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Gender Discrimination Claims in 2025

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GENDER DISCRIMINATION CLAIMS IN 2025

Gender discrimination claims – sometimes related to, but distinct from, sexual harassment claims - are still impacted by the discussion of subtle and overt biases raised by the # MeToo movement in many jurisdictions. Although there may be some skepticism of the #metoo movement resulting from some of the cases in which gender discrimination and sexual discrimination claims were discredited, many juries will identify or presume bias, conscious or not, in decisions made by employers. This discussion focuses on the law that applies to these claims as well as methods used to overcome the perception of unconscious gender bias, especially in light of jury instructions telling juries that we all have such biases. It also addresses the effect of recent decisions of the U.S. Supreme Court and EEOC policies implemented under the new administration.

Gender Discrimination 101

Gender discrimination claims can be brought under Title VII or state statutes. Below is an analysis of each and the differences to look for, as well as some of the thornier issues that these laws present for defendants.

A. Title VII Claims

Title VII is the traditional format for gender discrimination claims. Title VII prohibits an employer from treating an employee differently – in hiring, firing, or other workplace decisions - because of sex. It also prohibits harassment in the workplace based on sex.

a. Sex discrimination and work situations

Hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, or any other term of employment

b. Sex discrimination harassment

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature

- i. Plaintiff was subjected to [slurs, insults, jokes or other verbal comments or physical contact][sexual advances, requests for sexual conduct, or other verbal or physical conduct of a sexual nature]
- ii. Conduct was unwelcome
- iii. Conduct was sufficiently pervasive to alter the conditions of the plaintiff's employment and created a sexually abusive or hostile work environment
- iv. Plaintiff perceived the working environment to be abusive or hostile and
- v. A reasonable person in the plaintiff's circumstances would consider the working environment to be abusive or hostile.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993); *Fuller v. City of Oakland, California*, 47 F.3d 1522, 1527 (9th Cir. 1995)

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)(a claimant may state a claim by alleging harassment severe or pervasive enough "to alter the conditions of [the victim's] employment and create an abusive working environment.")

Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)(Title VII is not a "general civility code," and a few inappropriate comments do not constitute a hostile work environment).

DISCUSSION TOPIC NO. 1 – Do we think that we are going to see changes in gender discrimination claims in today’s political climate? Implications of recent Supreme Court decisions and policies implemented by the EEOC on gender discrimination claims?

1. EEOC Developments
 - a. New administration policies regarding “gender ideology”
 - b. Targets on DEI programs
 - i. EEOC settlement with 4 large law firms
2. Affirmative Action and so-called “reverse discrimination”
 - i. Recent cases and special interest group initiatives and their impact on private employers since the Supreme Court ruling in *Students for Fair Admissions v. Present & Fellows of Harvard College*, 600 U.S. 181 (2023).

DISCUSSION TOPIC NO. 2 – Does an isolated but inflammatory incident suffice to create a hostile work environment? What are some of the flimsier hostile work environment claims you have seen? What have been some of the best defenses raised?

1. Employer is responsible where the employer or supervisory employees knew or should have known of the conduct unless it can show that it took immediate and appropriate corrective action. 29 C.F.R. Part 1604
 - a. What about alleged conduct or statements of a current supervisor, long before that employee became a supervisor and long outside the statute of limitations?
 - b. *Vance v. Ball State University*, 570 U.S. 421 (2013)(affirming the Seventh Circuit’s narrower definition of a “supervisor” to mean an employee who can take tangible employment actions, rather than the broader definition of directing some of the daily activities of another employee)

DISCUSSION TOPIC NO. 3 – Has anyone addressed a situation with low-level supervisors outside of the administration or management of the company? Have you ever been able to argue that a manager or supervisor's statements do not qualify as statements of the employer? What about out of work conduct/statements? How do you advise your clients to train all supervisors and managers to act like upper management to avoid claims based on their actions?

1. 15 or more employees
2. Time limits – 180 days to file a charge (up to 300 days in some states)
 - a. Continuing Violations Doctrine - *Evidence* of hostile work environment may extend beyond 180 days, "Context" of discriminatory acts / discriminatory "animus"
 - i. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)(civil rights statute does not bar an employee from using prior acts as background evidence in support of a timely claim)
 - ii. *Talbot v. Village of Sauk Village*, No. 97 C 2281, 1999 WL 286089 (N.D. Ill. April 27, 1999)
 - iii. *West v. Ortho-McNeil Pharm. Corp.*, 405 F.3d 578, 581 (7th Cir. 2005).
 - iv. *Shanoff v. Ill. Dep't of Human Servs.*, 258 F.3d 696, 705 (7th Cir. 2001)(prior acts serve as evidence to "illuminate the nature of the hostility involved in the actionable conduct")

DISCUSSION TOPIC NO. 4 – What kinds of background checks should you conduct to ensure that there are no future claims about statements made by your current supervisors? Has anyone successfully challenged the admission of a claim of language dug up from past years that was never reported to the management or administration?

1. State Human Rights statutes

Most states have some form of human rights statutes that prohibit discrimination based on gender.

- a. Illinois Human Rights Act, 775 ILCS 5/2-101 et seq.

"Harassment" means any unwelcome conduct based on an individual's actual or perceived race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, unfavorable discharge from military service, citizenship status, work authorization status, or family responsibilities that has the purpose or effect of substantially interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment. For purposes of this definition, the phrase "working environment" is not limited to a physical location where an employee is assigned to perform his or her duties.

- b. Massachusetts Anti-Discrimination Statute, M.G.L. ch. 151B et seq.

The term "sexual harassment" shall mean sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment. Discrimination based on sex shall include, but not be limited to, sexual harassment.

It shall be an unlawful practice "[f]or an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, pregnancy or a condition related to said pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child, ancestry or status as a veteran of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification."

DISCUSSION TOPIC NO. 5— How do you advise employers who are in ongoing litigation with a current employee as to how to avoid retaliation claims?

Title VII prohibits an employer from retaliating against an employee who engaged in a "protected activity" and suffered an "adverse employment action" as a result.

1. Protected activity?
 - a. Filing a Charge, Testifying in a legal proceeding, Posting on social media?