

# Discrimination

## Acknowledgements

EJC is grateful for the following individuals for their assistance in updating the Discrimination Chapter for the 6<sup>th</sup> Edition:

Jonathan Puth, Esq., Webster, Fredrickson, Correia & Puth PLLC  
Sheri Shilling, Esq., Webster, Fredrickson, Correia & Puth, PLLC  
David Kutch, Esq., Webster, Fredrickson, Correia & Puth, PLLC  
Daniel A. Katz, Esq., Gary Gilbert & Associates PC  
John R. Ates, Esq., Ates Law Firm PC  
Tom Gagliardo, Esq., The Gagliardo Law Firm  
Brian East, Esq., Advocacy Incorporated (Austin, Texas)  
Michael Robinson, EJC (Law Clerk)  
Averie Maldonado, EJC Seibel Fellow (Law Clerk)

## Table of Contents

<b>Table: Sources of Law – Discrimination .....</b>	<b>179</b>
<b>Table: Categories of People Protected from Discrimination .....</b>	<b>180</b>
<b>Federal Discrimination Laws.....</b>	<b>181</b>
<b>Title VII – Civil Rights Act of 1964.....</b>	<b>181</b>
<b>The Civil Rights Act of 1866, 42 U.S.C. §1981 &amp; the Civil Rights Act of 1870, 42 U.S.C. § 1983 .....</b>	<b>181</b>
<b>Pregnancy Discrimination Act .....</b>	<b>182</b>
<b>Age Discrimination in Employment Act.....</b>	<b>183</b>
<b>Americans with Disabilities Act (ADA) and ADA Amendment Act (ADA-AA) .....</b>	<b>183</b>
Definition of Disability.....	184
Qualified to Perform Essential Functions of the Job.....	186
Reasonable Accommodations .....	186
Direct Threat Defense .....	187
Alcoholism and Drug Addiction .....	187
<b>The Rehabilitation Act - Disability Discrimination Claims for Federal Employees and Employees of Federal Government Contractors.....</b>	<b>188</b>
<b>The Congressional and Presidential Accountability Acts .....</b>	<b>189</b>
<b>Equal Pay Act.....</b>	<b>189</b>
<b>Lilly Ledbetter Fair Pay Act.....</b>	<b>190</b>
<b>Genetic Information Non-Discrimination Act.....</b>	<b>190</b>
Definition of “Genetic Information” .....	190
Discrimination and Harassment Because of Genetic Information.....	191
Retaliation.....	191
Rules Against Acquiring Genetic Information.....	191

Confidentiality of Genetic Information .....	192
<b>Immigration Reform and Control Act – National Origin .....</b>	<b>192</b>
<b>Welfare to Work.....</b>	<b>192</b>
<b>Federal Contracts.....</b>	<b>193</b>
<b>Retaliation.....</b>	<b>193</b>
<b>Criminal Records .....</b>	<b>194</b>
<b>DC Discrimination Laws.....</b>	<b>194</b>
<b>Differences between DC and Federal Law .....</b>	<b>194</b>
Size of Employer.....	194
Protected Categories.....	194
English-Only Rules.....	195
Sexual Orientation and Transgender Discrimination .....	195
Damages & Filing Deadlines .....	195
<b>Maryland Discrimination Laws .....</b>	<b>196</b>
<b>Virginia Discrimination Laws .....</b>	<b>198</b>
<b>Theories of Liability – Proving Discrimination .....</b>	<b>199</b>
<b>Disparate Treatment .....</b>	<b>199</b>
McDonnell-Douglas Analysis.....	199
Adverse Employment Action.....	201
Direct Evidence Cases .....	201
Mixed Motive Cases.....	201
Pattern and Practice - Statistical Proof of Disparate Treatment.....	202
<b>Disparate Impact - When a Rule has a Discriminatory Effect .....</b>	<b>202</b>
<b>Harassment.....</b>	<b>203</b>
Employer’s Affirmative Defense .....	204
<b>Denial of Promotion.....</b>	<b>204</b>
<b>Retaliation.....</b>	<b>204</b>
<b>Constructive Discharge.....</b>	<b>205</b>
<b>Procedure for Filing Complaints of Discrimination.....</b>	<b>206</b>
<b>Filing Complaints against Private Employers – DC.....</b>	<b>206</b>
Filing Complaints at the Equal Employment Opportunity Commission (EEOC) .....	206
Filing at the DC Office of Human Rights.....	207
<b>Filing Complaints against Private Employers - Maryland.....</b>	<b>208</b>
Filing Complaints at the EEOC .....	208
Filing at the Maryland Commission on Human Relations.....	208
Local Agencies.....	208
<b>Filing Complaints against Private Employers - Virginia.....</b>	<b>209</b>
Filing Complaints at the EEOC .....	209
Virginia Human Rights Council Filings.....	209
Local Agencies in Virginia.....	209
<b>Claim Procedure: DC Government Employees .....</b>	<b>210</b>
<b>Claim Procedure: Federal Government Employees .....</b>	<b>211</b>
EEO Counseling – Stage 1 .....	211
Filing the formal complaint – Stage 2 .....	211
The investigation – Stage 3 .....	212
Agency decision/EEOC hearing/Filing suit in court – Stage 4 .....	212
<b>Deadlines for Filing Claims.....</b>	<b>213</b>

<b>Compulsory Arbitration Agreements .....</b>	<b>214</b>
<b>Special Issue: Undocumented Workers &amp; Discrimination Claims .....</b>	<b>214</b>
<b>The Fair Labor Standards Act/ Wage and Hour Laws.....</b>	<b>215</b>
<b>Protection under Federal and State Employment Discrimination Laws.....</b>	<b>216</b>

**Table: Sources of Law – Discrimination**

Federal Statute	42 U.S.C. §2000e 42 U.S.C. § 1981
Federal Regulations	29 C.F.R. § 1600.101 <i>et seq.</i>
D.C. Statute	D.C. Code §§ 2-1401.01-1411.06
D.C. Regulations	4 DCMR §§ 500-599; 700-799
Federal Employees	29 C.F.R. § 1614.101 <i>et seq.</i>
D.C. Employees	4 DCMR §§ 100-199
Virginia Statute	VA. Code Ann. § 2.2-214; § 2.2-2639; §§ 2.2-3900 <i>et seq.</i> ; § 40.1-28.6; §§ 51.5 <i>et seq.</i>
Maryland Statute	Md. Ann. Code Art. 49B § 16
Howard County (MD)	Howard County Code §§ 12.200-12.218
Montgomery County (MD)	Montgomery County Code Chapter 27
Prince George’s County (MD)	Prince George’s County Code § 2.185
Alexandria (VA)	City of Alexandria Code § 12-4
Arlington County (VA)	Arlington County Code § 6-22(d)
Fairfax County (VA)	Fairfax County Code, Chapter 11-1-5
Prince William County (VA)	Prince William County Code § 10.1

## **Table: Categories of People Protected from Discrimination**

The following table lists “protected categories” under Federal law, the District of Columbia, Maryland, Virginia, and counties in the D.C. metro area.

Table: Types of Discrimination Prohibited

	Fed	Title VII	1981	D.C.	Md.	Va.	HC	MC	PGC	ALX	ARC	FC	PWC
Race		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Color		✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Nat'l origin	✓	✓	*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Ancestry					✓			✓		✓			
Sex		✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Pregnancy		✓		✓	✓	✓							
Religion		✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Creed					✓		✓	✓	✓				
Age (40+)	✓			✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Age (18+)				✓									
Disability	✓			✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Personal Appearance				✓			✓		✓				
Marital Status				✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Familial Status							✓		✓				✓
Family Responsibility				✓				✓					
Parenthood/Kids								✓			✓		
Childbirth or related medical conditions				✓		✓	✓						
Sexual Orientation				✓	✓		✓	✓	✓	✓	✓		
HIV/AIDS & Public Employees						✓							
Genetic Status	✓			✓				✓					
Occupation							✓		✓				
Source of Income				✓			✓	✓					
Matriculation				✓									
Political Affiliation				✓			✓		✓		✓		
Gender Identity/Expression				✓				✓					

Federal (general)

⇒

Fed.

Federal—Title VII of the Civil Rights Act

⇒

Title VII

Federal—Section 1981

⇒

1981

(Although it does not technically cover “national origin,” Congress clearly intended to cover various ancestries as “races” when it passed the Civil Rights Act of 1866. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987))

D.C.—D.C. Human Rights Act

⇒

D.C.

Maryland—Fair Employment Practices Act

⇒

Md.

Virginia—Virginia Human Rights Act

⇒

Va.

Howard County

⇒

HC

Montgomery County

⇒

MC

Prince George’s County

⇒

PGC

Alexandria City

⇒

ALX

Arlington County

⇒

ARC

Fairfax County

⇒

FC

Prince William County

⇒

PWC

## Federal Discrimination Laws

### **Title VII – Civil Rights Act of 1964**

*Title VII* protects individuals from discrimination on the basis of **race, color, religion, sex, or national origin**. See 42 U.S.C. § 2000e-2.<sup>62</sup> Title VII was amended in 1978, in the Pregnancy Discrimination Act, to clarify that sex discrimination included discrimination on the basis of **pregnancy, childbirth**, and related medical conditions. *Id.* at § 2000e(k).

*Title VII* covers employers with **15 or more employees** (for each working day in each of 20 calendar weeks in the current or preceding calendar year). See 42 U.S.C. § 2000e(b).<sup>63</sup> It also covers **employment agencies** that discriminate in many areas of the referral process, including job advertisements, employment counseling, and job referrals. **Labor unions** operating or maintaining a hiring hall or having 15 or more members, and are recognized under the *National Labor Relations Act* or are recognized as the complaining worker's representative, also are covered. See 42 U.S.C. § 2000e(c),(e). Unlike some other anti-discrimination statutes, *Title VII* caps damages depending on the employer's size. While there are no limits on recovery of monetary losses (such as lost pay, benefits, expenses and interest), recoveries for compensatory damages for emotional injuries and punitive damages each are capped at \$50,000 to \$300,000, depending on the employer's number of workers.

### **The Civil Rights Act of 1866, 42 U.S.C. §1981 & the Civil Rights Act of 1870, 42 U.S.C. § 1983**

Race discrimination claims may also be brought under the Civil Rights Acts of 1866 and 1870. 42 U.S.C. §§ 1981, 1983. Both of these sections were created specifically to protect against racial discrimination; however, the courts have made clear that the concept of "race" as it was understood in 1866 at the passage of the statute covers what we may think of today as "national origin" discrimination. "Based on the history of Section 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (recognizing that in the 19<sup>th</sup> century, society considered as "races" such ethnicities as Irish, Swedes, Finns, Italians, Hebrews, Arabs, etc., thus rendering discrimination against such "races" illegal under Section 1981).

Section 1981 protects the rights of all persons to enter into and enforce contracts. An at-

---

<sup>62</sup> While many employees of religious institutions are covered by Title VII and other anti-discrimination statutes, some employees are not covered due to a "ministerial exception" grounded in the First Amendment to the Constitution. *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S.Ct. 694, 703 (2012) ("[T]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.")

<sup>63</sup> An agent may also be a covered employer, if the principal is large enough. See *e.g. Owens v. Rush*, 636 F.2d 283 (10th Cir. 1980) (holding Sheriff was agent of county, and therefore covered under Title VII). Conversely, a principal may be liable for the discriminatory acts of its agent.

will employment relationship is contractual in nature, thereby implicating Section 1981 protection. *See McLean v. Patten Communities*, 332 F.3d 714 (4th Cir. 2003). Unlike Title VII, Section 1981 protects against discrimination by employers of all sizes. Moreover, there is no requirement under Section 1981 to first exhaust administrative remedies by going to the Equal Employment Opportunity Commission or a state or local agency. Rather, a victim of discrimination may file directly in court for a Section 1981 violation.

Section 1983 allows people to sue government agencies for violations of their Constitutional Rights. Under this section, government officials may be sued and may be held personally liable for the harm caused.

In addition to discrimination, § 1981 authorizes claims for retaliation. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 445 (2008). Additionally, and unlike several federal laws such as Title VII, Sections 1981 and 1983 allow lawsuits against individual employees or supervisors who discriminate or retaliate. *Smith v. Bray*, 681 F.3d 888 (7th Cir. 2012); *Patterson v. County of Oneida*, 375 F.3d 206 (2d Cir. 2004)

The statute of limitations for claims under Sections 1981 and 1983 vary depending on the exact claim being brought. For hiring claims, the statute of limitations is the state's general statute of limitations (three years in Maryland, Virginia, or Washington, DC). Other claims, such as harassment, retaliation, or discriminatory termination, have the federal four-year statute of limitations. *See Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004).

Sections 1981 and 1983 do not have caps on damages that may be recovered.

## **Pregnancy Discrimination Act**

Under the 1978 *Pregnancy Discrimination Act (PDA)*, discrimination based on pregnancy constitutes sex discrimination under Title VII. *See* 42 U.S.C. § 2000e(k). An employer is required to treat pregnancy the same way that the employer treats other temporary disabilities, such as a broken leg. For example, an employer cannot force a pregnant employee on leave to use vacation benefits before receiving sick leave pay or disability payments unless the employer imposes a similar requirement on all employees for other disabilities.

Biologically, pregnancy ends with the birth of the child. This is also the point where protection under the *PDA* ceases. Under federal law, the status of being a mother or parent is not a protected class.<sup>64</sup>

### *Relationship to the ADA & FMLA*

A majority of courts hold that a normal pregnancy is not a disability under the *Americans with Disabilities Act (ADA)*. *See, e.g., Gudenkauf v. Stauffer Communications*, 922 F. Supp. 465,

---

<sup>64</sup> Under DC law, however, it is illegal for an employer to discriminate against a worker because of his or her familial responsibilities. *See* DC Code §2-1402.11(a) (2003). In other words, a worker cannot be discriminated against on the grounds that he or she is a parent. However, being a parent does not entitle a worker to accommodations or other special treatment.

473 (D. Kan. 1996). Complications resulting from pregnancy or a physical impairment aggravated by a pregnancy, however, may be a disability under the *ADA*. See, e.g., *Patterson v. Xerox Corp.*, 901 F. Supp. 274 (N.D. Ill. 1995).<sup>65</sup> In addition, the termination of employment because of pregnancy may also create a claim under the *Family and Medical Leave Act (FMLA)*. See 29 U.S.C. § 2612(a)(1)(A).

## Age Discrimination in Employment Act

The 1967 *Age Discrimination in Employment Act (ADEA)* prohibits discrimination against people who are age 40 and older. See 29 U.S.C. §§ 621-634. The benefited employee, who received the job, promotion, raise, etc., instead of the aggrieved employee, does not need to be younger than age 40 (the cut-off age for the protected class under federal law). The benefited employee only need be “significantly younger.” Therefore, a 60-year-old can win a case in which s/he was replaced by a 50-year-old.<sup>66</sup> The ADEA protects individuals from being discriminated against in favor of younger employees. Workers over the age of 40 cannot sue an employer on the basis that the employer treated older employees more favorably. In other words, the ADEA protects the older worker but not the younger worker. See *General Dynamics Land System, Inc. v. Cline*, 540 U.S. 581 (2004).

A successful ADEA plaintiff may obtain the following as damages: (1) injunction to prevent or repair discriminatory employment practices, (2) reinstatement or reinstatement, (3) an award of back pay and front pay, and (4) liquidated damages in an amount that potentially doubles the lost wages when a court finds a willful violation. Because damages under the ADEA are largely economic, plaintiffs in age discrimination cases often are advised to bring claims under both the ADEA as well as under state or local law such as the 1977 District of Columbia Human Rights Act, which allows for non-economic damages such as emotional damages and punitive damages. As with other employment statutes, the ADEA allows for the recovery of attorneys’ fees and costs.

## Americans with Disabilities Act (ADA) and ADA Amendment Act (ADA-AA)

The *Americans with Disabilities Act (“ADA”)* protects individuals with disabilities in a variety of ways. The three most common employment claims under the ADA are disparate treatment, disparate impact, and failure to accommodate. For these types of claims, applicants or employees have to prove that they have a **disability** and that they were **qualified** for the job. (Both of these terms are discussed below.) There are other kinds of claims under the ADA that may not require proof that the employee has a disability or is qualified, including retaliations claims, association claims, and claims regarding medical exams or inquiries.

The *ADA Amendment Act (ADA-AA)* greatly broadened the definition of disability under the ADA and became effective on January 1, 2009.

---

<sup>65</sup> DC law is similar to the federal law. See DC Code § 2-1401.05; 4 DCMR § 516.4.

<sup>66</sup> Unlike the ADEA, the DC Human Rights Act protects all persons 18 and older from discrimination based on age. See D.C. Code §§ 2-1401.01-1411.06.

## *Definition of Disability*

Disability is defined under the *ADA* as including three separate prongs—“actual” disability, “record of” disability, and “regarded as” disability. However, for complained-of actions occurring on or after January 1, 2009, the meaning of this terminology has changed substantially as a result of the *ADA-AA*. Because most cases are now governed by the *ADA-AA*, this section addresses the new definition. Also, pre-*ADA-AA* authority on the definition of disability is now questionable.

### Actual disability

“Actual” disability means a “**physical or mental impairment that substantially limits one or more major life activities**” of an individual. 42 U.S.C. § 12102(1)(A).

The *ADA-AA* does not affirmatively define the term “substantially limits,” but does state that it means something less than a significant or severe limitation. Pub. L. 110–325, §§ 2(a)(8) and 2(b)(4), 42 U.S.C. § 12101 (Note). The new law also expressly requires the definition of disability be construed broadly<sup>67</sup>, 42 U.S.C. § 12102(4)(A); 29 C.F.R. § 1630.1(c)(4), and should not demand extensive analysis. Pub. L. 110–325, § 2(b)(5), 42 U.S.C. § 12101 (Note); 29 C.F.R. § 1630.1(c)(4). Moreover, the *ADA-AA* states that the focus of an *ADA* claim should not be whether the individual has a disability but rather whether the covered entity has met its legal obligations toward the individual. Pub. L. 110–325, § 2(b)(5), 42 U.S.C. § 12101 (Note); 29 C.F.R. § 1630.1(c)(4). This means that the *ADA* will cover many more people.

In assessing whether an impairment is substantially limiting, the *ADA-AA* requires the determination be made “without regard to the ameliorative effects of mitigating measures.”<sup>68</sup> 42 U.S.C. § 12102(4)(E)(i); 29 C.F.R. § 1630.2(j)(1)(vi). Mitigating measures include, but are not limited to, things that an individual may use to reduce, or even eliminate, the effects of an impairment, such as medication, medical supplies, equipment, and appliances; prosthetics; implantable hearing devices; mobility devices and equipment and oxygen therapy equipment; assistive technology; learned behavioral or adaptive neurological functions; psychotherapy; behavioral therapy; and physical therapy. 42 U.S.C. § 12102(4)(E)(i); 29 C.F.R. § 1630.2(j)(5)(v). For example, a person with epilepsy whose seizures are controlled by medication now is assessed as if he or she were not taking anti-seizure medication. Also, courts still should consider the *negative* effects (or side-effects) of mitigating measures. *See* 29 C.F.R. 1630.2(j)(4)(ii). Note, however, that mitigating measures do not include “ordinary” eyeglasses or contact lenses.<sup>69</sup> 42 U.S.C. § 12102(4)(E)(ii) and (iii); 29 C.F.R. § 1630.2(j)(5)(i).

---

<sup>67</sup> In doing so, the *ADA-AA* effectively overruled *Toyota Motor Mfg. Ky. v. Williams*, 534 U.S. 184 (2002), which had held that the definition of disability was a “demanding standard.” *See* P.L. 110-325, § 2(b)(4), 42 U.S.C. § 12101 (Note).

<sup>68</sup> This provision effectively overruled *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999), and *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), which had held that mitigating measures must be considered when determining whether someone has a disability. *See* P.L. 110-325 §§ 2 (a)(4) and 2(b)(2), 42 U.S.C. § 12101 (Note).

<sup>69</sup> In other words, a person’s vision is assessed with regular eyeglasses on, 29 C.F.R. § 1630.2(j)(1)(vi), and if fully corrected, it may not constitute an “actual” disability. But such person may still have a “regarded as” disability, 29



The *ADA-AA* also requires that conditions that are episodic or in remission are disabilities if they would substantially limit a major life activity when active. 42 U.S.C. § 12102(4)(D); 29 C.F.R. § 1630.2(j)(1)(vii).

The *ADA-AA* defines major life activities by two non-exhaustive lists that include both everyday activities and common bodily functions:

(A) Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions include but are not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

42 U.S.C. § 12102(2). *See also* 29 C.F.R. § 1630.2(i)(1)(i) and (ii).

#### Record of disability

Even if applicants or employees do not have an “actual” disability, they may be covered under another prong of the *ADA*’s disability definition. The second prong is a “record of” disability. 42 U.S.C. § 12102(1)(B). A person with a “record of” disability is an individual “who has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.” 29 C.F.R. § 1630.2(k)(1). All of the *ADA-AA*’s rules of construction described above—broad construction, not considering mitigating measures, assessment in the active state, and expanded view of major life activities—also apply in a “record of” claim.

#### Regarded as disability

The third prong is “regarded as” disability, which has been completely redefined by the *ADA-AA*. It now covers any individual who has been subjected to an action prohibited by the *ADA* “because of an actual or perceived physical or mental impairment whether or not the impairment limits, or is perceived to limit, a major life activity.” 42 U.S.C. § 12102(1)(C).

Note that, as stated above, the individual no longer has to show that a covered entity perceived her to be substantially limited in a major life activity. Thus, the terms “substantial limitation” and “major life activity” are now irrelevant to “regarded as” claims. 29 C.F.R. § 1630.2(j)(2).

On the other hand, it is a defense to an allegation of “regarded as” coverage that the

---

C.F.R. Part 1630 App., § 1630.10(b), and may also be able to challenge an employer’s uncorrected visual-acuity standards. 42 U.S.C. § 12113(c); 29 C.F.R. § 1630.10(b).

actual or perceived impairment is both transitory (having an expected or actual duration of six months or less) *and* minor. “Regarded as” disability has by far the broadest coverage, and because of its expansiveness, it often should be the first prong to consider in establishing disability. *See* 29 C.F.R. § 1630.2(g)(3). It has one significant limitation, however: It will not support a failure-to-accommodate claim. 42 U.S.C. § 12201(h); 29 C.F.R. §§ 1630.2(o)(4) and 1630.9(d). Thus, the individual alleging that the employer failed to provide a reasonable accommodation must be able to establish an “actual” or “record of” disability for that claim.

### *Qualified to Perform Essential Functions of the Job*

As noted above, most (though not all) ADA claims require the applicant or employee prove *both* a disability (under one of the above prongs) *and* that they are **qualified**.

Under the ADA, a person with a disability is qualified if he or she “satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.” 29 C.F.R. § 1630.2(m). There is usually no dispute as to education, experience, and licenses. The more typical areas of inquiry are identifying the essential job functions, and if they cannot be performed without an accommodation, identifying a reasonable accommodation that would allow the individual to perform the essential job functions.

### *Reasonable Accommodations*

Discrimination includes failing to make reasonable accommodations to the known physical or mental limitations of an individual with a disability, or denying employment opportunities to such a person based on the need to make reasonable accommodations. 42 U.S.C. § 12112(b)(5)(A) & (B). A reasonable accommodation may include: job restructuring, a part-time or modified work schedule, use of leave, a leave of absence, making facilities or an application process more accessible, making employer-provided transportation accessible, and/or reassignment to a vacant position.<sup>70</sup> The employer need not make an accommodation if doing so would pose an undue burden.<sup>71</sup> 42 U.S.C. § 12112(b)(5)(A). In order to identify a reasonable accommodation, the employer and employee must typically engage in a good-faith, “interactive process.” 29 C.F.R. § 1630.2(o)(iii).

Under the ADA-AA, the courts have determined the following to be reasonable

---

<sup>70</sup> Reassignment is generally defined as requiring the employer place the individual into the vacant position, rather than forcing the person to compete for the open job. *See, e.g., Aka v. Washington Hosp. Center*, 156 F.3d 1284, 1304–1305 (D.C. Cir. 1998). Although there is contrary precedent in the Eighth Circuit, it is based on case law that has since been abrogated. *See EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012). On the other hand, many courts state that an employer does not have to create a new position as an accommodation. *See, e.g., Aka*, *supra*, 156 F.3d at 1305; *Sydnor v. Fairfax County, Va.*, 2011 WL 836948, at \*8 (E.D. Va. Mar. 3, 2011).

<sup>71</sup> Under DC law, an employer is not required to make a reasonable accommodation that is contrary to business necessity. *See* DC Code § 1-2502(5A); 4 DCMR § 513.

accommodations in specific cases: medical leave;<sup>72</sup> flexible work schedules;<sup>73</sup> teleworking;<sup>74</sup> assigning certain duties to a team member with a disability and excusing the performance of certain other assignments;<sup>75</sup> rest-and-recover breaks between assignments;<sup>76</sup> working from a seated position;<sup>77</sup> use of a lifting device;<sup>78</sup> sign-language interpreter for meetings and trainings.<sup>79</sup> The Supreme Court has held that an employer's duty to reasonably accommodate can be superseded by a bona fide seniority system.<sup>80</sup>

### *Direct Threat Defense*

An employer is not required to employ a person who constitutes a direct threat to the safety of others in the workplace. *See* 42 U.S.C. § 12113(b). An employer similarly is protected if a person would pose a direct threat to that individual's own safety. 29 C.F.R. § 1630.15(b)(2); *see also Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002).

Direct threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The analysis requires an individualized assessment of the individual's present ability to safely perform the essential job functions. This analysis also must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. 29 C.F.R. § 1630.2(r).

In determining whether an individual would pose a direct threat, the factors under consideration include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. 29 C.F.R. § 1630.2(r).

### *Alcoholism and Drug Addiction*

It is likely that alcoholism is a disability under the ADA-AA (although casual drinking or occasional over-drinking may not be). Moreover, the ADA-AA typically would apply to persons who are no longer using alcohol or drugs, but who have a history of addiction.

On the other hand, the ADA does not stop an employer from taking action against one who is *currently engaging* in the illegal use of drugs, 42 U.S.C. § 12114(a), or who has done so

---

<sup>72</sup> *Barnett v. Uniformed Services University of the Health Sciences*, 2011 WL 3511049, at \*11 (D. Md. Aug. 9, 2011).

<sup>73</sup> *Valle-Arce v. Puerto Rico Ports Authority*, 651 F.3d 190 (1st Cir. 2011).

<sup>74</sup> *Dahlman v. Tenenbaum*, 2011 WL 3511062 (D. Md. Aug. 9, 2011).

<sup>75</sup> *Miller v. Ill. Dep't of Transp.*, 643 F.3d 190, 198 (7th Cir. 2011).

<sup>76</sup> *Carter v. Pathfinder Energy Services, Inc.*, 662 F.3d 1134 (10th Cir. 2011).

<sup>77</sup> *Sydnor v. Fairfax County, Va.*, 2011 WL 836948 (E.D. Va. Mar. 3, 2011).

<sup>78</sup> *Zombeck v. Friendship Ridge*, 2011 WL 666200 (W.D. Pa. Feb. 14, 2011).

<sup>79</sup> *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103 (9th Cir. 2010).

<sup>80</sup> *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

recently.<sup>81</sup> Also, an employer may hold a current or former substance abuser to the same employment standards to which it holds other workers. *See* 42 U.S.C. § 12114(c)(4); 29 C.F.R. § 1630.16(b). This is true even if the unsatisfactory performance under those standards is related to the substance abuse. 29 C.F.R. § 1630.16(b) (4).

## **The Rehabilitation Act - Disability Discrimination Claims for Federal Employees and Employees of Federal Government Contractors**

There are three sections of the 1973 Rehabilitation Act relevant here—Section 501, which protects federal-sector employees; Section 503, which protects employees of certain federal government contractors; and Section 504, which protects employees of entities receiving federal financial assistance.

### Section 501

The ADA does not apply to federal employees so, as noted above, most federal employees of the Executive Branch must file their claims under Section 501 of the Rehabilitation Act of 1973.<sup>82</sup> 29 U.S.C. § 791. The substantive liability standards of Section 501 are the same as those of the ADA described above, 29 U.S.C. § 791(g); 29 C.F.R. § 1614.203(b), and the ADA-AA's changes in how "disability" is to be interpreted also apply equally to Section 501 claims, Pub. L. 110–325, § 7; 29 U.S.C. §§ 705(9)(B) and 705(20)(B), as amended. The charge-filing and exhaustion procedures are substantially different, however.<sup>83</sup> This section does not apply to uniformed members of the military, 29 C.F.R. § 1614.103(d)(1), and may not apply to airport security screeners. *See Joren v. Napolitano*, 633 F.3d 1144 (7th Cir. 2011).

### Section 503

Section 503 applies to employees of contractors holding federal contracts worth more than \$10,000. 29 U.S.C. § 793. (Note that many of those contractors also will be covered by the ADA.) Again, the substantive liability standards of § 503 are the same as those of the ADA described above, 29 U.S.C. § 793(d), and the ADA-AA's changes in how "disability" is to be interpreted also apply equally to § 503 claims. Pub. L. 110–325, § 7; 29 U.S.C. §§ 705(9)(B) and 705(20)(B), as amended. However, there is no private right of action under § 503; the only remedy is via an administrative complaint with the Department of Labor. *Martin Marietta Corp. v. Maryland Comm'n on Human Relations*, 38 F.3d 1392, 1403 (4th Cir. 1994).

### Section 504

Section 504 applies to recipients of federal financial assistance. 29 U.S.C. § 794. This does not include federal procurement contractors who receive federal money to purchase a good

---

<sup>81</sup> Many courts have interpreted the "currently engaging" language as including drug use that is sufficiently recent to justify the employer's reasonable belief that the drug abuse remained an ongoing problem. *See, e.g., Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1186–1187 (10th Cir. 2011) (collecting authorities).

<sup>82</sup> Although some courts also allow such claims to proceed under § 504, doing so does not seem to have any advantages, and it may invite confusion over the proper causation standard.

<sup>83</sup> *See* [http://www.eeoc.gov/federal/fed\\_employees/complaint\\_overview.cfm](http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm).

or service (and who instead may be covered under the ADA or § 503). Instead, federal financial assistance is typically money used for the public good. Thus, most recipients of federal financial assistance are state and local governmental entities, or private non-profit organizations.

Like the sections above, the ADA-AA applies to § 504 claims, P.L. 110–325, § 7; 29 U.S.C. §§ 705(9)(B) and 705(20)(B), as amended, and its substantive liability standards are the same as those of the ADA, 29 U.S.C. § 794(d), with two important exception—most courts hold that § 504 requires proof of sole cause,<sup>84</sup> and compensatory damages are not available without proof of intentional discrimination (usually defined as “deliberate indifference”).<sup>85</sup> Still, there may be good reason to proceed under § 504, including the fact that there is no exhaustion requirement against non-federal employers, *Lucas v. Henrico County School Bd.*, 822 F. Supp. 2d 589, 602–604 (E.D. Va. 2011) (collecting cases); the fact that the statute of limitations may be longer;<sup>86</sup> the fact that there is no damage cap, *see Roberts v. Progressive Independence, Inc.*, 183 F.3d 1215, 1223–1224 (10th Cir. 1999), interpreting 42 U.S.C. § 1981a, (although punitive damages are not available, *Barnes v. Gorman*, 536 U.S. 181 (2002)); and the fact that although states retain the power to assert immunity from ADA employment-discrimination claims, they have waived immunity from claims under § 504. *Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 491–496 (4th Cir. 2005); *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161 (D.C. Cir. 2004).

## The Congressional and Presidential Accountability Acts

The Congressional Accountability Act of 1995 extends the employment protections of the ADA and § 501 to employees of the House, Senate, Office of Congressional Accessibility Services, the Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment. *See* 2 U.S.C. §§ 1301(3), 1302(a)(3), 1302(a)(10), and 1311(a)(3).

Likewise, the Presidential and Executive Office Accountability Act extends those employment protections to certain employees of the Executive Office of the President, the White House, and the Vice President’s residence. *See* 3 U.S.C. § 411.

## Equal Pay Act

The 1963 *Equal Pay Act (EPA)*, a section of the Fair Labor Standards Act, 29 U.S.C. §

---

<sup>84</sup> *See, e.g., Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 498 n.17 (4th Cir. 2005).

<sup>85</sup> *See, e.g., S.H. ex rel. Durrell v. Lower Merion School Dist.*, \_\_\_ F.3d \_\_\_, 2013 WL 4752015 (3d Cir. Sept. 5, 2013) (non-employment case collecting authorities).

<sup>86</sup> Rather than requiring that a charge be filed within 180 (or 300) days, § 504 “borrows” the relevant state-law limitations period. Courts in Maryland typically apply that state’s three-year statute of limitations. *See, e.g., Jeandron v. Board of Regents of University System of Maryland*, 510 Fed. Appx. 223, 226 (4th Cir. 2013), citing cases. Courts in Virginia follow that state’s one-year statute of limitations. *Wolsky v. Med. Coll. of Hampton Roads*, 1 F.3d 222, 225 (4th Cir. 1993). DC courts are mixed, and the result depends on the court. *Federal* courts in the District have generally held that the District’s three-year limitations period for personal injury applies, but the District of Columbia Court of Appeals has applied a one-year statute. *Featherston v. District of Columbia*, 908 F. Supp. 2d 153, 154–155 (D.D.C. 2012).

206(d), prohibits discrimination in compensation based on sex. It is incorporated into Title VII by the Bennett Amendment, 42 U.S.C. § 2000e-2(h).

To make a case for compensation discrimination, a plaintiff must show unequal compensation for substantially equal work—entailing equal skill, effort, and responsibility—that was performed under similar working conditions. *See* 29 U.S.C. § 206(d)(1).

An employer can defend against wage discrimination cases by showing that the difference in compensation can be explained by a merit system, a seniority system, a system measuring quality or quantity of production, or some other *bona fide* factor other than sex. *See Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

## **Lilly Ledbetter Fair Pay Act**

The 2009 Lilly Ledbetter Fair Pay Act addresses the timeliness of compensation in discrimination claims. It superseded the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, which held that when an employer makes a discriminatory decision with regard to compensation, such as denying a raise, discrimination occurs at the time of the initial decision to deny the raise, rather than subsequently with each paycheck based on the discriminatory decision.

Under the *Ledbetter Act*, a discrimination claim arises each time an individual receives a paycheck. As long as the individual receives one discriminatory paycheck within the filing period, her complaint will be timely.

**Note:** The maximum back pay period is limited to two years prior to the filing of the complaint. *See* P.L. 111-2.

## **Genetic Information Non-Discrimination Act**

The 2008 Genetic Information Nondiscrimination Act (GINA), which prohibits genetic information discrimination in employment, took effect on November 21, 2009. Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information. GINA prohibits the use of genetic information in making employment decisions, restricts acquisition of genetic information by employers and other entities covered by Title II, and strictly limits the disclosure of genetic information. *See* 42 U.S.C.A. § 2000ff-1.

The EEOC enforces Title II of GINA (dealing with genetic discrimination in employment). The departments of Labor, Health and Human Services and the Treasury are responsible for issuing regulations for Title I of GINA, which addresses the use of genetic information in health insurance.

### *Definition of “Genetic Information”*

Genetic information includes information about an individual’s genetic tests and the genetic tests of his or her family members, as well as information about any disease, disorder, or

condition (i.e., his or her family medical history). Family medical history is included in the definition of genetic information because it often is used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future. *See* 42 U.S.C.A. § 2000ff.

### *Discrimination and Harassment Because of Genetic Information*

The law forbids discrimination on the basis of genetic information when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment. *An employer may never use genetic information to make an employment decision because genetic information doesn't tell the employer anything about someone's current ability to work.* Under GINA, it is also illegal to harass a person because of his or her genetic information. Harassment can include, for example, making offensive or derogatory remarks about an applicant or employee's genetic information, or about the genetic information of a relative of the applicant or employee. Harassment is illegal when it is so severe or pervasive that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted). The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee, such as a client or customer.

### *Retaliation*

Under GINA, it is illegal to fire, demote, harass, or otherwise “retaliate” against an applicant or employee for filing a charge of discrimination, participating in a discrimination proceeding (such as a discrimination investigation or lawsuit), or otherwise opposing discrimination. *See* 42 U.S.C.A. § 2000ff-6(f).

### *Rules Against Acquiring Genetic Information*

It usually will be unlawful for an employer to acquire an employee's genetic information. There are six narrow exceptions to this prohibition:

- Inadvertent acquisitions of genetic information do not violate GINA, such as situations where a manager or supervisor overhears someone talking about a family member's illness.
- Genetic information (such as family medical history) may be obtained as part of health or genetic services, including wellness programs, offered by the employer on a voluntary basis, if certain specific requirements are met.
- Genetic information may be acquired as part of the certification process for FMLA leave (or leave under similar state or local laws), where an employee is asking for leave to care for a family member with a serious health condition.
- Acquisition through commercially and publicly available documents like newspapers is permitted, as long as the employer is not searching those sources with the intent of finding genetic information.
- Acquisition through a genetic monitoring program that monitors the biological effects of toxic substances in the workplace is permitted when the monitoring is required by law or, under carefully defined conditions, when the program is voluntary.

- Acquisition of genetic information of employees by employers who engage in DNA testing for law enforcement purposes as a forensic lab, or for purposes of human remains identification, is permitted; however the genetic information only may be used for analysis of DNA markers for quality control to detect sample contamination. *See* 42 U.S.C.A. § 2000ff-1(b)

### *Confidentiality of Genetic Information*

It also is unlawful for an employer to disclose genetic information about applicants or employees. Employers must keep genetic information confidential and in a separate medical file. (Genetic information may be kept in the same file as other medical information in compliance with the Americans with Disabilities Act.) There are limited exceptions to this non-disclosure rule.

## **Immigration Reform and Control Act – National Origin**

The 1986 *Immigration Reform and Control Act (IRCA)*, which applies to employers with three or more employees, prohibits employers from discriminating against workers or prospective workers based upon national origin or citizenship status. *See* 8 U.S.C. § 1324b(a). Employers who are shown valid forms of employment verification must accept them and cannot require extra documentation of non-citizens or people who they perceive are non-citizens. *Id.* at § 1324b(a)(6). It also requires, however, that all employers be able to prove that workers hired after November 6, 1986 are documented and legally allowed to work in the United States. *Id.*

A worker cannot bring *Title VII* and *IRCA* claims under the same set of facts, so the *IRCA* is only useful when Title VII does not apply—such as when an employer has three to 15 employees, or when the discrimination is based on citizenship status. *IRCA* reports go to Department of Justice, Special Counsel for Immigration-Related Unfair Employment Practices. (800) 255-7688. P.O. Box 27728, Washington, DC 20038-7728. <http://www.usdoj.gov/crt/osc>. A worker generally has 180 days to file a complaint.

## **Welfare to Work**

The federal discrimination statutes apply to welfare recipients participating in welfare-to-work programs. EEOC guidance indicates that “welfare recipients participating in work-related activities are protected by federal anti-discrimination statutes if they are ‘employees’ within the meaning of the federal employment discrimination laws.” *Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, EEOC Enforcement Guidance (December 3, 1997), <http://www.eeoc.gov/>. The Second Circuit ruled that TANF recipients who are working in New York City's workfare program are “employees” covered by Title VII. *See United States v. City of New York*, No. 02-6102, 2004 U.S. App. Lexis 2439 (2d. Cir. Feb. 13, 2004).



Because TANF is a federally-funded program, Title VI of the Civil Rights Act, which prohibits discrimination in federally-funded programs, also applies. Title VI complaints are made to the Office of Civil Rights, U.S. Department of Health and Human Services.<sup>87</sup>

## Federal Contracts

Discrimination because of age, disability, race, color, religion, sex and national origin are prohibited by Executive Order, and these requirements apply to contracts and subcontracts of the federal government which are worth at least \$10,000. *See* Executive Order 11246. The Office of Federal Contract Compliance (OFCCP) at the Department of Labor is responsible for investigation and enforcement of these complaints.

## Retaliation

Almost all of the federal discrimination statutes contain anti-retaliation provisions. These provisions generally prohibit employers from retaliating against an employee for participating in or pursuing a complaint of unlawful discrimination in a formal discriminatory forum, e.g., the EEOC, or for opposing unlawful discrimination.

Participation in the making of a complaint or testifying at a discrimination hearing is almost always protected, unless it is done with malice. Employees who raise concerns about discrimination using internal employer mechanisms also are protected. *Crawford v. Metropolitan Gov't of Nashville and Davidson Cty.*, 129 S. Ct. 846 (2009). The employee must have a reasonable good faith belief that the underlying activity that he or she is opposing is unlawful discrimination to be considered to have engaged in protected activity by opposing discrimination.

The Supreme Court has found that retaliation need not amount to a tangible employment action or adverse employment action. Instead, it need only be action that would have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Burlington Northern & Santa Fe Railroad v. White*, 548 U.S. 53 (2006).

In addition, there is disagreement within the Circuits as to what remedies are available for retaliation claims under the ADA. For example, the Seventh Circuit limited the remedies in an ADA retaliation case to the equitable remedies set forth in 42 U.S.C. § 2000e-5(g)(1). *See Kramer v. Banc of America Securities, LLC*, 355 F.3d 961 (7<sup>th</sup> Cir. 2004). The Third Circuit, on the other hand, held that retaliation claims under the ADA were to be analyzed “under the same framework we employ for retaliation claims arising under Title VII.” *Shellenberger v. Summit Bancorp*, 318 F.3d 183 (3d Cir. 2003) (quoting *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997)). While the Supreme Court has not yet directly dealt with this issue, it is likely, based on its expansive holdings in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386, to agree with the Third Circuit and conclude that the Title VII analysis applies. Similarly, the Supreme Court has found

---

<sup>87</sup> DC’s welfare reform law also states that DC discrimination laws apply to welfare-to-work recipients. DC Code 3-205.19i (Supp. 1999).

an implied right of action for retaliation under Section 1981. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008). Notably, the Supreme Court has held that the ADEA protects federal employees who complain of age discrimination. *Gomez-Perez v. Potter*, 553 U.S. 474 (2008).

## **Criminal Records**

The EEOC has issued guidance on the consideration of criminal records in its compliance manual. Essentially, the EEOC suggested that excluding persons from employment on the basis of a criminal record, without a business necessity for the policy, likely would have an adverse impact on African-Americans and Hispanics and, as such, violates Title VII of the Civil Rights Act of 1964. For more extensive treatment of this issue, see *Chapter 12: Criminal Records as a Barrier to Employment*.

## **DC Discrimination Laws**

In many respects, the laws in DC are the same as the federal laws regulating employment discrimination. However, DC's anti-discrimination protections are more expansive. Throughout the above section, some differences have been noted in the footnotes. Additional key differences are discussed more fully below.

## **Differences between DC and Federal Law**

### *Size of Employer*

The *DC Human Rights Act*, DC Code §§ 2-1401.01-1411.06, differs from Title VII in that it applies to all employers, regardless of size. The only limitation is that the religious accommodation requirement, i.e., a day off for Sabbath worship or holy day observations, applies only to employers with five or more employees. *Id.* at § 2-1402.11(c). Religion-based discrimination still is prohibited for all employers.

### *Protected Categories*

As previously mentioned, the DC statute provides expanded coverage to different types of discrimination. Areas covered under DC law, but not federal law, include:

- Marital and familial status (including family responsibilities)
- Personal appearance (including transgender)
- Family responsibilities
- Sexual orientation or expression (gay, lesbian, bisexual, heterosexual, etc.)
- Gender identity or expression (transgender, transsexual, individuals who are non-conforming to gender stereotypes, etc.)
- Political affiliation
- Matriculation (being enrolled in college or vocational school)
- Place of residence or business

- Source of income
- Age discrimination protection is available to anyone over 18 years old (unlike federal law, which requires the claimant to be at least 40 years old). DC Code 2-1401.02(2)

### *English-Only Rules*

Rules that require workers to speak English-only are illegal under DC law. *See* 5 DCMR § 506.3. They also may constitute discrimination on the basis of race or national origin in violation of the 1977 D.C. Human Rights Act.

### *Sexual Orientation and Transgender Discrimination*

Sexual orientation is covered under the D.C. Human Rights Act; thus, it is illegal to discharge, suspend, or refuse to hire or promote an individual because of her sexual orientation or suspected orientation. Sexual orientation is defined as “male or female homosexuality, heterosexuality and bisexuality, by preference or practice.” *Underwood v. Archer Management Services, Inc.*, 857 F. Supp. 96, 98 (D.D.C. 1994).<sup>88</sup>

The D.C. Human Rights Act also was amended by the Human Rights Clarification Amendment Act of 2005 to protect against discrimination based on “gender identity or expression.” DC Code § 2-1402.11 (2006). These terms are defined as including the “gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual’s assigned sex at birth.” *Id.* Consequently, transgender persons now also are entitled to protection under the DC Human Rights Act. *Id.*<sup>89</sup>

### *Damages & Filing Deadlines*

The DC statute does not have a damages cap, while *Title VII* caps damages depending on

---

<sup>88</sup> In Maryland, the Anti-Discrimination Act of 2001 protects workers from workplace discrimination based upon sexual orientation. *See* 2001 MD S.B. 205 (May 15, 2001) (effective October 1, 2001). Sexual orientation, however, was limited to female or male homosexuality, heterosexuality or bisexuality; thus, transgendered persons and transsexuals are not covered by this law. Under the law, employers may not discriminate against people based upon sexual orientation in terms of hiring or firing. *See* Md. Ann. Code Art. 49B § 16(a)(1). Only employers with more than 15 workers are covered by this law. Additionally, religious organizations are exempt from this act.

<sup>89</sup> There is no protection for discrimination based on sexual orientation under Title VII. *See Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3<sup>rd</sup> Cir. 2001); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9<sup>th</sup> Cir. 2002) (en banc). A plaintiff, however, might successfully argue that s/he was discriminated against because of a **failure to conform**. *See, e.g., Centola v. Potter*, 183 F.Supp.2d 403 (D. Mass. 2002) (employer violated Title VII by failing to stop co-worker harassment of plaintiff based on his failure to conform to male sexual stereotypes). In that case, the court held that “[i]f an employer acts upon stereotypes about sexual roles in making employment decisions, or allows the use of these stereotypes in the creation of a hostile or abusive work environment, then the employer opens itself up to liability under Title VII’s prohibition of discrimination: on the basis of sex.” *Id.* at 409.

Same-sex harassment, however, is prohibited by Title VII under Supreme Court precedent. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) (male employee on an oil rig was forcibly subjected to sex-related harassment in the workplace by male co-workers such as being sodomized with a bar of soap, called homosexual, and threatened with rape).

the employer's size. In addition, federal claims are subject to a 300-day statute of limitations. The D.C. one-year statute of limitations is slightly more generous.

While federal government employees cannot bring claims under the DC Human Rights Act (DCHRA), employees of the DC government can bring claims under the *DCHRA* and *Title VII*, as well as the *ADA*, and the *ADEA*.

Private employees are not required to exhaust administrative remedies before bringing an action in court under the *DCHRA*. However, DC government workers who file discrimination claims under the *DCHRA* must exhaust administrative remedies on their statutory claims through the DC Office of Human Rights before going to court. *Newman v. DC* 518 A.2d 698 (DC 1986).

### **Maryland Discrimination Laws**

Careful consideration should be given to the significant differences between federal statutes and how they have been interpreted, and the Maryland statute and several county ordinances and how they have been interpreted. Issues of coverage and scope, administrative and judicial limitation periods, damages and venue should be evaluated before initiating a claim. This is a brief summary of the Maryland statute and the ordinances in Baltimore County, as well as Howard, Montgomery and Prince George's counties.

*Maryland's Fair Employment Practices Act* (FEPA) prohibits discrimination on the basis of race, color, religion, national origin, sex, age, marital status, sexual orientation, genetic information, or disability, unrelated in nature and extent to an individual's ability to perform a particular job, or because of the individual's refusal to submit to a genetic test or make available the results of a genetic test. *See* Md. Ann. Code Art. 20-606(a). FEPA also covers pregnancy. *Id.* at § 20-609. It applies to private employers, public employers, labor organizations, and joint labor-management training committees. *Id.* at § 20-601. Employers must have more than 15 employees each day for more than twenty weeks to be held accountable under FEPA. *Id.* at § 20-601.

There are significant textual differences between the Maryland statute and federal statutes. For example, "disability" and "employer" are defined more broadly in Maryland, accommodations that may be required during an employee's pregnancy (as of October 1, 2013) have been expanded and the protected age class is not defined as 40 or older. There are other textual differences.

Additionally, the Maryland Court of Appeals has indicated a willingness to depart from federal jurisprudence. In *Haas v. Lockheed Martin Corp.* 396 Md. 469, 914 A.2d 735 (2007) it declared:

"Maryland appellate courts have interpreted state statutes, rules, and constitutional provisions differently than analogous federal provisions on numerous occasions, even where the state provision is modeled after its federal counterpart."

“Maryland courts sometimes prefer interpretations of state statutes varying from similar federal statutes . . . .” p. 742, fn. 10

The *Haas* Court went on to determine that an act of discriminatory discharge occurs on the last date of employment, contrary to the Supreme Court’s holding that it occurs on the date the employee is notified that discharge will occur at a future date.

“We hold that, for the purpose of claims filed pursuant to § 42 of the Maryland Code, Article 49B, [now codified at State Government Article §20-601, *et seq.*] a “discharge” occurs upon the actual termination of an employee, rather than upon notification that such a termination is to take effect at some future date. In doing so, we find more persuasive the reasoning employed by those states that have rejected the [U.S. Supreme Court’s] *Ricks/Chardon* rule in favor of the one we adopt today.” *Id.* at 750.

A plaintiff’s burden of proof is also different under Maryland law. The Court of Appeals in *Ruffin Hotel Corp. of Maryland v. Gasper*, 418 Md. 594, 17 A.3d 676 (2011), which was brought under the Montgomery County antidiscrimination ordinance stated:

“We believe Maryland law to be settled that a plaintiff’s burden is to prove that the exercise of his or her protected activity was a “motivating” factor in the discharge, thereby creating burden-shifting to the defendant. An instruction that imposes upon a plaintiff the burden of proving that the exercise of his or her protected activity was the “determining” factor in the discharge from employment is a misstatement of the law, and erroneous.

Counties may enact separate ordinances when authorized by the General Assembly. Four counties have been so authorized. See: Montgomery County Code §27-1, *et seq.*, Prince George’s County Code §2-185, *et seq.*, and Howard County Code §12.200, *et seq.*, Baltimore County Code §29-1-101, *et seq.* While there is no such authorization set forth in Title 20, Baltimore City has enacted an ordinance as well. Its validity is subject to question.

There are significant differences between Title 20 and the several county ordinances, including, but not limited to the following:

While Title 20 imposes the same caps on damages as *Title VII* of the Civil Rights Act, county ordinances do not.

While Title 20 applies only to employers with 15 or more employees, the Howard County ordinance applies to those with five or more workers, while the Montgomery and Prince George’s ordinances apply to those with just one employee. The Baltimore County ordinance only applies to employers with less than 15 employees – which deprives such employees of a common law right of action as articulated in *Brandon v. Molesworth*, 104 Md. App. 167, 655 A.2d 1292 (1995). In that case, the Court held that an employee exempted from statutory protections had a common law claim for gender discrimination. This suggests that any employee excluded from Title 20 and county ordinances may have a common law claim for other forms of discrimination.

Some county ordinances have added protected categories. For example, Prince George's County prohibits discrimination based on "familial status" and "political opinion," neither of which is specified in Title 20. Montgomery County prohibits discrimination based on "family responsibilities;" Howard County has added "occupation" and "gender identity or expression" and Baltimore County also prohibits "gender identity or expression" discrimination. A comprehensive list of additional protected categories is found under each county's code.

Employees who are discriminated against in violation of county's codes may bring civil actions in circuit court within two years of the discriminatory act. However, as with Title 20 and federal statutes such as *Title VII*, one must first exhaust administrative remedies. Claims must be filed administratively within one year of the complained act or omission in Montgomery County, but within 180 days in Prince George's County and six months in Howard and Baltimore counties. Note that not all months are 30 days long which means there can be a difference between "six months" and "180 days." For example, January 1 to June 30 is six months, but it is also 181 days. In Prince George's County, an administrative complaint alleging the occurrence of a discriminatory act on January 1 and filed on June 30 would be untimely.

In *Pope-Payton V. Realty Management Services, Inc.*, 815 A.2d 919, 149 Md. App. 393 (2003) the Court of Special Appeals rejected the contention that venue lies where an employment decision was made and held that venue is proper in the county where the decision is implemented, i.e., where the employee works or worked.

The Maryland Equal Pay Act prohibits employers from paying male or female employees different wages for work involving equal or substantially similar skill, effort and responsibility, unless the disparity exists based on a merit system, a seniority system, an incentive system, or some other lawful factor other than sex. The law applies to any employer with two or more employees with more than \$250,000 in annual gross sales. See Md. Ann. Code Lab. & Empl. Art. § 3-301 *et seq.*

## **Virginia Discrimination Laws**

The *Virginia Human Rights Act* prohibits discrimination on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability for employers with more than five but less than 15 employees. See Va. Code Ann. §§ 2.2-3900 *et seq.* Additionally, discrimination against qualified individuals who have physical or mental impairments is covered under the *Virginians with Disabilities Act*. *Id.* at §§ 51.5 *et seq.* Claims under the *Virginia Human Rights Act* must be either filed in court within 300 days or the employee must have filed with a local human rights agency within 300 days. See VA. Code Ann. §§ 2.2-3903(c).

Under the *Virginia Human Rights Act*, certain agencies must review their regulations and services to ensure there is no discrimination against individuals with HIV or AIDS. *Id.* at § 2.2-214. Public workers and those working for government contractors also are protected from discrimination, on bases similar to those covered in the *Virginia Human Rights Act*. *Id.* at §§

2.2-4200-4201. In addition, Virginia requires equal pay regardless of gender. *Id.* at § 40.1-28.6. The *Virginia Human Rights Act* only covers employers who have between five and 15 workers. *Id.* at §2.2-2639.

Unlike in Maryland, a worker cannot rely on any public policy contained in the *Virginia Human Rights Act* (VHRA) to support a wrongful termination claim in Virginia. *See Doss v. Jamco*, 254 Va. 362, 492 S.E.2d 441 (Va. 1997). If the policy is reflected elsewhere in the Virginia Code (such as in a criminal statute), however, the fact that it is also in the VHRA will not, by itself, defeat the claim. *See Mitchem v. Counts*, 259 Va. 179, 523 S.E.2d 246 (2000).

## **Theories of Liability – Proving Discrimination**

There are two main types of discrimination cases: disparate impact cases and disparate treatment cases. In disparate impact cases, the plaintiff claims the employer had a practice or policy that applies to all employees or applicants that had a disparate impact on a protected group. In disparate treatment cases, the plaintiff claims that he or she was treated differently because of his or her membership in a protected group. Harassment/hostile work environment cases are a subset of the disparate treatment type case. In these cases, the plaintiff claims that he or she has been subjected to harassment on the basis of his or her membership in a protected category that is severe and pervasive enough to create a hostile work environment. Each of these legal theories is discussed below.

### **Disparate Treatment**

Disparate treatment claims can be proven by direct evidence (e.g., an admission), or indirect/circumstantial evidence. Very few plaintiffs have direct evidence that unlawful discrimination has occurred, so most cases are brought relying on indirect or circumstantial evidence. Plaintiffs who lack direct evidence of discrimination need to have facts that roughly fit into the framework used by federal courts. The basic framework, described below, applies to all types of discrimination (race, sex, etc.), and is generally applicable in state court actions as well, even for non-federal claims.

#### *McDonnell-Douglas Analysis*

In a disparate treatment case, the plaintiff must first establish his or her *prima facie* case, which consists of four elements: 1) The plaintiff was a member of a protected category; 2) the plaintiff was qualified for his or her position or the promotion sought; 3) an adverse employment action was taken against the worker or applicant (e.g., fired, not hired, constructive discharge); and 4) the position was given to a less qualified person or kept open. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Jefferies v. Harris County Community Action Association*, 615 F.2d 1025, 1030 (5<sup>th</sup> Cir. 1980).

Generally, the position must have been given to someone not in the plaintiff's protected class, but there are exceptions, such as in age discrimination cases where a 60-year-old plaintiff

could bring a claim for being denied a position in favor of a 50-year-old employee (both are in the protected class).

Once the plaintiff establishes a *prima facie* case, the employer has the burden to produce evidence showing that there was a legitimate, non-discriminatory reason for the adverse employment decision. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). This is merely a burden of production, not a burden of proof. *Burdine*, 450 U.S. at 255.

Sometimes an employer will defend itself by arguing that the decision for the adverse employment action was made by someone in the same protected group as the plaintiff. Note, however, that the mere presence of one minority in the decision-making process cannot shield the company from all charges under civil rights statutes. *See In re Lewis*, 845 F.2d 624, 635 (6<sup>th</sup> Cir. 1988); *Billingsley v. Jefferson County*, 953 F.2d 1351, 1353 (11<sup>th</sup> Cir. 1992).

If the defendant meets its burden of production, the burden shifts back to the plaintiff to show by a preponderance of the evidence that the reason offered by the defendant is merely a pretext for discrimination. *See McDonnell*, 411 U.S. at 804-05. This requires a showing that (1) the reason was false and (2) discrimination is likely the actual reason. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993) (quoting *Burdine*, 450 U.S. at 256); *see also Aka v.*

*Washington Hospital Ctr.*, 156 F.3d 1284, 1289 (DC Cir. 1998). Some DC cases laying out this framework include *Arthur Young & Co. v. Sutherland*, 631 A.2d 354 (DC 1993); *RAP, Inc. v. District of Columbia Commission on Human Rights*, 485 A.2d 173 (DC 1984).

Critically, however, once an employer puts forth its purported non-discriminatory reason for an adverse action, the plaintiff has no burden to prove a *prima facie* case. *Brady v. Office of Sergeant at Arms*, 520 F.3d 490 (2008):

In a *Title VII* disparate-treatment suit where an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not — and should not — decide whether the plaintiff actually made out a *prima facie* case under *McDonnell Douglas*. Rather, in considering an employer's motion for summary judgment or judgment as a matter of law in those circumstances, the district court must resolve one central question: Has the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin? *See Hicks*, 509 U.S. at 507-08, 511, 113 S.Ct. 2742; *Aikens*, 460 U.S. at 714-16, 103 S.Ct. 1478.2



### *Adverse Employment Action*

An **adverse employment action** is one that produces a significant change in the employee's status—affecting the terms, conditions, or privileges of employment. Examples include a decision to terminate or failure to promote, a decision not to hire, a reassignment with greatly different responsibilities, or a change in benefits. See *Brown v. Brody*, 199 F.3d 446, 456 (DC Cir. 1999) (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). In *Stewart v. Ashcroft*, the D.C. Circuit found that the denial of an opportunity to move up within the “hierarchy” of a division within the Department of Justice constituted an adverse employment decision. 2003 U.S. App. LEXIS 26165 (DC Cir. 2003). The court stated that “failing to select an employee for a position with substantially greater supervisory authority is an adverse employment action.” *Id.* at 13. In *Daka, Inc. v. McCrae*, the DC Court of Appeals found that a transfer to a position with no responsibility, no potential for overtime, and “a diminution of job title that adversely affected his employability” could constitute an adverse employment action. 2003 D.C. App. LEXIS 752 (DC 2003). Importantly, however, this “adverse action” formula only applies in discrimination cases. In retaliation cases, by contrast, an “adverse” action includes any action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Burlington Northern & Sante Fe Railway. Co. v. White*, 548 U.S. 53 (2006).

### *Direct Evidence Cases*

When there is evidence of animus, the burden-shifting framework does not apply, and the case is analyzed as a direct evidence claim. See *Kearney v. Town of Wareham*, 316 F.3d 18, 22 (1<sup>st</sup> Cir. 2002). The classic example of direct evidence or animus is when a supervisor tells the worker that she is being fired because there are “too many women in the department.” This rarely happens, and, when it does, the plaintiff rarely has credible evidence to corroborate her version of the events. If the plaintiff does have such evidence, then liability is generally established.

### *Mixed Motive Cases*

The Supreme Court clarified in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), that the Civil Rights Act of 1991 amended *Title VII* to allow for limited remedies in mixed motive disparate treatment cases involving direct evidence cases or in indirect evidence cases analyzed under *McDonnell Douglas*. Mixed motive cases are when part of the employer's reason for taking an adverse action against the plaintiff involved unlawful discrimination. The plaintiff, however, must still prove that the unlawful reason was a **motivating factor** in the employer's decision. If the employer can prove that the same adverse action would have been taken even without the unlawful discriminatory motive, the plaintiff may still recover injunctive and declarative relief, as well as attorney's fees. See generally LARSON K. LEX, LEXSTAT 1-1 EMPLOYMENT DISCRIMINATION § 1.07 (2006); *Landgraf v. Usi Film Prods.*, 511 U.S. 244 (1994). The mixed motive analysis is not available for cases brought pursuant to the ADEA (age discrimination) cases. *Gross v. FBL Financial Services*, 129 S. Ct. 2343 (2009).

### *Pattern and Practice - Statistical Proof of Disparate Treatment*

If an employer has a pattern of discrimination against a particular group, it may be used as evidence that the employer discriminated against a **particular** person. The leading case on this point is *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), which lays out the elements of proof and the role of statistics. The *Teamsters* case discusses the particular allocation of proof in a class action, but pattern and practice evidence is helpful in developing individual cases as well. A plaintiff may introduce any of the following evidence: statistics, testimony of employees, statements by decision makers (*e.g.* Texaco executives being taped), evidence of highly-subjective decision-making practices, evidence of specific exclusionary practices, or evidence of a pattern of discrimination charges. Again, the employer may articulate some legitimate non-discriminatory reason, and the worker must then show that the employer's reason is a pretext for the real reason.

### **Disparate Impact - When a Rule has a Discriminatory Effect**

In a disparate impact case, a worker claims that a particular employment practice, such as a personnel rule or a common practice, violates *Title VII* because it has a **disparate impact** on members of a protected class. It is not necessary to prove that the employer intended to discriminate, so even "innocent" employers may be found liable under this theory.

The plaintiff's *prima facie* case consists of showing that the employment practice has a disproportionate adverse impact on a protected class. The employer may defend by showing that the practice is required by business necessity, also sometimes referred to as a bona fide occupational qualification (BFOQ), which requires the employer to show that (1) the practice involves the essence of the business, and (2) either that substantially all people in the protected category cannot perform the job or that it is impossible to evaluate people on an individual basis.<sup>90</sup>

One of the leading cases discussing the disparate impact theory is *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). In *Griggs*, the Supreme Court held that the employer's requirement that hired applicants possess a high school diploma had an unlawful disparate impact on African Americans, where a high school diploma was not significantly related to positive job performance. *See also Dothard v. Rawlinson*, 433 U.S. 321 (1977) (holding prison could set height and weight requirements for guard positions, but could not create male- and female-only positions); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (holding rule barring former heroin addict on methadone from driving subway was justified by business necessity).

The disparate impact analysis is limited to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process. *See Wards Cove Packing Company, Inc. v. Antonio*, 490 U.S. 642 (1989) (finding mere existence of racial

---

<sup>90</sup> DC has a more restrictive definition of business necessity, but the plaintiff may still prevail if s/he shows that there is an alternative employment practice with less effect on the protected group that still achieves the employer's business objective. *See* DC Code § 2-1401.03(a); 4 DCMR § 506.

imbalance insufficient to establish disparate impact without demonstration that a particular employment practice created disparate impact); *American Federation of State, County and Municipal Workers v. State of Washington*, 770 F.2d 1401, 1406 (9<sup>th</sup> Cir. 1985).<sup>91</sup> However, "if the complaining party can demonstrate to the court that the elements of [the employer's] decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice." *McClain v. Lufkin Industries*, 519 F.3d 264 (5<sup>th</sup> Cir. 2008) citing 42 U.S.C. § 2000e-2(k)(1)(B)(I).

## Harassment

Harassment can come in two forms. The first is **quid pro quo** harassment, which is generally only implicated in the sexual harassment context. It involves the promise of a benefit or a threat based on the employee's willingness or unwillingness to submit to sexual advances and/or offers. This type of harassment is addressed in the section on Sexual Harassment contained in this Manual. The second is harassment resulting from the creation of a **hostile work environment**.

A hostile work environment exists when there is unwelcome behavior on the basis of a protected category that is "sufficiently severe and pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). A hostile work environment is a "workplace . . . permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)). In addition, the plaintiff must perceive the environment as abusive in order for a hostile environment to exist. See *Harris v. Forklift Systems*, 510 U.S. 17, 21-22 (1993).

The behavior does not need to be directed specifically at the victim in order to be considered harassment. See *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415-16 (10<sup>th</sup> Cir. 1987); cf. *Garvey v. Dickinson College*, 763 F. Supp. 799, 801-02 (M.D. Pa. 1991) (finding incidents against others cannot be too attenuated). For example, an atmosphere where sexual or racial jokes are pervasive may create a hostile work environment.

Unlike quid pro quo, hostile environment applies to harassment on the basis of membership in any protected class or category. The behavior need not be sexual in nature, as long as it creates a hostile environment related to some protected class or category. See e.g., *Firefighters Institute for Racial Equality v. St. Louis*, 549 F.2d 506, 514-15 (8<sup>th</sup> Cir. 1977), cert. denied sub nom. *Banta v. United States*, 434 U.S. 819 (1977); and *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976) (finding hostile environments based on the protected class of race); *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976) (religion); and *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8<sup>th</sup> Cir. 1977) (national origin).

---

<sup>91</sup> The disparate impact theory is not available under 42 U.S.C. § 1981.

### *Employer's Affirmative Defense*

It is important for potential plaintiffs to remember that before filing a complaint of hostile environment or harassment, they should work to comply with any existing employer policy regarding discrimination. *See Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998). If the employer proves that it had an effective anti-harassment policy and that the employee failed to take advantage of it, and if there is no tangible adverse employment action, then the employer can raise an affirmative defense to the harassment. *Id.* If the harasser was a supervisor, then the employer may raise an affirmative defense that (1) the employer exercised reasonable care to prevent and correct the harassment, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. *Id.*; *see also Farragher v. City of Boca Raton*, 524 U.S. 775 (1998).

### **Denial of Promotion**

To establish a prima facie case of a **denial of promotion based on discrimination**, a plaintiff must show that: (1) she is a member of a protected class; (2) her employer had an open position for which she applied; (3) she was qualified for the position; and (4) she was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. *See Taylor v. Virginia Union University*, 193 F.3d 219, 229 (4th Cir. 1999). Well-established case law makes clear that an employee need not prove that she applied for and was rejected for a promotion in order to make out a prima facie case. *See Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977). In *Teamsters*, the court stated, “[t]he denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims . . . could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups.” *Id.* at 367; *see also Dews v. A. B. Dick Co.*, 231 F.3d 1016, 1020, 1021 (6th Cir. 1999) (holding that in non-promotion case, plaintiff need not prove that he applied for and was rejected for promotion when employer did not notify employees about available promotion); *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126 (11th Cir. 1984) (holding failure to apply for a promotion not required where employee did not know of job and no formal mechanism to express interest is in place).

### **Retaliation**

*Title VII*, § 1981, and the *DC Human Rights Act* provide a cause of action for individuals whose employers have retaliated against them for **participating** in a charge of unlawful discrimination or for **opposing** a practice made unlawful by the discrimination statutes. *See* 42 U.S.C. § 2000e-3(a); 42 U.S.C. § 1981; D.C. Code § 2-1402.61.

Participation in the making of a complaint or testifying at a discrimination hearing is almost always protected, unless it is done with malice. The protection of opposition activity is more limited. The employee must have an objectively reasonable and good faith belief that the underlying activity that he or she is opposing is unlawful discrimination.

A *prima facie* case for retaliation is made if the plaintiff can show that (1) s/he engaged in a statutorily-protected activity, (2) the employer made an adverse personnel decision resulting in a tangible harm, and (3) there is a causal connection between the two. *McKenna v. Weinberger*, 729 F.2d 783, 790 (DC Cir. 1984).

The definition of what constitutes an **adverse personnel decision** in the retaliation context was expanded by the Supreme Court in *Burlington Northern & Sante Fe Railway. Co. v. White*, 548 U.S. 53 (2006). In *Burlington*, the Court held that under *Title VII*'s anti-retaliation provision an adverse personnel decision includes any action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Id.*

As with discrimination cases, once the plaintiff has presented evidence of a *prima facie* case of retaliation, the burden then shifts to the employer to produce evidence of a legitimate non-discriminatory reason for the adverse action. If the employer is successful, then the plaintiff must show by a preponderance of the evidence that the employer's purported reason was a mere pretext for retaliation.

Knowledge of protected activity by a retaliating official can be assumed when an adverse action follows closely on the heels of protected activity. *Jones v. Bernanke*, 557 F.3d 670 (DC Cir. 2009). Additionally, an inference of retaliation may be made if the adverse action follows protected activity, even if the initial protected activity of the employee had occurred years earlier. *Id.*

Notably, a plaintiff need not prevail on his or her underlying complaint to successfully establish a retaliation claim. In participation cases, the mere filing of a complaint is statutorily protected activity. *See Berger v. Iron Workers Reinforced Rodman Local 201*, 843 F.2d 1395, 1425 (D.C. Cir. 1988). In opposition cases, the plaintiff must have a reasonable belief that he was complaining of unlawful discriminatory conduct. *See Clark Co. School Dist.*, 532 U.S. 268 (2001).

## **Constructive Discharge**

Another adverse action against an employee involves an employer that **constructively discharges** the employee. This occurs "when the employer deliberately makes working conditions intolerable and drives the employee into an involuntary quit." *Atlantic Richfield Co. v. D.C. Comm'n on Human Rights*, 515 A.2d 1095, 1101 (D.C. 1986).

In *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), the Supreme Court resolved a split amongst the circuit courts on this issue and held that *Title VII* encompassed employer liability for constructive discharge in the harassment context, but that the affirmative defenses of *Burlington/Faragher* apply. Accordingly, to prove this claim, a plaintiff must show that his or her working conditions were so intolerable that a reasonable person would have felt compelled to resign. Where a supervisor is the perpetrator and the harassment results in a constructive discharge that also involves a tangible employment action (e.g., transferring the employee to a position in which he or she would face unbearable work conditions), the employer is strictly liable for the harassment/constructive discharge. Where no tangible employment action has

occurred, however, the employer still may use the *Burlington/Faragher* affirmative defenses, discussed earlier in this section.

## **Procedure for Filing Complaints of Discrimination**

### **Filing Complaints against Private Employers – DC**

#### *Filing Complaints at the Equal Employment Opportunity Commission (EEOC)*

A worker cannot file a lawsuit under *Title VII*, the ADA, the ADEA, or *Genetic Non-Discrimination Act (GINA)* without first filing an administrative complaint or charge with the **EEOC** or a **state fair employment practices agency**. The EEOC is the federal agency charged with enforcement of *Title VII* and other employment discrimination statutes. See <http://www.eeoc.gov> for additional *Title VII* guidance.

DC, Virginia, and Maryland are “deferral jurisdictions,” which means they have state Fair Employment Practice Agencies or FEPA agencies which may accept charges of discrimination. In D.C., this agency is the Office of Human Rights (DCOHR). In Maryland, this agency is the Maryland Commission on Human Relations, and in Virginia, this agency is the Virginia Human Rights Council. Because of “work sharing agreement[s],” between the EEOC and these agencies, any charge filed with these agencies is automatically “cross-filed” with the EEOC. See *Wilson v. Communications Workers of America*, 767 F. Supp. 304, 306 n.2 (D.D.C. 1991). A claimant has 300 days to file his or her complaint with the EEOC in DC, Md., or Va. because these are “FEPA” states.

For discrimination occurring in Washington, DC, claims may be filed with the EEOC at the Washington Field Office; 131 M Street NE; 4<sup>th</sup> Floor, Suite 4NWO2F; Washington DC 20507-0100; 1-800-669-4000 (nearest Metro stop is New York Ave./Gallaudet on the red line). Walk-in hours are 9 a.m. to 2 p.m., Monday through Friday. Although scheduled appointments are not required, potential claimants should call the office and add their name to a list. Investigators then will call them back and do a 10-15 minute screening over the telephone. During the screening, the investigator will ensure that the EEOC has jurisdiction. If the potential claimant decides to file a claim, he or she may then make an appointment to do so. Appointments generally are scheduled for two weeks in the future. Individuals who are unable to go into the office can ask to have their appointment over the telephone. The office is open from 8:00 a.m. to 4:30 p.m., Monday through Friday.

The worker must include all claims, charges, or complaints in his or her original filing. Otherwise, s/he might be barred from raising the charges later in court. “Only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit.” *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 962-63 (4<sup>th</sup> Cir. 1996).

The EEOC Washington Field (WFO) has an “investigator of the day” system, under

which an EEOC investigator is available to answer questions about specific situations. Call the main number for the WFO, (202) 419-0713, and ask for the investigator of the day. If the EEOC sounds pessimistic about a claim, remember that the EEOC finds no probable cause of discrimination in about 95 percent of all claims filed with the agency. A worker may find an attorney to litigate and win her case despite the EEOC's finding of no probable cause. The EEOC also maintains a toll-free number 1-800-669-4000 (Spanish available).

### *Filing at the DC Office of Human Rights*

The D.C. FEP Agency is the D.C. Office of Human Rights (part of the Department of Human Rights and Local Business Development). It is located at 441 4th St. NW, Suite 570 North (Metro: Judiciary Square) (202-727-4559).

A claimant, generally, must file his or her claim in the DC Office of Human Rights within one year. DC law provides for mandatory mediation, which is available, but not required, under federal law. Currently, the time between filing a complaint and getting to mediation is 60 days, but it can take significantly longer than the EEOC-suggested 270 days to get a decision after the close of the investigation. Notably, a complainant need not first file with the Office of Human Rights to maintain an action in court for discrimination under the *DC Human Rights Act*.

In order to file a claim, a complainant can simply walk in and watch a video on OHR filing procedures and fill out a questionnaire. However, persons must have an appointment to see an intake specialist. Call Monday through Friday, 8:30 a.m. to 5:00 p.m. to schedule an intake appointment. Appointments are scheduled two to three months in advance. Intake interviews are conducted Monday through Thursday, 9 a.m. to 3 p.m. and usually take one to two hours. The complaint form, available on-line at <http://ohr.dc.gov/complaint>, (also available in English at <http://wrmanual.dcejc.org/23> and in Spanish at <http://wrmanual.dcejc.org/24>) can be completed ahead of time. Workers should not delay in contacting the office for an appointment because the filing deadlines will be strictly enforced.

Because cases are “cross-filed” in DC, it is not necessary to file with the EEOC as well. It is, however, the claimant's burden to ensure that the claim is cross-filed.

If a worker only wants to pursue his or her claim under the *DC Human Rights Act*, he or she may proceed by filing a lawsuit directly in D.C. Superior Court and bypassing the administrative office. DC Code § 2-1403.16(a). This differs from claims under federal law, which first must be filed with the EEOC. Workers who are represented by an attorney may consider going directly to court.

**Practice Tip:** Many employment discrimination attorneys file cases directly in DC Superior Court and avoid the DC Office of Human Rights and the EEOC altogether. Litigating in the Civil Division is very confusing and pro se litigants should take this on only as a last resort. Workers should contact employment discrimination attorneys to try to find one who will take their case for a contingency fee or reduced cost. Also, if the DC Office of Human Rights makes a finding of, whether or not there is discrimination, an employee loses her right to litigate her case in court and must work through the DC Office of Human Rights administrative process.

## Filing Complaints against Private Employers - Maryland

### *Filing Complaints at the EEOC*

Workers must file a complaint with the EEOC within **300 days** of the alleged discriminatory event. EEOC complaints must be filed with the **EEOC's Baltimore District Office**, City Crescent Building, 10 South Howard Street, 3<sup>rd</sup> Floor, Baltimore, MD 21201 (410-209-2237 or 1-800-669-4000; TDD 410-962-6065). Office Hours: Monday through Friday, 8:30 a.m. to 5 p.m. Walk-in hours are Monday through Thursday from 8:30 a.m. to 3:00 p.m. and Friday from 9:00 a.m. to 12:00 p.m. For walk-in appointments, a photo ID is required to gain entrance to the office.

**Note:** The MCHR and the EEOC will cross-file claims if the applicant checks the appropriate boxes on the charge form.

### *Filing at the Maryland Commission on Human Relations*

Within **six months** of the alleged discrimination, the worker must submit a claim with the Maryland Commission on Human Relations (MCHR). *See* Md. Ann. Code Art. 49B, §9A(a) [now §§ 20-208, 20-1004]. A complaint filed within six months with the federal or local human rights commission is deemed acceptable. The commission is located at 6 St. Paul St., 9<sup>th</sup> Floor, Suite 900, Baltimore, Md. 21202 (410-767-8600 or 800-637-MCHR (Md. only)). Office hours are Monday through Friday from 8:30 a.m. to 5:00 p.m. Intake hours are Monday through Friday from 9 a.m. to 3 p.m. Complaint forms are available on the commission's web site: <http://www.mchr.state.md.us>. The web site is in English and Spanish.

### *Local Agencies*

The local agencies are as follows:

**Howard County.** Office of Human Rights, 6751 Columbia Gateway Dr., 2<sup>nd</sup> Fl., Suite 239, Columbia, Md. 21046 (410-313-6430; TDD 410-313-6401). Office Hours: Monday-Friday, 8 a.m. to 5 p.m. Source of law: Howard County Code §§ 12.200-12.218.

**Montgomery County.** Office of Human Rights, 21 Maryland Avenue, Suite 330, 2<sup>nd</sup> Floor, Rockville, Md. 20850 (240-777-8450; TDD 240-777-8480). Office Hours: Monday-Friday, 8:30 a.m. to 5 p.m. Source of law: Montgomery County Code, Chapter 27. The code is similar to *Title VII*, and suits under it are authorized by Md. Code Ann. Art. 49B §42 (2001).

**Prince George's County.** Human Relations Commission, 14741 Governor Oden Bowie Drive, Suite L105, Upper Marlboro, Maryland 20772 (301-883-6170; TDD 301-925-5167). Office Hours: Monday-Friday, 8:30 a.m. to 5 p.m. Source of law: Prince George's County Code § 2.185.

Complaints against small employers who are exempted from Title VII, the Maryland Human Rights Act, and local discrimination laws, can be filed directly in court. *See Kerrigan v.*



*Magnum Entertainment, Inc.*, 804 F. Supp. 733 (D. Md. 1992).

## **Filing Complaints against Private Employers - Virginia**

### *Filing Complaints at the EEOC*

The **Washington Field Office of the EEOC** covers federal claims arising in Northern Virginia, including Arlington County, Fairfax County, Warren County, Clarke County, Frederick County, Loudoun County, and the western half of Fauquier County. The EEOC's Washington Field Office is located at 131 M. Street, NE, Fourth Floor, Washington DC 20507, (202) 419-0700; TTD (202) 419-0702 (Metro: New York Ave.—Florida Ave.—Gallaudet U.). Office Hours: Monday to Friday, 8 a.m. to 4:30 p.m. Walk-in intake hours are Monday to Friday from 9 a.m. to 2 p.m.

### *Virginia Human Rights Council Filings*

To file a claim and to make sure all claims are preserved, clients and advocates should call the **Virginia Council on Human Rights**, Director Sandra D. Norman, Third Floor, 1220 Bank Street Jefferson Building, Richmond, Va., 23219 (804-225-2292 or 800-633-5510 (in Virginia only)). Claims should be filed within 180 days of the occurrence of the discrimination. See Va. Code Ann 2.2-522. Complaint forms are available on the Council's website: <http://www.chr.state.va.us/> and also at <http://wrmanual.dcejc.org/25>. Local agencies also should be contacted in the place in which the discrimination occurred. Source of law: Virginia Code Chapter 43. Virginia Human Rights Act § 2.2-3900. Virginians with Disabilities Act § 51.5-1 et seq.

### *Local Agencies in Virginia*

The local agencies are as follows:

**City of Alexandria.** Alexandria Office on Human Rights, 421 King St., Suite 400, Alexandria, VA 22314 (703-746-3140). Office Hours: Monday-Friday, 8 a.m. to 5 p.m. The office accepts walk-in clients, or clients can call to receive a questionnaire form by mail. Additionally, the questionnaire form can be obtained online at: <http://alexandriava.gov/> or <http://wrmanual.dcejc.org/26>. Source of law: City of Alexandria Code § 12-4 (Human Rights Ordinance).

**Arlington County.** Complaints regarding employment discrimination require an Employment Discrimination Intake Form. These forms are available online at: <http://www.arlingtonva.us/> and <http://wrmanual.dcejc.org/27>. They must be printed, completed and returned by mail or in person to The Office of Human Rights, 2100 Clarendon Boulevard, Suite 318, Arlington, Va. 22201 (703-228-3929; TTY: 703-228-4611). Office Hours: Monday-Friday, 8 a.m. to 5p.m. Source of Law: Arlington County Code § 6-22(d).

**Fairfax County.** Fairfax County Human Rights Commission, 12000 Government Center Parkway, Suite 318, Fairfax, Va. 22035-0093 (703-324-2953; TDD 703-324-2900). Office

Hours: Monday-Friday, 8:30 a.m. to 5 p.m. Clients can call and speak immediately with an intake officer or walk in to fill out a questionnaire form. The last walk-in is taken at 4 p.m. Advocates can call Deputy Director Annie Carroll at 703-324-2721. Source of Law: Fairfax County Code, Chapter 11-1-5.

The Fairfax County Human Rights Commission does not take complaints for employers located in Fairfax City, Alexandria, or Falls Church. Alexandria complaints are handled by the Alexandria Human Rights Office (see above). For Fairfax City or Falls Church claims, clients or advocates should contact the Virginia Council on Human Rights or the EEOC.

**Prince William County.** Prince William County, Human Rights Commission, 15941 Donald Curtis Drive, Suite 125, Woodbridge, VA 22191-4291 (703-792-4680). In order to file a complaint, persons must complete an Intake Questionnaire. This form is available online at <http://www.pwcgov.org/> and <http://wrmanual.dcejc.org/28>. The form can be filled out there and then printed out, or printed out first and then completed. Completed forms should be mailed to the above address. Claimants also can call the office and request that a form be mailed to them. The DC Employment Justice Center has some copies of the form as well. Office Hours: Monday to Friday, 8 a.m. to 5 p.m. (Spanish-speaking clients should call from 9 a.m. to 3 p.m.) Source of law: Prince William County Code § 10.1.

## **Claim Procedure: DC Government Employees**

DC government workers who file discrimination claims under the *DC Human Rights Act* must exhaust administrative remedies on their statutory claims through the DC Office of Human Rights *Human Rights Act (OHR)* before going to court. *Newman v. DC*, 518 A.2d 698 (DC 1986).

To proceed administratively, the employee must contact the EEO counselor in the agency within **180 days** of the alleged discriminatory event (except for complaints about sexual harassment, for which the client has one year to consult the EEO counselor). *See* 4 D.C.M.R. § 105.1. The EEO counselor then has 21 days to investigate the complaint, during which s/he meets with the complainant, interviews the parties involved, and tries to resolve the matter. The EEO counselor has 30 days to resolve the complaint once the complainant makes contact. If the complaint is not resolved within 30 days, the EEO counselor will issue the complainant an exit letter. If an EEO counselor is not responsive within one to two-2 business days after initial contact, the complainant should document her attempts and contact another EEO Counselor or contact OHR directly.

The complainant has 15 days after the receipt of the exit letter to contact OHR and file a formal complaint. For a DC government employee who receives an exit letter or an adverse decision from her agency EEO counselor, the “formal” complaint process through the OHR is the same process as for any other employee initiating a complaint at the OHR.

When filing a civil action in court, the worker is in the same position as a worker filing a civil action against a private employer. The worker has **one year** to file his or her complaint. *See* DC Code § 2-1403.16.

DC employees also may have causes of action under *Title VII*, the *ADA*, or the *ADEA*, which may be brought using the administrative procedures of the EEOC, followed by a lawsuit in federal court. For federal claims, the employee must file with the EEOC within **300 days** of the discriminatory adverse action.

## **Claim Procedure: Federal Government Employees**

The process for filing discrimination complaints against the federal government is governed by the Equal Employment Opportunity Commission's (EEOC) regulations found at 29 C.F.R. § 1614. Discrimination based upon race, sex, national origin, religion, handicap, or age is prohibited in employment with the federal government. The process for an employee of, or applicant for, employment with the federal government to file a complaint of discrimination against his/her agency is substantially different than an employee or applicant alleging discrimination against a private-sector employer.

### *EEO Counseling – Stage 1*

The first step of the federal-sector complaint process is EEO counseling. An employee of, or applicant for, employment with the federal government who believes he/she has been discriminated against must contact an EEO counselor in the agency's EEO office within **45** calendar days of the date of the alleged discriminatory event. 29 C.F.R. § 1614.105(a)(1). This time frame can be extended in limited circumstances. *Id.* at § 1614.105(a)(2). Examples of situations where the time frame can be extended are: 1) if a continuing violation occurs, 2) if the worker has severe health problems which make her completely incapacitated and unable to file a complaint, or 3) if the worker is misled by the agency official of the filing deadline. Union grievance proceedings do **not** toll the statute of limitations.

The EEO counselor must advise the complainant that he/she has the choice between traditional EEO counseling or participation in alternative dispute resolution (ADR). *Id.* at § 1614.105(b)(2). Traditional EEO counseling involves the EEO counselor meeting with the complainant and the agency officials involved to gather basic facts regarding the claim and to determine if the case can be settled. EEO counseling is only supposed to last 30 calendar days from the date of the complainant's first contact with the agency's EEO office. *Id.* at § 1614.105(d). If the complainant chooses ADR, then the pre-complaint processing will terminate after 90 calendar days. *Id.* at § 1614.105(f).

**Note:** The complaint must include *all* the relief the worker is seeking and must include *all* of the claims. If these are not included, the worker may be barred from including them in court or at a later stage of the administrative process.

### *Filing the formal complaint – Stage 2*

After the EEO counseling stage is completed, the EEO counselor will send a letter to the complainant notifying the complainant of the right to file a formal discrimination complaint. *Id.* at § 1614.105(d). This letter typically is referred to as the "notice of final interview." Significantly, the complainant has only **15 calendar days** from the date he/she receives the

notice of final interview to file the formal complaint. *Id.* at § 1614.106(b). If the formal complaint is not filed within those 15 calendar days, then the complainant will be barred from raising that complaint in the future. The formal complaint must contain the following information: identity of the complainant and the agency; description generally of the action(s) that form the basis of the complaint; address and telephone number of the complainant or the complainant's representative; and signature of the complainant or the complainant's attorney. *Id.* at § 1614.106(c). The complaint also should include a request for compensatory damages and all other relief being sought by the complainant.

The complaint can be amended to include issues or claims "like or related to" those raised in the original complaint at any time prior to the conclusion of the investigation of the original complaint. *Id.* at § 1614.106(d). In general, a complaint may be amended to include additional bases of discrimination at any time before an EEOC hearing.

### *The investigation – Stage 3*

In what seems like an odd conflict-of-interest, the agency that is accused of discrimination is responsible for investigating the complaint. A formal discrimination complaint must be investigated within 180 calendar days of the date the complaint was filed. *Id.* at § 1614.108(e). If the original complaint was amended, the investigation must be completed within either 180 calendar days after the date of the last amendment or 360 calendar days from the date of the filing of the original complaint, whichever is earlier. *Id.* at § 1614.108(f). The agency EEO office can request a 90-day extension to continue and complete its investigation but the complainant is under no obligation to agree to any extensions.

### *Agency decision/EEOC hearing/Filing suit in court – Stage 4*

At the completion of the investigation, the agency must notify the complainant of his/her rights for continued processing of the complaint. *Id.* at § 1614.108(f). In short, after the investigation is complete, the complainant may: (1) request that the agency issue a decision regarding the merits of the complaint; (2) request a hearing by an EEOC administrative judge; or (3) file suit in U.S. District Court. *Id.* at § 1614.108(f). Importantly, at any time after 180 calendar days has expired from filing a formal discrimination complaint, the complainant may file suit in an appropriate U.S. District Court or request that an administrative judge of the EEOC conduct a hearing. *Id.* at § 1614.108(g). Once that initial 180 calendar days has expired, the complainant does not have to wait for the agency to complete its investigation to request an EEOC hearing or file suit in court, nor does the complainant need a "right to sue" letter. If the investigation has been completed prior to the 180 calendar days, the agency will provide the complainant with notice of his/her rights. A complainant must file a request for a hearing within 30 days of receiving notice from the agency of hearing rights. If the complainant wishes to request an EEOC hearing, the complainant must send the hearing request to the appropriate office of the EEOC and a copy of the hearing request must be sent to the agency's (i.e., employing/discriminating agency) EEO office.

The maximum amount of compensatory damages allowed, other than back pay and possibly front pay, is \$300,000. *See Fogg v. Ashcroft*, 349 U.S. App. D.C. 26; 254 F.3d 103 (DC

Cir. 2001) (holding Civil Rights Act limits on damage awards applies to each lawsuit, not each claim within each suit).

## Deadlines for Filing Claims

The following are general statute of limitations for filing specific claims under federal and state law:

- *Title VII, ADA or ADEA* - 300 days (but federal employees must file their EEO claims with an EEO counselor within 45 days)
- *DC HRA* – One year for private employees (180 days for DC government employees)
- *VA HRA & Virginians Disabilities Act* – 180 days
- *MD HRA* – Six months
- 42 U.S.C §§ 1981 & 1983 – Three years, Four years for retaliation claims.
- *Rehabilitation Act* – 45 days
- *EPA* – Two years / Three years for willful violations
- *IRCA* – 180 days

Under *Title VII*, the charge-filing and suit-filing periods are subject to equitable estoppel, equitable tolling, and waiver. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (superseded by the Civil Rights Act of 1991 (Nov. 21, 1991) [P.L. 102-166](#), § 2, 105 Stat. 1071); *cf. Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airlines*, 763 F.2d 875, 1985 U.S. (7th Cir. Ill. 1985) (denying flight attendant plaintiffs retirement benefits that were not part of the settlement agreement). The Supreme Court has held that the filing of an “intake questionnaire” and affidavit with the EEOC may be sufficient to satisfy the requirement that a charge be filed. *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008).

The statute of limitations begins to run from the discriminatory act, not from when the consequences of that act became apparent. *See Delaware State College v. Ricks*, 449 U.S. 250 (1980). In *Delaware*, the plaintiff, a university professor, was told that he would not be granted tenure; however, the university allowed him to stay on for an additional year under a “terminal contract.” The plaintiff filed a national origin claim, and argued that the statute of limitations began to run from the day that he no longer worked at the university. However, the Supreme Court agreed with the university and held that the statute of limitations began running from the time when the plaintiff was informed that he would not be granted tenure because that was when he was aware, or should have been aware, of his discrimination claim.

The Lilly Ledbetter Fair Pay Act, Pub. Law No. 111-2, 123 Stat. 5 (2009), makes clear that pay discrimination claims on the basis of race, sex, national origin, religion, age, and disability accrue whenever an employee receives a discriminatory paycheck, as well as when a discriminatory pay decision is made, when a person becomes subject to the practice, or when a person is otherwise affected by the decision.

**Special Note On Section 1658 Statute of Limitations:** Under 28 U.S.C.S. § 1658(a) (2006), “a civil action arising under an Act of congress enacted after the date of the enactment of

this section [enacted Dec. 1, 1990] may not be commenced later than 4 years after the cause of action accrues.” Depending on the particular jurisdiction, this statute might lengthen or shorten

the available statute of limitation. For example, the Fourth Circuit recently affirmed the lower court’s holding that racial discrimination claims arising within employment relationships are subject to a four-year statute of limitations. *See James v. Circuit City Stores*, 370 F.3d 417 (4th Cir. 2004). Furthermore, the U.S. Supreme Court held that § 1658(a) applies to any post-Dec. 1, 1990 amendment to a pre-Dec. 1, 1990 statute that makes possible the plaintiff’s cause of action. *See Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369 (2004).

### **Compulsory Arbitration Agreements**

There is extensive case law on the issue of compulsory arbitration agreements, whether contained in pre-employment contracts, collective bargaining agreements, or elsewhere. In this regard, the Supreme Court has issued several important holdings. First, the outcome of a collectively-bargained arbitration award may not be used to bar a discrimination lawsuit. *See Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) (on remand, the plaintiff was denied award because he was fired for non-discriminatory reasons). Second, however, an individually-signed agreement to arbitrate may bar a *Title VII* claim. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Third, the Federal Arbitration Act (FAA) is applicable to all workers *except* transport workers. *See Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302 (2001). Hence, in general, workers who sign arbitration agreements with their employers are subject to those agreements. Fourth, arbitration agreements that do not address class arbitration can be interpreted to prohibit class arbitration. *Stolt-Nielsen v. Animalfeeds Int’l*, No. 08-1198 (Apr. 27, 2010) (slip op.). Fifth, the Supreme Court has held that whether an employee’s agreement to arbitrate discrimination claims is unconscionable is an issue for the arbitrator, not federal courts, to decide. *Rent-a-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010).

**Note:** It is becoming increasingly important to ask clients and prospective clients if they have mandatory arbitration agreements. Many workers might not even be fully aware that they have signed such agreements, so it is crucial to ask them to produce to you **all** documents from the employer that they have signed.

### **Special Issue: Undocumented Workers & Discrimination Claims**

Regrettably, many employers turn a blind eye to immigration status during the hiring process; their aim is to assemble a workforce that is both cheap to employ and that minimizes their risk of being reported for violations of statutory rights. Therefore, employers have a perverse incentive to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain.

*Rivera v. NIBCO*, 364 F.3d 1057, 1072 (9<sup>th</sup> Cir. 2004).

Your life depends on a random stranger who could kill you, will probably disrespect you, and will most likely pay you much less than you deserve. But even those prospects are better than the ones you used to have. This is the life of *los jornaleros* – the day laborers.

*Ask a Mexican*, Gustavo Arrellano

The Immigration Reform and Control Act of 1986 (IRCA), for the first time in U.S. history, imposed civil and criminal penalties on employers who knowingly hire and employ undocumented workers—that is, individuals who do not have authorization to work in the United States. The penalties are “employer sanctions.” See 8 U.S.C. §§ 1324a(a)(1)(A), (a)(2), (e)(4), (f). IRCA requires employers to verify an employee’s identity and authorization to work by referring to certain documents and must complete the I-9 form for each new hire. These sanctions and requirements came with the promise that enforcement of this law would result in a reduction of illegal immigration and improve the working conditions of U.S. employees. Neither has occurred. In the last 25 years, the number of undocumented immigrant workers has grown steadily, and the wages and working conditions of the low wage sector of the labor market have declined.

In *Hoffman Plastics Compounds v. National Labor Relations Board*, 535 U.S. 137, 148-52 (2002), the Supreme Court ruled that an undocumented worker who gained employment through the use of false documents could not get “back pay” for the time that he was illegally fired for union activities. While *Hoffman* was limited to the “back pay” remedy under the NLRA,<sup>92</sup> that decision has emboldened many employers to assert that undocumented workers have no remedies under any employment or labor statute. While *Hoffman* is not applicable in many circumstances, it has strongly influenced the litigation of immigrants’ protections under labor and employment laws.

## **The Fair Labor Standards Act/ Wage and Hour Laws**

Immigration status has no impact on the requirement that an employer pay an employee for work already performed. Prior to *Hoffman*, numerous courts stated that the FLSA’s definition of “employee” included all immigrant workers, documented or undocumented, and that they were protected by the FLSA’s requirements that an employer pay minimum wage and overtime. See *In re Reyes*, 814 F.2d 168, 170 (5<sup>th</sup> Cir. 1987), *cert. denied*, 487 U.S. 1235 (1988); *Patel v. Quality Inn South*, 846 F.2d 700 (11<sup>th</sup> Cir. 1988), *cert. denied*, 489 U.S. 1101 (1989). These and other courts consistently held that requiring employers to pay employees for work already performed was wholly consistent with IRCA and the policies underlying it. Any other interpretation would be an invitation to unscrupulous employers to hire undocumented immigrants, not pay them, and then use their undocumented status as a defense to wage claims.

---

<sup>92</sup> The term “back pay” may refer to the wages the employee would have earned would it have been for the employer’s illegal activity under the NLRA or discrimination statutes, or, it may refer to wages owed under the FLSA or state wage laws for work already performed.

Since *Hoffman*, the courts have consistently held that the ruling in *Hoffman* did not reverse prior case law that immigrants, including undocumented immigrants, must be paid for work performed. See e.g. *Galaviz-Zamora v. Brady Farms*, 230 F.R.D. 499 (W.D. Mich. 2005); *Liu, et al. v. Donna Karan International Inc.*, 207 F.Supp.2d 191 (S.D.N.Y. 2002); *Singh v. Jutla*, 214 F.Supp.2d 1056 (N.D.Cal. 2002).

Because immigration status is irrelevant to an FLSA or state wage claim for unpaid wages for work previously performed, courts mostly have prohibited inquiry into immigration status during discovery in FLSA cases. See e.g. *David v. Signal Intern, LLC*, 257 F.R.D. 114, 122, (E.D.La. 2009) (granting a protective order where discovery of immigration status would have chilling effect on plaintiffs' claims and immigration status was irrelevant to wage claims for work actually performed); *Montoya et al. v. S.C.C.P. Painting Contractors, Inc. et al.* 530 F.Supp.2d 746 (D.Md. 2008) (holding that to allow the immigration status of a class representative to be investigated—indeed to require a representative to enjoy legal immigration status—would seriously undermine the effectiveness of the FLSA.); *Liu, et al. v. Donna Karan Int'l Inc.*, 207 F.Supp.2d 191 (S.D.N.Y. 2002) (denying discovery of immigration status based on risk of intimidation and chilling effect in a FLSA action). *Topo v. Dhir*, 210 F.R.D. 76, 79 (S.D.N.Y. 2002) (denying discovery of immigration status in a FLSA case because of its *in terrorem* effect even though status could be “relevant to a collateral matter on cross examination”).

Employers continue to try to argue that undocumented immigrants do not qualify for FLSA protection by virtue of their undocumented status. Once a plaintiff has proven the amount of unpaid wages, the FLSA provides for an award of that sum plus an equal amount in liquidated damages. In *Ulin v. Lovell's Antique Gallery*, 2010 WL 3768012 (N.D. Cal. 2010), the defendant employer argued that *Hoffman* precluded an award of liquidated damages because liquidated damages were “akin to back pay for work not performed.” The court rejected this argument, stating that “liquidated damages are a form of compensation for time worked that cannot otherwise be calculated.”

The bottom line: Employers have to pay employees for work performed and immigration status is irrelevant to that protection.

## **Protection under Federal and State Employment Discrimination Laws**

Under *Title VII*, 29 U.S.C. § 2000e *et seq.*, an aggrieved worker may be entitled to reinstatement, instatement, back pay, front pay, compensatory damages, punitive damages, injunctive relief, as well as attorney's fees and costs. Before *Hoffman* it was settled law that undocumented immigrants, as well as those documented, were protected by federal anti-discrimination laws, including *Title VII*, the *Age Discrimination in Employment Act* (ADEA), the *Americans with Disabilities Act* (ADA), and the *Equal Pay Act* (EPA). See e.g. *EEOC v. Tortilleria “La Mejor,”* 758 F.Supp. 585 (E.D. Cal. 1991). Since *Hoffman*, both the Equal Employment Opportunity Commission and many courts have reiterated that immigrants continue to be protected by the anti-discrimination statutes. However, there is no conclusive decision



regarding the extent to which *Hoffman* affects the remedies available to undocumented immigrants.

One of the most anti-employee decisions following *Hoffman* is *Egbuna v. Time-Life Libraries*, 153 F.3d 184 (4<sup>th</sup> Cir. 1998). Mr. Egbuna resigned his position with the defendant, then changed his mind and re-applied. He was offered a position, but the offer was rescinded. As plaintiff, he alleged the company rescinded its offer because he corroborated another employee's discrimination claim. He sued, alleging the defendant violated the anti-retaliation provisions of *Title VII*. The *en banc* Court held that because he did not have authorization to work in the U.S. at the time of his re-application, he could not establish a *prima facie* case under the *McDonnell Douglas* framework. Employers have cited *Egbuna* for the proposition that undocumented immigrants are excluded from anti-discrimination statutory protections. *Egbuna* has been distinguished by numerous courts and ignored by others.

In *Rivera v. NIBCO*, 364 F.3d 1057 (9<sup>th</sup> Cir. 2004), a national origin termination case brought on behalf of Latino and Asian workers, defense counsel sought the immigration status of the charging parties in discovery. The Ninth Circuit upheld the district court's issuance of a protective order barring such questions. The Circuit held: (1) that discovery was not the place for defendants to seek immigration status, or information regarding place of birth, since employers had the responsibility to get that information at the time of hire; and (2), if these questions were allowed, they would have a chilling effect on employees who pursued their claims and would undermine the purpose of civil rights laws.

Following *Rivera*, other courts have permitted *Title VII* claims to go forward in circumstances in which defendants have alleged the plaintiff was an undocumented immigrant, and/or issued protective orders barring questions regarding immigration status during discovery. See e.g., *EEOC v. The Rest. Comp. d/b/a Perskins Rest. & Bakery*, 490 F.Supp. 2d 1039, 1047 (D.Minn. 2007) (IRCA does not prohibit undocumented immigrant from pursuing *Title VII* claim); *EEOC v. Bice of Chicago*, 229 F.R.D. 581, 583 (N.D.Ill. 2005) (protective order granted prohibiting defendant from inquiring as to immigration status during discovery); *Hirsbrunner v. Martinez Ramirez*, 438 F.Supp.2d 10, 15-16 (D.P.R. 2006) ("It is well settled that Title VII affords aliens working in the United States protection irrespective of whether they are authorized to work in the United States."); *Escobar v. Spartan Security Serv.*, 281 F.Supp.2d 895, 897 (S.D.Tx. 2003) (rejecting defendant's motion for summary judgment based on *Egbuna*); *EEOC v. First Wireless*, 225 F.R.D. 404, 405-06 (E.D.NY 2004) (no discovery into immigration status).

Since *Egbuna*, the EEOC has successfully prioritized the protection of immigrant workers under *Title VII*. A short list of these enforcement actions includes: *EEOC v. Wilcox Farms*, No. 08-CV-1141 (D. Or. filed Sept. 30, 2008) (consent decree for \$260,000 settlement signed October 9, 2008); *EEOC v. Grimmway Enterprises, Inc.*, No. CV-06-00561 (E.D. Cal. filed May 10, 2006) (consent decree for \$175,000 settlement signed November 19, 2007); *EEOC v. Kovacevich Farms*, No. CV-06-00165 (E.D. Cal. filed February 6, 2006) (consent decree for \$1.68 million settlement signed December 3, 2008); *EEOC v. Rivera Vineyards, Inc.*, No. 03-CV-01117 (C.D. Cal. filed Sept. 5, 2003) (consent decree for \$1,050,000 settlement signed June 15, 2005); *EEOC v. Harris Farms, Inc.*, No. C-F-02-6199 (E.D. Cal. filed September 2002) (\$994,000 jury verdict on January 21, 2005); *EEOC v. Prima Frutta Packing Inc.*, No. 03-CV-

04237 (N.D. Cal. filed March 11, 2004 and April 19, 2004) (consent decree for \$235,000 settlement signed April 29, 2004); *EEOC v. L&T Group of Cos., Ltd.*, No. C-06-0031 (D. N. Mar. I. July 28, 2009) (\$1.7 million settlement).

A number of these cases involve knowledge of the employee's immigration status obtained well after the hiring. No circuit has followed the logic of *Egbuna* to proscribe an undocumented immigrant plaintiff from seeking judicial relief. The Equal Employment Opportunity Commission has identified pursuing relief under *Title VII* on behalf of all immigrant workers as a national priority. While an immigrant plaintiff's undocumented status may affect the remedy—such as re-hire or back pay resulting from a discriminatory firing—it does not affect her right to bring an action and seek other relief.

This position is consistent with the Supreme Court's view in *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879 (1995), as well as the Fourth Circuit's approach, regarding balancing the parties' equities in the application of the "after-acquired evidence" circumstance. In *McKennon*, an ADEA case, the Court noted that after-acquired evidence of a legitimate basis for termination does not shield the employer from liability for discriminatory acts that occurred apart from evidence of an otherwise-legitimate reason for termination. 115 S.Ct. at 881. That decision notes that the remedies available—such as back pay or reinstatement—may be affected by the after-acquired evidence, but liability for the statutory violation is not affected.

The Fourth Circuit has adopted this approach. In *Russell v. Microdyne Corp.*, 65 F.3d 1229 (4<sup>th</sup> Cir. 1995), a *Title VII* sexual discrimination case, the defendant was granted summary judgment after it demonstrated that, during discovery, it uncovered evidence which would have led to the plaintiff's termination apart from any discriminatory animus. In reversing the grant of summary judgment, the Court held that the after-acquired evidence analysis was relevant to what damages the plaintiff might be awarded, but not to her ability to prosecute the action. The Court noted that the after-acquired evidence defense was not a defense to liability, or to damages arising from a discriminatory "failure to promote," which occurred prior to when the defendant learned of the plaintiff's earlier misdeeds. Moreover, the Court ruled that the plaintiff was eligible to recover both compensatory and punitive damages for the discriminatory conduct, wholly apart from any eligibility for, or award of, back pay, front pay, or reinstatement. *Russell*, 65 F.3d at 886-86.

In *Equal Employment Opportunity Commission v. Signal International, L.L.C.*, No. 12-557 (E.D. La September 10, 2013), a district court in the Fifth Circuit, for the first time, adopted the reasoning of *Rivera v. NIBCO*, 364 F.3d 1057 (9<sup>th</sup> Cir. 2004), to prohibit discovery of immigration status in a *Title VII* case. The court noted, "Even if the [immigrant] intervenors' current immigration status was relevant to the claims asserted by the EEOC, discovery of such information would have an intimidating effect on an employee's willingness to assert his workplace rights and subject such an employee to deportation."

The bottom line: Immigrants by and large are protected under anti-discrimination laws; however, the remedies available may be affected if one is an undocumented immigrant. This is an issue which will be hotly litigated in the near future.

Additional information and resources regarding immigrants' rights under employment law may be found on the websites of numerous organizations, including:

National Employment Law Project: <http://www.nelp.org/>

National Immigrant Law Center: <http://www.nilc.org/>

Southern Poverty Law Center: <http://www.splcenter.org/>