



Lighter? Side of the Law

I Have the Right to Harass Women

Winston was fired after 19 years as an English teacher in the Maine Technical College System. While complaints had been made of sexual misconduct, he was dismissed because of a sexual harassment complaint, which was filed for kissing a female student "after a sexually suggestive conversation."

Winston sued, "claiming that he was terminated because of his 'mental handicap of sexual addiction.'" His expert witness testified that this disorder, which had led to his seeking the services of prostitutes, was a permanent condition but that Winston could perform his job as a teacher. The supreme court of Maine tossed out the complaint, noting that the ADA specifically excludes "sexual behavior disorders" from the term *disability*.

Source: Winston v. Maine Technical College System, 652 A.2d 911.

SUMMARY

- Title VII of the Civil Rights Act and the Age Discrimination in Employment Act requires employers not to discriminate on the basis of sex, race, color, religion, national origin, or age. This applies to all aspects of the employment process—hiring, promotion, discipline, benefits, and firing. The laws are enforced by the EEOC and private party suits.
- Legally, race means black or African-American, White, American Indian or Alaska Native, Native Hawaiian or Other Pacific Islander, Asian, and the ethnic category Hispanic or Latino. Under federal law, sex means male or female. There is no consideration for sexual orientation, although some state laws cover it.
- Sex discrimination specifically includes discrimination with respect to childbearing plans, pregnancy, and related medical conditions.
- Sexual harassment poses a legal challenge for managers, who must take steps to inform employees of the seriousness and the consequences of harassment and establish internal procedures to allow claims to be investigated with an assurance of confidentiality.
- Key tests that the courts use to look for discrimination are disparate treatment, where, everything else being equal, employment decisions are illegally motivated by discrimination based on race, sex, national origin, religion, or age; and disparate impact, where the effect of hiring or promotion standards is to discriminate, even if unintentionally, on the basis of protected class status.
- A charge of discrimination must be filed at a federal or state EEO office within 180 days (300 under state law) of a discriminatory event. The EEOC may dismiss a charge, offer to mediate a dispute, file suit on behalf of an employee or group of employees, or give the employee a right-to-sue letter to go forward with litigation with their own attorney.
- An employee bringing suit must meet the *McDonnell-Douglas* test, which applies to all aspects of the employment process, to show that they (1) belong to a protected class; (2) met the qualifications of the job in question; (3) were rejected for the job, or suffered some other adverse job action; and (4) the employer sought other persons with similar qualifications or otherwise treated the employee differently.
- When employers are sued under the discrimination laws, they must present a preponderance of evidence that the practices they engage in are not discriminatory. The practices must be related to legitimate business necessity. Practices that, when properly designed, are allowed to stand include professionally developed ability tests, *bona fide* seniority and merit systems, and *bona fide* occupational qualifications that provide a rationale for personnel decisions.
- Employers may have affirmative action plans imposed on them by court order as a remedy for discrimination. Federal contractors must have affirmative action plans in place. These plans are designed to increase minority or female representation in certain job categories. Setting goals to be met within certain time frames may do this.
- The Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 require employers to

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take positive steps to make accommodations for disabled workers.

- A disability under the ADA means a limitation of a major life activity, such as walking, breathing, seeing, and hearing. It does not mean an impairment that a

person can adjust to and not suffer a serious limitation on a major activity. The standard for disability is strict; the test is whether the disabled person can do the job in question with reasonable accommodation.

TERMS TO KNOW

You should be able to define the following terms:

Title VII	hostile environment	<i>bona fide</i> seniority program
discrimination	age	merit system
protected classes	genetic information	<i>bona fide</i> occupational qualification
race	right to sue letter	back pay
reverse discrimination	differential standard	front pay
color	harassment	affirmative action
national origin	constructive discharge	executive order
religion	disparate treatment	workforce analysis
reasonable accommodation	<i>prima facie</i> case	underutilization analysis
undue hardship	pretext	disability
sex	retaliation	reasonable accommodation
sexual harassment	disparate impact	
<i>quid pro quo</i>	business necessity	

DISCUSSION QUESTION

Would a dress code that required men to wear three-piece suits but stated only that women had to "look professional" be discriminatory against the male employees? What differences would be considered discriminatory?

CASE QUESTIONS

1. Parr applied for a position as an insurance representative for which he was well qualified. The manager who interviewed Parr told him he would probably be hired and also told him the company did not sell insurance to African Americans. Parr told the employment service that set up the interview of the manager's remarks and that he was married to an African-American woman. The employment service told the insurance company of Parr's marriage, at which point they declined to hire him. Was that a violation of Title VII? [*Parr v. Woodmen of the World Life Insurance*, 791 F.2d 888, 11th Cir. (1986)]
2. Nelson worked for Dr. Knight as a dental assistant for 10 years. There was some sexual banter, but Nelson did not regard it as serious. Knight's wife demanded Nelson be fired because she could be a threat to their marriage, so Knight fired Nelson, who then sued for sex discrimination. Do you think she had a case? [*Nelson v. Knight*, 2012 WL 6652747, Sup. Ct., Iowa (2012)]
3. Friedman applied for employment at a pharmaceutical warehouse. He was offered a position and told that, as a condition of employment, he would have to be vaccinated against the mumps. He refused to be vaccinated because the vaccine is grown in chicken embryos. He said that it would violate his system of beliefs as a vegan, which prohibits the use of any animal-related product. The employment offer was withdrawn; he sued for discrimination based on religion. The district court dismissed the case, holding that veganism is not a religion. Friedman appealed. Does he have a case? [*Friedman v. So. Cal. Permanente Medical Group*, 102 Cal.App.4th 39, Ct. App., Calif. (2002)]
4. Lack sued his former employer, Walmart, and his former supervisor, Bragg, for sexual harassment. He contended that Bragg made "inappropriate and

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