



Important Legal Updates on Discrimination Claims

Learning Objectives



Understand legal versus illegal discrimination.



Discuss litigation trends/unintentional violations.



Identify strategies to reduce liability.

What You Should Know About Legal Discrimination

- Legal versus Illegal
- LGBT/Bathrooms
- Religion



Legal Discrimination

- Determine the best candidate for the job;
- Identify who has the most growth or management potential; and
- Evaluate the top performer.



Illegal Discrimination

- Disability, race, religion, age, national origin, gender, sex, marital status, veteran status, genetic information, height, weight, misdemeanor arrest record or any other legally protected status.



Illegal Discrimination

- Unconscious discrimination
- *EEOC v. Abercrombie and Fitch Stores, Inc.*-An employer may not assume an applicant's religious practice prevents the performance of an essential job function.
- Changing interview questions based on stereotypes is improper.

Pretext Versus Honest Belief Rule

- *Fatemi v White*-Expanding examples of reasons to terminate after the fact is not “pretext.”
- *Curly v City of North Las Vegas*-Tolerating misconduct for years does not show pretext when employer ultimately decides to terminate.

LGBT

- Not conforming to sexual stereotypes
- Sexual orientation is a concept that is not understood without reference to sex.
- Sexual Orientation discrimination punishes employees that may have a close personal or marital association with members of a particular sex.
- City ordinances, Federal contractors, and other State laws.

Pretext Versus Honest Belief Rule

- *Burton v Freescale Semiconductor, Inc.* - A sudden first time campaign to overload a file to justify a decision that has already been made could raise an inference of pretext

Pretext Versus Honest Belief Rule

- *Yazdin v Conmet Endoscopic Technologies, Inc.*-The honest belief rule is inapplicable when the employer fails to make a reasonable informed and considered decision.
- *Sklyarsky v Means-Knaus US Partners*-The employee's opinion about his work performance is irrelevant. Employer won on summary judgment when the decision maker honestly believed the plaintiff was performing poorly.

Bona Fide Occupational Qualification

- Religion, sex, or national origin may be a BFOQ
- Race can NEVER be a BFOQ



Americans With Disabilities Act

- A “disability” is a physical or mental impairment that substantially limits one or more major life activities. This includes employees who have a record of an impairment, even if they do not currently have a disability. It also includes individuals who do not have a disability but are regarded as having a disability.

Essential Functions

- Employees must be able to perform essential job functions with or without reasonable accommodation.



Essential Functions

- *EEOC v Ford*-Essential functions generally are those that are determined in the employer's judgment or a written [job] description.



Americans With Disabilities Act

- Questions for the Jury (unless arbitration provision in employment agreement):
 - Whether a serious back injury prevents essential lifting functions are Kroger
 - Whether a deaf lifeguard is unable to do essential job functions
 - Whether an employee may sit on a chair at AT&T Mobile

Safety Defense

- *Michael v. City of Troy*. An employer's determination that an employee cannot safely perform his job function is objectively reasonable when the employee relies on a medical opinion that is objectively reasonable.
- *Henschel v. Clare County Road Commission*. An excavator who lost a leg in a motorcycle accident can't safely operate the excavator.

Reasonable Accommodations

- Engage in the interactive process.
- Employers do not have to agree to employee's specific request and are free to offer other reasonable accommodations.
- The ADA requires employers to re-assign to a vacant position if available. Michigan law does not have this requirement. Plaintiff attorneys should only bring claims in federal court.

Associational Discrimination

- Expense (cost of insuring).
- Disability by association (fear employee may contract the disability or fear employee is genetically predisposed to develop a disability).
- Distraction (an employee has been somewhat inattentive at work because of the disability of the associated person).