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BASIC GUIDELINES: HOW TO PROVE DISCRIMINATION, HARASSMENT, AND RETALIATION

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I. COVERAGE

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination in employment based upon race, color, religion, sex, and national origin. Prohibitions based on age and disability are covered in separate laws, the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA") and the Americans with Disabilities Act Amendments ("ADAAA").

Title VII applies to employment agencies, labor organizations, and employers that employ more than 15 employees. The prohibitions of Title VII extend to every conceivable employment decision, such as hiring, firing, promotion, wages, training, and job classification. The ADEA extends to every employer with 20 or more employees and the Americans with Disabilities Act covers every employer with 15 or more employees.

The Texas Commission on Human Rights Act ("TCHRA"), TEX. LAB. CODE § 21.001 *et. seq.* is the state version of Title VII, but also includes age and disability. It covers every employer with 15 or more employees.

II. PROVING CLAIMS OF DISCRIMINATION

A. Disparate Treatment

1. Elements of Claim

    a   Title VII prohibits disparate treatment in terms and conditions of employment based on race, color, gender, national origin, and religion. An employee can make out a disparate treatment claim by direct or indirect evidence. Cases of direct evidence disparate treatment claims are rare. The most common disparate treatment claims are based on indirect or circumstantial evidence.

    i. Direct Evidence

    In a case where an employee has direct evidence of discriminatory animus
    – like a statement by a supervisor attributing a change in terms and conditions specifically based on a person's protected trait – it is well established that such direct evidence establishes a prima facie case for the employee and the burden of production and persuasion automatically shifts to the employer to show a legitimate, non-discriminatory reason(s) for its challenged actions.

ii. Circumstantial Evidence

In a disparate treatment claim based on indirect or circumstantial evidence, there is a well-established burden shifting approach for analyzing such claims established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under the *McDonnell Douglas* approach, the employee first must establish a prima facie claim of disparate treatment based on a protected trait covered by Title VII. If the employee succeeds, the employer must come forward with a legitimate, non-discriminatory reason for the challenged action. This is only a burden of production, not persuasion. Once the employer makes this showing, the burden shifts back to the employee to establish that the legitimate, non- discriminatory reason is a cover, or a pretext, for discriminatory animus. This is a burden of persuasion, not simply production.

iii. Statistical Evidence

On occasion, aggrieved employees will offer statistical evidence to prove that unlawful discrimination affected the employer's decisions. Such statistics can be powerful circumstantial evidence of unlawful bias.

For example, in a case alleging that the employer refuses to hire women because of their gender, the employee might compare the number of women in the workforce to the number of women within the employer's reasonable recruitment area that have the requisite skills to perform the employer's work. If this comparison reveals that women are employed in significantly lower percentages than their representation in the reasonable recruitment area, the employee's statistics may suggest that unlawful bias played a role in the employer's decisions.

Once the plaintiff demonstrates that there is a statistical disparity between a minority group and the representation of individuals with that protected characteristic in the employer's workforce, the employer is given the opportunity to refute the plaintiff's statistical evidence either by offering a legitimate nondiscriminatory reason for the disparity or by showing that the employee's statistics are inaccurate or insignificant.

2. The following are examples of what an employee must show to establish a prima facie case of disparate treatment discrimination under the *McDonnell Douglas* standard:

a   *Hiring Discrimination*

To allege a claim for racial discrimination in hiring, an employee must show:

i.   that he or she is a member of a protected class (race, national origin, sex, disability, age, *etc.*)

ii.   that he or she applied for the job

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