a team.

- **Guided Discussion**
  Indicates a discussion between the facilitator and the participants.

- **Report Back**
  Indicates debriefing of individual, class or team activities where you will present your individual or group findings.
Welcome

Goal
You will become familiar with the employment laws that affect the workplace in order to best serve the needs of your membership.

Learning Objectives
After you complete this workshop, you will be able to:

- Identify the Federal employment laws that govern the workplace.
- Describe the protections provided to employees under Title VII, the Family Medical Leave Act, and the First Amendment.
- Explain the remedies available to employees who believe their rights have been violated under the Federal and/or State anti-discrimination laws.
- Explain the roles of the employer and the union in enforcing the Federal and State employment laws.
- Analyze workplace scenarios pertaining to discrimination and harassment.

Foreword
This workshop will provide you with an overview of the pertinent employment laws that affect the workplace. Please note that this workshop is intended to provide informal guidance and should not be relied upon as legal advice. If you have questions pertaining to a specific case or that are beyond the scope of this workshop, please contact your local legal counsel.
# Agenda

<table>
<thead>
<tr>
<th>Activity</th>
<th>Time</th>
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<tbody>
<tr>
<td>Welcome and Agenda</td>
<td>5 minutes</td>
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<tr>
<td>Overview</td>
<td>5 minutes</td>
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<tr>
<td>Employment Law Quiz</td>
<td>35 minutes</td>
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<td>Employment Law Summary</td>
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<td>Scenarios</td>
<td>50 minutes</td>
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<tr>
<td>Summary</td>
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**Total Time** 2 hours
Overview

What are some Federal laws that govern your workplace?

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Why is it important for union leaders to be familiar with these laws?

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Employment Law Quiz

Individual Activity

1. Employees who are covered by a collective bargaining agreement are generally considered to be employed “at will.”  T  or  F

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2. There are several Federal employment laws that prohibit discrimination in the workplace that is based on certain “protected classes.” Which of the following are considered “protected classes” under Federal law? Check all that apply.

  ___ race       ___ national origin       ___ economic status       ___ health
  ___ sex/gender ___ age (40 and over)    ___ sexual orientation     ___ religion
  ___ disability ___ employment history    ___ pregnancy             ___ color

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Employment Law Quiz

Individual Activity, continued

3. What is a “constructive discharge”?

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4. What determines whether or not a behavior is considered sexual harassment?
   a. The intent of the “harasser”
   b. The perception of the “victim”
   c. Both

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5. By law, sexual harassment can only occur between a man and a woman.  T  or  F

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Employment Law Quiz

Individual Activity, continued

6. One must have direct evidence to prove that an employer is guilty of unlawful discrimination.
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7. The employer is generally liable for harassment or discrimination caused by a supervisor.
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8. The union is equally liable as the employer for harassment or discrimination caused by a union member.  T  or  F
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Employment Law Quiz

Individual Activity, continued

9. Asking a coworker out on a date is usually considered sexual harassment.  T  or  F

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10. The Federal Family Medical Leave Act guarantees that employees are paid while they are on leave.  T  or  F

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Employment Law Summary

This section will provide you with a brief overview of the pertinent employment laws enforced by the Equal Employment Opportunity Commission (EEOC) and the Department of Labor (DOL).

Laws Enforced by the EEOC

The EEOC enforces Federal laws that prohibit workplace discrimination against a “protected class” of individuals (as discussed on page 9). The following laws are governed by the EEOC: Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA), and the Americans with Disabilities Act (ADA).

Under Title VII, the ADEA and the ADA, it is illegal to discriminate in any aspect of employment, including:

- hiring and firing
- compensation, assignment or classification of employees
- transfer, promotion, layoff or recall
- job advertisements
- recruitment
- testing
- use of company facilities
- training and apprenticeship programs
- fringe benefits
- other terms or conditions of employment

Title VII of the Civil Rights Act of 1964

Title VII prohibits intentional discrimination and practices that have the effect of discriminating against individuals because of their race, color, religion, sex, or national origin (birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group).

Sex Discrimination:

Title VII’s prohibitions against sex discrimination cover sexual harassment and pregnancy-based discrimination.

Sexual Harassment:

The EEOC defines sexual harassment as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct directed at a person because of his/her gender when this conduct explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance, or creates an intimidating, hostile, or offensive work environment.
Employment Law Summary

The law recognizes two types of sexual harassment: 1 quid pro quo and 2 hostile environment.

1. Quid Pro Quo: _______________________________________________________________  
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2. Hostile Environment: __________________________________________________________  
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In addition to sexual harassment, Title VII prohibits pregnancy-based discrimination. Under the ADA, pregnancy, childbirth, and related medical conditions must be treated by the employer in the same manner as other temporary illnesses or conditions.

Age Discrimination in Employment Act (ADEA)

The ADEA protects individuals who are age 40 or older from employment discrimination based on age. The ADEA’s protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

The ADEA does not protect anyone who is younger than age 40 from discrimination based on age. Fire fighters should note, however, that there are exceptions to this law that allow public safety employers to set maximum age requirements for hiring and retirement.

Equal Pay Act

The Equal Pay Act prohibits discrimination on the basis of sex in the payment of wages or benefits, where men and women perform work of similar skill, effort, and responsibility for the same employer under similar working conditions.
Employment Law Summary

American with Disabilities Act (ADA)

Title I of the Americans with Disabilities Act of 1990, prohibits employers and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions and privileges of employment. An individual with a disability is a person who:

1. Has a physical or mental impairment that substantially limits one or more major life activities;
2. Has a record of such an impairment; OR
3. Is regarded as having such an impairment.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question. Reasonable accommodation may include, but is not limited to:

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities.
- In certain limited circumstances: job restructuring, modifying work schedules, reassignment to a vacant position;
- Acquiring or modifying equipment or devices, adjusting modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

An employer is required to make an accommodation to the known disability of a qualified applicant or employee if it would not impose an "undue hardship" on the operation of the employer's business. Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources and the nature and structure of its operation.

Retaliation:

The anti-discrimination laws enforced by the EEOC also prohibit the employer from demoting, harassing or otherwise "retaliating" against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination.

State and Local Anti-Discrimination Laws:

In addition to the Federal protections provided, many states, the District of Columbia, and municipalities have also enacted protections against discrimination and harassment based on sexual orientation, status as a parent, marital status and political affiliation. Individuals should contact their nearest EEOC District office for more information.
Employment Law Summary

Remedies:

Any individual who believes that his or her employment rights have been violated may file a charge of discrimination with the EEOC. A charge must be filed within 180 of the date of the violation.

Upon receipt of a claim, the EEOC will contact the employer and conduct an investigation of the allegation(s). All laws enforced by the EEOC, except the Equal Pay Act\(^2\), require filing a charge with the EEOC before a private lawsuit can be filed in court. Individuals must ensure that they file their charges within the timelines required.

In addition to the EEOC, many states and municipalities have anti-discrimination laws and agencies responsible for enforcing those laws. The EEOC refers to these agencies as "Fair Employment Practices Agencies (FEPAs)." Through the use of "work sharing agreements," the EEOC and the FEPAs avoid duplication of effort while at the same time ensuring that a charging party's rights are protected under both federal and state law.

If the courts find an employer guilty of discrimination, the plaintiff may be awarded back pay and benefits, reinstatement, punitive damages, etc.

Laws Enforced by the DOL

The Department of Labor (DOL) administers a variety of Federal employment laws involving wages, benefits, affirmative action, health and safety, etc. For purposes of this workshop, we will focus on the Family Medical Leave Act (FMLA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Family Medical Leave Act (FMLA)

Under the FMLA, covered employers must grant eligible employees up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

- the birth and care of the newborn child of the employee;
- the placement with the employee of a son or daughter for adoption or foster care;
- to care for an immediate family member (spouse, child, or parent) with a serious health condition; or
- to take medical leave when the employee is unable to work because of a serious health condition.

The FMLA provides leave for eligible employees, however, it does not guarantee pay. The employer’s leave policies and/or collective bargaining agreement dictate how or if employees are paid during their leave. The statute permits employers to require an employee to expend accrued leave concurrently with the FMLA’s 12 weeks of protected time off.

In addition to the Federal FMLA, several states have enacted statutes that provide additional leave protections. It is important for employees to check their state laws to ensure that they receive all the benefits to which they are entitled.

Individuals who believe their rights have been violated can file a complaint with the DOL and/or file a private civil lawsuit against their employer.

\(^2\) Individuals who wish to file a claim under the Equal Pay Act (EPA) are not required to first file a charge with the EEOC. However, since many EPA claims also raise Title VII sex discrimination issues, it may be advisable to file charges under both laws within their respective time limits.
Employment Law Summary

The Uniformed Services Employment and Reemployment Rights Act (USERRA)

The Uniformed Services Employment and Reemployment Rights Act (USERRA), prohibits discrimination against persons because of their service in the Armed Forces Reserve, the National Guard, or other uniformed services. USERRA prohibits an employer from denying any benefit of employment on the basis of an individual’s membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. USERRA also protects the right of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment after being absent due to military service or training.

Employees who believe their rights have been violated can file a claim with the DOL via the Veteran’s Employment and Training Service (VETS). Employees can also contact their military unit for legal guidance on these issues.

Both the FMLA and USERRA can also be enforced by an action in Federal or State court.

First Amendment – Religion, Expression, Association, Right to Petition

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The First Amendment protects the right of an individual to join a union and participate in union activity, regardless of whether the individual is employed in a right-to-work and/or non-collective bargaining state. It also prohibits government employers from retaliating against an employee for speaking out on matters of public concern.

Although the First Amendment establishes the right to free speech, there are certain exceptions that apply to public employees. See the Appendix for more information pertaining to the First Amendment’s “freedom of association” and “freedom of speech” applications to fire and rescue personnel.

Individuals who believe their First Amendment rights have been violated should contact their local legal counsel or their District Vice President. Refer to the IAFF Legal Guardian Policy in the Appendix for information pertaining to IAFF legal representation in these cases.

This workshop has provided you with a brief overview of the employment laws that affect the workplace. Visit www.eeoc.gov and www.dol.gov for more information and guidance pertaining to these laws.
Scenarios

How do you handle a member who approaches you with a complaint of harassment or discrimination if you are in a collective bargaining environment?

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How would you handle the same complaint if you are in non-collective bargaining environment?

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Scenarios

Team Activity

You will now work on scenarios that address workplace harassment and discrimination.

Directions:

- Each team should select a reporter, timer and scribe.
- Each team should read its assigned scenario and answer the corresponding questions.
  - Discrimination scenario – page 33.
- Each team has 10 minutes to complete the exercise. Each team will present its answers to the class.
Scenarios

Team Activity, continued

Harassment Scenario:

You are a union president who works in a collective bargaining environment. Your contract does not address harassment or discrimination (or other employment laws); however, your fire department has a policy on sexual harassment. According to the policy, employees who believe they are victims of harassment should report their concerns to their immediate supervisor, or the next level supervisor if they are being harassed by their immediate supervisor.

After a union meeting, Sarah, a union member, approaches you with a complaint about Jason, a union member who is a fire fighter in her station. She complains that Jason has asked her out repeatedly and that she has turned him down each time. She said that Jason follows her around, makes sexual innuendos and generally makes her feel uncomfortable around the fire house. She said that she is aware of the sexual harassment policy, but she does not want to report Jason to her supervisor. Sarah distrusts management and does not want her problem to turn into a big issue in the fire house. Sarah is otherwise happy with her job and the other fire fighters in her station. She asks that you talk to Jason as union president and tell him to stop bothering her.

As the union president, how would you handle this situation?

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Overview of Employment Law – International Association of Fire Fighters
Discrimination Scenario:

You are a union president who works in a collective bargaining environment. Your collective bargaining agreement does not have an anti-discrimination clause or any language referencing Federal or State laws. Your employer has an anti-discrimination policy stating that the employer prohibits discrimination on the basis of race, color, religion, sex, etc. The demographics of your fire department consists of over 90% white males.

John, an African American fire fighter (driver), approaches you with a complaint of discrimination against management. John was a driver and was recently stripped of his driving privileges and demoted to fire fighter. He was in an accident last week that caused $10,400 in damages to the fire truck and $1,650 in damages to a parked car. No one was injured. John told you that he is aware that Mark, a driver who is Caucasian, has had two accidents this year, but has kept his position and has not been demoted to fire fighter. He believes that management is discriminating against him because he is African American.

As union president, how would you handle this situation?
Summary

This workshop has provided you with a brief overview of the pertinent employment laws in order to help you best represent your membership. If you have questions pertaining to a specific case or that are beyond the scope of this workshop, please contact your local legal counsel.

Learn More

If you enjoyed this workshop, we recommend the following Partnership Education Programs:

- Duty of Fair Representation
- Introduction to Grievances

Visit our web site at www.iaff.org/PEP to learn more.

You can also learn at home or your fire station via our Online Learning Modules. Visit www.iaff.org/onlinelearning to view our latest offerings.
Appendix

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Just Cause......................................................................................... A-3
First Amendment Issues for Fire and Rescue Personnel............... A-4
Recent Developments in Employment Law................................... A-5
IAFF Legal Guardian Policy

Overview

The IAFF “Legal Guardian Policy” is designed to make available, in appropriate circumstances, legal representation by and/or through the International’s General Counsel’s Office (referred to here as “GCO”). Representation is available under the policy where: (a) an affiliate, officer, or a member of a United States or Canadian affiliate has suffered, or is subject to suffering, adverse harm by an employer because of his/her union-related activities; or (b) where a court decision could establish a precedent that would have a significant impact on other IAFF affiliates.

A. First Category

Resolution No. 74 (adopted at the 1996 Convention) directs the IAFF to pursue whatever legal remedies are available and appropriate to protect union leaders who are disciplined or otherwise discriminated against because of their union activities. Consistent with this Convention Resolution, the first category of cases covered under this policy would include situations where an IAFF affiliate or member has engaged in “protected activities,” which are defined as follows:

(1) organizing, leading, or supporting an IAFF affiliate;
(2) participating in union affairs;
(3) participating in political activity or a political campaign supported by the affiliate (such as supporting a candidate for local government office);
(4) participating in claims supported by the affiliate (such as an OSHA claim, an FLSA claim, a state or provincial law claim, a whistleblower claim, or a grievance or arbitration claim); and
(5) speaking out on a matter of public concern affecting the IAFF, an affiliate, or its members.

B. Second Category

The second category of cases covered under the policy includes litigation involving an affiliate or a member which is expected to have a precedent-setting impact (helpful or harmful) on other IAFF affiliates and members beyond the particular affiliate which is directly involved.

C. Procedures and Funding

Legal representation by the GCO under this policy will be handled using the following procedures:

1. The District Vice President will communicate with the IAFF General President concerning a request for the legal services of the GCO;
2. The District Vice President and the affected affiliate will submit the facts (documents, etc.) fully describing the matter and how it should qualify for the assistance of the GCO;
3. The GCO will study the information and make a recommendation to the General President as to whether the matter has merit and qualifies for the assistance of the GCO under this policy. In a legal matter involving a Canadian affiliate or member, the General President may consult with a Canadian attorney as well as the GCO; and IAFF Legal Guardian Policy;
IAFF Legal Guardian Policy

4. The General President will make the decision as to whether the GCO will be authorized to provide legal services and representation.

The General President’s decision will be guided by the availability of funding, the merits and significance of the case, the potential impact of a court ruling on the membership of the IAFF, and other appropriate factors. In addition, the General President may consult with the General Secretary-Treasurer and the chairpersons of appropriate committees with regard to any decision made under this policy. The General President’s decision shall be forwarded as soon as is practical to all IAFF District Vice Presidents.

Consistent with existing practice, the General President may authorize funding of a particular action from the general funds of the organization, or from the EDF. If the EDF is utilized, the General President’s authorization would be subject to approval by the Executive Board (either by a telephone poll or a vote at the next Board meeting). The GCO will make every reasonable effort to recover and reimburse the IAFF for expenditures involving attorneys’ fees and litigation costs.
**Just Cause for Discipline**

Most collective bargaining agreements stipulate that there must be “just cause” for imposing discipline on an employee. If your agreement contains this clause, management must fulfill certain obligations before disciplining an employee or else it would be in violation of the contract. The most quoted and applied criteria for determining “just cause” is the seven point test written by Arbitrator Carroll Daughtery.

**Carroll Daughtery’s Seven Point Test**

1. Did management give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?

2. Was the employer’s rule or managerial order reasonably related to:
   a. the orderly, efficient and safe operation of the employer’s business, and;
   b. the performance that the employer might properly expect of the employee?

3. Did management, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate policy or disobey a rule?

4. Was the employer’s investigation conducted fairly and objectively?

5. At the investigation, did management obtain substantial evidence or proof that the employee was guilty as charged?

6. Has the employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?

7. Was the degree of discipline administered by the employer in a particular case reasonably related to:
   a. the seriousness of the employee’s offense, and;
   b. the record of the employee in his/her service with the employer?

*NOTE: Some arbitrators use their own criteria to determine if the just cause provision has been violated. In general, arbitrators check to make sure that the grievant received due process.*
First Amendment Issues For Public Employees - Fire & Rescue Personnel

By Kurt Rumsfeld, IAFF Legal Counsel

Among our most cherished rights are the right to speak freely on matters of public concern and the right to associate with whom we choose. These rights to freedom of speech and freedom of association are protected by the First Amendment to the United States Constitution. Although there is no “right” or “entitlement” to government employment, public employers cannot fire, refuse to hire or otherwise discriminate against an individual based on his or her exercise of First Amendment rights. The First Amendment provides an important check on the ability of public employers to discipline or otherwise discriminate against a public employee.

Freedom of Speech

Under the First Amendment, individuals have the right to speak out on matters of public concern without having government employers retaliate against them for the exercise of free speech. In the employment context, to be protected, there are two basic requirements:

1. an employee’s speech or comments must involve a matter of “public concern”; and
2. the employee’s interest in speaking on the matter of public concern must not be outweighed by the employer’s interest “in promoting the efficiency of public services.”

In addition, the employee must prove that the protected speech was a “substantial” or “motivating” factor in the adverse employment decision. Another way to say this is that the employee’s protected speech must have been a reason that moved the public employer towards its decision. Further, the employer can escape liability if it can prove that it would have made the same decision even in the absence of the employee’s protected speech activities.

Matters of Public Concern

Matters of public concern are issues that concern the public at large versus issues that only affect an individual employee. Speech on matters of “public concern” is speech that can be “fairly considered as relating to any matter of political, social or other concern to the community.” Courts have routinely found that issues regarding public safety (including budgets, taxation, and fraud) are matters of public concern. Conversely, courts have found that issues are not matters of public concern if they only concern such things as whether an individual employee was properly disciplined for non-speech reasons, personality disputes among employees, or other complaints regarding working conditions that only affect the complaining employee.

Weighing the Harm

Once it is determined that the employee’s speech is on a matter of “public concern,” the employee’s interest, as a citizen, in making the speech must be weighed against the harm, if any, to the employer’s efficient and effective operations. Where the employee’s interest is strong, such as political speech or speech raising a serious issue of public safety, it will be very difficult for the employer to “win” this balancing test. As one court said with respect to speech concerning cuts to emergency services, “it is hard to imagine any combination of government interest sufficient to outweigh [the employee’s] interest in informing the public about policies he believed were dangerous to the City’s citizens.”

In this regard, the courts often look to whether the injury or disruption of the workplace in affecting the public employer’s ability to provide its services occurred, or is likely to occur. Moreover, employers may not single out a particular employee or particular type of speech for punishment.
First Amendment Issues For Public Employees - Fire & Rescue Personnel

If an employee or particular type of speech is being singled out, the courts usually strike down the speech based restrictions as unconstitutional.

Examples of Freedom of Speech Cases

Set forth below are a few examples of First Amendment freedom of speech cases that employees have successfully pursued:

- In Texas, a fire fighter was discharged for speaking to the media following a routine fire in which a fire fighter died of a heart attack, and another fell from a ladder, sustaining serious injury. The fire fighter, who was president of the local fire fighters union, informed the press that recent budget cuts and staffing reductions may have played a part in the incidents. The Court found the fire fighters' statements to the media constituted speech on a matter of public concern, protected under the First Amendment. The fire fighter was reinstated with back pay, benefits, and payment of his attorneys' fees and costs.

- In Missouri, a fire fighter was discharged after publicly announcing the local union’s endorsement of a local fire district board candidate at a political meeting. The union-endorsed candidate was running against a long time incumbent, who had the support of the fire chief and his fellow fire board members. Although the Fire Department claimed the fire fighter was fired due to abuse of sick leave, the jury concluded that this was a false reason given by the Fire Department to disguise its true motive of punishing the employee for engaging in protected political speech. The jury awarded the fire fighter substantial damages, including back pay, compensatory damages for pain and suffering, and attorneys' fees and costs. In addition, the fire district was ordered by the court to reinstate the fire fighter.

- In a case involving a state highway patrol, a state trooper was disciplined for allegedly withholding information regarding missing property. At trial, the court found that the true reason for the trooper's discipline was that the trooper had endorsed a candidate for patrol superintendent who was opposed by the trooper's superior. In balancing the employee's interest in free speech against the employer's interest in the efficiency of the service, the court ruled in favor of the trooper because the highway patrol could not show that an injury or disruption of the workplace was or would be the result of such protected speech.

- In a Tennessee case, a fire department prohibited any literature in the workplace that mentioned “unions” or “labor organizations.” The Department did allow fire fighters to read other magazines and books in the workplace, including adult magazines such as Playboy. The prohibition solely related to union material. The court struck down this rule finding that it was an invalid content based restriction on speech that was unnecessary to promote the efficiency of the department's service to citizens. This case also demonstrates that a public employer may not discriminate against certain types of speech based on the employer’s opposition to, or disagreement with, the content of the speech.

- In a South Carolina case, several fire fighters were not hired after their department was merged into another City’s fire department. The fire fighters had been active in the union and had publicly commented on City related issues in the past. The fire fighters won a jury trial in which the court found that the City had violated the fire fighters’ First Amendment rights.
First Amendment Issues For Public Employees - Fire & Rescue Personnel

Freedom of Association

Public sector employers (state, local and federal government employers) may not take adverse actions against employees based on the groups with which the employees associate, such as labor associations, political organizations, and civic groups. This right is not absolute, however. For example, a police detective may not be able to associate with known organized crime figures, or associate with a motorcycle gang that the City is investigating. In evaluating “free association” claims, courts must balance the employee’s First Amendment interest in belonging or associating with a group against the employer’s interest “in promoting the efficiency of public service.” It is rare for an employer to be able to justify restrictions based on an employee’s right of association.

In addition, the employee must prove that the protected associational activity or membership was a “substantial” or “motivating” factor in the adverse employment decision. Another way to say this is that the employee’s protected association must have been a reason that moved the public employer towards its decision. Further, the employer can escape liability if it can prove that it would have made the same decision even in the absence of the employee’s protected activities.

In attempting to justify a restriction on speech or freedom of association, the employer must offer more than mere speculation or conjecture; rather the courts will look to whether an injury or disruption of the workplace affecting the public employer’s ability to provide its services occurred, or is likely to occur.

Examples of Freedom of Association Cases

Set forth below are a few examples of First Amendment freedom of association cases that employees have successfully pursued:

- In a fire department there were two IAFF local unions – one for the officers and one for the rank and file. The City ordered the employees in the officers’ local to withdraw their affiliation with the International union, claiming that it created a conflict of interest for the officers to affiliate with the same union in which their subordinates were members. A federal court struck down this restriction finding that there was no rational basis for the City’s fears.

- In a case involving the District of Columbia’s attempt to restrict the association rights of police officers who were trying to organize a union, the court held that a District of Columbia Code provision, which forbade membership by D.C. police officers in a union that was affiliated with any union that asserted the right to strike, was unconstitutional. The City argued that the restrictions against affiliations were necessary “to insure a smoothly running, fair and impartial police force.” The City suggested that a police officer’s union sympathies would interfere with his ability to respond to labor disputes. The Court rejected the City’s arguments and struck down the Ordinance as an impermissible restriction of freedom of association.
First Amendment Issues For Public Employees - Fire & Rescue Personnel

- In a case involving fire fighters’ attempts to become affiliated with an international union, the court declared a North Carolina statute that prohibited fire fighters from becoming members of a labor organization that is affiliated with a national or international labor organization, to be unconstitutionally overbroad. The court held that:

  It matters not...whether the firemen of the City of Charlotte meet under the auspices of the intervenor, a national labor union, but whether their proposed concerted action, if any, endangers valid state interests. We think there is no valid state interest in denying firemen the right to organize a labor union – whether local or national in scope.

- In a similar case involving police officers, a court struck down a regulation that prohibited police officers from joining or maintaining membership in any labor organization whose membership was not exclusively limited to full-time law enforcement officers. The City attempted to justify the regulation on the grounds that the police officer must appear to be impartial and neutral in the handling of labor disputes. The Court concluded that the City’s asserted interest did not outweigh the First Amendment rights of the police officers to join a labor organization of their own choosing.

Remedies

Employees who successfully pursue First Amendment cases are eligible to recover the following types of remedies:

- Declaratory relief such as a court’s ruling that a statute or ordinance is unconstitutional
- Injunctive relief such as an order that the employee be returned to work
- Actual damages such as lost wages and benefits
- Compensatory damages, such as pain and suffering caused by the employer’s misconduct
- In extreme cases, punitive damages to punish the public officials who violated the employee’s rights
- Attorneys’ fees and cost incurred in pursuing the case
Recent Developments in Employment Law

This document summarizes significant court decisions that were rendered during the past few years involving employment discrimination laws. It should be carefully noted that this summary is provided for informational purposes only and is not intended to constitute legal advice. Any person in need of legal advice or assistance on any topic covered in this summary should consult and confer with an attorney for advice particular to his or her situation.

The primary law governing employment discrimination in the workplace (both private and public sector) is Title VII of the Civil Rights Act of 1964. This statute makes it an "unlawful employment practice for an employer … to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex or national origin.” 42 U.S.C. §2000e-2(a). Courts have held that Title VII protects employees against both disparate treatment discrimination (meaning that the employer intentionally discriminated against the plaintiff because of a prohibited reason) and, in most cases, disparate impact discrimination (meaning that the employer maintained a policy that had a discriminatory impact upon a protected class of employees). Except where noted, this summary will address Title VII and its application to disparate treatment cases.

A. Background Information on Proving Title VII Disparate Treatment Claims

It is always hard to prove intent or state of mind. Culpable employers rarely admit, even accidentally, that they have acted with any intent to unlawfully discriminate, and most employers allege non-discriminatory reasons for their actions. Recognizing this fact, courts do not require employees to produce "smoking gun” evidence of discriminatory intent by an employer as a prerequisite for prevailing in a Title VII claim.

In fact, in 1973, the Supreme Court established an evidentiary framework that is specially tailored to Title VII cases for plaintiffs who do not have “direct” evidence of discriminatory intent. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court established a mechanism that shifts the burden of producing evidence (but not the burden of persuasion, which always remains with the plaintiff) between the plaintiff and the defendant during the course of a Title VII lawsuit. The first step in the McDonnell Douglas framework (as applied, by means of example, to a Title VII refusal-to-hire case) requires the plaintiff to establish a “prima facie” case of discrimination (“prima facie” is a Latin term meaning “at first sight”). As the term suggests, the plaintiff at this step must produce enough evidence to show that: (i) s/he is a member of a class protected by Title VII; (ii) s/he applied and was qualified for a job for which the employer was seeking applicants; (iii) despite being qualified for the position, s/he was rejected; and (iv) after rejection, the position remained open and the employer continued to seek applications from persons of the plaintiff’s qualifications. This standard, of course, is flexible, and can be modified to accommodate Title VII claims alleging discrimination with respect to other adverse employment actions, such as demotions, failure to promote, and terminations.

The initial burden is generally not difficult for most plaintiffs to meet. Once it is met, the burden of production then shifts to the employer to produce evidence that the plaintiff was rejected (or otherwise adversely acted upon) for a legitimate, non-discriminatory reason. Even evidence that might not seem credible to the plaintiff is sufficient to meet the employer’s burden at this stage.
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Once this burden is met, the plaintiff must then persuade the trier-of-fact (through additional evidence, if necessary) that the “legitimate” reasons offered by the employer for its employment decision were not its true reasons. It is often said that, at this point in the case, the McDonnell Douglas framework disappears, and the sole remaining issue is whether the plaintiff has persuaded the fact-finder that the employer discriminated against him/her because of a prohibited reason.

While all of this might seem like legal gamesmanship, the McDonnell Douglas framework can have serious consequences for both parties. For instance, if either party fails to meet its burden of production at any step, the court can rule against that party as a matter of law, essentially deciding the case before it gets to a jury. The framework can also help plaintiffs by requiring the employer to commit to a reason as to why the employment decision was made, a reason which the employee can then prove to be without merit.

As part of the 1991 amendments to the Civil Rights Act, Congress added a twist to this framework by enacting a provision stating that an unlawful employment practice is established under Title VII when the plaintiff demonstrates that a prohibited factor was a “motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. §2000e-2(m). Under these circumstances, an employer has a limited defense that does not absolve it of liability, but restricts the remedies available to the plaintiff to declaratory relief, certain types of injunctive relief (but not reinstatement, admission, hiring, promotion or payment of wages), and attorneys' fees and costs. This defense is only available, however, if the employer can demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor."


Since the enactment of §2000e-2(m), a number of federal courts had limited the availability of this remedy to those plaintiffs who could produce "direct" - or smoking gun - evidence of discrimination in support of their claim. In this case, the Supreme Court rejected this view, and held that liability under §2000e-2(m) could be established by either direct or circumstantial evidence. This will have a significant effect on the types of instructions given to juries in Title VII cases, and should make it easier for plaintiffs to avail themselves of this remedy.

Howley v. Town of Stratford, 217 F.3d 141 (2nd Cir. 2000):

The plaintiff, a lieutenant and the Town’s only female fire fighter, claims that the fire department discriminated against her because of her gender by denying her a promotion to assistant chief. Of the six candidates, she was ranked fifth based upon the results of an examination by an independent company, and the promotion was awarded to the third ranked candidate. As its “legitimate” reason, the Town argued that she had not satisfied the line officer experience requirement of four years, and was in any event eliminated by her low examination rank. In defending against the Town’s motion for summary judgment, the plaintiff noted that the Town had waived the four-year requirement for other male applicants, including the successful candidate.

The court agreed, and also noted that the Town had not followed the rankings with respect to its promotion of the successful candidate (who ranked third), and had conducted an “indifferent exploration” of the successful candidate’s credentials. It therefore concluded that a question of fact existed for a jury as to whether the Town’s stated reason was its real reason for denying her the promotion, or was merely pretext for discrimination.

On the other hand, the court concluded it was “unclear” whether the plaintiff had produced enough evidence of discriminatory intent to convince a jury of her claim, noting that “typical indicia
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of such discrimination are not apparent." For instance, the court noted that the plaintiff had not shown that she was passed over for a male applicant who she had outscored, and she pointed to no evidence of gender bias by any member of the panel. The court therefore remanded the case to address whether she could produce admissible evidence from which a juror could conclude that discrimination had occurred.


A female paramedic has produced sufficient evidence to demonstrate that she was terminated because of her sex by an ambulance company, where the company purportedly terminated her for allegedly abandoning a patient during a call that had been cancelled by an EMT, but the evidence showed that the company did not even discipline male paramedics who had been involved in similar situations.

B. Adverse Impact Cases Under Title VII

Employers may also violate Title VII if they utilize an employment practice or criterion that has the effect of adversely impacting a protected class under Title VII. The employer can be held liable for the discriminatory impact of such a practice even if it was utilized with no discriminatory intent. The employer may successfully defend the use of the practice, however, by showing a “business necessity” for the practice.

Lanning v. Southeastern Pennsylvania Transportation Authority, 308 F.3d 286 (3rd Cir. 2002):

In this case, the court rejected a claim by female applicants for the state police that a physical abilities test disqualifying 90 percent of female applicants had an unlawful disparate impact on females. The test, which centered on a requirement that applicants run 1.5 miles in 12 minutes, was implemented after widespread criticism that officers were unable to fulfill their duties because they were out of shape. The state presented evidence that aerobic capacity correlated to duties as foot-patrol officers, and that the success rate was high for female applicants who trained for the test. Based upon this showing, the court concluded that the employer had established that the test “measured the minimum standards necessary to succeed as a SEPTA officer” and had therefore proven the business necessity defense.

C. Mandatory Arbitration of Title VII Claims


The U.S. Court of Appeals for the Fourth Circuit holds that a union waived its member employee’s right to sue her employer for sex discrimination under Title VII because language providing for the arbitration of Title VII claims in its collective bargaining agreement made arbitration of the claim her only option. Most federal courts (relying upon the Supreme Court’s decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)) have held that a union cannot waive an individual employee’s right to sue an employer under Title VII. The Fourth Circuit is apparently determined to single-handedly reverse this Supreme Court precedent.
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The court concluded that the bargaining agreement contained a “clear and unmistakable” waiver of the employee’s right to litigate based upon the following two provisions:

- The union and the employer “agree that they will not discriminate against any employee with regard to race, color, religion, age, sex, national origin or disability… The parties further agree that they will abide by all the requirements of Title VII of the Civil Rights Act of 1964.”

- The same section of the agreement stated that “[u]nresolved grievances arising under this Section are the proper subjects for arbitration.”

Union officials – particularly those in the Fourth Circuit Court of Appeals (which encompasses Maryland, Virginia, West Virginia, North Carolina and South Carolina) – should therefore be cautious about including similar language in their collective bargaining agreements.

D. Unlawful Retaliation for Participating in a Title VII Claim

It is unlawful “for an employer to discriminate against any of his employees or applicants… because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. §2000e-3. To establish a prima facie case of retaliation, the plaintiff must show: (1) s/he engaged in activity that Title VII protects; (2) the defendant knew s/he engaged in this protected activity; (3) the defendant subsequently took an employment action adverse to the plaintiff; and (4) a causal connection between the protected activity and the adverse employment action exists. Courts use the McDonnell Douglas burden shifting analysis to process these claims.

Noviello v. City of Boston, 398 F.3d 76 (1st Cir. 2005):

Plaintiff, a female parking enforcement officer, alleged that she was harassed by her co-workers because she had filed a discrimination complaint against her supervisor, who was apparently very popular. The court concludes that a hostile work environment, tolerated by the employer, can alone constitute an "adverse employment action" within the meaning of the non-retaliation provision of Title VII. The court also held, however, that tepid jokes, teasing, aloofness, rudeness or ostracism in response to a complaint, or unpleasantness generated by co-worker support of the harasser, is “usually” not enough, standing alone, to support such a claim. There is a split in the circuit courts regarding this question, with some courts holding that a retaliatory employment action can only mean an "ultimate employment decision such as hiring, granting leave, discharging, promoting, and compensating," meaning that the Supreme Court could very well review this issue in the near future.


Following the filing of a race discrimination claim with the state EEOC office, the employer announces it will conduct an internal investigation of the allegation. Plaintiff, a white male, tells his supervisor that he would testify in support of the allegation in a court of law. Plaintiff is terminated shortly thereafter, allegedly for insubordination, and management officials subsequently tell other employees that it was “inappropriate” for employees to contact outside agencies regarding workplace problems.
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The employer argues that the employee’s conduct is unprotected because he had not participated in an EEOC investigation. Rejecting this argument, the court holds that “Title VII protects an employee’s participation in an employer’s internal investigation into allegations of unlawful discrimination where that investigation occurs pursuant to a pending EEOC charge.”

**EEOC v. Kohler**, 335 F.3d 766 (8th Cir. 2003):

Plaintiff is terminated less than one month after filing a complaint that the company was discriminating against him based on race. The court emphasizes that temporal proximity is an important factor in determining whether the adverse action had a retaliatory motive. It also notes that similarly situated employees – namely, employees who engaged in similar lax practices with respect to their time cards but who had not filed discrimination complaints – were not terminated, and this also buttressed the plaintiff’s causation showing.


The plaintiff, a female restaurant worker, alleges that she is terminated because her fiancé, an ex-employee of the same restaurant who had already filed an EEOC charge against the restaurant, had engaged in protected activity. The employer argues that Title VII does not outlaw third-party retaliation against persons who may associate with persons who engage in protected activity.

The court rejects this argument, holding that Title VII prohibits retaliation against someone who participates in a Title VII claim, and it also prohibits “anticipatory retaliation” against persons who the employer fear may later file a charge or assist or participate in an investigation. Defining the term “assist” broadly to include voluntary or involuntary support, the court finds that a jury could conclude the employer terminated the plaintiff to put financial pressure on her fiancé to settle the existing EEOC claim with the restaurant, or because she could reasonably be expected to participate in the investigation.

**E. What Constitutes an “Adverse Employment Action” Under Title VII?**

**O'Neal v. City of Chicago**, 392 F.3d 909 (7th Cir. 2004):

An African-American female is transferred from her position as an "administrative sergeant" in the Narcotics Unit to the position of "beat sergeant" in one of the districts. In her Title VII lawsuit, she claims that the transfer is the result of racial and gender discrimination, but the court upholds summary judgment for the employer on grounds that she did not suffer "adverse action" within the meaning of Title VII.

As stated by the court, generally speaking there are "three general categories of materially adverse employment actions actionable under Title VII: (1) cases in which the employee's compensation, fringe benefits, or other financial terms of employment are diminished, including termination; (2) cases in which a nominally lateral transfer with no change in financial terms significantly reduces the employee's career prospects by preventing her from using her skills and experience, so that the skills are likely to atrophy and her career is likely to be stunted; and (3) cases in which the employee is not moved to a different job or the skill requirements of her present job altered, but the conditions in which she works are changed in a way that subjects her to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in her workplace environment." A "purely subjective" preference for one position over another, and the "ordinary difficulties associated with a job transfer," do not meet these criteria.
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Hillig v. Rumsfeld, 381 F.3d 1028 (10th Cir. 2004):

Negative job reference can constitute an "adverse employment action" if it is shown to have a likely impact on future job opportunities. In such cases, evidence of the loss of a specific job is not required. The court subjects this conclusion, however, to a "de minimis" test.

Russell v. Principi, 257 F.3d 815 (D.C. Cir. 2001):

Receipt by the plaintiff of a grade-lower performance evaluation than her co-worker can constitute an adverse action under Title VII where the effect of the evaluation was to award her a lower bonus than her co-worker and potentially expose her to a higher risk of being laid off in any future reduction in force.


Placement of employee on 30-day performance improvement plan, which amounted to no more than an "alteration in work responsibilities," does not constitute an adverse action when unaccompanied by tangible harm, such as a decrease in salary or a change in job title or classification.

F. Sex Discrimination/Grooming Standards

Jespersen v. Harrah's Operating Company, 392 F.3d 1076 (9th Cir. 2004):

Female bartender who receives outstanding reviews is terminated after she refuses to comply with company's newly enacted appearance standard that required her to wear makeup. She alleged that the policy discriminated on the basis of sex because it did not require the same of male bartenders, and in fact prohibited them from wearing makeup. She objected to the policy because of the cost of cosmetics, the time requirements involved in applying the makeup and because it diminished her credibility in dealing with unruly guests. The court held that Title VII does not prohibit employers from imposing different grooming standards for men and women - since Title VII only protects "immutable" characteristics - so long as the standards do not impose a greater burden on one sex than the other. Here, the court found that the plaintiff had failed to show that the policy, which also required men to maintain short hair and neatly trimmed fingernails, imposed an "unequal burden" on females.

G. Harassment Cases

Since its groundbreaking decision in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the U.S. Supreme Court has recognized causes of action under Title VII for sex discrimination based upon both "quid pro quo" harassment and "hostile environment" harassment theories. Lower courts have also recognized harassment causes of action based upon other forms of Title VII discrimination, such as race and religious discrimination.

(1) Quid Pro Quo Sexual Harassment

Under the "quid pro quo" theory, the employer is liable for harassment if a supervisor conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate, or punishes the subordinate for refusing to comply with a request for sexual favors.
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Porter v. California Dept. of Corrections, 383 F.3d 1018 (9th Cir. 2004):

Plaintiff claims that the denial of her transfer request by her supervisor is "quid pro quo" punishment for having declined his past sexual propositions, which were made when he was not her direct supervisor. The court agrees with the plaintiff that this should be analyzed as a "quid pro quo" harassment claim, on grounds that a primary policy of Title VII "would be thwarted if we were to find that liability could not attach simply because an alleged harasser was not in fact in a position to exact reprisals at the moment his advances were rebuffed -- even where he was entrusted with and abused such authority subsequently."

(2) HOSTILE ENVIRONMENT SEXUAL HARASSMENT

Under the "hostile environment" theory, an employer may not subject an employee to a hostile or abusive work environment where (1) the harassment is because of the employee’s sex; (2) the harassment is so severe or pervasive that it affects the terms and conditions of employment; (3) the employer knew or should have known of the harassment; and (4) the employer failed to take prompt and remedial action.

Unlike the quid pro quo theory, hostile environment harassment does not have to result in a tangible employment action to be actionable. If it does, however, the employer may be held vicariously and strictly liable for the harassment of a supervisor. If it does not, the employer may still be held liable for such harassment, but in these cases the employer may avoid liability by proving the following affirmative defense: (1) it exercised reasonable care to prevent harassment; (2) it exercised reasonable care to promptly correct the harassment; and (3) the plaintiff unreasonably failed to utilize the employer’s corrective mechanism. The employer may also be held vicariously liable for harassment by the plaintiff's co-worker if the plaintiff can demonstrate that the employer was negligent in either discovering or remedying the harassment.

The availability of the “affirmative defense” for supervisory harassment has led many employers to establish employment policies specifically designed to address complaints of sexual harassment. This development has given rise to a number of cases over the last several years in which the availability of this defense, or the plaintiff’s utilization of the policy, is directly at issue. The Supreme Court has also recently resolved a long-simmering dispute about whether a "constructive discharge" brought about by supervisory harassment constitutes a "tangible employment action" and therefore precludes assertion of the affirmative defense.

(a) AVAILABILITY OF THE AFFIRMATIVE DEFENSE


As noted, employers may be held strictly and vicariously liable for supervisory harassment that culminates in a "tangible employment action," which means a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." In such cases, employers may not utilize the affirmative defense that they exercised reasonable care to prevent and correct the harassment and that the employee failed to utilize this mechanism.

Until recently, federal courts had split on whether this defense was available to employers in cases where the plaintiff alleged s/he was "constructively discharged" because of supervisory harassment. To show "constructive discharge," the plaintiff has to demonstrate that his/her
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Working conditions were so intolerable that a reasonable person in the employee's position would have felt compelled to resign.

In this case, the plaintiff, a female communications officer with the state police, alleged that she had been subjected to frequent and inappropriate sexual and derogatory conduct by a male supervisor that culminated in her arrest on questionable charges. Before the arrest could have any effect on her employment status, she resigned from her job. The lower court dismissed her charges because she had failed to avail herself of the employer's procedures for reporting harassment. The appeals court, however, reversed this decision on grounds that the lower court failed to consider her "constructive discharge" claim.

The U.S. Supreme Court, resolving a conflict on this issue among the circuit courts, held that a "constructive discharge" can constitute a "tangible employment action" - thereby depriving the employer of the affirmative defense - when a supervisor's "official act" precipitates or underlies the constructive discharge. The Court explained that a supervisor's sexual assault of a plaintiff would not constitute an "official act" because it would be wholly unauthorized, entitling the employer to the affirmative defense to show that it corrected the act as soon as it became aware of it. On the other hand, an employer's decision to transfer an employee (as part of the harassment) could constitute an "official act," meaning that if the plaintiff could show that the transfer constituted a "constructive discharge," the affirmative defense would not be available to the employer. The Court remanded the case for a determination of whether the employer's decision to arrest the employee constituted an "official act" within these parameters.

Holly D. v. California Institute of Technology, 339 F.3d 1158 (9th Cir. 2003):

Female university administrator consents to the sexual advances of her supervisor in order to avoid suffering adverse employment consequences. Court initially finds that she suffered no "tangible adverse employment action" and then found that the employer had established the affirmative defense. The appeals court reject this approach, holding that the threat of discipline in order to secure sexual favors constituted a tangible employment action for which the employer would be vicariously liable, regardless of its reasonable care to prevent the harassment.

The court distinguished this situation from cases in which a supervisor casts an "unfulfilled" threat, which would be treated as a hostile environment claim for which the affirmative defense would be available. The court also noted that no economic harm need be shown, noting that "[i]f a supervisors commits a ‘tangible employment action’ by ‘failing to promote’ an employee who refuses to engage in sex with him, such an employment action must also result if he promotes the employee because she submits to his coercive demands.”

(b) Co-Worker Harassment

Rhodes v. Illinois Dept. of Transportation, 359 F.3d 498 (7th Cir. 2004):

Female plaintiff, who worked as a highway maintainer for the employer, alleged that she was sexually harassed by comments from a managerial employee and pornography at the work site. The court held that this did not constitute "supervisory" harassment, since "it is not enough that she point to evidence that anyone with managerial authority engaged in sexual harassment" but rather she must "show that the harasser served specifically as her supervisor," and while the supervisor in question managed her work assignments and made recommendations concerning sanctions for rule violations, he did not have "authority to hire, fire, promote, demote, discipline or transfer" the plaintiff. The plaintiff was therefore only entitled to recover if she could show that the employer was negligent in either discovering or remedies the harassment. On this point, the court held that the employer would not be legally apprised of the harassment unless the employee reports the harassment or the harassment is sufficiently obvious. Here, where the
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employer had an adequate anti-harassment policy in place, and it addressed her sole complaint regarding pornography adequately, the employer was not liable for this co-worker harassment.

(c) Amount of Harassment Required to be Actionable

McCurdy v. Arkansas State Police, 375 F.3d 762 (8th Cir. 2004):

Court finds that employer is not strictly liable for a single incident of supervisory sexual harassment, which allegedly was limited to a supervisor's unconsented touching and other inappropriate activity over a one-hour period. The plaintiff reported the incident, and the employer promptly responded by initially ensuring that the supervisor was separated from the plaintiff and eventually transferring him to another city and demoting him. The lower court rejected the employer's assertion of the affirmative defense, since it could not show the plaintiff had failed to take advantage of its harassment prevention policy (because she in fact had done so). The appeals court reversed this decision, holding that requiring the employer to satisfy this prong of the affirmative defense made no sense in situations like this one where the harassment consisted of a single incident and the employer promptly remedied the same in response to the plaintiff's complaint.

Newman v. Federal Express Corp., 266 F.3d 401 (6th Cir. 2001):

Court affirms ruling that African-American plaintiff had failed to show sufficiently hostile environment due to race where, although he received an anonymous, racially charged letter, he stated in a deposition that he did not consider the letter a “big deal” and he was not shocked or disturbed by it. He also referred to a threatening message left on his voice mail as “silly.” The court held that there can be no Title VII violation where the victim does not subjectively perceive the environment to be abusive.

Brown v. Henderson, 257 F.3d 246 (2nd Cir. 2001):

Plaintiff is repeatedly harassed by co-workers, who crudely make fun of her for allegedly having a relationship with a male co-worker and who mock her eating habits. During discovery in the case, however, the plaintiff explained that her conflict with her co-workers began with a clash over their working hours and evolved into a disputed union election. The court holds that she failed to demonstrate that her harassment was because of her sex, but rather finds that it was a result of internal union disputes. The fact that much of the harassment was expressed in a sexual context did not change the outcome.


U.S. Supreme Court holds that an employee failed to establish that she had been subjected to a hostile environment where she had been subjected to a single incident in which her supervisor and a co-worker chuckled over an offensive comment made in her presence. Specifically, the plaintiff’s job involved reviewing the psychological profiles of job applicants. Her supervisor read aloud an off-color, sexually suggestive comment from one of the profiles, eliciting another comment from her co-worker and laughter from both men. She complained about the comment, and later alleged that she had been retaliated for having filed a complaint. The Supreme Court ordered dismissal of her claim because “[n]o reasonable person could have believed that the single incident recounted above violated Title VII’s standard.” The court noted that the plaintiff’s job required her to review the sexually explicit statements, and that she had admitted that reviewing the particular statement in the file had not bothered or upset her.
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**O’Rourke v. City of Providence, 235 F.3d 713 (1st Cir. 2001):**

The plaintiff was one of the first female fire fighters hired by the City of Providence. At the first station to which she was assigned, the court finds that she was subjected to pornographic materials, sexual derision and systematic exclusion from social and professional activities. Having come from a fire fighting family, she went for a long period without reporting the harassing conduct until it became unbearable. Even after she complained, however, the harassment continued. She transferred to another station, but was told that she was not wanted there, and she was thereafter excluded from the fire fighters’ daily activities. As a result of the trauma she experienced, she gained weight and had difficulty sleeping, and voluntarily left active duty. The trial court found in her favor and awarded her $275,000 in damages, an amount that was eventually affirmed on appeal. The appellate court also held that the plaintiff was entitled to bring instances of harassment that occurred two years before the statute of limitations on her claim had begun to run, on grounds that the harassment constituted a “continuing violation” of the law. The court also warned employers that non-sexual conduct was as relevant to demonstrating that she had been harassed within the meaning of Title VII as the sexually-oriented conduct.


The court holds that an employee who actively searched through a company computer with the purpose of uncovering offensive materials cannot complain that she was subjected to a hostile work environment when she actually found sexually explicit information. The offensive materials must be directed at the complaining employee or generally displayed to the public to support a harassment claim.

**Williams v. New York City Housing Authority, 154 F.Supp.2d 820 (S.D.N.Y. 2001):**

Plaintiff is an African-American employed as a caretaker at a housing project. He sees a noose hanging on the wall behind his supervisor’s desk, which remains there for several days. Once he complains, his supervisor immediately removes it and apologizes, saying “you know I’m not like that.” The court holds that this single incident is sufficiently severe to support a claim of race harassment under Title VII. The court notes that the noose is “the most repugnant of all racist symbols.”

**d) Adequacy of Anti-Harassment Policy**

**Watson v. Blue Circle, Inc., 324 F.3d 1252 (11th Cir. 2003):**

When harassment is committed by co-workers or customers, a plaintiff must show that the employer either knew (had actual notice) or should have known (had constructive notice) of the harassment and failed to take immediate and appropriate corrective action. Constructive notice can be established when the harassment is so severe and pervasive that management reasonably should have known of it, but an employer can avoid a finding of constructive notice if it can demonstrate it had a “valid and well-disseminated harassment policy.” In this case, the court held that dissemination of the policy was not enough to establish the affirmative defense, and noted evidence suggesting that the employer did not adequately investigate and respond to allegations of sexual harassment.
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Harrison v. Eddy Potash, Inc., 248 F.3d 1014 (10th Cir. 2001):

Plaintiff is the only female miner in a thirty person underground crew. She is repeatedly subjected to sexual advances by her male supervisor. She consistently rejects these advances and eventually reports his behavior to company officials, who react quickly by investigating the report, formally reprimanding him and moving him to a different crew, and placing him on suspension. She eventually sues under Title VII, and her employer defends on grounds that it exercised reasonable care by publishing a sexual harassment policy prior to the harassment and reacting quickly to her complaint. The court disagrees, however, on grounds that the employer failed to show that the mining crew was given copies of the policy, and that management made no mention of the policy once it was issued. Moreover, the plaintiff was neither told of, nor provided a copy of, the policy when she was hired. The court also held that the company's quick response to the harassment did not absolve its failure to have reasonably implemented the policy.

Spriggs v. Diamond Auto Glass, 242 F.3d 179 (4th Cir. 2001):

An African-American employee is subjected to repeated racial slurs by a white supervisor. He complains to his immediate supervisor who, despite the company’s harassment policy, tells the plaintiff he wants the complaint to be handled internally and that the plaintiff should not complain to other officers. When plaintiff presses his complaint with a district manager, he is told that his supervisor “did not mean anything by his language.” Although the employer successfully defends against the claim at trial on grounds that it had a published harassment policy, the court of appeals reverses on grounds that the company did not reasonably enforce its policy when it received complaints by the plaintiff.

Gentry v. Export Packaging Co., 238 F.3d 842 (7th Cir. 2001):

Female employee subjected to sexual harassment by her supervisor attempts to complain to a benefits coordinator in the human resources department, but subsequently quits when the harassment does not stop. At trial, the company establishes that it had issued a harassment policy that allowed employees to report harassment to a “human resources representative,” but company representatives disagree as to who such a representative was. Also, the company failed to inform its employees as to this aspect of the policy. The court therefore held that the company could not assert an affirmative defense to the claim.

(d) Same Sex Harassment


Fire fighter alleges that he was subjected to sexual harassment by his male coworkers, and much of the harassment was tinged with homosexual references. The court notes that same-sex harassment can be proven in three ways: (1) where it is motivated by the aggressor’s sexual desires; (2) where it is motivated by hostility towards participation of a particular sex in the workplace; or (3) where it is motivated by belief that the victim did not conform to the stereotypes of his or her gender.

The court then concluded that the plaintiff did not fall into any of these three categories. With particular reference to the homosexual content of the harassment, the court noted that the plaintiff failed to allege that he was discriminated against because he failed to conform to gender stereotypes. In fact, it noted that he attributed the harassment to a mistaken belief that he was a homosexual, a form of harassment not prohibited by Title VII. It therefore concluded that he had
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failed to demonstrate that he was discriminated against because of his sex. This fire fighter was, however, ultimately awarded a $1.2 million verdict for other claims, including unlawful retaliation.

**Linville v. Sears, Roebuck and Co.,** 335 F.3d 822 (8th Cir. 2003):

Male tool salesman who is repeatedly backhanded in the scrotum by a coworker cannot allege a claim of gender discrimination under Title VII because he failed to provide evidence that harassment was “because of his sex,” even though it was obviously tinged with offensive sexual connotations. There was no evidence, for instance, that the coworker was motivated by a hostility towards men in the workplace.

**Rene v. MGM Grand Hotel, Inc.,** 305 F.3d 1061 (9th Cir. 2002):

In an update to a case I presented two years ago, the 9th Circuit has finally concluded that the same-sex, sexually vulgar harassment to which this hotel butler was subjected was actionable under Title VII, regardless of the motivation of the harassers, because of its sexual content.

(f) Other Forms of Harassment

**Gorski v. New Hampshire Dep’t of Corrections,** 290 F.3d 466 (1st Cir. 2002):

First Circuit recognizes a hostile environment claim based on pregnancy discrimination.

**Abramson v. William Patterson College of New Jersey,** 260 F.3d 265 (3rd Cir. 2001):

The Third Circuit recognizes, for the first time, a hostile environment claim based upon religious harassment.

**Flowers v. Southern Regional Physician Services, Inc.** , 247 F.3d 229 (5th Cir. 2001) and **Fox v. General Motors Corp.**, 247 F.3d 169 (4th Cir. 2001):

Fourth and Fifth Circuits recognize a hostile environment claim based upon disability harassment.

F. Sexual Orientation and Sex Stereotype Discrimination

**Dawson v. Bumble & Bumble,** 398 F.3d 211 (2nd Cir. 2005):

Plaintiff, a lesbian employee of an "avante garde" hair salon in Manhattan, claims that she was terminated because she failed to conform to her gender stereotype - namely, that "she appears more like a man than a woman." Although the U.S. Supreme Court recognized a potential cause of action for such a claim in **Price Waterhouse v. Hopkins**, 490 U.S. 228 (1989), the court rejects her claim on grounds that it cannot be used by an "avowedly homosexual plaintiff" who is attempting to "bootstrap protection for sexual orientation into Title VII," and the plaintiff failed to produce evidence that she was discriminated against because of her appearance.
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Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004):

Court holds that plaintiff, a transsexual male diagnosed with gender identity disorder, stated a claim for sex discrimination where he alleged that he was suspended from his employment because he exhibited female characteristics that did not conform to "sex-stereotypical" behavior and characteristics attributed to men, pursuant to the Supreme Court's decision in Price Waterhouse.

G. Race/Sex Discrimination and the First Amendment

Patrolmen's Benevolent Association of the City of New York v. New York City, 310 F.3d 43 (2nd Cir. 2002):

Hispanic and African-American police officers are involuntarily reassigned into the precinct in Brooklyn that was the site of the Abner Louima beating, in response to community outrage and a perceived need for more African-American officers in the area. The officers challenge the race-based decision on constitutional grounds, arguing that it violated their 14th Amendment right to equal protection. Specifically, the officers complained that, far from being welcomed, they endured frequent insults and epithets from the community members about the assault. They also presented evidence that there were better ways to accomplish community policing than simply transferring minority officers to the precinct, such as community outreach. The jury awards damages to each plaintiff, and the city appeals.

The appeals court applies "strict scrutiny" to the race-based reassignment decision. To survive this scrutiny, the city must show that the decision was "narrowly tailored to further a compelling governmental interest." The court notes that the remediation of past discrimination is the only compelling interest ever identified by the Supreme Court, but also holds that an operational need to carry out law enforcement effectively, "with a workforce that appears unbiased," could also serve as a compelling interest. The city, however, had failed to demonstrate that race-based assignments met this compelling need, or that the same objective could not have been met through non-discriminatory means. The court noted that the city took weeks to accomplish the transfers, even though it said the need for them was immediate. The court also noted that the involuntary nature of the reassignments, rather than improving race relations, could have had the opposite effect by creating resentment among the minority officers.

Pappas v. Giuliani, 290 F.3d 143 (2nd Cir. 2002):

New York City police officer is caught by a sting operation distributing racist and anti-semitic literature in a return envelope to a fund raising solicitation by an auxiliary police department. The police department terminates him for violating department regulations. He contends the termination violates his First Amendment right to speak out on matters of public concern.

The court rejects the claim. "For a New York City police officer to disseminate leaflets that trumpet bigoted messages expressing hostility to Jews, ridiculing African Americans and attributing to them a criminal disposition to rape, robbery, and murder, tends to promote the view among New York’s citizenry that those are the opinions of New York’s police officers. The capacity of such statements to damage the effectiveness of the police department in the community is immense. Such statements also have a great capacity to cause harm within the ranks of the Police Department by promoting resentment, distrust and racial strife between fellow officers. In these circumstances, an individual police officer’s right to express his personal opinions must yield to the public good.” The court found that the officer was not being punished for personally holding these opinions, but rather for deliberately disseminating them.
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H. Pregnancy Discrimination

As part of its prohibition against gender discrimination, Title VII prohibits employers from discriminating against a female employee because she is pregnant. To establish a prima facie case of pregnancy discrimination under the McDonnell Douglas test, the plaintiff must show: (1) she was pregnant; (2) she was qualified for her job; (3) she was subjected to an adverse employment action; and (4) there is a nexus between her pregnancy and the adverse employment decision.


The plaintiff had been suffering from deteriorating job evaluations prior to becoming pregnant. The employer did not inform the employee that she was terminated because of performance issues until two days after she announced she was pregnant. The court held, however, that the employer was entitled to judgment as a matter of law because it provided uncontested evidence that it began the process of terminating her four days before she announced her pregnancy. Noting that early pregnancy, unlike race or gender, “is not an obvious condition,” the court held that a plaintiff has the burden of demonstrating that her employer knew of her pregnancy at the time the decision to take the adverse action was made. This is necessary to establish the causation element of the prima facie case.

I. Religious Discrimination

Title VII prohibits discrimination against an employee “because of … religion.” In order to establish a prima facie case of religious discrimination, the plaintiff must demonstrate that (1) s/he has a bona fide religious belief or practice that conflicts with an employment requirement; (2) s/he informed the employer of this belief or practice; and (3) s/he was disciplined for failing to comply with the conflicting employment requirement. If this burden is met, the employer then must show that it made good faith efforts to provide the employee with a reasonable accommodation or that providing such accommodation would cause undue hardship to the employer’s business. Moreover, the First Amendment prohibits public employers from unreasonably interfering with the religious practices of its employees, and from granting a preference to one religion over another.

Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004):

Plaintiff, a self-described "devout Christian" who believed that homosexual activities violated Biblical commandments and that he had a religious duty to "expose evil when confronted with sin," posts Biblical scriptures purportedly condemning homosexual activity on his work cubicle in response to his employer's poster promoting tolerance of diversity in the workplace, which featured "Black," "Blonde," "Old," "Hispanic," and "Gay" employees. After he refuses to remove the posters in compliance with the employer's anti-harassment policy, and following a series of meetings with his managers, he is terminated, and sues on grounds that he was discriminated against because of his religious beliefs. The court rejects his claim. Even assuming that his religion required him to post the statements on his cubicle, which the court did "with considerable reservations," the court held that the only accommodations acceptable to him -- namely, either removing the diversity poster or allowing him to rebut it with his own posting -- would have imposed an undue hardship upon the employer "because it would have inhibited its efforts to attract and retain a qualified, diverse workforce."
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Bodett v. Coxcom, Inc., 366 F.3d 736 (9th Cir. 2004):

Plaintiff supervisor is terminated after her company discovers that she had repeatedly harassed a subordinate female because she was a lesbian, in violation of the company's policy prohibiting harassment on the basis of sexual orientation. The plaintiff argued that she was terminated because of her religion's condemnation of homosexuality, which she claimed led to her conduct towards her subordinate because "sometimes there is a higher calling than a company policy."

The court rejected her claim on grounds that the company was entitled to enforce its harassment policy, and there was no evidence that its actions were otherwise caused by hostility towards her religion.

Endres v. Indiana State Police, 349 F.3d 922 (7th Cir. 2003):

A Baptist police officer is terminated after he refuses an assignment to protect gaming commission personnel at a casino, arguing that to do so would violate his religious beliefs by facilitating gambling. His request for an alternative assignment had been denied as too burdensome. The court rejects his argument that the police department's failure to accommodate his beliefs constituted religious discrimination. Noting that many religious officers might have scruples about various aspects of police work -- for instance, protecting abortion clinics or liquor stores -- the court stated, "Must prostitutes be left exposed to slavery or murder at the hands of pimps because protecting them from crime would encourage them to ply their trade and thus offend almost every religious faith?" The court also noted that the requested reassignment would have caused more than minimal hardship, since the casino assignment was unpopular and the department could not have found volunteers to take his place.

J. Disability Discrimination

The Americans with Disabilities Act (ADA) prohibits "discrimination against a qualified individual with a disability because of the disability." 42 U.S.C. §12101 et seq. It provides an affirmative defense for actions based on a qualification standard shown to be job-related for the position in question and consistent with business necessity. This standard may include a "requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. §12113(b).


The employer refuses to continue the employment of a contract employee who has tested positive for hepatitis C because his condition would be aggravated by his continued employment, thereby posing a direct threat to his own health. EEOC regulations define the "direct threat" defense to include a threat to the disabled person. Although the Ninth Circuit held that this impermissibly expanded the language of the ADA, the Supreme Court upheld the regulation, and allowed the employer to avail itself of this defense. The Court noted that OSHA regulations specifically require employers to provide a safe workplace, and rejected the idea that this sanctioned "paternalistic" decisions by employers, at least where the threat was tangible and documented.

ABA Study: Plaintiffs Rarely Prevail in ADA Cases

Defendant-employers prevail in 95.7 percent of cases filed under Title I of the ADA, according to a 1999 American Bar Association study. Moreover, plaintiffs prevailed in only 17 percent of federal appeals court decisions in employment-based ADA claims. The study found that many cases were terminated by a grant of summary judgment when the court concluded that the plaintiff had not shown an impairment meeting the definition of disability under the Act.
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K. National Origin Discrimination

Title VII also prohibits discrimination because of national origin. This "refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86 (1973).

Eliserio v. United Steelworkers of America, Local 310, 398 F.3d 1071 (8th Cir. 2005):

Plaintiff, a Hispanic male, is repeatedly harassed by co-workers with anti-Hispanic taunts after he crosses a picket line. There is also evidence that a local official encouraged management to demote plaintiff. Although he is ultimately reinstated pursuant to a union grievance, he resigns from his employment after the harassment continues and then sues his employer and union for national origin discrimination. While recognizing that a union does not have an affirmative duty under Title VII to remedy employer discrimination, or to take remedial action for discriminatory acts by their individual members, the court finds that the union could be liable in this case for itself instigating and actively supporting the discriminatory acts.

Storey v. Burns Int'l Security Services, 390 F.3d 760 (3rd Cir. 2004):

Plaintiff, a security guard, is discharged after he refuses to remove Confederate flag stickers - one of which says "The South Was Right" - on his lunch box and truck, in conformity with his employer's diversity tolerance program. He sues his employer, alleging discrimination on the basis of his national origin, which he describes as "Confederate Southern-American." For the sake of argument, the court accepted his argument that this constitutes a valid national origin classification under Title VII because "members of this group share a common culture and history of persecution." It rejected his claim, however, on grounds that he did not allege that "anything fundamental to his national origin ... requires display of confederate symbols," and that his "personal need to share his heritage can not be equated with something endemic to national origin."

L. Union Liability Under Title VII

EEOC v. Pipefitters Ass'n Local 597, 334 F.3d 656 (7th Cir. 2003):

Court rejects EEOC's argument that the employer and the union "have exactly the same legal responsibility" to correct situations involving racial or sexual harassment, holding that "if a worker complains to the union that he is being harassed, all the union can do is file a grievance on his behalf against the employer; the union cannot eliminate the harassment itself – that is the company's responsibility." The court noted that Title VII does prohibit unions from discriminating against their members on the basis of race or gender, but this prohibition should be applied in the context of the union’s role in labor-management relations – for instance, if it “refuses to accept blacks as members, or refuses to press their grievances.” While a failure to act on a harassment grievance might implicate the union’s duty of fair representation, it does not, standing alone, constitute a Title VII violation.

Jacobs v. United Steelworkers of America, 2002 U.S.App.LEXIS 23553 (8th Cir. 2002):

While unions are prohibited from causing or assisting unlawful discrimination by an employer, Title VII does not impose an affirmative duty to investigate and take steps to remedy employer discrimination.