Chapter 5
Employee Relations and Equal Employment Opportunity

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Employment Law

Fair Employment Practices

People deserve to be treated fairly at work. Effective organizations have human resource policies and practices that treat people with respect and protect them from unfair discrimination. The following list of moral principles represents an ethical Bill of Rights for treating people fairly:

1. All employment decisions regarding hiring, promotion, pay increases, training opportunities, and terminations should be based on objective, performance-related criteria rather than on subjective biases or personal whims. This means employment decisions should be more than just non-discriminatory, they should be based on job-related criteria.

2. Each employee should be treated as a person of worth with dignity and respect rather than as an object that can be physically, sexually, or verbally abused. Employees should not be subjected to unwelcome or intimidating acts.

3. Disciplinary actions and criticisms should only occur for good cause, and employees should have the right to due process before any punitive actions are taken.

4. Employees should not be terminated unless their jobs are eliminated or they are unable to perform them. Personal whims and personality clashes are not valid reasons for termination.

5. Performance should be fairly and objectively evaluated against clearly defined standards; the evaluation should not be influenced by subjective biases or irrelevant personality traits.

6. Employees should be fairly and equitably paid for their work on the basis of the job's requirements, the employee's performance, and the employee's knowledge, skills, and abilities. One person should not be paid more than another unless there is a legitimate, job-related reason for it.

7. Employees should be taught how to perform their jobs, and they deserve accurate and timely feedback on their performance.

8. Employees should have a safe and healthy work environment that is free from unnecessary hazards or harmful substances, and they should be informed about anything that could cause health problems.

9. An employee's personal health and family responsibilities have a higher priority than organizational responsibilities; therefore, the organization should make reasonable accommodations to help employees with personal problems and family emergencies.

10. Organizations should not invade employees' personal privacy. Only relevant, job-related information should be disseminated within an organization, and nothing personal should be disseminated outside the organization unless the employee authorizes it or the outside party has a legitimate need to know.

If every employer followed these moral principles, employees would be treated fairly and the plethora of state and federal anti-discrimination laws would be unnecessary. But, because of abuses in the past, employers are now required to abide by numerous laws that regulate how employees should be treated. Although employers may disagree about the need for some of these laws, a careful analysis of the employment conditions at the time they were passed explains why each law was needed to correct an abusive situation.

Labor Relations Laws

During the 1800s employees were virtually powerless against employers' arbitrary wage cuts and terminations. In some situations, employees' wages were arbitrarily reduced, even though their rents for company-owned housing remained unchanged. Eventually, employees were allowed to organize unions to protest management actions, and later they were allowed to strike to enforce their demands. Although these were important gains for labor, their strikes were still ineffective; the balance of power was clearly in the hands of employers who used court injunctions, yellow-dog contracts, union spies, and even violence to destroy the effectiveness of unions. A ***yellow dog contract*** is a statement that employees were required to sign before they could be hired stating that they were not a union member nor would they join a labor union or encourage others to join. ("Yellow Dog" was a derisive term for a lackey or coward.) These contracts helped employers obtain court injunctions to prevent strikes and workers who violated the injunctions were held in contempt of court.

The history of labor relations in America demonstrates that employers are much more powerful than individual employees and employees need some form of protective legislation. Congress has passed four major labor relations laws to protect unions and create a better balance of power between employers and employees.

The ***Norris-LaGuardia Act*** of 1932 limited the use of court injunctions and prevented the courts from interfering in picketing and union meetings.

The ***National Labor Relations Act*** of 1935 provided for the establishment of unions and declared that labor disputes should be settled peacefully through collective bargaining between the company and representatives of the workers. Settling disputes through collective bargaining became a national policy in all industries. This act also created the National Labor Relations Board (NLRB) and charged it with the responsibility of supervising union elections and resolving unfair labor charges.

During the 1940s, the balance of power shifted in favor of the unions; unions grew rapidly and they wanted to exercise their new power. Many strikes were prevented only because of wartime demands. When the war was over, the nation experienced a record number of lost days due to strikes. As a consequence, the ***Taft-Hartley Act*** was passed in 1947 to create a better balance of power. This law identified unfair labor practices that unions were no longer allowed to do, such as forcing employees to join the union, charging excessive dues, or coercing employees to participate in union activities.

During the 1950s, a congressional investigation revealed a serious misuse of union funds and other abuses by union leadership. As a consequence of these revelations, the ***Landrum Griffin Act*** was passed in 1959 requiring unions to operate using democratic procedures. Union leaders had to be elected democratically and union policies had to be approved by the vote of the membership.

Some people criticize labor unions for generating restrictive work rules, demanding exorbitant wage rates, disrupting important public services, creating inflationary pressures, protecting incompetent workers, limiting the rights of nonunion workers, and instigating violent acts. Other people praise unions for protecting employees from arbitrary management decisions, providing safe and pleasant working conditions, and increasing wages and benefits so that workers can have a decent standard of living. Union sympathizers claim that unions are necessary to protect employees from arbitrary management actions. They say that unions provide a necessary balance of power in negotiations with large, powerful corporations. Union critics claim that unions abuse their power by disregarding productive efficiency and that they threaten rather than protect the rights of individual workers to have secure jobs.

Like political issues, these arguments could be debated endlessly. Deciding whether one side is right or wrong, however, is not as important as understanding both sides of the issue. You should be able to appreciate both views regardless of your biases. As a general rule, companies that are organized and required to negotiate with a union deserve to be because of how they have treated their employees. And for the same reason, they deserve the kind of working relationship they have with their union.

Organizing a Union

The procedure for organizing a labor union involves electing union officers and gaining recognition as the bargaining representative of the workers. Some employers voluntarily recognize the union; however, most employers require the union to be certified through an NLRB-supervised election.

The typical organizing procedure starts when employees sign authorization cards requesting an NLRB-supervised election. Once thirty percent of the employees have signed authorization cards, the NLRB notifies the company that an election will be held on a given date. The NLRB supervises the election. If a majority of the workers vote in favor of having a union represent them, the union is certified as the bargaining representative of the employees and the employer is required to negotiate with it in good faith bargaining.

The process for decertifying a labor union follows the same procedure. The NLRB must receive a petition from at least 30 percent of the workers calling for an election. After the usual investigation, an election is held. If less than 50 percent vote in favor of the union, the union is decertified.

The time just prior to an election is an intense period when employers and union representatives campaign for employee support. Both sides need to know the special laws limiting what they can and cannot do. Many activities that are normally legal become illegal prior to a representation election. The Taft-Hartley Act allows unions and employers to express their views and to disseminate information as long as it "contains no threat of reprisal or force or promise of benefit."

The NLRB has established a lengthy list of guidelines for fair elections. The general intent of the board is to provide conditions that are as ideal as possible so that the uninhibited desires of the employees can be determined. Any evidence of violence by either management or the union is certain to be condemned by the board. Many other actions also are illegal because they violate the employee's freedom of choice. When violations by either side are observed and when the guilty party receives a majority vote, the NLRB can order a new election or override the results.

For example, the board has ruled that an election is invalid when an employer visits employees in their homes or assembles them in a manager's office for the purpose of urging them to reject the union. Employers cannot single out certain employees and talk with them individually or in small groups. Nor can an employer question employees about their union sentiments.

An employer must not threaten economic retaliation if the union wins the election. The employer cannot suggest that there will be a loss in wages or benefits if a union is elected, nor can an employer threaten to divert production to another nonunion facility, threaten to close the plant, or in any other way intimate that the employees might lose their jobs if they vote in favor of a union. However, the employer is not prevented from presenting factual information to employees about the economic effects of union representation or the consequences of increased labor costs.

During an election campaign, employers generally are not free to grant wage increases or benefits improvements unless they can demonstrate that these changes are completely unrelated to the campaign. Normally this means that all wage and benefit improvements have to be announced either before or after the election campaign. Nor can an employer announce a wage or benefit improvement that will begin after the election regardless of the outcome. Such an announcement appears to imply an incentive to defeat the union by showing that the union is not needed to obtain better wages.

Employers are allowed to assemble their employees on company time and to disseminate information without being required to provide equal time for the union. The meeting place, however, must be a customary meeting place and not a place having a "special impact of awe," such as the company president's office. Since the union is generally not given equal access to a captive audience of employees on company time, union representatives often meet with employees in their homes.

Even though employers are not allowed to threaten employees, to promise rewards, or to use inflammatory rhetoric during an organizing campaign, they are free to aggressively describe the disadvantages of a unionized company. An employer can remind employees that if they organize a union they will have to pay union dues. The employer can show employees the union's financial reports, and tell them that if they become union members most of their dues will be used to pay the salaries and expense accounts of union officials. The employer can explain that collective bargaining and grievances are costly because both sides need to request highly paid experts to settle the disputes and that the

company would prefer to see both sides keep their money. An employer also can show how costly union activities such as strikes, bargaining, and grievances are to the employees, the company, and society because of lost production and lost time during these periods. The employer can present information showing the indirect costs of unionization that the company wants to avoid: executive time spent in bargaining sessions, working time of employees spent on union business, payment of arbitrator's fees, and costs of hiring lawyers and labor relations experts. Money spent for such costs obviously cannot go to the company in the form of profits or to the employees in the form of higher wages.

An employer also is free to explain how a union can limit the employee's personal freedoms. Employees who join unions have to obey the orders of union officials, within the scope of their authority, which means that the employees will have two bosses instead of one. Once the employees join a union, the union's constitution becomes a binding contract between them and the union, and they will be expected to obey all union rules. An employer is free to explain that a union's constitution contains provisions for punishable union offenses, union trials, suspensions, expulsions, and fines. Finally, the employer can point out that a union represents a threat to job security since the union may call a strike regardless of a given employee's feelings and can fine employees who cross its picket line.

Negotiating an Agreement

Collective bargaining basically consists of management and union representatives coming together to reach an agreement that will be acceptable to their constituents. The process can be smooth and uncomplicated if both parties are willing to negotiate cooperatively to reach an agreement. However, the process can also be extremely combative and time consuming. The bargaining process usually consists of four stages:

1. *Opening presentation of demands*. During the first formal bargaining meeting, both sides present their demands, unless they have been exchanged beforehand. The union typically goes first, and the management team asks questions to clarify the issues and to assess the importance of each demand. The first meeting usually determines whether the bargaining will be a combative struggle or a cooperative, problem-solving effort.

2. *Analyzing the demands*. The demands submitted by each side usually include some that absolutely must be fulfilled before an agreement can be reached, others that are desirable but not necessary, and a few that are included just for trading purposes. The negotiators examine each other's lists and try to identify the real issues.

3. *Compromise*. When the interests of both sides are not identical, a compromise must be achieved. Generally, each side continues to make counter proposals until an agreement is reached.

4. *Informal settlement and ratification*. After both sides have obtained what they feel is their best compromise, their agreement must be ratified. Top management assesses whether the tentative agreement allows them to operate the company efficiently and profitably. The agreement is then presented to the union membership to obtain their ratification.

Two very different strategies for reaching an agreement are distributive bargaining and integrative bargaining.[1] ***Distributive bargaining*** refers to a conflict situation in which each side negotiates aggressively to receive the largest share of the rewards. A win-lose relationship exists in this situation. Each side sees the confrontation as a predicament in which the total rewards to be allocated are fixed and

where each is battling to maximize its own share. Getting more is sometimes achieved by threats, deceit, and misinformation.

Integrative bargaining refers to a cooperative problem-solving form of negotiations. Both parties investigate problem areas and try to reach mutually acceptable solutions. A working relationship of trust, respect, and acknowledged legitimacy exists in this situation. Communication between the parties is open and frequent. The total rewards are not viewed as a fixed amount to be divided but as a variable amount that both sides can increase and share through cooperative teamwork.

The dominant negotiating strategy in American unions has been distributive bargaining. When employers and employees have an open and trusting relationship, the employees generally do not vote to have a union represent them. Where a union exists, distrust, conflict and a "them-versus-us" mentality tend to exist. Consequently, most negotiations are a power struggle between the union and management.

Occasionally, negotiations reach an impasse because neither side is willing to give. The Taft-Hartley Act requires that both parties engage in ***good-faith bargaining***, or they will be guilty of an unfair labor practice. The conditions for good-faith bargaining, as defined by the courts and the NLRB, include the following:

1. Both parties must be willing to meet at reasonable times, in reasonable places, to discuss each party's bargaining issues. A serious attempt must be made to adjust differences and to reach an acceptable common ground.

2. A counterproposal must be offered when another party's proposal is rejected. This must involve the "give and take" of an auction system.

3. A position on contract terms may not be constantly changed.

4. Evasive behavior during negotiations is not permitted.

5. There must be a willingness to incorporate oral agreements into a written contract.

Offering a counterproposal is an important indication of good-faith bargaining since it demonstrates a bona fide intent to reach an agreement and shows that bargaining is more than empty discussions. Although the law says that the parties must engage in good-faith bargaining, it does not say that they must reach an agreement. The NLRB cannot order the parties to reach agreement, nor can it direct the parties to incorporate a particular provision into their labor agreement. When an impasse occurs, several things might happen, including strikes, lockouts, picketing, boycotts, mediation and conciliation, and arbitration.

A strike occurs when the entire work force of a company acts in concert and refuses to work. A strike is a union's strongest negotiating weapon because it can exert intense economic pressure on a company. But it must be used carefully. Before going on strike, union members should know why they are striking and what they hope to gain. Although strikes are usually called for economic reasons, they cannot ordinarily be justified economically. More income is usually lost during the strike than the workers can hope to recover through higher wages and benefits in a new contract. Strikes can be costly in other ways, too. If the strike does not succeed in achieving its purpose, union leaders may be voted out of office, the union may be defeated in a decertification election, and the union could lose its public support.

Occasionally, workers may engage in other forms of protest. A ***sit-down strike*** is when they report to work but accomplish nothing. A ***work slowdown*** is when they report to work but accomplish very little. A ***wildcat strike*** occurs when a group of workers walk off the job in violation of a valid labor agreement and usually against the direct orders of the labor union. Under many labor agreements, the employer has the right to discharge employees engaging in such strikes or to otherwise penalize them for these forms of work stoppage. Those who participate in a wildcat strike lose their status as employees under the provisions of the Taft-Hartley Act. If the employees are discharged, the NLRB will not direct that they be reinstated. A ***sickout*** occurs when several employees claim they are not working because of illness. Employers dislike paying sick leave to striking workers but they usually have to pay because it is extremely difficult to prove a *prima facie* case of employee conspiracy.[2]

A ***lockout*** occurs when an employer refuses to allow employees to work. In some ways a lockout is management's counter weapon against the union's strike. However, a lockout is not a legal economic weapon if its use is intended to discourage union membership. Like a strike, a lockout is permissible only after a deadlock has been reached on mandatory bargaining items.

Equal Employment Opportunity

Equal opportunity is every American's birthright. The American dream is based on the belief that everybody can achieve success if they work hard to earn it; success does not depend on being born into a privileged class. Unfortunately, many Americans have not had equal opportunities for employment. Instead, they have been unfairly treated and discriminated against because of their age, race, religion, sex, or disability. The drive to eliminate racial discrimination has progressed very slowly, and at some points, very painfully. The Civil War highlighted the issue of whether one individual has the right to own another human being. Following the war, two amendments to the Constitution prohibited slavery and provided equal protection for all citizens within state and local governments.

Five civil rights acts were passed between 1866 and 1875 to eliminate racial discrimination in society. The 1866 act, also known as ***Section 1981*****,** applies to racial discrimination in employment relationships. Section 1981 guarantees all persons of the United States the same right in every state and territory to make and enforce contracts and to the full and equal benefit of all laws and protections as is enjoyed by white persons. This provision (as amended by the 1991 Civil Rights Act) applies to employment contracts, union or nonunion, and guarantees all employees the right to nondiscrimination in the making, performance, modification, and termination of contracts, as well as the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. Section 1981 continues to serve as the legal basis for pressing some charges of discrimination even though there are more recent civil rights acts.

Civil Rights Act, 1964

Although slavery was abolished after the Civil War and civil rights legislation prohibited discrimination, racial prejudice continued. Minorities in America— blacks, Indians, Asians, Hispanics, and other nationalities— were often treated as second-class citizens and systematically excluded from many areas of society. Finally a comprehensive civil rights act was passed in 1964 to prohibit discrimination in society. Title VII of this act (as amended in 1972 and 1991) prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. The law applies to employers with fifteen or more employees, employment agencies, labor organizations, state and local governments, and educational institutions.

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

1. to fail or refuse to hire or to discharge any individual, or otherwise 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; or
2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The act expressly prohibits any advertisements or recruiting activities that indicate a preference based on race, color, religion, sex, or national origin unless the preference can be justified as a bona fide occupational qualification for employment. Furthermore, the act requires employers to compile and keep records that can be used to determine whether unlawful employment practices have been or are being committed.

Bona Fide Occupational Qualifications (BFOQ). Title VII specifically states that it is not unlawful for an employer to discriminate on the basis of religion, sex, or national origin if such an attribute is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Race is never a legitimate BFOQ.

The concept of ***business necessity*** has been narrowly defined by the courts. When a practice is found to have a discriminatory effect, it can be justified only by showing that it is necessary to the safe and efficient operation of the business, that it effectively fulfills the purpose it is supposed to serve, and that there are no alternative policies or practices that would serve the same purpose with less discriminatory impact.

Many employers initially assumed that sex was a BFOQ that would make women ineligible for strenuous jobs and males ineligible for traditional female jobs such as airline flight attendants. Employers were concerned that customers might object when jobs were performed by members of the nontraditional sex. However, the courts have refused to view tradition or customer preference as establishing a BFOQ. The few times when sex has been held to be a legitimate BFOQ include: (1) in order to satisfy basic social mores about modesty, such as the case of a locker-room attendant; (2) when a position demands a particular sex for aesthetic authenticity, as in the case of a fashion model or movie actor; and (3) when one sex is by definition unequipped to do the work, as in the case of a wet nurse.

Equal Employment Opportunity Commission (EEOC). The jurisdiction of the *EEOC* has been broadened since it was first created by Title VII. The EEOC was originally charged with the responsibility of preventing unlawful employment practices through informal methods of conciliation and persuasion. In 1972, Congress gave the EEOC the power to bring lawsuits against employers in the federal courts on behalf of an aggrieved person or a class of aggrieved persons. The authority of the EEOC has been further extended to prevent discrimination based on age and physical or mental handicaps.

EEOC inspectors have the power to obtain many kinds of information from the employer even though it may be costly and difficult to collect. For example, if a Hispanic female who was fired for insubordination charged that she was terminated because her employer did not want to promote her, the

EEOC may request more information than just that relevant to this particular case. The inspector might request a complete census of each job category by race and sex, a record of all promotions and transfers over the past several years, and a record of all disciplinary actions and the bases for them over the past several years. These requests for information can be enforced with a court order if an employer resists providing them.

When an EEOC investigation determines that a charge of discrimination is justifiable, it attempts to resolve the problem through a process called conciliation. Conciliation refers to an informal, out-of-court settlement between the employer and the EEOC. Most discrimination charges are settled by conciliation agreements.

If the EEOC and the employer are unable to reach an agreement, the EEOC may give a notice of right to sue to the aggrieved person and the case can be prosecuted in a federal district court either by the EEOC or by the aggrieved individual. If either party appeals the federal court's decision it can be heard by a court of appeals and ultimately the U.S. Supreme Court. If an employer is found guilty of discrimination, the court decrees can call for drastic remedies, including back-pay, hiring quotas, reinstatement of employees, immediate promotion of employees, elimination of testing programs, or the creation of special recruitment and training programs.

Affirmative Action

In 1965 President Lyndon B. Johnson issued Executive Order 11246 to reverse the effects of racial discrimination. This order, commonly known as Order Number 4, was issued during the Viet Nam War and applies to all federal government contractors and subcontractors with 50 or more employees or with contracts exceeding $50,000. This order does more than prohibit discrimination, it requires employers who hold federal contracts or subcontracts to develop written ***affirmative action plans*** that establish goals and timetables to achieve equal opportunity. Affirmative action plans are reviewed by the Office of Federal Contract Compliance Programs (OFCCP) from the Department of Labor.

Preparing an affirmative action plan requires collecting extensive information on the percentages of minorities and females in a company's workforce by job category and comparing them with the availability of minorities and females in the surrounding labor force. If there is an imbalance, the employer must establish goals and timetables for correcting it. Furthermore, the company must communicate internally and externally that it is an equal opportunity employer.

Almost every human resource function must be carefully evaluated to determine whether it systematically discriminates against minorities and females. This form of discrimination is referred to as ***systemic discrimination***, meaning that the human resource system itself tends to exclude protected groups. The OFCCP requires employers to have written affirmative action plans available for review and audit.

Many white males have complained that affirmative action plans have made them the victims of ***reverse discrimination*** and some court decisions have agreed. Some state and local laws have also prohibited using race as a basis for showing preference for employment or education. The Supreme Court allows employers to give preferential treatment to minorities and females through an affirmative action plan, providing the rights of other workers are not "unnecessarily trammeled," such as violating a negotiated seniority agreement when making layoffs or promotions.[3] However, affirmative action plans that show preferences to minorities or females are not legal unless a company can show that it is correcting a manifest imbalance caused by prior discrimination.[4]

Discrimination

Experience has demonstrated that without protective legislation many employers tend to discriminate against disadvantaged workers to the detriment of both these people and society. The interests of society are advanced when everyone has an opportunity to participate and contribute without unfair discrimination.

Race and National Origin Discrimination

Recruiting announcements, employment application forms, and preemployment interviews are the traditional instruments that have been used to eliminate minority persons at an early stage of the employment process. The law, interpreted through court rulings and EEOC decisions, prohibits the use of recruiting methods that disproportionately eliminate members of minority groups unless the methods are valid predictors of successful job performance or can be justified by business necessity. Some of the state fair employment practice laws also prohibit requesting information that could indirectly reveal race or national origin, such as former name, previous residence, names of relatives, place of birth, citizenship, education, or color of eyes and hair. The EEOC cautions employers about obtaining the following kinds of information unless they can demonstrate a business necessity.

1. *Height and Weight*.
2. *Marital status, number of children, and provisions for child care*. An employer may not have different hiring policies for men and women with preschool children.
3. *Educational level*. Unless evidence exists that a specific educational level is significantly related to successful job performance, this information should not be requested since a high rate of minorities tend to be disqualified on this basis.[5]
4. *English language skill*. Unless skill in the English language is required of the work, it should not be assessed since minority groups could be discriminated against on this basis. Employers should not have rules that require employees to speak only English at work unless such rules are necessary.
5. *Names of friends or relatives working for the employer*.
6. *Arrest records*. People can be arrested without being convicted.
7. *Conviction records*. Federal courts have held that conviction records should be used as bases for rejection only if their number, nature, and recency indicate that the applicant is unsuitable for the position. If an inquiry is made concerning an applicant's record of convictions, it should be accompanied by a statement that the conviction record will not necessarily be a bar to employment and that factors such as age at the time of offense, seriousness and nature of the violation, and rehabilitation will be taken into account.
8. *Discharge from military service*. Employers should not automatically reject applicants with less than honorable discharges from military service. According to the Department of Defense, minority service members receive a higher proportion of undesirable discharges than whites. An applicant's military service record should be used to decide whether further investigation is warranted. As with conviction records, a question regarding military service should be accompanied by a statement that a discharge indicating other than honorable service is not an absolute bar to employment and that other factors also will influence the hiring decision.
9. *Citizenship*. The law clearly protects all individuals, both citizens and non-citizens residing in the United States, against discrimination on the basis of race, color, religion, sex or national origin.
10. *Economic status*. Rejecting applicants because of poor credit ratings can have a disparate impact on minority groups, and hence, questions about economic status have been found unlawful by the EEOC unless business necessity can be proven. This includes inquiries regarding bankruptcy, car

ownership, rental or ownership of a house, length of residence at an address, or past garnishment of wages.

11. *Availability for work on weekends or holidays*. Employers and unions should attempt to accommodate the religious beliefs of employees and applicants unless to do so would cause undue economic hardship.

Although this information should normally not to be used in making an employment decision, some of it may be needed for legitimate business purposes. For example, employers need such information as marital status, number and ages of children, and age of the employee for benefits, insurance, reporting requirements, and other business purposes. The EEOC recommends that this information be obtained after the selection decision has been made.[6]

Although the EEOC guidelines and some state laws restrict employers from asking certain questions, it is important to remember that discrimination does not occur because of the questions that are asked nor is it prevented by avoiding these questions. Discrimination is a function of how people are treated, not what they are asked. A recruiter who is prejudiced has countless ways to determine age, race, and sex without asking.

Gender Discrimination

Manifestations of gender discrimination have been most frequently observed in five areas.

1. *Hiring*: Women have been typecast into traditionally female jobs, such as secretary, teacher, clerk, teller, flight attendant, and nurse.

2. *Pay*: Women have been paid less than men, a practice that originated when women were viewed as temporary workers earning supplementary income and men were viewed as family breadwinners, who needed a larger income.

3. *Promotion*: Women have often been overlooked for promotions because they are not perceived as having the same long-term career orientation as men, especially if the promotion involves a transfer.

4. *Benefits*: Because of childbirth and child care, women have had different medical benefits and leave policies (such as maternity benefits and mandatory leave following childbirth).

5. *Sexual harassment*: Women have been subjected to a variety of abusive activities that have ranged from sexual assault to verbal harassment.

Protection for women against these types of gender discrimination is provided primarily by two laws: the Equal Pay Act (1963) and the Civil Rights Act Title VII (1964). The Equal Pay Act requires equal pay for equal work. Men and women doing the same or substantially similar work requiring equivalent skill, effort, and responsibility must be paid the same.

The Civil Rights Act of 1964 (amended in 1972) prohibits sex discrimination regarding any employment condition and serves as the basis for prohibiting sexual harassment. Preferential treatment for either gender, male or female, is strictly prohibited unless there is a bona fide occupational qualification (BFOQ) that justifies it.

Many women experience subtle forms of discrimination that limit their career advancement. This condition, called the ***glass ceiling***, is created by a host of attitudinal and organizational barriers that prevent women from receiving the information, training, encouragement, mentoring, and other opportunities they need to advance. The Glass Ceiling Initiative, a congressional investigation of the problem mandated by the 1991 Civil Rights Act, reported that significant progress has been made to eliminate barriers for women's advancement, even though some barriers still exist.

The Civil Rights Act does not protect sexual preference. The federal courts have rejected repeated attempts by homosexuals, transsexuals, and transvestites to shield themselves from unequal treatment by claiming discrimination under Title VII. The EEOC has also concluded that adverse employment actions taken against individuals because of their sexual orientation do not constitute discrimination.[7] The gay rights movement has obtained legislated protection from employment discrimination only at the local level.

Sexual Harassment

Although Title VII of the Civil Rights Act does not mention sexual harassment, court decisions since 1964 have extended this protection to cases of sexual harassment. The EEOC has issued guidelines that define sexual harassment and explain the employer's responsibility to prevent it. According to the EEOC, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when 1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; 2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or 3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[8]

Two kinds of sexual harassment have been defined by the courts: quid pro quo and hostile environment. A ***quid pro quo*** (this for that) charge of sexual harassment occurs when one person offers another person something in exchange for a sexual favor, such as a pay increase, a promotion, or continued employment. A case of ***hostile environment*** occurs when the discriminatory misconduct is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." The Supreme Court has identified several factors for determining whether a work environment is hostile or abusive: (1) the frequency and severity of the conduct; (2) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; (3) whether it unreasonably interferes with an employee's work performance; and (4) its impact on the employees psychological well-being. The Supreme Court has even ruled that employers are vicariously liable for the actions of supervisors even if the harassment does not result in a tangible employment action.

Employees who are offended by sexual conduct in the work environment, such as touching, jokes, lewd comments, or pornographic pictures, may request that the environment be changed. If the employer fails to correct the offensive environment, employees can press charges of sexual harassment without having to demonstrate that the harassment caused either physical or psychological damage.

The EEOC holds the employer responsible for the acts of its agents and supervisory employees with respect to sexual harassment, regardless of whether the employer knew or should have known of their occurrence. The employer is also responsible for conduct between coworkers and even responsible for the acts of non-employees, such as vendors or customers. It is the employer's responsibility to take all steps necessary to prevent sexual harassment, such as discussing the subject, expressing strong disapproval, and taking strong appropriate sanctions when it occurs.

The EEOC guidelines have forced employers to become involved in the romantic entanglements of their employees and the potentially discriminatory impact of these entanglements on employment decisions. The EEOC guidelines state "where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sexual discrimination against other persons who were qualified for but denied that employment opportunity or benefit." According to this guideline, if two people are romantically involved and one partner receives preferential treatment, then other members of the work group who did not get promoted can claim that they were the victims of unlawful sex discrimination. Because of the difficulty of knowing when a sexual advance is unwanted or the possibility that it may suddenly become unwanted, employers find that it is wise to have rules similar to their nepotism policies that prevent members of a work group from becoming romantically involved.

To protect themselves with an affirmative defense against liability and damages, employers must be able to demonstrate that (1) they exercised reasonable care to prevent and correct harassing behavior and (2) the employee failed to take advantage of any corrective opportunities provided by the employer to avoid harm. To demonstrate reasonable care, employers should create and communicate a "zero tolerance" sexual harassment policy, train employees about the policy and what they should do if they witness or experience sexual harassment, and train supervisors about the policy and their obligation to take corrective action.

Religious Discrimination

Under Title VII of the Civil Rights Act, employers are not allowed to hire, promote, train, compensate, discipline, lay-off, or terminate on the basis of an individual's religious beliefs or observances. This provision is intended to protect employees from any adverse employment decisions because of their religious beliefs and how they choose to observe them. The most frequent type of accommodation requested is adjustments in an employee's work schedule.[9] If an employee has a legitimate request for time off for religious observances (for Sabbath or holy days), an employer should try to accommodate the employee's request.

Religious discrimination charges typically arise after employees are asked to work overtime or when they are assigned to perform an unpleasant task. However, it may be difficult to know when the charges are frivolous claims due to resistance to change versus legitimate religious conflicts requiring accommodation. According to a Supreme Court case, religious accommodation should not require an employer to (1) sacrifice the rights of other workers to accommodate another employee; (2) breach a collective bargaining agreement to provide benefits or special needs that would not be equally enjoyed by others; (3) suffer a loss in work unit efficiency in their efforts to accommodate; and (4) provide more than *de minimus* action (in other words, the employer should not have to pay overtime for another worker or for a replacement worker).[10]

Age Discrimination

While most cultures show respect and veneration for the elderly, the United States is one of the few cultures that tends to attach a stigma to age. Middle-aged managers and professionals are often considered more competent than older managers and professionals, and older workers are frequently discriminated against because of their age. Some forms of age discrimination are very visible, such as terminating 60-year-old employees first when there is a reduction in force, and refusing to hire older applicants. Other forms of age discrimination are more subtle, such as not including an older worker on a

project team, not listening to the ideas of an older worker in a committee meeting, or demeaning older workers by applying derisive labels (such as "old goat") to them.

The ***Age Discrimination in Employment Act*** (ADEA), passed in 1967, originally protected workers between the ages of 40 and 60. However subsequent amendments have eliminated the upper age limit for almost everyone but executives and policymakers who can still be forced to retire at age 65. The ADEA protects employees over age 40 from arbitrary and age-biased discrimination in hiring, promotion, training, benefits, compensation, discipline, and terminations. Employers are not even allowed to provide different health or medical benefits to older workers than younger workers, nor can they stop making contributions to an employee's pension plan just because that employee has reached retirement age but chooses to continue working. Early retirement programs are allowed under ADEA, but employers must be very careful to avoid using early retirement incentives as a means of forcing older workers to quit.

The EEOC guidelines prohibit age harassment against employees over age 40.[11] Age harassment refers to any form of demeaning behavior associated with age, such as (a) age-inferred remarks having a derogatory connotation; (b) comments that attribute a person's health, attendance, performance, or attitudes to their age; (c) age-related jokes and sarcasm; and (d) the use of age-related terms such as "pops", "the old man", "the old goat", and "dead wood" when they are used in a derisive manner.

Employers who try to induce older workers to quit by making their jobs unpleasant also violate the ADEA. By requiring them to perform difficult, degrading, or boring jobs, older workers can be forced to quit. This action is called ***constructive discharge***, because the court constructs from the facts of the situation evidence that the employee was actually discharged. A constructive discharge is deemed to have occurred if a reasonable person would have found the conditions of employment to be intolerable.[12]

Occasionally, there are legitimate reasons why a business decision should be based on age. The act itself states that it shall not be an unlawful employment act for employers to base certain decisions on age "where age is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business." It should be noted, again, that the BFOQ defenses have been very narrowly defined by the courts. The burden of proof is on the employers to show that their business survival depends upon employing younger workers in specific jobs such as a youth counselor, a fashion model, a teen sales clerk, or an actor. If older workers are unable to perform a job because of reduced physical abilities or stamina, they should only be removed from that job after an individual assessment has been made showing they are unable to satisfactorily perform the job.[13] Only a very few mandatory retirement policies have survived the scrutiny of the courts such as an age 55 retirement policy for police officers and an age 60 limit for airline captains. Although airline captains are not permitted to continue beyond age 60, as imposed by FAA regulations, flight engineers are allowed to continue until it can be demonstrated that their performance is inadequate.

Disability Discrimination

In 1991, Congress passed the ***Americans with Disabilities Act*** to protect people with disabilities from job discrimination. The law requires all employers with 15 or more employees to make reasonable accommodations to hire disabled people. A ***person with a disability*** is defined as (a) an individual who has a physical or mental impairment that substantially limits one or more major life activities (such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, learning, and working), (b) a person who has a record of such an impairment (such as cancer or heart disease) or (c) a person who is regarded as having such an impairment (such as a former drug addict or alcoholic). A person who currently uses illegal drugs is specifically excluded from coverage. Although a former addict who has

been successfully rehabilitated is protected by the act, those who have used illegal drugs within the past several weeks are excluded.

A physical or mental impairment refers to a condition that weakens, diminishes, or restricts an individual's physical or mental ability. Thus, the definition of a disability is very broad. The Supreme Court has been forced to deal with the question of whether communicable diseases are defined as a disability and the answer is yes. At least two forms of communicable diseases, tuberculosis (TB) and acquired immune deficiency syndrome (AIDS), have been classified as physical disabilities. Court decisions have also indicated that epilepsy, cancer, heart conditions, and morbid obesity qualify as protected disabilities. However, being too short or left-handed have not been considered disabilities.

People who have disabilities that pose a ***direct threat*** to the health or safety of themselves or society may be denied employment in those instances where reasonable accommodations cannot eliminate the threat. But, the direct threat must pose a significant, specific, and current risk of substantial harm rather than a speculative or remote concern for what might happen.

Employers are required to make ***reasonable accommodations*** to the known physical or mental limitations of people who are otherwise qualified, unless they can show that the accommodation would impose an undue hardship on the business. Reasonable accommodations refer to modifications in the job or changes in the work setting that make it possible for an individual with a disability to work successfully. People are considered ***otherwise qualified*** if they can perform the essential functions of a job with reasonable accommodations. Employers are encouraged to have written job descriptions listing the essential functions of each job.

Employers are not expected to abandon legitimate job requirements or suffer burdensome sacrifices, however, to make accommodation. Whether an accommodation is reasonable is decided separately for each case. The federal guidelines offer some suggestions, such as making bathrooms and drinking fountains accessible to disabled persons, restructuring jobs, instituting part-time or modified work schedules, modifying equipment, and providing readers or interpreters.

The Americans with Disabilities Act places severe restrictions on the hiring process to prevent discrimination. Employers are not allowed to ask whether an applicant has a disability on application forms, in job interviews, or in background or reference checks. Nor can the employer ask questions about a disability even if it is obvious, such as whether it is temporary or permanent, how long it is expected to last, or if the condition is likely to change. An employer is also prohibited from requiring a pre-employment medical examination or from obtaining medical histories until after a conditional offer of employment has been made. However, tests for illegal drugs are not medical examinations under the act and may be given at any time.

In the hiring process, employers are expected to describe the essential functions of the job and then ask the applicants if they can perform them. If an otherwise qualified person needs an accommodation, it is that person's responsibility to request it and the employer decides whether it is reasonable. With certain limitations, an employer may ask applicants with obvious disabilities to describe or demonstrate how they would perform the essential functions of a job.

After making a conditional job offer and before an individual starts work an employer may require a medical examination or ask health-related questions, providing that all candidates who receive job offers are treated the same way. A person with a disability can only be denied employment for a valid job-related reason.

The act also prohibits discrimination against a person who has a known relationship or association with a disabled person. This refers to family relationships and other social or business associations. Therefore, an employer may not refuse to hire an applicant because that person has a spouse, a child, or another dependent who has a disability. The employer may not assume that the individual will be unreliable, have to use leave time, or be away from work in order to care for the family member with a disability.

Discussion Questions

1 What are the arguments for and against voting in favor of a labor union? Explain why you would or would not join a union. Do you think the laws are more supportive of unions or management? Explain.

2 Some people believe civil rights legislation proves that morality can be legislated. Do you agree that racial prejudice has been significantly reduced in recent years, and if so, would you attribute this in whole or in part to the laws that have been passed?

3 What are the conditions when sex and age are considered bona fide occupational qualifications? Why is race never a BFOQ? Do you think the courts have interpreted the laws too narrowly and are forcing undesirable changes in social customs? Explain

4 Why is sexual harassment often described as a display of power? How do power and status differences contribute to problems of sexual harassment?

5 Why do we have affirmative action programs and what are the arguments for and against them? Explain when they are useful and necessary and when they are unfair.

6 Can a company fire or refuse to hire people who smoke? How do the laws regarding discrimination and disability apply to smokers? Aside from the question of what is legal, how should the issue of smoking be treated morally?

Notes

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3. *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987).
4. *Regents at the University of California v. Bakke*, 438 U.S. 265 (1978); *Steelworkers v. Webber*, 443 U.S. 193 (1979); *Adarand Constructors, Inc. v. Pena*, *93-1841, U.S.C., (1995)*
5. *Griggs v. Duke Power Company*, 401 U.S. 424 (1981).
6. Preemployment Inquiries (Washington, D.C.: Equal Employment Opportunity Commission).
7. Sabrina M. Wrenn, "Gay Rights and Workplace Discrimination," *Personnel Journal* 67 (October 1988): 91-102.
8. 29 Code of Federal Regulations, Part 1604.11.

9. William E. Lissy, “Labor Law for Supervisors: Accommodating Employees' Religious Practices,” *Supervision* 49 (November 1988): 22-23,27.
10. *Hardison v. Trans World Airlines*, 375 F. Supp. 877 (W.D. Mo. 1974).
11. 29 Code of Federal Regulations, Part 1625, 1993.
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