



Understanding Sex Discrimination and Harassment



Sex Discrimination

SEX DISCRIMINATION

It's not the 1950s, but sex discrimination is still very much alive. It may not be as pervasive as it is in *Mad Men*, but women—and men—are still sometimes treated differently by their employers.

Most of us have always known that discrimination based on the fact that a person is male or female is wrong—that employers can't do it. But when it comes to bringing a lawsuit, the devil is in the details.

First, let's define sex discrimination in the workplace: It's when your employer treats you differently because you are a woman or a man. There's really three parts to this law. To bring a lawsuit for sex discrimination, an employee must prove (1) that he or she is a member of a certain legally protected class (male or female), (2) the employer did something bad to him or her, and (3) the employer did so because the employee is a male or female.

Often, the toughest thing to prove is that pesky "because." But let's start at the beginning.





Member of a Certain Class of People

MEMBER OF A CERTAIN CLASS OF PEOPLE

Federal law makes it illegal to discriminate against someone based on the fact that he or she belongs to a certain class of people. The main classes are based on race, religion, national origin, sex, pregnancy, disability, and age. With sex discrimination, we're obviously zoning in on the class "sex." That's pretty straight-forward: You can't be treated differently because you are male or female.

You'll notice that in that list of protected classes "sexual orientation" is not listed. So does that mean an employer can get away with discriminating against someone because he or she is gay?

This is where sex discrimination can come in to protect the rights of homosexual employees. You see, if a supervisor is treating a gay employee differently (because he is a man who is attracted to men), well, the supervisor wouldn't be doing that if the employee were female (and liked men). This treatment only happened because the employee is male, and that's sex discrimination.

Sex discrimination of gay employees can also be manifested as sexual harassment, like when a gay person is repeatedly hit on because he or she is gay.

Finally, males and females cannot be treated differently because they do not fit a gender stereotype. It is sex discrimination to treat a man differently because he, for example, wears a pink shirt. And it is sex discrimination to punish a woman for coming off as overly masculine or presume she cannot take a position that involves a lot of travel because it would take her away from her family.



The Employer Does Something Bad

THE EMPLOYER DOES SOMETHING BAD

Obviously, you can't be fired or laid off simply because of your sex. Those are the easy ones to spot.

You also can't be passed over for a job because you're male or female. This type of discrimination happens when you apply for a job that you are qualified for, but you were not hired because—for example—some of the company's clients are "more comfortable dealing with men."

This means a job applicant might have a legal claim against an employer even if they are never hired! But, you must be able to prove that you were not hired because of your sex. (More on that later.)



THE EMPLOYER DOES SOMETHING BAD

Other bad things that employers do which may support a sex discrimination claim include:

(1) Paying an employee less

If a male with similar training and experience is paid more than you, that might be discrimination. (It's also not allowed by the Equal Pay Act, but it happens all the time).

(2) Not giving the employee a promotion

Perhaps you are continually are passed over for promotions, despite the fact you get excellent reviews each year, while less-qualified men always get the promotions.

(3) Denying certain perks or benefits

This is like paying an employee less. Federal law makes it illegal to discriminate in many types of compensation, including overtime pay, bonuses, stock options, profit sharing, life insurance, vacation and holiday pay, reimbursement and benefits, such as health insurance.

(4) Limiting the potential for raises or denying a raise

This is a lot like the promotions and pay categories. The bottom line is: You cannot be held back because of your sex.

(5) Giving an employee worse job duties or classification

For example, a woman coming back from maternity leave tells her employer that she cannot work as many overtime hours. The employer then changes her position to a lower level, and she gets less pay. Meanwhile, male co-workers in similar positions are allowed to scale back their overtime hours without any repercussions.

(6) Enforcing policies that are unfairly divisive based on gender

This is often seen in policies about dress code. Examples include when a woman is not allowed to wear pants or if females' uniforms are revealing while males' uniforms are not.

(7) Discriminating against an employee because she is pregnant

Pregnancy discrimination is a form of sex discrimination under federal law. You cannot be discriminated against because you are pregnant. Beginning on June 27, 2023, you may also be entitled to reasonable accommodations for pregnancy, childbirth, or a related medical condition so long as the accommodation will not cause your employer an undue hardship. See our Pregnancy Discrimination ebook for more information.

A woman with long brown hair, wearing a white shirt, is looking off to the side with a thoughtful expression. She is packing a cardboard box with various office supplies, including a purple mug and a small potted plant. The background is a plain, light-colored wall.

An Egregious Case of Sex Discrimination

Beginning on June 27, 2023, you may also be entitled to reasonable accommodations for pregnancy.

AN EGREGIOUS CASE OF SEX DISCRIMINATION

We once represented a woman who endured one of the worst examples of sex discrimination possible: During a company trip, she was sexually assaulted by her supervisor, who used lies to get into her hotel room. It happened twice.

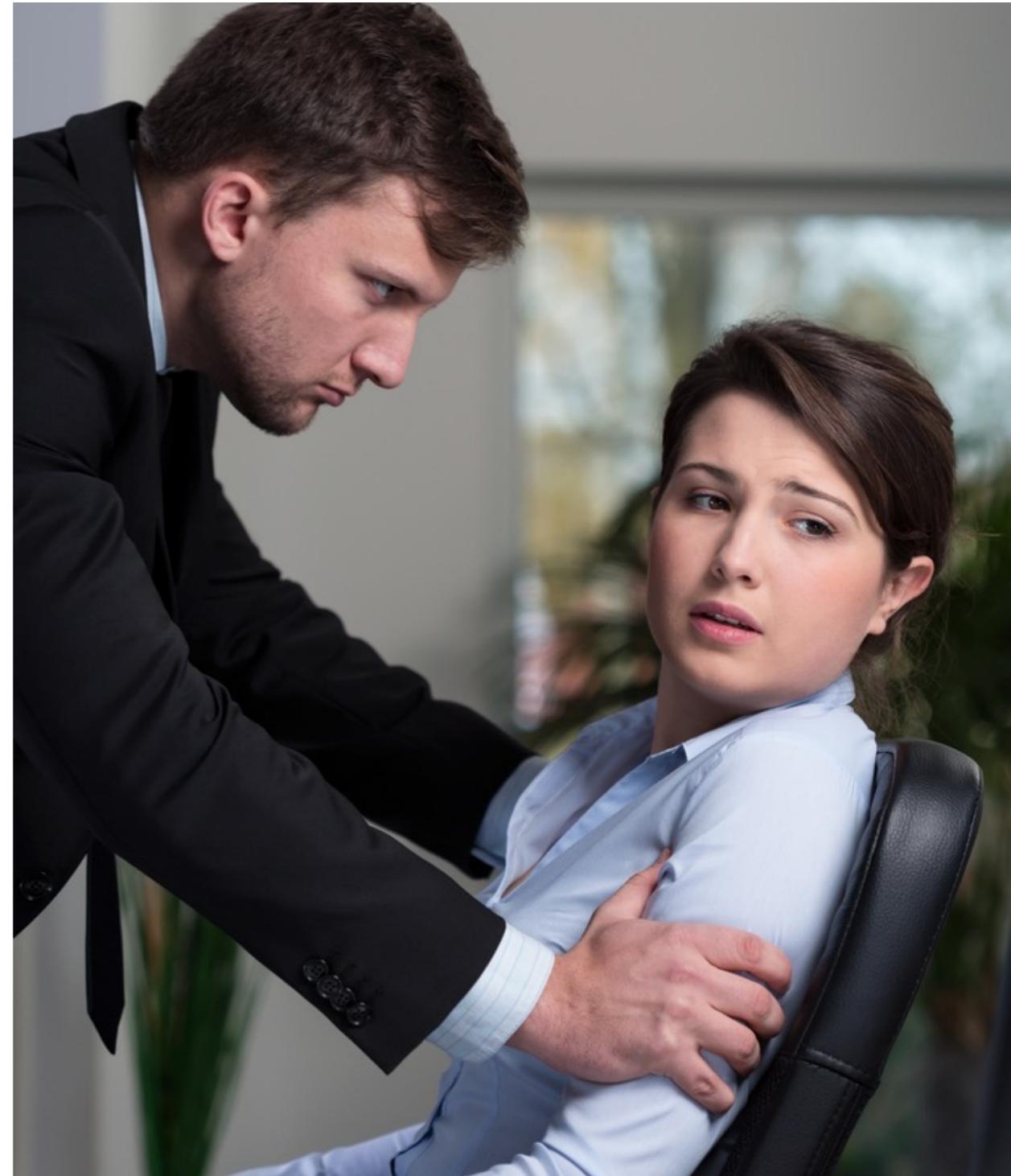
She was horrified, humiliated, and embarrassed. And if that weren't enough, she was also afraid she would lose her job.

When she refused her boss's continued sexual advances, he began to publicly berate her. He also started to do everything in his power to make her life miserable. He assigned her impossible tasks, setting her up for failure. He gave her additional responsibilities. He yelled at her when she asked for help, then he transferred her to another position, where she had no experience.

In front of her co-workers, he treated this woman terribly and made disparaging comments about her looks. After our client contacted her company's human resources department, her supervisor somehow found out and told her to never do that again. Shortly thereafter, he fired her anyway.

Sex discrimination doesn't have to be this terrible to be illegal, but this example shows how difficult it can be for women—and men—to come forward with these kinds of stories. Our society often blames the victim, so there can be feelings of shame associated with these experiences.

When this woman entered our offices, we listened to her and supported her, creating a safe space for her to share her experiences. Then, we worked hard to secure a favorable settlement for her.



A woman with blonde hair, wearing a white shirt, is shown from the chest up. She is holding a pen in her right hand and looking directly at the camera with a serious expression. The background is blurred, suggesting an office or meeting environment. The image has a blue tint.

The Bad Thing Happened *because* of
the Employee's Sex

THE BAD THING HAPPENED BECAUSE OF THE EMPLOYEE'S SEX

Maybe you were laid off and you think it's because you're a woman. Your employer likely didn't say so (and probably never will), so how do you confirm it really was sex discrimination?

Proving that third prong—that your employer discriminated against you because of your sex- is often the hardest element of discrimination to prove, usually because there often isn't direct evidence (like your manager saying, "I'll never promote a woman to that position!"). However, there are several pieces of circumstantial evidence that can help an employee prove his or her case.

First, if you are a female, the main question is: How were male employees in similar positions (with similar training and experience) treated? Evidence that you were laid off while all your male co-workers with less experience kept their jobs could prove discrimination.

Of course, an employer will likely offer some other reason for its actions. For example, your supervisor might say your work was subpar or that the male employees who got preferential treatment were more qualified in some way.

If you believe this is pre-textual—that it is a made-up reason meant to save face—then you will need to show how your employer's reason is false. Here, the history of your employer's decisions is relevant. Did your employer regularly pass over females for males? Did supervisors often fire equally qualified women, keeping the men?

Also, if the employer's reason for treating you differently is based on a gender stereotype (like telling a woman she was "not assertive enough"), you might have a good argument for sex discrimination.

There is no particular type of circumstantial evidence that must be brought to prove discrimination, but answering "yes" to several of the following may show you have enough proof:

- Were you treated differently than a similar employee of the opposite sex (with similar job experience and qualifications)?
- Are the circumstances of your mistreatment particularly unusual, egregious, or unjust?
- Are there noticeably few employees of your sex at your workplace?
- Have you noticed that other employees of your sex seem to be singled out, like you?
- Have you heard other employees of your sex complain about discrimination, especially at the hands of the same person or people who discriminated against you?
- Do you have statistics that show one sex is being treated differently than the other?
- In the case of termination or lay-offs, did your employer retain less-qualified people of the opposite sex in the same job?

A woman with long dark hair and glasses is sitting at a desk in a classroom, looking at several sheets of paper. She is wearing a plaid shirt. In the background, other students are visible, though they are out of focus. The scene is dimly lit, suggesting an evening or indoor setting with artificial light. A teal banner is overlaid on the image, containing the text "Paid Less, Excluded More".

Paid Less, Excluded More

PAID LESS, EXCLUDED MORE

We once represented a woman who received a major promotion. That should have been a reason for celebration. However, she soon learned that she would be paid significantly less than the male who had previously held the position, and she had been given more job duties!

This is a very common form of discrimination, stemming from society's historical perspective that women should be helpful. Female employees are often expected to step up to the plate more in order to help a company and be a "team player." At the same time, they are often paid less. It is common knowledge that women make less on the dollar than men. However, when it comes to filing a lawsuit, female employees need proof.

In this case, our client knew she was being paid less, so she stood up for herself. She got a slight bump in pay, but the gap wasn't closed. Also, she faced another problem: When she assumed the leadership position, she was actually excluded from management meetings, along with the one other female manager. It became very obvious that this was a "boy's club" and the women were not welcome.

When she and the other woman started meeting on their own, her manager threatened her and told her she had a bad attitude. When she came to us, she was overwhelmed with the stress that this hostility had caused. She had worked hard to get that promotion, and she was qualified, so why were all her efforts being thwarted?

We filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission and filed a lawsuit against this company for violations of the U.S. Equal Pay Act. We stuck by our client until she got the settlement she deserved.



Sex Harassment



SEX HARASSMENT

Sexual harassment is a form of sex discrimination. It's any type of unwelcome advances or verbal or physical conduct that is sexual in nature. It could be quid pro quo harassment ("do this for me, and I'll promote you," for example) or harassment that creates a hostile work environment.

The classic examples of sex harassment are requests or demands for sexual favors—or unwanted sexual attention that makes going to work uncomfortable. There is also gender-based harassment. This is when, for example, a woman is called a derogatory name, or female employees are constantly referred to as "girls."

Harassment based on sexual orientation constitutes sex discrimination because an employer is still treating a person a certain way because of their sex.

Most people know how to spot sexual harassment. It's an unwelcome comment about your looks or a proposition for sex, for example. Sometimes it's as egregious as a demand from a superior to perform a sexual favor—or be fired. Other times it's as subtle as the way your co-workers look at you.

The main take-away here is that one unwelcome comment or action is often not enough. Unless it is extremely terrible, and enduring the offensive conduct becomes a requirement for continued employment, the sexual harassment needs to be so "severe" or "pervasive" that a reasonable person would consider the work environment to be "intimidating, hostile, or abusive."



SEX HARASSMENT

To establish a case for this type of “hostile work environment” sexual harassment, the victim must prove:

- (1) He or she suffered intentional, unwanted discrimination because of his or her sex;
- (2) The harassment was severe or pervasive.;
- (3) The harassment negatively affected the terms, conditions or privileges of his or her work environment;
- (4) The harassment would detrimentally affect a reasonable person of the same sex; and
- (5) Management knew about the harassment, or should have known, and did nothing to stop it.

Some examples of potential harassment include:

- Sexual propositions
- Repeated requests for dates
- Sexual comments
- Leering looks
- Inappropriate touching or violation of personal space
- Obscene jokes, sexual innuendos or sexual pictures
- Obscene slurs, epithets or name-calling
- Physical assaults or threats
- Intimidation, ridicule, or mockery
- Insults based on sex or gender
- Comments about an employee’s body or clothing
- Implied threats about your employment status if you don’t perform a sexual act or go on a date

Again, once may not be enough. One dirty joke—or one unwanted comment—while it might make you extremely upset, might not be enough to have a claim against your employer.

SEX HARASSMENT

Also, the law generally requires that you confront the harasser and tell him or her to stop. You must also report it to a supervisor at an early stage to prevent escalation. If your employer takes immediate and appropriate action and stops the harassment, that might be the end of it. The law protects employers who have anti-discrimination, anti-harassment policies—as long as the employer actually enforces them.

If the employer does nothing to stop the behavior, it can be liable for the harassment. And, if the the harassing or discriminatory behavior continues and it is so intolerable that the employee feels he or she must quit to get away from it, that resignation is called a “constructive discharge.”

To be intolerable, it must be objectively intolerable—meaning the behavior was so bad the average person in your position would be compelled to resign. It’s not enough that your boss treated you badly or you were no longer happy at work.

With “constructive discharge” or “constructive termination,” the law will treat you as if you were fired, which means you may still be able to file a lawsuit for sex discrimination even though you and not the employer made the decision for you to leave your job (and you may be eligible for unemployment benefits as well).



A woman in a business suit is sitting at a desk with her arms crossed, looking towards another person whose back is to the camera. The scene is set in an office with large windows and blinds. The overall tone is professional and serious.

Reporting the Discrimination

REPORTING THE DISCRIMINATION

To file a federal lawsuit for sex discrimination (or any type of discrimination), an employee must first file a complaint with the U.S. Equal Employment Opportunity Commission—and this complaint (called a “charge of discrimination”) must be filed within 180 or 300 days from when the discrimination took place. Sometimes that date is the date of your termination, but sometimes the discrimination you are complaining about takes place well before your termination—for example, a demotion followed by a termination.

As if the timing rules are not complicated enough, the 300 day rule only applies if there is a State or local law prohibiting sex discrimination in employment and a State or local agency enforces that law. So, to be on the safe side, it is important to act quickly—preferably within 180 days of behavior you believe to be discriminatory—to protect your rights. Failure to file a charge within the time period required by law may result in the loss of your claim.

If you are making a claim under the Equal Pay Act for sex discrimination in wages and benefits, you do not need to file a charge before filing a lawsuit and different time limits apply. You can file the lawsuit within 2 years of that last discriminatory paycheck.



A close-up photograph of a man in a dark suit, white shirt, and patterned tie. His hands are clasped in front of him. The image is overlaid with a teal banner at the bottom left containing the word "Retaliation" in white text.

Retaliation

RETALIATION

Sex discrimination and harassment on their own are illegal—but you may have another claim against your employer if your employer retaliates against you for complaining about such discrimination of yourself or another.

Retaliation is any type of negative employment action that would make someone less likely to make a complaint. It includes job termination, refusing to promote an employee, harassing him or her, transferring him to a further location, increasing surveillance, making threats, giving bad evaluations or references, and more.

Not every complaint about sex discrimination is protected, though. You are only protected from retaliation if you (1) file a charge of discrimination with the government, (2) participate in a discrimination proceeding or (3) oppose what you in good faith believe is discrimination to yourself or others.

This can be a gray area. For example, does an employee have a “good faith” belief that one unwanted remark is discrimination? Or is it not good faith because it wasn’t “severe” or “pervasive?” This can get complicated, but the short answer is: Your reaction to what your employer is doing must be reasonable.



About the Author



ABOUT THE AUTHOR



Matthew K. Fenton has been a member of the Florida Bar since 1994 and has been practicing exclusively in matters arising from the employment relationship since 1997. He received his law degree from the University of Florida, with honors, in 1993, where he served on the Editorial Board of the University of Florida Law Review. Shortly after graduation, he served as law clerk to U.S. Magistrate Judge Mark A. Pizzo from 1995 to 1997. Mr. Fenton is a trial lawyer who has tried numerous employment law cases in both state and federal courts.

He has been selected by his peers for inclusion in every edition of the Best Lawyers in America since 2009 and has been repeatedly selected by his peers as a Florida Super Lawyer in Employment Law, which denotes status as one of the top 5 percent of Florida's lawyers. He has also been selected as a member of the Legal Elite in Employment Law by Florida Trend Magazine, representing approximately 2 percent of the active Florida bar members who practice in Florida. In 2016, Mr. Fenton was selected by Best Lawyers in America as the "Lawyer of the Year" for individuals in Tampa Employment Law.

Mr. Fenton has spoken on employment law topics and authored numerous publications on employment law, most recently contributing a chapter to the American Bar Association's practice guide "Litigating the Workplace Harassment Case." Mr. Fenton is a member of several voluntary bar organizations, including the Hillsborough County Bar Association where he is a past Co-Chair of the Labor and Employment Law Section.

Mr. Fenton is active in both the Florida and national chapters of National Employment Law Association, the Tampa Bay Trial Lawyers Association and the Florida Justice Association. Mr. Fenton has been admitted to practice in all Florida courts, in the United States District Court for the Middle District of Florida, the United States District Court for the Southern District of Florida and in the Eleventh Circuit Court of Appeals.

Mr. Fenton, a lifelong resident of Tampa, Florida, is proud to be married to a first generation Cuban-American, Rebeca Fenton, and father to two wonderful boys. When he is not fighting for employee rights, Mr. Fenton enjoys traveling with his family, collecting and listening to music from a broad variety of musical genres, spending time at the beach, and watching or attending Florida Gator football and basketball.



About the Firm

ABOUT THE FIRM

At Wenzel Fenton Cabassa, P.A., we represent workers who have been wronged by their employers. We strive to get to know each client's unique circumstances, and we advise them on the best course of action. Our objective is to secure justice for our clients and to hold their employers accountable.

At our firm, our attorneys have decades of experience representing employees, so we are uniquely positioned to advise you on the best course of action, whether you've been fired or you're facing problems in your current job.

At Wenzel Fenton Cabassa, we know that good work doesn't always get rewarded. Our firm handles cases involving employment discrimination and harassment, whistle-blowing, civil rights, wrongful termination, the Family Medical Leave Act (FMLA), wage and overtime disputes, workers compensation issues, contract disputes, severance-related issues, EEOC mediations, government investigations, and violations of non-compete and trade secret agreements, among others.

We offer a free initial consultation, during which we will listen to your employment-related issues and discuss the steps we can take to resolve them.

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