

7.1: DISCRIMINATION LAW

INTRODUCTION

“Discrimination is rarely so obvious or its practice so overt that recognition of it is instant and conclusive, it being accomplished usually by devious and subtle means.”

This quotation is from the *300 Gramatan Association v. State Division of Human Rights*, 45 NY2d 176 (1978) case. This case involved an individual named Harold Johnson, who attempted to rent an apartment in a 96-unit apartment building owned by 300 Gramatan Avenue Associates in the City of Mount Vernon, NY. Mr. Johnson went to the premises on March 10, 1975, to examine a vacant five-room apartment and, after talking with the superintendent, attempted to rent it.

Mr. Johnson was told later that day that the apartment was “under litigation” and not available for rent. Mr. Johnson filed a complaint two days later with the State Division of Human Rights. The State Division of Human Rights held a hearing and determined that the owner of the building had violated NY’s Human Rights Law by discriminating against Mr. Johnson when they refused to consider him as a prospective tenant because of his race and color. Mr. Johnson is a black man. Testimony at the hearing established the vacant apartment was never under “under litigation” on March 10, 1975. On appeal, the NY Court of Appeals agreed with the Division of Human Rights that found in favor of Mr. Johnson.

Some discrimination is very overt and direct. But often it is not and is difficult to ascertain and prove. This chapter will discuss the various laws in place to combat discrimination and the remedies available to victims of discrimination.

FEDERAL LAWS AGAINST DISCRIMINATION

The federal government has enacted several statutes proscribing discrimination of various types and in various contexts, and providing remedies for violations of these statutes.

The following are employment-related anti-discrimination statutes:

Equal Pay Act of 1963, making sex discrimination in employment unlawful.

Title VII of the Civil Rights Act of 1964 (Title VII), making race, color, creed, religion, and national origin in employment unlawful. (Title VII’s anti-discrimination requirements apply to more than just employment discrimination.)

Age Discrimination in Employment Act of 1967 (ADEA), making age discrimination in employment unlawful, protecting individuals over the age of forty.

Americans with Disabilities Act of 1990 (ADA), making discrimination based on disability unlawful, whether the disability is permanent or temporary.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

Federal anti-discrimination laws related to employment are enforced by the administrative agency called the Equal Employment Opportunity Commission (EEOC). EEOC hearings are presided over by an Administrative Law Judge. Jurisdiction of the EEOC applies to any employer with 15 or more employees, and since it is enforcing federal law, extends over all states.

If a person feels they are a victim of discrimination that is a violation of federal law, they must exhaust their EEOC administrative remedies first before they can proceed in a federal court. Usually, if an EEOC decision goes against a person or company, the federal trial court will not substitute its judgment for that of the EEOC. It is a “presumption” that the preceding EEOC administrative proceeding had reached a proper conclusion.

Remedies under federal discrimination laws, whether administrative or judicial, entitle the party discriminated against to attorney fees, back pay, pre-judgment interest, and any lost benefits. Under federal laws, the prevailing party is not entitled to punitive damages.

NYS LAWS AGAINST EMPLOYMENT DISCRIMINATION

Very much like the federal Constitution, the NYS Constitution proscribes discrimination quite generally. In 1951 the NYS legislature enacted the Human Rights Law (HRL), which over the years has been amended and added to. The HRL forbids discrimination because of age, race, creed, religion, color, national origin, sex, sexual orientation, disability, or marital status as to hiring, compensation, and any other terms and conditions of employment. The HRL is found at Article 15 of NYS’ Executive Law.

DIVISION OF HUMAN RIGHTS (DHR)

The administrative agency that enforces the HRL is NYS' Division of Human Rights (DHR). Just like its counter-part EEOC at the federal level, the DHR is presided over by an Administrative Law Judge. Unlike the EEOC, jurisdiction of the DHR extends to any NYS employer with more than four employees.

Like the federal law, access to the NYS courts requires that administrative remedies of DHR be used and exhausted first before a victim of employment discrimination is allowed to file a court case. NYS courts are also reluctant to reverse decisions by the DHR.

In NYS, a person alleging employment discrimination may seek a jury trial, may obtain a job offer or reinstatement, may get compensation for lost wages, may recover some court costs, attorney fees, and may be awarded punitive damages (which are not allowed under federal law).

HOW ARE EMPLOYMENT DISCRIMINATION CASES ANALYZED?

As long as a claimant meets the jurisdictional requirements for the number of employees employed by the employer, a claimant has a choice of filing a complaint under the federal or state employment discrimination laws and agencies. The facts of their particular case may dictate which law or agency would be the best fit. Regardless of which they choose, the federal and NYS agencies and courts use the same two criteria, or standards, for determining whether there has been employment discrimination: (1) "disparate treatment" and, (2) "disparate impact."

DISPARATE TREATMENT: Disparate treatment occurs when someone is treated less favorably in an employment situation than others because of intentional unlawful discrimination. The burden of proof in this civil matter is by a preponderance of the evidence. A claimant must prove that the employer intended to discriminate. The claimant must prove that the employer's proffered reasons for such action as failure to hire, failure to give a pay raise, failure to promote, etc., are untrue and the actions were or were not taken because of the intentional unlawful discrimination of the employer. It is certainly easier to prove disparate treatment if it is not an isolated case. It is usually easier to prove intentional discrimination when there is a pattern of employer discriminatory behavior.

What happens when the evidence of a case shows that there is both a legitimate and illegal reason for the employer's actions? The U.S. Supreme Court decision in *Price Waterhouse v Hopkins*, 490 US 228 (1989) answers this question. Ann Hopkins brought a \$25M lawsuit against her employer, Price Waterhouse, alleging that her employer, a male-dominated accounting firm, had passed her over for promotion because she was a woman. At that time, the firm had 662 partners of which only seven were women. Price Waterhouse proved that they had lawfully not promoted the plaintiff because of her weak interpersonal skills and for that reason alone, she was not eligible for partnership status. The United States Supreme Court ruled in favor of Price Waterhouse, holding that so long as legitimate reasons outweighed the impermissible one, in this case sex discrimination, then the employer would not be liable for employment discrimination.

Abercrombie is a national chain of clothing stores that required its employees in 2008 to comply with a "Look Policy" that reflected the store's style and forbid black clothing and caps, though the meaning of the term cap was not defined in the dress policy. In 2008, Samantha Elauf, a practicing Muslim, applied for a position at an Abercrombie store. She wore a headscarf, or hijab, every day, and did so in her interview.

Elauf did not mention her headscarf during her interview and did not indicate that she would need an accommodation from the "Look Policy." Her interviewer likewise did not mention the headscarf, though the interviewer contacted her district manager, who told her to lower Elauf's rating on the appearance section of the application, which lowered her overall score and prevented her from being hired. The EEOC sued Abercrombie on Elauf's behalf claiming that the company had violated Title VII of the Civil Rights Act of 1964 by refusing to hire Elauf because of her headscarf.

The U.S. Supreme Court, on June 1, 2015 ruled 8-1 in Elauf's favor. (Note the length of time these actions can take.) The court held that if the applicant can show that the employer's decision not to hire an applicant was based on a desire to avoid having to accommodate a religious practice, then the employer has violated Title VII. The Court also held that Title VII does not demand mere neutrality; instead it creates an affirmative duty to accommodate religious practices.

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