



GUIDE TO UNDERSTANDING
**EMPLOYMENT
DISCRIMINATION**

INTRODUCTION



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UNDERSTANDING EMPLOYMENT DISCRIMINATION

It may be the 21st century, but discrimination still happens in the workplace. Some of our clients have suffered egregious instances of racism or sexism—but even subtle discrimination can be unlawful. The short explanation is this: an employer cannot discriminate against an employee because he or she belongs to a certain classification of people.

Those groups are called “protected classes,” and not every group is protected. Employees are only protected from discrimination based on their age, disability, race or color, national origin, pregnancy, genetic information, religion, and sex.

How do we know this? It’s all spelled out in federal statutes:

Age discrimination is unlawful under the Age Discrimination in Employment Act (ADEA). Disability or handicap discrimination is unlawful under the Americans with Disabilities Act (ADA). Genetic information is

protected under the Genetic Information Nondiscrimination Act of 2008 (GINA). The rest are protected under Title VII of the Civil Rights Act of 1964 (and a corresponding state law in Florida).

When it comes to discrimination, the biggest areas we see are based on race, religion, sex, age, or disability. Sex discrimination (and harassment) is such a big subsection, we’ve written a separate chapter solely about this area of the law. We also have a chapter on pregnancy discrimination. Check them out if you think they apply to you.

We’ll deal with the remaining areas below. But first, we should discuss the overarching framework of these laws. There’s really three parts: To bring a lawsuit for discrimination, an employee must prove:

- (1) that he or she is a member of one of those legally protected classes,
- (2) the employer did something bad to him or her, and
- (3) the employer did so because the employee belongs to that class of people.

Let’s go through each element now.



GROUNDS FOR A DISCRIMINATION LAWSUIT

YOU MUST BE PART OF A (LEGALLY) PROTECTED GROUP

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, like we discussed earlier.

That means you cannot be treated worse because you're black, Muslim, a woman, or 65 years old, for example.

As you can see, not every class is protected—like hair color, for example. You can be discriminated against for the ridiculous reason that you have blonde hair or are a brunette. Or because you like the Gators and the boss is a Seminole. However, employers should be careful because a seemingly odd reason for discrimination could still be connected to a protected class. If a supervisor, for example, only makes dumb-blonde jokes toward female employees, its could be sex discrimination. Stereotyping employees is also unlawful if it's based on stereotypes about people in these protected groups. It's wrong even if the individual employee doesn't exhibit that stereotype.

A famous case of unlawful gender stereotyping, which went all the way to the U.S. Supreme Court, involved a high-level female employee who was twice denied a promotion and told she'd increase her chances of getting it if she dressed more femininely, wore makeup, and generally acted more feminine. The Court found that she was being discriminated against because she was a woman.



THE EMPLOYER DOES SOMETHING BAD

Obviously, you can't be fired or laid off simply because you belong to one of those protected classes. Job terminations are the easiest examples of discrimination to spot.

You also can't be passed over for a job because of your status in one of those classes. 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" or because you're too old or are Christian or Jewish.

This means a job applicant might have a legal claim against an employer even if he or she is never hired. However, you must be able to prove that you were not hired because of your inclusion in one of those classes. (More on that later.)



THE EMPLOYER DOES SOMETHING BAD

Other bad things that employers do 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 passed over for promotions, despite the fact you get excellent reviews each year, while less-qualified people not in your protected class (say men or white employees) get the promotions.

(3) Denying certain perks or benefits

The most common example of this is 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; and/or 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 inclusion in one of those protected classes.

(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) 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.



THE BAD THING HAPPENED BECAUSE OF THE EMPLOYEE'S INCLUSION IN A PROTECTED CLASS

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

Proving that third prong—that your employer discriminated against you because of your inclusion in a protected class—is usually the most difficult, often because there isn't direct evidence (like your manager saying, "I'll never promote a minority 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. Same goes for race or religion. This is called "disparate treatment."

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 white employees who got preferential treatment were more qualified in some way.

If you believe this is pretextual—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 all the white people keep their jobs in the company's reorganization, while only black employees were laid off?

For example, if your employer says you were laid off because of poor attendance, the court would want to look at how many days you missed—and then compare your record to a co-worker like you who wasn't fired. This is called a "comparator," and it can be a powerful tool.



THE 15-PLUS EMPLOYEE REQUIREMENT

THE 15-PLUS EMPLOYEE REQUIREMENT

One note: To be protected by federal law from discrimination based on race, color, national origin, sex, religion (all covered under Title VII of the Civil Rights Act of 1964), the employer in question must have 15 or more employees. Yep, the law lets small employers off the hook.

However, you might have a separate claim under a local ordinance, so don't hesitate to talk to an employment law attorney if you think your small company did something illegal. But just know that Title VII only protects people who work for companies with more than 15 employees. The same goes for the corresponding Florida civil rights law.





DISCRIMINATION BASED
ON RACE, COLOR, OR
NATIONAL ORIGIN

DISCRIMINATION BASED ON RACE, COLOR, OR NATIONAL ORIGIN

Federal law protects employees from discrimination based on their race, color, and national origin. These areas are similar, but each is slightly different.

Race discrimination happens when an employer treats a worker worse because of his or her race (like the fact he or she is black, from the Middle East, Hispanic, etc.)

In addition to making race discrimination unlawful, it is also a violation of Title VII to discriminate on the basis of a characteristic associated with race—like hair color, hair texture, or certain facial features. This is true even if not all members of the race share this same characteristic.

Color discrimination is a lot like race discrimination, but they're not synonymous. Color discrimination means that someone is discriminated against on the basis of the lightness or darkness of his or her skin—or another color characteristic of the person.

Finally, discrimination based on national origin is when an employer treats someone worse because of the employee's—or the job applicant's—country of origin, culture, accent, ethnicity, or assumed ethnicity. One interesting nuance is that an employer may create an English-only language requirement if it is necessary for the business' function. But if it applies to employees during breaks, it may break the law.

DISCRIMINATION BASED ON RACE



DISCRIMINATION BASED ON RACE

We once represented an African-American man with nearly two decades of high-level sales experience. He was selected for a vice president position at a company where he'd manage a team of salespeople and interns.

A couple of months in, this man's supervisor expressed he was unhappy with his lack of sales, despite the fact the employer hadn't spelled out those expectations. Our client said he'd do whatever it took to make the company happy and sought guidance—but he was fired anyway!

Why was this unlawful? Because other employees were treated differently by the company. Turns out, a lower-level, white salesman—who was being paid significantly more than our client, despite his lesser experience—was able to keep his job. Also, another white employee, who was cited for making too few sales, was given a chance to improve. Our client didn't get that chance. He was replaced with a young, white, recent college graduate.

We did an investigation and found evidence of race and age discrimination. We represented this man until he received a settlement offer that he found satisfactory.





DISCRIMINATION BASED ON RELIGION

DISCRIMINATION BASED ON RELIGION

The same federal law that prohibits race discrimination also prohibits employers with 15-plus employees from treating job applicants or employees differently—or harassing them—based on their religious beliefs or practices or lack thereof.

This law protects all aspects of religious observance, practices, and beliefs. It even covers small and new religions, not just the major organized religions.

Like the law that makes race discrimination illegal, this law protects people from being treated worse simply because of their religion. But there's something more: Title VII also allows employees to have a "reasonable accommodation" for their "sincerely held" religious belief or practice—as long as the accommodation will not impose much of a burden on the company.



DISCRIMINATION BASED ON RELIGION

For example, a Catholic employee might need to have a schedule change so he can attend Good Friday services, or a Muslim employee might get an exception to the company's dress code so that she can wear a hijab.

However, an employer doesn't always have to provide such an accommodation. Employers might not have to accommodate an employee's religious beliefs or practices if the accommodation imposes more than a minimal burden. That means that if the employer absolutely needs each employee to work every Sunday, then it likely does not have to allow a Christian employee off work each Sunday.

Nonetheless, some accommodations are warranted—and denying them can be unlawful. We once represented a Jewish employee who worked Mondays through Fridays as a sales representative for a Florida company. This man's boss asked him to come in to work on Saturday, and he replied that he couldn't. Saturday is the Sabbath, and his Jewish practices mandated that he not work on the Sabbath. This man's boss replied that he didn't care if this man was a Jew—and he fired him. We represented our client until he got a favorable settlement.

One note: the religious accommodation burden is different than the burden for accommodations under the Americans with Disabilities Act (ADA). The ADA requires employers to allow "reasonable accommodations" to disabled workers, so long as the accommodations do not impose an unreasonable hardship. That is considered a more significant difficulty or expense, so it's generally easier to get an accommodation because of a disability rather than a religious practice.



DISCRIMINATION BASED ON DISABILITY: THE AMERICANS WITH DISABILITIES ACT



DISCRIMINATION BASED ON DISABILITY: THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA) is a broad law passed in 1990 that protects the civil rights of people with disabilities. In addition to ensuring things like building accessibility, it also requires covered employers to provide “reasonable accommodations” to employees with disabilities. Such an accommodation is basically special treatment that’s needed to help the worker perform the essential duties of his or her job. This law has helped many qualified workers to keep working, despite their disability.

First, to be covered, an individual must have a qualified disability. Being “disabled” under the ADA means that you have an illness that substantially limits one or more major life activities.

What are those “life activities?” Congress defined a bunch of them in an amendment to the ADA in 2007, but it’s not limited to this list: activities involved in caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.



DISCRIMINATION BASED ON DISABILITY: THE AMERICANS WITH DISABILITIES ACT

It also includes a list of body functions: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

If one of these things is “substantially limited” by your illness or condition, then you might qualify for a reasonable accommodation. This is something your doctor can help you determine.

A reasonable accommodation is one that is necessary for you to perform your job. If you can do your job without any accommodations, you might not qualify. But if something like an occasional break, having water by your work station, or being allowed to use a stool would allow you to do your job, your employer must provide you with that accommodation if you ask for it. (You have to ask; an employer usually isn’t required to go looking for ways accommodate you.)

There is one caveat: An employer only needs to provide such an accommodation if it is reasonable, meaning that it does not put too much of a burden on the employer.

We once represented a man who suffered from epilepsy. One day at work, he had a minor seizure. It lasted a few minutes but he was able to get right back to his job. Nonetheless, his boss insisted he go home. Soon after, when our client called his boss to ask when he should report back for work, his boss said he shouldn’t bother.

Epilepsy qualifies as a disability or handicap under the ADA, and as long as an employee can perform the essential tasks of his job with a reasonable accommodation, he cannot be fired for that disability. That’s handicap discrimination, and it’s illegal.

The connection here was clear because the worker was sent home right after his seizure and told not to return. It doesn’t even have to be that quick—as long as we can show the employee was fired because of the disability.



DISCRIMINATION BASED ON AGE

DISCRIMINATION BASED ON AGE

Workers over age 40 are protected from age discrimination by federal law, as long as their employer has 20 employees.

While age discrimination can happen against current employees, it is very common at the hiring stage, as many employers hesitate to hire older workers. Were you not hired because of your age? That can be harder to prove.

Direct evidence, while rare, can help prove your case. Did the person interviewing you make a comment about your age, showing a bias? Questions like “aren’t you getting close to retirement?” or “how much longer do you plan to work?” can provide insight into the employer’s motives.

Circumstantial evidence works, too. For example, if you are clearly the most-qualified candidate, but the employer hires someone less qualified who is significantly younger, that is likely a case of age discrimination.

We once represented a woman who had worked as a secretary at a box-making factory. The company moved her to the box-assembly area and had her manage a computer program. She also manually assembled boxes, which a couple decades later showed in her worn hands and swollen joints. She was diagnosed with arthritis.

One day, the company decided it had to lay off some people and she was one of them—despite the fact the company had an open position for secretary, a position she had previously held. She had the experience, but the company fired her anyway and hired a much younger woman.

This was a terribly sad case of age discrimination and an awful way to treat a veteran of the company, we thought. We represented this woman through the initial investigation phase until we secured a favorable settlement.



DISCRIMINATION BASED ON SEX OR PREGNANCY

DISCRIMINATION BASED ON SEX OR PREGNANCY

Employees cannot be treated worse because of their sex (male or female) or because they are pregnant—or intend to become pregnant. Also, sexual harassment is a form of sex discrimination, and if it is severe or pervasive enough, it too can be unlawful.

This is so common that we've written a separate chapter solely on sex discrimination and another on pregnancy discrimination. Check them out if you think they apply.



DISCRIMINATION BASED ON GENETIC INFORMATION



DISCRIMINATION BASED ON GENETIC INFORMATION

Since 2009, it's been illegal for employers to discriminate or harass employees based on their DNA. This includes information about a worker's genetic tests and the tests of his or her family members.

Family medical histories are included here because they're often used to determine whether someone has an increased risk of getting a disease in the future.

If this seems like an odd law, consider this: The act was passed to prevent employers from passing over a person who might have health problems in the future because he or she might cause the company's health care coverage costs to rise. Also, those employees cannot be forced to pay higher healthcare premiums.





THE FIRST STEP IN MOST DISCRIMINATION CASES

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Before an employee can file a discrimination complaint against her employer under Title VII, she must file a charge with the U.S. Equal Employment Opportunity Commission (the EEOC).

If the EEOC finds the claim has merit, it will issue a cause finding. (This is rare). It may even sue on her behalf. (This is rarer.) If the EEOC decides not to represent the employee, it will issue her a “right-to-sue” letter and then she can file a complaint and begin the litigation process.

Florida also has its own corresponding laws protecting employees against discrimination. Called the Florida Civil Rights Act, it mirrors Title VII in many ways.

Once the EEOC decides, and you get that right-to-sue letter, the clock is ticking: You only have 90 days to file a lawsuit. So if you’ve already filed a charge with the EEOC on your own, let your attorney know right away.





WHAT IS EMPLOYMENT RETALIATION?

WHAT IS EMPLOYMENT RETALIATION?

Discrimination, as described above, is illegal on its own. 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 or her to a more remote location, increasing surveillance, making threats, giving bad evaluations or references, and more.

Not every complaint about discrimination is protected, though. That's because not every instance of discrimination or harassment is illegal. 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 or off-color 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.

Some employees have both a claim for discrimination and one for retaliation if they are discriminated against and they oppose the discrimination—and then they find themselves fired or otherwise retaliated against.



ABOUT THE AUTHOR



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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

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At Wenzel Fenton Cabassa, P.A., we represent workers 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, P.A., we know that hard work doesn't always get rewarded and that employees are often abused or taken advantage of by their employers. 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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