EMPLOYMENT DISCRIMINATION PROHIBITED UNDER TITLE VII OF THE UNITED STATES CIVIL RIGHTS ACT OF 1964

BY: Kenneth J. Rose, Esquire, The Rose Group, San Diego, California*

Originally published in English and Japanese in International Legal Strategy, Vol. XI-3 (March 2002)

***Kenneth J. Rose, an Attorney, is the Founder and Principal of The Rose Group. A Global Labor and Employment Law Firm located in San Diego, California, U.S.A. Mr. Rose represents employers with regard to international and domestic employment and labor law issues in a wide variety of industries. Mr. Rose is listed in the Guide to the World's Leading Labour and Employment Lawyers, published by the Legal Media Group. He is co-author of the chapter on U.S. employment and labor law in the multi-volume International Handbook on Contracts and Employment, published by the International Bar Association and Kluwer Law International, and has authored numerous articles on domestic and international employment law issues. Mr. Rose graduated in 1972 from the Cornell University School of Industrial and Labor Relations in Ithaca, New York. He received his law degree with honors in 1976 from the George Washington University Law School in Washington, D.C. Mr. Rose can be reached by Email: krose@rosegroup.us

Introduction

Employers in the United States are faced with a myriad of laws regulating the equal employment opportunity impact of their employment decisions, and these laws affect decisions ranging from the placement of a want ad, to employment terminations, to the value of pension benefits. The U.S. federal equal employment opportunity laws apply to most employers. However, employers must be careful to also comply with all applicable state anti-discrimination laws, as state and federal equal employment opportunity laws apply equally and simultaneously to covered employers. Some state anti-discrimination laws, such as California's Fair Employment and Housing Act, provide broader protections to employees than do the federal laws. Thus, the fact that an employer may be in compliance with the federal anti-discrimination laws will not always protect it from liability under state equal employment opportunity laws, and vice versa.

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. § 2000e et seq., revolutionized the individual rights of employees. It prohibits an employer from discriminating against an individual on the basis of *race, color, sex, national origin, or religion* with respect to hiring, discharge, compensation, promotion, classification, training, apprenticeship, referral for employment, or other terms, conditions, and privileges of employment. Title VII applies to employers with fifteen or more employees. The U.S. Equal Employment Opportunity Commission (EEOC) was established to enforce Title VII. Title VII's reach extends beyond the borders of the U.S. It covers United States citizens working abroad for American-owned or -controlled companies.

Other U.S. Federal Statutes Prohibiting Employment Discrimination

Although the focus of this article is Title VII and its prohibition of discrimination in employment on the basis of *race, color, sex, national origin, or religion,* brief reference is made to the other federal equal employment opportunity laws. In addition to Title VII, there are several major sources of federal legislation in the U.S. that impose equal employment opportunity obligations on employers, including: (1) the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq.; (2) the Age Discrimination in Employment Act (ADEA), 29 U.S.C.

§§ 621-634; (3) the Equal Pay Act, 29 U.S.C. § 206(d); (4) Presidential Executive Order 11246; and, (5) the Rehabilitation Act, 29 U.S.C. §§ 793, 794.

The ADA prohibits employers from discriminating in employment against persons with physical or mental disabilities. The ADA requires employers to make reasonable accommodation to the needs of disabled applicants and employees, as long as such accommodation does not result in undue hardship to the employer's operations. The ADEA prohibits discrimination on the basis of age against employees aged forty or older. The Equal Pay prohibits discrimination on the basis of sex with respect to wages paid for equal work on jobs that require equal skill, effort, and responsibility, and that are performed under similar working conditions. The CRA amended Title VII to allow for an award of compensatory and punitive damages, as well as jury trials in lawsuits brought under Title VII.

Executive Order No. 11246 and Sections 503 and 504 of the Rehabilitation Act, 29 U.S.C. §§ 793, 794, apply to employers who have a contractual or subcontractor relationship with the United States government to perform services or provide goods. Executive Order No. 11246 requires that every federal contractor and subcontractor agree not to discriminate against any employee or applicant for employment because of race, color, religion, sex, age, or national origin, and to take affirmative action to ensure that all applicants and employees are employed without regard to those classifications. The Rehabilitation Act prohibits federal contractors and subcontractors from discriminating against disabled individuals. The obligations of federal contractors and subcontractors under Executive Order No. 11246 and the Rehabilitation Act are enforced by the Office of Federal Contract Compliance Programs (OFCCP), a division of the U.S. Department of Labor.

Determining TitleVII Jurisdiction Over Japanese Firms with Employees in the U.S. and the Impact of International Treaties on Japanese Employers Doing Business in the U.S.

Japanese corporations doing business in U.S. are subject to Title VII. Citizenship of the employee is not relevant. Both U.S. and non-U.S. citizens working in the U.S. are protected by Title VII.

As already stated, Title VII applies to employers with fifteen or more employees. In determining whether a company has the requisite number of employees to be covered by Title VII, the courts have split on whether to include employees who

work abroad. Therefore, Japanese corporations that employ less than 15 employees in the U.S. may still be subject to Title VII if they employ more than 25 workers worldwide.

Due to a treaty between Japan and the U.S., Japanese corporations operating in the U.S. may avoid some Title VII concerns with regard to choosing upper level management for their U.S. operations. The U.S. with has negotiated friendship, Commerce and Navigation (FCN) treaties over 16 countries, including Japan, to encourage investments in each other's nation. The treaties include the right of companies of either nation to select within the territories of the other certain classes of employees, such as executives, attorneys or technical experts "of their choice." FCN treaties only provide protection for discrimination based on citizenship. Article VI (1) of the U.S.-Japan FCN Treaty provides:" Companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice."

The FCN Treaty applies both to Japanese corporations operating under their corporate names in the U.S., as well as to U.S. subsidiaries of Japanese corporations if the Japanese parent makes the management decisions. In those instances, the American subsidiaries also have the limited right to discriminate in favor of Japanese nationals in filling positions covered by the U.S.-Japan FCN Treaty.

To obtain the maximum protection from the FNC Treaty, it is recommended that the Japanese parent company should decide the terms and conditions of employment and make discharge decisions related to its Japanese expatriates assigned to work for the parent or a subsidiary in the U.S., limit the length of duty for Japanese nationals assigned to work in the U.S, and create job descriptions, explaining why it is necessary for a Japanese citizen to hold key jobs.

Categories of Discrimination Prohibited Under Title VII

Title VII prohibits an employer from discriminating against an individual on the basis of *race, color, sex, national origin, or religion.* As previously discussed there are other federal laws that prohibit discrimination due to age and disability.

1. Gender (Sex) Discrimination

Title VII's prohibition against discrimination based on gender or sex applies equally to men and women. This means that an employer may not use an individual's gender as a basis for employment decisions. An individual showing that the employer intentionally made an employment decision because of the individual's gender establishes sex discrimination. A double standard applied to men and women with regard to their interpersonal skills may also constitute sex discrimination. Thus, unlawful sex discrimination exists if a female employee is terminated because she did not behave in a way her employer deemed appropriate for women. An employee may also prove gender discrimination by demonstrating the adverse impact of a neutral policy on the members of one sex in comparison to the other.

a. Justifying That Gender is a Bona Fide Occupational Qualification

The only circumstances under which an employer can favor applicants of one gender over the other are if gender is a Bona Fide Occupational Qualification (BFOQ). This defense requires a showing by the employer of: (1) a relationship between gender and job performance, (2) the necessity of the classification for successful performance, and (3) that the job performance affected is the essence of the employer's business operation.

BFOQ defenses, however, are construed very narrowly and generally are not favored. For example, courts have ruled held that an airline's weight policy for flight attendants constituted unlawful discrimination against women, and was not justified as a BFOQ, finding that the airline presented no evidence that a requirement that female flight attendants be disproportionately slimmer than males bore a relation to their ability to greet passengers, push carts, move luggage or provide assistance in emergencies.

b. Pregnancy Discrimination

The Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k), enacted in 1979 as an amendment to Title VII, specifically provides that sex discrimination includes discrimination on the basis of pregnancy. That is, a pregnant employee is to be treated the same as any other employee, and when a female employee becomes unable to work due to pregnancy, childbirth, or related medical conditions, her disability is to be treated on the same basis as other disabilities. However, an employee's status as a "new mother" is not protected under the PDA.

In general, an employer may not terminate or even demote an employee because she is pregnant, and may not refuse to hire an applicant because she is pregnant if she is able to work and is qualified for the position. Reliance on stereotypes regarding pregnant women amounts to discrimination. Comments by supervisors about an employee's pregnancy—such as such as "if you have another baby, I'll invite you to stay home," "Oh, my God, she's pregnant again," and "you're not coming back after this baby" could be considered as evidence of pregnancy discrimination.

If a pregnant woman becomes unable to perform her regular job and requests a transfer to other work, a transfer is required only if transfers are granted to employees with other temporary disabilities. An employer providing leaves for disabilities also must provide leaves for pregnancy-related disabilities. Pregnant employees may not be required to begin their maternity leaves at a preset time (e.g., at the end of the seventh month of pregnancy), nor may an employer require a pregnant employee to remain on leave for a predetermined time (e.g., the employee cannot return until six weeks after the birth of the child).

However, an employer may require a pregnant employee to produce medical verification of her continued ability to work, as long as such verification is also required from other employees who inform the company that they anticipate a future disability leave. Similarly, an employee returning from pregnancy leave may be required to submit medical verification of her ability to work, provided that other employees returning from other disability leaves also must submit such verification. A job description may be sent to the employee's physician to ensure that the employee's physician fully understands the duties of the job involved, if this practice is also followed with other employees when medical verification of their continued ability to work is sought.

Under Title VII, the employee's job must be held open for her while on maternity leave on the same basis that jobs are held for employees on other disability leaves. Fringe benefits (including the accumulation of fringe benefits while on leave, payment into health or disability plans, and payment of sick leave during maternity leave) must be applied to pregnancy disabilities pursuant to the same terms and conditions as they are applied to other disabilities. Thus, an employer's medical insurance plan cannot exclude coverage for pregnancies. Although Title VII requires employers to treat pregnant employees the same as other employees requesting leave; it does not require preferential treatment.

c. Sexual Harassment

Sexual harassment is a form of gender discrimination prohibited by Title VII. As a result of the U.S. Supreme Court's decisions in Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998) and Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998), sexual harassment is now defined by the harm caused to the victim rather than the nature of the offensive conduct. The Supreme Court identified two categories of harassment: those involving a "tangible employment action" and those involving a "hostile work environment."

Tangible employment action harassment normally involves some type of monetary loss for an employee or significant changes in workload or work assignment. Therefore, it can more accurately be referred to as "economic harassment. It requires that the threat of job detriment or promise of job benefit actually result in some sort of employment action, such as a termination, promotion, demotion or reassignment to a considerably different job. Employers are strictly (or automatically) liable for conduct by managers that constitutes economic harassment.

Harassment that creates adverse working conditions but which does not result in a tangible employment action may be referred to as "environmental harassment." Such harassment can involve jokes, graffiti, comments, stories, photographs, gestures, e-mail, or written materials that interfere with an employee's work performance. Environmental harassment will be found where the conduct in question is: (1) unwelcome; (2) related to gender; (3) offensive both to the recipient and to a reasonable person; and (4) severe or pervasive. In addition, threats of job detriment or promises of job benefits that do not result in tangible employment actions may amount to environmental harassment if the threats create an intimidating, hostile, or offensive work environment. An employer will not be liable for environmental harassment engaged in by managers if the employer can show that (1) it used reasonable care to prevent and correct any harassment (such as by having a sexual harassment policy containing a complaint procedure of which employees were aware), and (2) the employee unreasonably failed to make a complaint under the policy or to avoid harm otherwise.

Courts have routinely ruled that managers and supervisors may not be found personally liable under Title VII for unlawful sexual harassment, as well as for other types of discrimination.

With respect to conduct between coworkers, an employer is responsible for acts of sexual harassment in the workplace where the employer knows, or should have known, of the harassment. However, legal iability may be avoided if the employer can show that it took immediate and appropriate corrective action after learning of the harassment.

2. Race Discrimination

Title VII prohibits discrimination based on race and thus prevents an employer from using an individual's race as a basis for any employment decision. The major races in the U.S. are African-Americans and Caucasians. All racial groups are equally protected from racial discrimination at the workplace. An individual showing that the employer intentionally made an employment decision because of the individual's race establishes unlawful racial discrimination. An employee may also prove race discrimination by proving the adverse impact of a neutral policy on the members of a particular race.

Title VII also protects employees who advocate on behalf of minorities. A university's African-American vice-president of human resources claimed he was discharged because he protested what he believed were discriminatory hiring practices. The court found that his conduct was protected under Title VII and ordered his race claim to proceed to trial. Title VII also protects employees from discrimination because they happen to associate with others of a different race.

3. National Origin Discrimination

Under Title VII, national origin has been broadly interpreted to mean the nation of origin of an applicant or employee, or his or her parents or ancestors.

One aspect of national origin discrimination that has evolved as an important issue, is a company rule that employees should only speak in English while at the workplace. Employer policies that require their employees to speak English-only at the workplace may be challenged on the basis that they discriminate against persons of national origins for whom English is not the primary language. The EEOC guidelines state that the "primary language of an individual is often an essential national origin characteristic," and that English-only rules require close scrutiny because they may violate Title VII by creating an atmosphere of inferiority, isolation, and intimidation based upon a person's national origin. The EEOC guidelines further conclude that while a limited English-only rule may be

permissible in some circumstances, such a rule would be deemed unlawful unless the employer can show that it is justified by business necessity and notifies the employees not only of the general circumstances when speaking only in English is required but also of the consequences of violating the rule. A speaking English-only policy will not support a national origin discrimination action where a business justification exists for the policy. One court found that the employer's goal regarding its English-only instruction was to lessen interpersonal conflict and to prevent non-Spanish speaking individuals from feeling left out of conversations; accordingly, it constituted a legitimate business reason justifying the policy.

4. Religious Discrimination

Title VII prohibits employment discrimination because of an individual's religious beliefs. It provides that employers must make reasonable accommodation to the religious practices of employees and applicants. Examples of reasonable accommodation include reassignment or transfer, restructuring of job duties, allowing reasonable time off for religious practices, flexibility in dress and appearance standards, and allowing voluntary exchanges of work schedules.

To succeed in an action for religious discrimination, it is not enough for an employee to establish membership in a particular religion, coupled with an "adverse employment action" such as a termination or demotion. Rather, the employee must also show that he was treated differently from employees who engaged in the same type of behavior or conduct, but who were not members of his religion.

Retaliation Against Employees Who Exercise Their Title VII Rights

Title VII prohibits employers from retaliating against employees for filing employment discrimination charges or assisting others in filing them and for opposing unlawful employment practices. In order to prevail in a lawsuit alleging retaliation, an employee generally must prove: (1) protected conduct, such as the filing of a charge of discrimination; (2) a negative or adverse action by the employer, such as a demotion or a termination directed against the person engaging in the protected conduct; and (3) a cause-and-effect connection between the first two elements.

The timing of the adverse employment action in relationship to the employee's protected activity is a factor in determining whether a causal connection exists

between the two; however, a lapse in time is not conclusive evidence that no retaliation occurred.

Proving and Defending Against Employment Discrimination Claims Filed Under Title VII

To demonstrate discrimination that violates Title VII, an individual must establish a connection between the employment condition or decision and a prohibited basis (such as sex or race). Such a connection may be established by pointing to: (1) individual instances of different or *disparate treatment* based on prohibited criteria, or (2) neutral policies or practices that have a much harsher or *disparate* impact upon a protected class to which an employee or applicant belongs (such as women, Latinos, or Muslims). Disparate treatment discrimination is intentional or direct discrimination. Disparate treatment discrimination may also be unlawful even though it is unintentional or indirect discrimination.

1. Disparate treatment discrimination

Disparate treatment discrimination occurs when an employee is intentionally treated differently because of an illegal criterion, such as race. The employee has the initial burden of establishing a prima facie case of disparate treatment. To do so, the employee must produce either direct or circumstantial evidence of the employer's motivation. Direct evidence may take the form of a supervisor's comments about the employee's race, sex, or other protected criteria. To establish a circumstantial case with respect to a failure-to-hire situation, the employee must prove that: (1) he or she is within a protected class (e.g., is of a particular race), (2) he or she applied for a job for which the employer sought applicants, (3) he or she was qualified for the job, (4) he or she was denied the job, and (5) the employer continued to accept applications for the job. This framework has been applied, with obvious modifications, to employment decisions other than hiring, such as terminations and denial of promotions.

If an applicant or employee establishes discrimination under a disparate-treatment theory, an employer may rebut the plaintiff's case by showing that the plaintiff was not treated any differently from other employees. For example, in a discipline case involving an Asian employee, the employer might show that a number of other employees of other racial backgrounds or national origins were similarly disciplined.

If, however, an employee was treated differently, the employer may show that the reasons for the different treatment were legitimate and nondiscriminatory. For example, nondiscriminatory reasons in hiring may include a consideration of qualifications, past experience, performance on an objective ability test, and past work record. Similarly, legitimate, nondiscriminatory reasons for discharge decisions may include breach of work rules and misconduct.

Once the employer articulates a legitimate nondiscriminatory reason for its decision, the employee then must prove that the reason the employer has given was false or a pretext for discrimination. However, an employee's proof that one of the reasons offered by the employer was pretextual does not justify a finding that all of the employer's proffered reasons were pretextual.

2. Disparate impact discrimination

The U.S. Supreme Court, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), stated that Title VII prohibits not only overt discrimination but also employment practices that appear neutral but are discriminatory in operation. Thus, Title VII prohibits not only intentional discrimination but also the unintentionally discriminatory consequences of employment practices that apply to all employees. Accordingly, under the disparate-impact theory, the employer's motivation in establishing the particular employment practice is irrelevant. The employee presents a prima facie case of discrimination by showing that a neutral policy has a harsher or adverse impact on a protected class (i.e., Hispanics, females, Asians, etc.)

For example, in *Griggs*, a company required that persons applying for manual labor jobs have high school degrees. Although the policy applied to all employees, more African-Americans were excluded because a greater number of African-Americans in the area did not graduate from high school, and the requirement was unrelated to the duties of the job. Statistical evidence is often used in disparate-impact cases in order to demonstrate the impact of a neutral policy upon a particular class.

If a plaintiff establishes that an employer's practice has a disparate impact upon a protected class, the burden of proof then shifts to the employer to demonstrate that the practice is job-related and consistent with business necessity. If the employer demonstrates, however, that a specific practice does not cause the disparate impact,

the employer does not need to further prove that the practice is required by business necessity.

However, even if an employer successfully establishes business necessity, the job applicant or employee may still prevail on a disparate impact claim by demonstrating that an alternative and effective business practice exists that would have a less discriminatory effect, and the employer refuses to adopt the alternative practice.

Another defense that an employer may use is to demonstrate that the statistical sample used by the applicant or employee is too small to establish discrimination. Yet another defense is to show that the terminated employee was not similarly situated to employees who retained their position.

Remedies for Unlawful Discrimination Under Title VII

The remedies available to an employee who successfully proves a case of employment discrimination are many and varied. For example, Title VII gives courts broad authority to remedy unlawful employment practices, and courts have ordered injunctive relief, back pay, front pay for lost future earnings, affirmative relief including promotions and reinstatement, orders directing employers to change or abolish employment practices, and requiring the employer to pay the employee's attorney's fees and costs.

Title VII also allows for awards of compensatory and punitive damages when the employer is found to have engaged in intentional/disparate treatment discrimination. Punitive damages are limited, however, to cases in which the employer has engaged in disparate treatment discrimination and has done so "with malice or with reckless indifference" to the employee's rights protected by Title VII. Malice and reckless indifference focus on an individual's state of mind, whether the employer had knowledge that it might be acting in violation of Title VII should first be examined. Employers will not be automatically subject to punitive damage awards even though a manager or supervisor acted with the requisite malice or reckless indifference. Instead, where an employer has undertaken good faith efforts to comply with Title VII—such as preparing and implementing written anti-harassment and discrimination policies, and educating employees on harassment and discrimination issues—the employer will not be liable for punitive damages for the discriminatory employment decisions of its managers when those decisions are contrary to the employer's policies.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.