

CHAPTER 15

HANDLING DISCRIMINATION COMPLAINTS

Discrimination, in all of its insidious, illegal forms, affects federal employees in numerous ways. A single discriminatory action can affect an employee's ability to advance within the agency, to receive promotions and to earn awards. Moreover, discrimination can debilitate an employee's self confidence and sense of dignity. Frequently, victims of discrimination challenge such treatment. However, all too often, employees are not aware of their rights and the processes available for fighting discrimination. As leaders within our chapters, we can fight and stop illegal discrimination by educating ourselves and employees about our rights and the processes for contesting illegal actions. We need to identify discrimination when it occurs and implement strategies for eradicating it.

The outline below provides an overview of the different forums where a federal employee can raise an allegation of discrimination, the governing discrimination laws, and the theories for applying discrimination laws. A chapter should consult with their National Field Representative when handling a discrimination case.

I. THE LAWS GOVERNING DISCRIMINATION MATTERS

Congress has enacted various statutes to protect federal employees from illegal discrimination. Chapter stewards should be aware of the following statutes.

A. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et. seq.*

In 1964, Congress enacted Title VII of the Civil Rights Act. The Act protects private sector employees from discrimination based on race, color, religion, sex or national origin in employment practices. The Equal Opportunity Act of 1972 amended Title VII of the Civil Rights Act of 1964 to extend these protections to federal employees. Title VII was again amended by the Civil Rights Act of 1991, which, among other things, guaranteed the right to a jury trial in federal court discrimination actions and authorized the compensatory damages up to \$300,000 for federal employee victims of prohibited discrimination.

B. Age Discrimination in Employment Act, 29 U.S.C. 621, *et. seq.*

The ADEA protects employees who are at least 40 years old from employment discrimination because of age. The prohibition applies to discriminatory conduct which benefits another employee or applicant for employment, provided the beneficiary is significantly or substantially younger. O'Connor v. Consolidated Coin Caterers Corp., 116 S.Ct. 1307 (1996)

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C. The Equal Pay Act, 29 U.S.C. 206(d)

The Equal Pay Act is a part of the Fair Labor Standards Act, 29 U.S.C. 201, *et. seq.* It prohibits gender based pay discrimination for equal work on jobs requiring equal skill, effort and responsibility and which are performed under similar working conditions.

D. The Rehabilitation Act of 1973, 29 U.S.C. 791, *et. seq.*

The Rehabilitation Act of 1973 prohibits discrimination against employees in hiring, placement and advancement based upon actual or perceived disabilities. Disabled individuals covered by the Act, as discussed later in this chapter, are entitled to reasonable accommodations necessary to effectively perform their jobs. When Congress passed the Americans With Disabilities Act of 1990, 42 U.S.C. 12101, *et. seq.*, (ADA), the Rehabilitation Act was amended to incorporate the ADA standards, effectively applying those standards to federal employees.

E. Discrimination because of sexual preference or orientation

In addition to discrimination proscribed by Title VII, the ADEA and the Rehabilitation Act, many of our contracts prohibit discrimination based on sexual preference or orientation. On May 28, 1998, then President Clinton amended Executive Order 11478, regarding equal employment opportunity in the federal government, to explicitly prohibit discrimination on the basis of sexual orientation. Sexual orientation discrimination may also violate 5 U.S.C. 2302(b)(10) which bars discrimination on the basis of conduct which does not adversely affect the performance of the employee or the performance of others.

Employees who believe they have been discriminated against because of sexual orientation should use the grievance procedure to allege a violation of any explicit contractual provision barring such discrimination. Or, employees have the option of pursuing the matter with the Merit Systems Protection Board's Office of the Special Counsel as a prohibited personnel practice under 5 U.S.C. 2302(b)(10). Generally, the EEO complaints process does not cover these claims unless the allegation involves an otherwise actionable claim of sexual harassment prohibited by Title VII. See, Oncale vs. Sundowner Offshore Services, Inc., 118 S. Ct. 998 (1998).

II. WHERE TO BRING A DISCRIMINATION COMPLAINT

A federal employee must choose between three separate forums when bringing a charge of discrimination against the employer. There are important time limits, choices to be made, and advantages and disadvantages to forum. It is essential that employees and their representatives understand these prerequisites to ensure proper processing of complaints.

- A. NEGOTIATED GRIEVANCE PROCEDURE: Most of the grievance procedures in the NTEU contracts permit grieving discrimination allegations. NTEU contracts generally incorporate prohibited personnel practices defined in 5 U.S.C. 2302(b), among which are violations of the discrimination laws discussed above. In any grievance alleging discrimination cite the appropriate prohibited personnel practices. Also, avoid reflexively advising employees to file EEO complaints over discrimination allegations. There may be sound reasons to grieve the matter.
1. The Election Requirement. Under 5 USC 7121(d), employees may grieve or file an EEO complaint over a “matter” involving discrimination, but not both. As soon as the grievance is filed, the grievant will be barred from filing a subsequent EEO complaint on the same matter even if discrimination claim was not raised in the grievance. Likewise, filing an EEO complaint first precludes a subsequent grievance on the underlying matter, even if the grievance is limited to non-discrimination claims. Therefore, it is important to carefully evaluate the pros and cons of pursuing the matter in either forum.
 2. Time Limits for Filing: Check the grievance procedure for the time limit on filing a grievance. It will likely be shorter than the 45 day time limit to initiate the EEO complaint process.
 3. Advantages and Disadvantages of Grieving Discrimination Issues
 - a. Advantages:
 - i. Most stewards are familiar with the process.
 - ii. The process is relatively simple, typically consisting of two or three steps.
 - iii. Grievances can be processed quicker than EEO complaints because of shorter time periods allocated to each step of the procedure, which are under the control of NTEU. A steward has the option of granting extensions or pursuing the grievance to the next step.
 - iv. NTEU can obtain documents to investigate and/or support the discrimination claim under 5 U.S.C. 7114(b)(4), while an agency generally has no corollary discovery rights in the grievance procedure.
 - v. Potentially winning arguments based on the contract or other laws or regulations can be made in addition to

the discrimination claim. In the EEO complaints process, only covered discrimination claims may be pursued.

- vi. In disciplinary, adverse action, and unacceptable performance actions, the agency bears the burden of proving the underlying charges before the employee must prove an affirmative defense of discrimination. In the EEO complaints process, the complainant has the burden of proving discrimination; the agency must prove nothing.

b. Disadvantages:

- i. If NTEU must arbitrate the grievance, arbitration is costly, particularly where we have to hire experts to help prove liability or damages.
- ii. The duty of fair representation is in effect, meaning we cannot refuse to represent non-members in the process solely because they are non-members. We may, however, refuse to pursue discrimination grievances that have no merit.
- iii. The grievance procedure is not available to challenge terminations of probationary employees, even on discrimination grounds.
- iv. There are no discovery tools beyond NTEU's rights under Section 7114(b)(4) (e.g., depositions, interrogatories, requests for production of documents).

- B. EEO COMPLAINTS PROCESS: Federal agencies are required to have EEO programs that include an administrative process for “prompt, fair and impartial” handling of EEO complaints, a process commonly referred to as the EEO complaint or “statutory” process. The Equal Employment Opportunity Commission has issued regulations at 29 CFR Part 1614 that contain the procedures for processing EEO complaints. Familiarity with the process is valuable, if for no other reason than to describe when counseling employees as an option for resolving their work-related issues.

1. Overview of the Complaints Process¹: The EEO process is very time consuming. Missed time lines by the complainant may result in dismissal of the complaint. The following is a general outline of the EEOC complaint process. Consult 29 CFR Part 1614 for more specific information (accessible at www.eeoc.gov):
 - a. Informal, Pre-Complaint Counseling. An EEO counselor must be contacted within 45 calendar days of the discriminatory act. The counselor is responsible for advising potential complainants about their rights in the complaints process and for seeking an informal resolution. Note that all matters should be raised at this "informal" stage or one runs the risk of having them time-barred later. The counseling stage lasts 30 days but may be extended up to an additional 60 days with the employee's consent (or longer if the employee accepts an agency's offer to try to resolve the dispute through the agency's Alternative Dispute Resolution process).
 - b. Filing a Formal Complaint. If informal resolution fails, the employee has 15 days from receipt of the notice of final interview to file a formal complaint. The complaint must be signed by the complainant and must describe the action(s) or practice(s) complained of. A complaint may be amended at any time up to the completion of the investigation, described below, to include related issues or claims (e.g., reprisal for filing the original complaint).
 - c. Investigation of Complaints: An EEO investigator assigned to a complaint must develop a factual record sufficient for a fact-finder to draw conclusions about whether discrimination occurred. This usually involves taking sworn statements from the complainant, alleged discriminating official(s), and witnesses, as well as obtaining relevant documents to include in the investigation file. A complainant should be prepared to provide the investigator with:

¹ The following primarily describes the individual complaint process found at 29 CFR 1614.104-109. For class complaints, refer to 29 CFR 1614.204.

- i. Name(s) of Alleged Discriminating Official(s) (also known as ADO's);
- ii. Names of employees/witnesses who can provide useful, related information;
- iii. Documents which might help prove charge or suggestions about documents that the investigator should obtain from the agency; and,
- iv. Suggestions for other relevant information the complainant would like the investigator to obtain from the agency (e.g., in a promotion case, statistical information relating to promotions of members of the complainant's protected class).

The regulations require an investigation to be completed within 180 days of filing the formal complaint or, if the complaint is amended, within 360 days from filing the original complaint. If these time limits have passed, the complainant has the option of requesting a hearing before an EEOC administrative judge or a final agency decision on the complaint. But doing so will stop further investigation of the complaint and could well result in moving forward without relevant information.

- d. Administrative Hearing: After the investigation has been completed, a complaint file will be made available to the employee. At this point, the employee has 30 calendar days to either request a hearing before an EEOC administrative law judge or an immediate final agency decision based strictly on the investigative record. Generally, an employee is better off requesting a hearing to further develop the factual record in the case. If the employee requests a hearing, the agency must inform the EEOC which will then assign an administrative judge to the case. At this point, although not required, an employee would be well-served by professional representation.

Discovery: Upon being assigned the case, the judge will issue an acknowledgement order. The order should be read carefully, because failure to comply may result in sanctions or dismissal of the complaint. Among other things, the order generally requires the parties to submit a list of their witnesses and authorizes them to engage in discovery. Discovery

mechanisms include: requests for admissions and production of documents, interrogatories, and depositions. A complainant should anticipate extensive discovery requests from the agency.

Decision Without A Hearing: In theory, either party may ask the judge to issue a decision without a hearing (commonly referred to as a motion for summary judgment) by arguing that there are no material disputed facts and that the facts prove or fail to prove discrimination. In practice, defending agencies, not complainants, submit these requests. Complainants almost always need the hearing to meet their burden of proving discrimination.

Hearing: At the hearing both parties may call witnesses and introduce documentary evidence. After closing the record, the administrative judge will issue a decision.

- e. Final Agency Decision: An agency has 40 days from receipt of a judge's decision to issue a final order notifying the complainant of whether it will implement, or partially implement the decision. Expect an agency to refuse to implement a decision for the complainant but to adopt as its own a decision against the complainant.
- f. Appeal to the EEOC: A complainant dissatisfied with a final agency decision may appeal it to the EEOC's Office of Federal Operations (OFO) within 30 calendar days of receiving the final decision. The OFO will conduct an appellate review of the case and issue a decision on behalf of the Commission.
- g. "Windows" to File an Action in Federal District Court: A federal employee has several opportunities to file a discrimination lawsuit in federal district court. As general rule, an employee must first exhaust his or her administrative remedies by filing an EEO administrative complaint. The exhaustion requirement is met and a court action may be filed:
 - 180 days after filing the administrative complaint if no final decision has been issued;
 - within 90 days of receiving the final agency decision;
 - 180 days after filing an appeal to the EEOC if no decision has been issued on the appeal; or,

- within 90 days of receiving the EEOC's decision on appeal.

Note that in age discrimination cases, an employee can skip the administrative process and go directly to federal court after giving the EEOC at least 30 days notice of intent to do so, provided the notice is filed with the EEOC within 180 days of the discriminatory act.

3. Advantages and Disadvantages of Filing EEO Complaints

a. Advantages:

- i. There is no direct cost to the chapter, although considerable resources are expended if the Field Office handles the case.
- ii. The duty of fair representation does not apply. We can and should refuse to represent nonmembers in the process. NTEU staff may represent a member in the complaints process if the case has merit and there is available staff time to handle these very resource intensive cases.
- iii. The EEO route may be the only forum available for a terminated probationary employee to challenge the removal.

b. Disadvantages:

- i. The process is extremely time-consuming. The average agency EEO complaint process is clogged with complaints. As a result, "prompt" complaint handling is the exception, not the rule. Lack of impartiality and fairness is another common criticism, at least during the process stages preceding the assignment of complaints to an EEOC administrative judge for a hearing.
- ii. Agencies are allowed (and frequently do) ignore an administrative judge's decision, forcing an appeal to the EEOC, which further delays resolution.

- iii. The employee foregoes potentially meritorious contractual and legal arguments that could be made in the grievance procedure. The only issue in the complaints process is whether the employee has been illegally discriminated against.
- iv. If the employee is not represented by NTEU, the employee will likely need to hire an attorney, particularly at the hearing stage, to have a decent chance of winning the case.

C. MERIT SYSTEMS PROTECTION BOARD Discrimination claims can only be raised before the MSPB if they related to actions that are otherwise appealable to the MSPB, such as adverse actions, performance based removals or downgrades, or RIFs. These types of cases are commonly referred to as “mixed” cases. Ordinarily, NTEU will first have an opportunity to appeal these actions to arbitration and raise related discrimination claims in that forum, although on occasion NTEU will appeal a case to the MSPB in lieu of arbitration.

III. THEORIES OF DISCRIMINATION

A. Disparate Treatment

A disparate treatment case is one in which an employee alleges that s/he has been treated less favorably than his/her peers because of race, sex, national origin, religion, age, disability or for engaging in protected EEO activity, like filing a EEO grievance or complaint. In a disparate treatment case the employee must prove that the employer intended to discriminate against the employee. Personnel actions that commonly give rise to disparate treatment claims are promotion non-selections and disciplinary actions.

A analytical framework for disparate treatment cases was established by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Subsequent decisions have modified the analysis to fit different personnel actions. These decisions have made clear that the framework is merely a helpful way to evaluate evidence in disparate treatment type discrimination cases, especially when there is only circumstantial or indirect evidence of discriminatory intent. There are three parts to the analysis; a *prima facie* case, an agency’s non-discriminatory reason, and pretext.

1. Prima facie case. Evidence establishing a *prima facie* case creates an inference of discrimination which, if not rebutted, may be enough to win a case. But usually, establishing a *prima facie* case is easily done and is only

just the beginning. On the other hand, if there are insufficient facts to establish a *prima facie* case, it's probably safe to conclude that the discrimination claim is not winnable.

The elements of a prima facie case are:

- a. The employee belongs to a protected group (e.g. female, African-American, Latino, over 40) or engaged in protected EEO activity.
- b. The Agency took some employment action which treated the complainant differently from similarly situated employees outside of the complainant's protected group.

Examples: As noted, these required elements are flexible and vary with the type of personnel action involved.

A *prima facie* case in a refusal to hire or promotion non-selection fact situation would be:

- i. An employee belongs to a protected class.
- ii. The employee applied and was qualified for a job for which the employer was seeking applicants.
- iii. Despite the employee's qualifications, s/he was rejected.
- iv. After rejection, the position remained open and the employer continued to seek applications from persons with the employee's qualifications, or hired or promoted an applicant who was not a member of the employee's protected class.

A *prima facie* case in a discipline situation would be:

- i. The employee belongs to a protected class.
- ii. The employee was subjected to a disciplinary action.
- iii. Similarly situated employees outside of the protected class were not disciplined or were treated less severely for the same or similar conduct. ("Similarly situated" generally requires a showing that the other employees worked under the same chain of command, had similar service records, and committed the conduct under substantially similar circumstances.)

2. The Agency's Non-Discriminatory Reasons: If there is enough evidence to establish a *prima facie* case, the Agency must rebut the resulting inference of discrimination by stating a legitimate, nondiscriminatory reason for its actions. Legitimate nondiscriminatory reasons are work-related reasons for

the action that make sense. The following are examples of acceptable non-discriminatory reasons in promotion cases:

- < The selectee lived in the position's location, while the complainant did not.
- < The complainant could not work effectively with management.
- < The complainant had less relevant work experience than did the selectee.
- < The complainant had poor communication skills.
- < The complainant had demonstrated poor performance in the past.
- < The complainant had less education than the selectee.
- < The complainant had been disciplined for conduct problems in the past.

Some examples of acceptable non-discriminatory reasons in discipline cases include:

- < The complainant had a worse disciplinary record.
- < The complainant had a shorter length of service.
- < The complainant held a higher, more responsible position.

3. Pretext: Ultimately, the complainant must show that the stated non-discriminatory reasons are not the true reasons for the different treatment but merely a pretext for intentional, illegal discrimination.² Ways to prove pretext include:

- Proving the non-discriminatory reasons are false or not believable.
- Presenting other evidence of discriminatory intent, such as statements by the alleged discriminating official indicating bias towards members of the complainant's class (e.g., "the older they get, the slower they work").
- Showing a pattern of manipulating procedures or decision making criteria to the consistent disadvantage of the complainant or protected class members.

² If pretext is shown, an agency can escape liability only if it can show by "clear and convincing evidence" that it would have taken the challenged action even in the absence of the proven discrimination, a very difficult burden to carry.

Examples of promotion situations where pretext was found include:

- < Faulting the complainant for performance at a hearing that never took place.
- < Supervisor could not specify one instance in which the selectee's work was superior to the complainant's work to support his recommendation of the selectee.
- < The selecting official failed to consider complainant's 11 years of experience, basing the selection solely on responses to interview questions.
- < Five witnesses stated that the complainant was better qualified for the position at issue than the selectee.

Examples of disciplinary situations where pretext was found include:

- < A failure to document or corroborate the reasons for a negative personnel action.
- < The deciding official's rationale for treating the complainant more harshly was riddled with inconsistencies, rendering it unbelievable.
- < Similarly situated employees who committed same offense, but who were not in complainant's protected class, were not similarly disciplined.

B. Disparate Impact

Disparate impact cases can become quite complicated, often involving the review and statistical analysis of voluminous information. The following brief overview of the disparate impact theory is designed to familiarize stewards with the concept. Because disparate impact cases generally involve practices that are ongoing and affect significant numbers of employees, they should be discussed with a National Field Representative before proceeding.

In a disparate impact case, complainants allege that a facially neutral employment practice impacts more harshly on their protected group and cannot be justified by business necessity. In the Civil Rights of 1991, Congress reaffirmed that these types of employment practices run afoul of Title VII. Proof of discriminatory motive is not required because the concern in a disparate impact case is the consequences of an employer's actions, not the motivations behind the actions.

There is a three-prong test or analysis in disparate impact cases.

1. First, there must be a facially neutral employment practice that disproportionately impacts a protected group of employees.

a. Adverse or disparate impact

Showing a disparate impact requires comparing actions involving members of a protected group (e.g., women, Asians, employees over 40, etc.) to similar actions involving in the unprotected group. For example, a statistical analysis might show that that white incumbents of a class of positions, on average, get promoted to the grade 12 level after only 1.5 years at the grade 11 level whereas it takes grade 11 Latino incumbents an average of 2.9 years to achieve their grade 12. Or statistics might show that women make up 35 percent of the relevant work force or potential applicant pool, but occupy only 5 percent of certain types of positions, even when controlled for length of service.

The “4/5s Rule”: The EEOC has adopted a rule holding that a selection rate for a protected group of less than four-fifths (4/5) or eighty percent (80%) of selection rate of the group with the highest selection rate is considered evidence of disparate or adverse impact, provided there are enough occurrences to make the figures statistically significant. See 29 C.F.R. 1607.4(d).

b. Employment practice caused the disparate impact

After showing a disparate impact, the procedure(s), employment practice(s), rule(s) or the way an agency applies procedures or rules that created the disparity should be identified. Generally, accomplishing this task requires hiring a statistician to subject a process to a regression analysis. For example, to determine if an agency's failure to follow blind selection procedures causes the disparate impact on a particular group, a statistician could apply statistical tests to determine if disparities begin to appear at the selection stage, instead of during the ranking process.

But the Civil Rights Act of 1991 explicitly provides that if the elements of an agency's decision making process "are not capable of separation for analysis," then the entire decision making process can be analyzed as one employment practice.

Example: An agency's hiring policy which prefers external applicants over internal applicants for certain professional jobs disproportionately impacts older, African-Americans. The policy's application results in a lower hiring/promotion rate for that group because members of that group tend to reach paraprofessional bridge positions through internal advancement, rather than formal education.

By contrast, external hires tend to be younger whites who are recent white college graduates.

2. Once disparate impact by a particular practice or policy is shown, the burden of proof shifts to the agency to demonstrate that the challenged employment practice is "job-related for the position in question" and is required by "business necessity."

Example: Continuing with the above example, the employer might produce evidence showing that external hires tended to be recent college graduates whose majors required particular, relevant courses in an emerging area of importance in that line of work. Knowledge gained from these courses would not likely be acquired from work experience in lower graded jobs.

3. If the agency successfully demonstrates the job-relatedness and business necessity of the disputed employment practice, the employees can still prevail if they show that the agency's business goals can be met by an alternative employment practice having a less discriminatory impact, and the agency refuses to adopt the alternative.

Example: The complaints in the example above produce appraisals of employees' performance prepared after the employer adopted the external hiring preference showing that external hires performed no better than internal hires, and more often had longer learning curves. A less discriminatory alternative would be to conduct a study of the qualifications and skills that were essential to successful or superior performance in the jobs in question, and then tailor the hiring process to identify internal and external applicants with those qualifications and skills.

IV. FORMS OF DISCRIMINATION THAT DO NOT FIT WITHIN A DISPARATE TREATMENT OR DISPARATE IMPACT ANALYSIS

- A. Accommodation of Religious Beliefs: In addition to prohibiting coercion, disparate treatment or harassment of employees because of their religious beliefs, Title VII requires employers to reasonably accommodate employees' religious observances or practices, unless the accommodation would place an undue hardship on the conduct of the employer's business. 42 U.S.C. 2000e(j). The test for religious discrimination can be broken into two parts:

Part 1: The complainant must hold a bona fide religious belief that conflicts with an employment requirement. Generally, an agency is not in a position to question the validity or sincerity of the belief. Bona fide religious beliefs or practices include moral or ethical beliefs about what is right or wrong which are sincerely held with the strength of traditional religious views. United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333 (1970). The fact that no religious group espouses or accepts the beliefs is not determinative. 29 CFR 1605.1.

Part 2: The Agency must accommodate an employee's religious beliefs or practices that impose no more than a de minimis cost on the Agency. Trans World Airlines v. Hardison, 432 U.S. 63 (1977). Because most accommodation disputes concern conflicts between religious practices and work schedules, the EEOC's identify options for accommodating such conflicts. *See* 29 CFR 1605.(d).

Accommodation Options

- Voluntary shift substitutions or swaps among employees with substantially similar qualifications.
- Flexible scheduling.
- Lateral transfers or changes in job assignments.

Undue Hardship (more than "de minimis" costs)

- Administrative costs associated with implementing the above options are de minimis.
- In assessing whether other costs are more than de minimis, the EEOC will look at identified costs in relation to the size and budget of the employer.
- If an accommodation requires a departure from a bona fide seniority system which would deny another employee his or shift preference under that system, it is an undue hardship.

B. Hostile Environment: Another form of discrimination prohibited by Title VII that does not fit neatly into either a disparate treatment or a disparate impact theory is harassment which creates a "hostile environment." Although hostile environment claims are usually based on sex, the standards apply to harassment because of race, religion, and national origin, as well. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 180 (1989) (quoting the EEOC Compliance Manual Section 615.7, setting forth principles and standards applicable to harassment based on race, religion, and national origin).

1. Elements of a Hostile Environment Claim

- a) The employee was subjected to objectively severe or pervasive conduct that creates a hostile or abusive environment;
- b) The conduct was unwelcome and perceived as hostile or abusive;
- c) The harassing conduct was based on or because of the victim's sex, race or some other basis prohibited by discrimination laws;

2. Employer Liability in Hostile Environment Cases:

- a) *If a co-worker is perpetrating the harassment*, an agency will be liable if the *complainant* proves that the agency: (i) knew or should have known of the harassment and (ii) failed to take prompt and appropriate corrective action.
- b) *If a supervisor or management official is perpetrating the harassment*, an agency can avoid liability only if the *agency* proves: (i) it exercised reasonable care to prevent *and* promptly correct any harassing behavior³ *and* (ii) the complaining employee unreasonably failed to take advantage of any preventative or corrective measures provided by the agency or otherwise avoid harm. Faragher, 524 U.S. 775, 807 (1998); Ellerth, 524 U.S. at 965 (1998).

C. Tangible Employment Action or “Quid Pro Quo” Sex Discrimination: Another form of sex discrimination prohibited by Title VII is harassment that includes a tangible employment or personnel action, such as a promotion or a removal, or conditioning a personnel action on submission to or refusal to submit to sexual demands or sexually based treatment. In these cases, the employer is strictly liable, regardless of the precautionary or corrective measures taken to prevent the behavior.

D. Discrimination Based On Pregnancy: The Pregnancy Discrimination Act of 1978 amended Title VII to make clear that employment decisions based on pregnancy are a form of sex discrimination under Title VII. Besides prohibiting disparate treatment of pregnant women because of their pregnancy, the Act requires treating pregnant women who are temporarily unable to perform functions of their jobs because of pregnancy the same as other temporarily disabled employees.

D. Disability Discrimination: The Rehabilitation Act of 1973 was intended to break down barriers to the employment of disabled individuals in the federal government.

³ The availability of this defense is one reason why many employers place such an emphasis on having a sexual harassment policy in place, training employees on that policy, and treating sexual harassment allegations very seriously.

Besides requiring federal agencies to develop affirmative action plans for the hiring, placement and advancement of persons with a disability, the Act requires reasonable accommodations of covered disabled employees that allow them to perform the essential functions of their jobs.

A claim that an agency failed to reasonably accommodate a disabled employee can be raised as a defense in a disciplinary action, if it can be shown that a disability caused or contributed to the performance or conduct leading to the action. Or a failure to accommodate can be a basis for challenging a promotion non-selection or refusal to hire where the non-selection or refusal was based upon the disability.

To prevail on such a claim, the following must be established:⁴

1. That the employee is disabled within the meaning of the Act, i.e., he or she:
 - (1) has a physical or mental impairment which substantially limits one or more of his or her major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment (*See* 29 CFR 1630.2).
 - a. A *physical impairment* is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following bodily systems: neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine.
 - b. A *mental impairment* is any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
 - c. "*Major life activities*," under the EEOC's regulations, include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
 - i. To be covered by the law, the impairment must limit activities of central importance to most people's daily lives" (like bathing, cooking, and brushing teeth). Thus, an employee who was unable to perform assembly line duties, i.e., manual tasks associated only with her job, was not substantially limited in a major life activity. In addition, a medical diagnosis of impairment alone is not sufficient to prove a

⁴ The EEOC's regulations implementing the ADA, found at 29 CFR 1630, now apply to the federal sector. 29 CFR 1614.203(b).

disability; there must be evidence linking the impairment to actual restrictions on a major life activity. Toyota Motor Mfg. Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).

Tip: When advising an employee who is seeking a reasonable accommodation, have the employee submit a statement describing how their impairment severely restricts or impairs one or more of the activities listed above in addition to work.

- ii. Corrective measures must be considered when determining if an impairment substantially limits a major life activity and, therefore, whether an individual is disabled. Sutton v. United Airlines, 119 S. Ct. 2139 (1999). In Sutton, the plaintiffs were not disabled within the meaning of the ADA, despite their extreme myopia, because their correctly eyeglasses made their vision virtually perfect. By the same token, if the corrective measure itself, e.g., medication, substantially limits a major life activity, the employee may be considered disabled when they otherwise would not be.

- d. *A note about alcoholism and drug abuse:* Drug abusers or addicts are covered by the Act only if they are not currently illegally using drugs when an agency acts on the basis of such illegal use. See 29 C.F.R. 1630.3. Thus, a recovering addict who is in a treatment program would be protected, and entitled to a reasonable accommodation such as leave or a modified schedule in order to continue treatment, while a current user would not be. This distinction underscores the importance of advising an employee with conduct or performance problems related to drug usage to seek help immediately, before the agency takes an action against them.

By contrast, alcoholism is generally considered a disability, even though the employee may still be abusing alcohol. See Whitlock v. Donovan, 598 F.Supp. 126 (D.D.C. 1984) aff'd without opinion, 790 F.2d 964 (D.C. Cir. 1986); Walsh v. Postal Service, 97 FMSR 5217. But before taking an action against an employee for poor performance or misconduct caused by alcoholism, an agency is not required to give the employee a choice between discipline or entering a treatment program. Alcoholic employees can be held to the same performance and conduct standards as non-alcoholic employees, as long as these standards are not discriminatorily enforced. Johnson v. Babbit, 96 FEOR 3123; Kimble v. Navy, 96 FMSR 5216. To the extent it contributed to the offending performance or conduct, however, an employee's alcoholism should still be brought to the agency's

attention as a mitigating factor when defending the employee. Undergoing treatment bears favorably on the employee's potential for rehabilitation.

2. The employee meets the qualification requirements for the job (i.e., education and/or experience or criteria under special appointing authorities). 29 CFR 1630.2(m)
3. The employee is able to perform the essential functions of the job, with or without a reasonable accommodation, without endangering his or her own health or safety of those of others.
 - a. See 29 CFR 1630.2(n) for a list of factors affecting "essential function" determinations.
 - b. A *reasonable accommodation* may include making facilities readily accessible and usable, job restructuring, modified or part-time work schedules, providing modified equipment or devices, adjusting or modifying exams, providing readers and interpreters, and other actions. 29 CFR 1630.2(o).
 - c. Generally, an employee must first request a reasonable accommodation. The request should be in writing and specify the nature of the accommodation(s) needed. Once this is done, the EEOC encourages an "interactive process" between the employee and the employer to identify an effective accommodation that does not pose an "undue hardship," including consulting with outside expert for assistance, unless the type of accommodation needed is obvious. 29 CFR 1630, Appendix 1630.9.
4. The employer cannot demonstrate that the identified "reasonable accommodation" imposes an undue hardship on business operations. 29 CFR 1630.9.
 - a. Factors affecting an undue hardship assessment include the cost of the accommodation, the size of the agency, and the impact on the ability of other employees to do their jobs. 29 CFR 1630.2(p).
 - b. Absent "special circumstances," an accommodation which requires deviation from a bona fide or negotiated seniority system will be an undue hardship.

- V. DISCRIMINATION REMEDIES: When advising or representing an employee, the following remedies should be considered and requested, as appropriate:
- a. Placement in the position the employee was discriminatorily denied, with back pay and interest computed under the Back Pay Act regulations, 5 CFR 550.805.
 - b. Cancellation of any unwarranted personnel action and restoration of the employee, with back pay and interest.
 - c. Expunction of adverse materials relating to a discriminatory action or practice.
 - d. Attorneys' fees.
 - e. Discipline of the discriminating official(s), if ordered by an arbitrator pursuant to 5 USC 7121(b)(2)(A).
 - i. Arbitrators are extremely unlikely to order this type of remedy because they tend to see it as punitive, not remedial, and view it as falling within the purview of the employer. But in extreme cases of discrimination, it should be requested.
 - f. In cases of intentional discrimination, compensatory damages up to \$300,000.
 - i. Compensatory damages are in addition to the remedies list above (like back pay) and include actual out-of-pocket and future losses, like moving expenses, job search expenses, and medical and psychiatric expenses. Also covered is non-monetary harm caused by the discrimination, like mental anguish, emotional pain and suffering, loss of enjoyment of life, and inconvenience.
 - ii. The complaining employee must prove his or her damages. In the initial stages of a complaint or grievance, an employee seeking damages should gather as much related documentation as possible, such as receipts for out-of-pocket expenses and statements of family members and medical providers about how the discrimination affected the employee.
 - iii. Punitive damages, i.e., damages designed to punish the employer and deter future discrimination, as opposed to making the victim whole, are not available against federal agencies.
 - iv. Compensatory damages can be awarded in negotiated grievance procedures, in the EEO complaints process, and by the MSPB.

VI. CONCLUSION

This Chapter provided an overview of one of a challenging and important area of law affecting federal employees. Most employees represented by NTEU lack the individual resources to identify and successfully challenge discriminatory practices. But collectively, through NTEU, we can pursue meritorious claims and work to eradicate discrimination from the workplace.