



# Sex Discrimination

## Who, What, Why . . .

*Who does it apply to:* The law applies to all employers with 15 or more employees.

*What is the issue:* Title VII was passed in the 1960s to protect against discrimination based on race, color, religion, sex or national origin.

*What am I required to do:* Employers are required not to discriminate against employees on the basis of sex. More specifically, employers are required not to treat an employee adversely because of his or her sex in relationship to any significant aspect of employment.

*What constitutes a violation:* There are two kinds of violations – direct mistreatment and disparate impact. Direct mistreatment is straightforward. If an employer affirmatively mistreats an employee because of sex by failing to hire, firing, demoting or any other type of significant slight someone might dream up, it can be actionable as sex discrimination.

*Disparate impact is more subtle.* If an employer creates a policy that is neutral or non-discriminatory on its face, that policy might have a consequence of negatively impacting workers of one sex more significantly than others. If an employer institutes a policy that it prefers to hire people with military service, the policy itself does not seem discriminatory because it may affect any applicant. That said, there are statistically fewer women in the military and hence the rule has an adverse effect on women applicants. This facially neutral rule has a disparate impact against female applicants and may create a claim.

*What counts as a sex:* The answer appears straightforward but really is not. While homosexuality and gender identity are not expressly protected under Title VII, actions based on sexual stereotypes are permissible. For example, if a man brings a claim for being treated differently because he does not act manly enough (instead of alleging discrimination based on homosexuality) a jury may be allowed to award damages.

*What if my employee violates without consent:* Choose carefully who you place in charge. Employees placed in positions of authority with the power to control the circumstances of other

employees are not personally liable. Their liability is placed with the employer even if the employee acts without authority. The same is true of independent contractors (whether properly characterized or not) placed in positions of authority over employees.

*What if gender is a requirement of the job:* Sometimes a person's sex may affect their ability to get a job based on a Bona Fide Occupational Qualification (BFOQ). There are, however, very few circumstances where such a requirement will stand up in court outside of the entertainment industry in which a particular sex is cast for a role. BFOQs are complicated and you should always check with your employment counsel before implementing one.

*Can retaliation play a part:* Title VII protects employees who engage in protected activities such as supporting another employee's claim of discrimination, resisting instruction to discriminate, and filing a complaint about discrimination with the employer or EEOC. Employers cannot negatively impact a significant aspect of employment for an employee who supports another's sexual identity or their complaint against sex discrimination. Employers also cannot retaliate against an employee for complaining of sex discrimination or making a charge of sex discrimination with the EEOC.

*What about harassment:* Even if an employer does not discriminate against an employee directly, the employer may be liable if its employees harass an employee about his or her sex. Sex harassment is such a pervasive concern that it receives its own topic. See the Employer Handbook edition on Sex Harassment for more guidance.

## Common Situations:

*Babymaker:* Doowe Cheatum & Howe is a prestigious law firm filled with go-getter attorneys that are willing to sacrifice almost anything for their careers. The few women working at the firm gave up on having children from the outset to convince the firm's leaders they would not take time to raise a family. Can the firm select only women disinterested in having children? Of course not, but businesses do it every day.

*I ain't working for her:* Tom's Construction is looking for a new superintendent to oversee two of its crews. Megan, a well-qualified graduate of Texas Tech's Construction Engineering department, applies for the position. Tom, who is interviewing applicants, takes a moment to call Megan to let her know she shouldn't get her hopes up because he simply cannot hire a woman for the position even though she is well qualified. Tom tells Megan almost apologetically, "Those men won't work for a lady." Has Tom strayed out of bounds? Yep. While we can identify with the concern he raises, it is Tom's job to create an environment in which women can work side by side with men, even if it means he has to make changes to his crews.

*Equal pay:* Sally has worked for Bob's Banjos for 23 years. Ted started with the company at about the same time. Each has risen to the job of Shift Manager, yet while at lunch one day, Ted mentions to Sally how much he earns – 10% more each year. Does Sally have a claim? Yes, it is sex discrimination, but it is also a violation of the Equal Pay Act, covered in more detail in the Employer Handbook edition on that topic.

## What Should I Do:

*Good:* Count up your workers every few months to know whether the law applies to you. Once you have more than 15 employees institute an anti-discrimination policy including sex discrimination.

*Better:* In addition to developing a policy, control who is permitted to interview and make material decisions about employees to be sure they are aware of the concerns of sex and other discrimination.

*Best:* In addition to the items above, create job descriptions for each position. Use the job descriptions to prepare advertisements for positions, to ask objective interview questions, and to create a uniform and objective performance review system to avoid accidentally discriminating against someone based on sex.



Michael Kelsheimer focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at [mkelsheimer@grayreed.com](mailto:mkelsheimer@grayreed.com) or by phone at **469.320.6063**