

**UNLAWFUL DISCRIMINATION IN EMPLOYMENT:
A CONDITION NOT UNLIKE THE FLU**

KEVIN B. JOHNSON

WILLIAM L. SMITH

Emporia State University, Kansas

ABSTRACT

This article takes the position that unlawful discrimination in employment is a condition, not unlike the flu. As the term is used in this article, a condition is a continuous risk that cannot be eliminated and that can be effectively dealt with only through constant vigilance and effort. While no one wants to suffer from either the flu or liability for unlawful discrimination, the effects of suffering from either condition can be lessened (or increased) based on how a person has tried to avoid the condition. Implications for practitioners are discussed and a plan of prevention is presented.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, sex, national origin, and religion [1]. The Age Discrimination in Employment Act and the Americans With Disabilities Act have added, respectively, age and disability to the list of factors prohibited as a basis for making employment decisions [2, 3]. Each state also has its own version of these federal laws, which applies to employers or situations not covered by federal legislation. Unlawful discrimination occurs when an employer makes an employment decision that violates a state or federal antidiscrimination law. Such discrimination also occurs when an employer creates or permits a hostile or intimidating environment to exist, based on an employee's race, color, sex, national origin, religion, age, or disability. Employers, consequently, have a

significant legal obligation to avoid any type of unlawful discrimination and to provide a workplace that is not hostile or intimidating.

The Supreme Court holds the employer to a lofty ideal. All workers have the right to an environment that is “free of hostility and intimidation.” . . . But one of the truisms that few people care to acknowledge publicly is that there is no such thing as an environment that is free of hostility and intimidation. Employers reach for the impossible when they hold themselves to the standards of creating such an environment. This fact is obscured by phrases such as “absolute liability” and “zero tolerance,” aphorisms that lead us to believe that the legal ideal is, in fact, attainable. But just as surely, no employer can rightfully be confident in its ability to successfully monitor and control all employee behavior. Zero tolerance is no more reasonable than absolute liability. But these bromides reinforce the misperception that workers can hope for an ideal workplace and employers should strive to create it [4, p. 12].

Compare unlawful discrimination to the flu. A normal person will take reasonable steps to avoid catching a flu virus, including: consulting with a physician; reading articles or other research on how to avoid the flu; getting a flu shot; avoiding the company of people already ill with the flu; and, taking preventive measures to avoid exposure to a flu virus. However, if, in spite of all best efforts, you wake up one morning with the flu, you simply have to deal with the illness. The flu is an illness, or a condition, that appears no matter how hard a person works to keep healthy. However, it is often true that a person who has tried to stay healthy is generally in a better position to combat the flu. One may still be ill, but the symptoms may not be as severe as they might have been. In addition, a recovery to full health is likely to be faster when preventive steps have been taken to be as healthy as possible.

In a similar vein, an employer who actively tries to prevent unlawful discrimination at the workplace will avoid many problems but will still remain susceptible to some type of unlawful discrimination. If this condition is discovered, the employer has to deal with it to resolve the problem and prevent reoccurrences. However, if the employer has been trying to prevent unlawful discrimination, those efforts will likely lead to a reduction (or mitigation) of any consequences.

No employer should ever view itself as the helpless victim of the legal system. An employer cannot take the attitude that it must simply wait its turn to fight a claim of discrimination and then just hope it can survive. As with the flu, there are actions that can be taken to reduce the risk of “catching” it. An ancient legal maxim from Roman law applies directly to this issue: *Vigilantibus et non formientibus jura subvenient* (the law aids the vigilant, not those asleep on their rights).

UNLAWFUL DISCRIMINATION IN EMPLOYMENT IS A CONDITION

Title VII, the primary source of discrimination law, gives a vague statement of what is prohibited. Unlawful discrimination in employment is “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual” [1, § 2000e-2(a)]. The phrase “or otherwise to discriminate” is used to ensure that the statute is not narrowly interpreted. This guarantees that unlawful discrimination will not be limited to specific failures or refusals of an employer.

The *McDonnell Douglas* case provided the test still used to diagnosis whether most cases of unlawful discrimination exist [5]. Consider the elements of this test (as it has evolved, beginning with the *Furnco* case [6]): Unlawful discrimination is proven by showing that 1) the individual is a member of a protected class; 2) the individual is qualified for the job in question; 3) in spite of being qualified, the individual has suffered an adverse employment decision; and 4) the basis for the adverse employment decision cannot be justified by the employer as being a legitimate business demand. This test does not require a specific act of discrimination be proven. Instead, it looks for factors that will lead to a conclusion when all factors are considered together. None of the factors ask what the employer did. The first three are determined from the employee’s perspective: what the employee is, whether s/he is qualified, and whether s/he has suffered an adverse employment decision. It is the final factor that specifically addresses the employer. It is used solely to determine whether the employer has a legitimate business reason for what it has done. Therefore, this test is designed to prove the absence of legitimate business decision making by the employer.

If there is no evidence that the employer has made an employment decision on the basis of sound business factors, the conclusion must be that unlawful discrimination exists. As the Court stated in *Furnco Construction Corp. v. William Waters, et al.*:

[The *McDonnell Douglas* test] is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A *prima facie* case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors [emphasis added; 6, at 2943].

The *McDonnell Douglas* test is similar to concluding that an illness exists because health can be proven not to exist. If a court can conclude that discrimination exists because the absence of legitimate business reasons for an employment decision can be proven, then discrimination can be proven without having to state what specific act, omission, or other intentional conduct occurred. When a thing can exist without there first being an act, omission, or other intentional conduct, then the thing can exist only because it is a condition. A condition

develops on its own. It does not require help and it can even find life when a vigorous effort is made to prevent its development.

LITERATURE REVIEW

Human Resources Literature

The idea that discrimination can be avoided, but not eliminated, is not new. While there are a number of articles offering advice on how to handle discrimination, very few describe how to eliminate the risk of discrimination. These articles concentrate instead on how to avoid discrimination claims. Sexual harassment, for example, is the subject of many claims by employees against their employers. R. J. Albert acknowledged that an employer can be held liable for discrimination, even though it was not aware it existed. Employers frequently are held liable for acts of harassment committed in the workplace *even though they are not aware that such acts are taking place*. Thus, increased efforts by employers to initiate measures designed to *deter* acts of harassment have accompanied the growth of sexual harassment lawsuits [7].

J. C. Cook described the Civil Rights Act of 1991 as breathing “new and vigorous life” into “unintentional discrimination” [8, p. 12]. This act contains amendments to Title VII that include allowing discrimination lawsuits to be heard by juries, instead of by judges only, and permitting the awarding of punitive damages in discrimination lawsuits. The important perspective presented in the article is that employers can and often are found liable for unintentional discrimination. This means that discrimination may arise in spite of the best and most diligent efforts of an employer to avoid discrimination in its own firm. Such a result can exist only when discrimination is a condition, not just the result of specific acts or omissions.

According to Slonaker and Wendt, federal and state laws have prohibited employment discrimination for a quarter of a century and yet it is still difficult to avoid discriminatory practices . . . [9]. Pranschke and Wright discussed how to manage HIV and AIDS in the workplace to *avoid* discrimination claims based on these diseases [10]. The significance of the article for this article is its consistent refusal to characterize its thorough advice as how to *eliminate or prevent* discrimination claims, only how to *address* this issue.

Caudron discussed the importance of how to handle the termination of an employee [11]. The article presents statistics and case histories to demonstrate that even when an employee is terminated for a legitimate reason, how the company handles the termination can be the cause of a claim being made against the employer. The author stated, “What all this means is that any company . . . better be mindful of the way they treat those (terminated) employees. Even lawsuits that employers can win can cost a lot of money and damage the corporate reputation. . . . Mistreating employees can make your company vulnerable. . . .

Many companies also are sued simply because they fail to treat departing employees with respect” [11].

M. Tallerico examined superintendent search-and-selection practices in terms of equity for females and people of color, using gate keeping and career mobility theories to inform her study in the state of New York [12]. She discovered a complex mix of unwritten selection criteria that were largely invisible, but manifested themselves in private conversations and interviews with prospective superintendents, headhunters, and school board members involved in the hiring decisions. These unwritten rules included a) defining quality in terms of hierarchies of particular job titles, b) stereotyping by gender, c) complacency about acting affirmatively, and d) hypervaluing feelings of comfort and interpersonal chemistry with the successful candidate. She suggested specific in-service education programs that could be implemented to overcome each of the questionable practices identified [12].

Jackson, Furnham, and Willen investigated personnel directors and managers’ willingness to revise their selection procedures as a result of both their attitudes toward disabled persons and their knowledge of the Disability Discrimination Act 1995 (DDA) [13]. The DDA states that “reasonable adjustments” must be made to the selection process for persons with disabilities to enable them to compete on an equal level with nondisabled candidates. Results showed that employer willingness to comply with the DDA was predicted by attitude toward disabled people and knowledge of the legislation. Education in both areas was suggested as a solution to any deficiencies noted [13].

These articles make it clear that responding to a discrimination claim from a current or former employee with anger, frustration, or a desire for revenge will most assuredly increase the problem and the company’s risk. While an employer’s feelings of frustration may be unavoidable, this frustration can be lessened when the employer understands that a discrimination claim is always a possibility and is prepared to handle a claim if made. Dealing with a condition is never pleasant, especially when much effort has been taken to prevent the condition (whether the condition is unlawful discrimination or the flu). Consequently, it is much easier to recover from the condition when one knows it will do no good to waste energy and resources on anger, frustration, and reliance on irrelevant arguments regarding preventive measures. An employer’s energy and resources are more wisely spent on confronting the actual issue and handling it in the best and most appropriate way possible.

Legal Authorities

The most significant statute on discrimination is Title VII of the Civil Rights Act of 1964 [1]. The key provision of this statute makes it unlawful for any employer covered by this act “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" [1, § 2(a)(1)]. The language of this act is very broad to encompass discrimination in all its forms, whether overt or subtle, intentional or unintentional. When determining whether discrimination has occurred, courts always make their decision on a case-by-case basis, allowing the facts of each case to determine the outcome of that case. Two basic tests have evolved as the diagnostic framework for determining whether a case of discrimination exists. The first of these tests is contained in the Title VII statute, at Section 2(k). This test is for proving cases of "disparate impact" or unintentional discrimination. This type of discrimination is alleged against an employer when the employer's actions, conduct, policies, rules, or procedures tend to discriminate against a class of employee, as opposed to discrimination against a specific individual. Disparate impact is proven if: a) the employee shows that the employer uses a particular employment practice that unintentionally discriminates on the basis of race, color, religion, sex, or national origin; and b) the employer fails to prove that the employment practice in question is job-related and consistent with business necessity.

While disparate impact cases are filed, most claims of unlawful discrimination are made by individuals alleging intentional discrimination against themselves. Proof of intentional discrimination or the test for proving intentional discrimination follows:

The [employee] in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of (unlawful) discrimination. This may be done by showing (i) that he belongs to a protected class, race, color, national origin, religion, sex; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [the employee's] qualifications. The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection [5].

The central focus of the inquiry in a case such as this is always whether the employer is treating some people less favorably than others because of their race, color, religion, sex, or national origin. The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A *prima facie* case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons

for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race [6].

Discrimination under the Age Discrimination in Employment Act and the Americans with Disabilities Act is proven through the same procedures utilized to prove discrimination under Title VII [2, 3]. The above cases, therefore, can be and are used as controlling authority for determining whether discrimination has been proven in a particular case.

These cases (*McDonnell-Douglas* [5] and *Furnco* [6]), as well as their progeny, have established the method for diagnosing whether discrimination exists in a particular case. Notice that nothing in these two Supreme Court opinions requires proof that the employer intentionally discriminated or intentionally caused or allowed discrimination to occur, even when the allegation is intentional discrimination. All that matters is that an employee or job applicant is proven to be the victim of unlawful discrimination. These cases simply demonstrate how the court analyzes a case to discover or to rule out discrimination. It is the same as when a physician analyzes a patient's symptoms to discover or to rule out the flu.

A clear statement that illustrates the position that discrimination is a condition that an employer is always susceptible to is found in the sexual harassment regulations of the Equal Employment Opportunity Commission (EEOC) on sexual harassment, a type of sex-based discrimination: "An employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment *regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence*" [14, § 1604.11, emphasis added]. These guidelines have been endorsed by the courts, beginning with the case of *Meritor Savings Bank* [15].

HOW CAN A FIRM PROTECT ITSELF

People who purposely or recklessly expose themselves to a flu virus will catch the flu. Employers who recklessly expose themselves to liability for unlawful discrimination will be found liable for unlawful discrimination. People who take steps to avoid the flu will not get the flu very often and, when they do, are likely to suffer only minor symptoms. Employers who have and follow realistic plans for avoiding claims of unlawful discrimination will successfully avoid many claims. Claims that are made will be better defended and are likely to result in less-severe consequences for the employer.

The EEOC addressed this issue in its guidelines on harassment: "Prevention is the best tool for the elimination of harassment. An employer should take all steps necessary to prevent harassment from occurring, such as affirmatively

raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned" [14, § 1604.11]. The only flaw in this guideline is that it talks about the "elimination" of harassment. This statement should read, "Prevention is the best tool for *avoiding* harassment."

In 1998, the U.S. Supreme Court issued two rulings that gave employers specific advice on how to minimize exposure to harassment and discrimination.

. . . a defending employee may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence which defense comprises to necessary elements that (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the plaintiff's employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise because (1) it implements statutory policy and complements the government's Title VII enforcement efforts to recognize an employer's affirmative obligation to prevent violations and give credit to employers who make reasonable efforts to discharge their duty, (2) if a plaintiff could have avoided harm, then no liability should be found against an employer who has taken reasonable care, and (3) if damages could reasonably have been mitigated by a plaintiff, then no award against a liable employer should reward the plaintiff for what the plaintiff's own efforts could have avoided [16 at 662]. See also *Burlington Industries, Inc. v. Kimberly B. Ellerth* [17].

It should be clear from the above that the only course available to an employer is to take steps to avoid unlawful discrimination. If such steps are taken, then even if an employee does actually experience unlawful discrimination (even if a symptom of the flu is felt), the employee may have only a weak claim against the employer (the flu will not be a serious health problem). The *Faragher* case tells employers to plan for prevention, but that if an employee claims to be the victim of unlawful discrimination, the employer can at least mitigate or lessen the consequences it suffers by having a plan in place for handling such a problem [16]. This case acknowledges the points of this article: that unlawful discrimination is a condition that can be avoided, although not eliminated; that if an employer knows how to deal with unlawful discrimination when it does develop; and if the employer has been making good faith efforts to avoid unlawful discrimination, then the employer will be in the best position to significantly contain and lessen the consequences of unlawful discrimination.

CONCLUSION AND IMPLICATIONS FOR PRACTITIONERS

Unlawful discrimination includes improper decisions and actions as well as harassment. Regardless of the form it takes, employers should understand that unlawful discrimination is a condition. This condition is part of an employer's life

just as the flu is part of personal life. There are things that can be done to avoid a condition, but nothing can eliminate either unlawful discrimination or the flu completely. This is why an employer who may have become known for its sincere and vigorous efforts to prevent unlawful discrimination in its workplace may still be found liable for unlawful discrimination. This may occur if the employer did not know discrimination was occurring, if it could have prevented any further discrimination, if it should not have occurred at all. The risk of unlawful discrimination is not something an employer can ever eliminate. This risk can be reduced, but it remains a risk.

An employer should acknowledge unlawful discrimination for what it is, a condition. It should then adopt a plan of prevention to include the following points:

- Establish a policy banning any form of unlawful discrimination in the workplace. This could be a one-sentence policy stating: “Unlawful discrimination is prohibited in this workplace.” How this policy will be implemented and used would be described by complying with the following recommendations.
- Establish a method for any employee to make a report or claim of actual or suspected discrimination in the workplace. Give employees more than one option for reporting discrimination, such as oral or written reports to anyone with supervisory or managerial authority. It may be even useful to allow employees to have another employee make the report on their behalf, as it can be a significant source of stress and fear to have to go talk to a “boss” about discrimination. The point is to make it possible and reasonably easy for any person to file a report.
- Take all such reports seriously and investigate each one. Talk to the employee making the report, to any alleged perpetrator, and to any listed witnesses. If the report is anonymous, observe how things occur in the workplace. Listen to comments, notice whether any employees seem to be under stress, look for unusual absence rates, determine whether turnover is higher than should be expected, and pay attention to what is and is not occurring in the workplace.
- Make findings and conclusions when the investigation is complete. Determine whether the reported unlawful discrimination happened or did not happen. It can be difficult to draw a conclusion and, regardless of the conclusion, there is no justification for failing to do so.
- If discrimination has happened, deal with the perpetrator appropriately. This may include termination from employment. Assure the victim that s/he will not be disciplined or suffer any type of adverse consequence for having made the claim. Offer the victim support and help as appropriate, particularly in cases of harassment.
- If discrimination did not happen, inform the alleged perpetrator and the “victim” of this conclusion. If the conclusion includes a finding that the “victim” fabricated the claim or otherwise acted maliciously, discipline the “victim” appropriately.

- If the investigation is inconclusive, tell the alleged perpetrator and the victim of this finding. Take no action against either one, as there is nothing on which to base any action. It may, however, be advisable to separate them or to make sure they do not have contact with each other. If this is not possible, it will be necessary to monitor the situation in some appropriate manner.
- Educate all personnel through in-house seminars, meetings, or similar methods regarding the company's antidiscrimination/harassment policy. Personnel may even be tested to see how well they have learned the procedures, as well as to determine the effectiveness or level of understanding achieved. Retest and retrain as necessary.
- The employer must remain educated regarding the requirements of the law pertaining to discrimination issues as the law affects the employer and its employees. Many trade publications and newsletters contain useful information for this purpose.
- Finally, every employer should have a lawyer who can be consulted when necessary.

By fully understanding that unlawful discrimination is treated as a condition that can strike anywhere at any time, much like the flu, an employer will have a realistic understanding of the issue. A realistic understanding allows an employer to know that it may have to deal with unlawful discrimination in spite of its best efforts to avoid it, but the employer will at least have a plan ready to deal with an actual claim. Believing that current efforts to eliminate unlawful discrimination from the workplace are feasible leads to a fool's assurance. When a claim is made, such an employer is usually left without an effective plan for handling the claim. This can aggravate the claim and even lead to other problems.

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Direct reprint requests to:

William L. Smith
Campus Box 4058, BAE Department
Emporia State University
1200 Commercial
Emporia, KS 66801
e-mail: smithwil@emporia.edu