



## **A Discrimination Primer**

**By Michael W. Fox**

**Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**

301 Congress Avenue, Suite 1150

Austin, Texas 78701

Ph: (512) 344-4711

Fax: (512) 344-4701

[michael.fox@ogletreedeakins.com](mailto:michael.fox@ogletreedeakins.com)

**THE UNIVERSITY OF TEXAS SCHOOL OF LAW**

**ESSENTIAL EMPLOYMENT LAW**

**Fall 2016**

# **A Discrimination Primer<sup>1</sup>**

## **Coverage**

The Civil Rights Act of 1964 contains 11 parts (titles) that prohibit discrimination in voting rights, accommodations, education, employment, and the use of federal funds. Title VII of the 1964 Civil Rights Act (Title VII) prohibits discrimination in employment based upon race, color, religion, sex, and national origin. Prohibitions on the basis of age and disability are covered in separate laws, the Age Discrimination in Employment Act and the Americans with Disabilities Act.

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, Texas Labor 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.

## **Proving claims of discrimination**

### **Disparate treatment**

A disparate treatment discrimination claim occurs when the employee believes that the employer intentionally treated him or her less favorably because of his or her race, age, religion, etc. Intentional employment discrimination of this type may be proved by either direct or circumstantial evidence. Except in very limited circumstances, the employee has the burden of proving that the employer engaged in intentional, unlawful discrimination.

### **Direct evidence**

Direct evidence is the best kind of evidence to support an employee's claim, as it demonstrates that it was the intent of the employer to discriminate unlawfully in the challenged employment action. This is the best kind of evidence for an employee. Typically, this type of evidence will consist of statements by a manager or supervisor reflecting a bias against individuals based upon race, gender, age, or any other legally protected characteristic. Statements that constitute direct evidence of discrimination include:

- "I don't want any Mexicans working on this job."

---

<sup>1</sup> The portion of this paper on Title VII and other federal law were authored by my colleagues at Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Thomas A. Farr, Gretchen W. Ewalt and Phillip J. Strach.

- “I am going to demote her because she is black.”
- “I am not going to hire a woman for this position; she will just get pregnant and leave us without any help.”
- “We need to get rid of him and bring in some young blood.”

Statements of this type only constitute direct evidence of unlawful discrimination when the manager that makes them is responsible for the challenged employment decision. For example, if the shipping department manager made the first statement listed previously, that statement would not demonstrate that the accounting department manager discharged an employee because of the employee’s Hispanic national origin.

### **Circumstantial evidence**

Direct evidence of discrimination is rare. Therefore, most aggrieved employees rely on circumstantial evidence to establish their claims. The type of circumstantial evidence needed to establish a claim of employment discrimination will vary depending upon the employment decision at issue. Thus, the evidence required to prove that a former employee was discharged because of her gender will differ from the evidence required to prove an allegation that an employer refused to hire an applicant because of her gender.

For example, in order to allege a claim for racial discrimination in hiring, a plaintiff must show:

- that he or she is a member of a protected class (such as, African-American)
- that he or she applied for the job
- that he or she was qualified for the job
- that the employer was seeking applicants for the position
- that the plaintiff was not hired
- that the position remained open after the plaintiff was rejected
- that the employer continued to seek applicants.

A claim of discriminatory discharge under Title VII requires proof that:

- the former employee is a member of a protected class (such as, African-American)

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: A Discrimination Primer

First appeared as part of the conference materials for the  
2016 Essential Employment Law: A Practical Course in the Basics session  
"Discrimination and Harassment"