

Employment Law for Business, 6th ed.
 Bennett-Alexander

Chapter 6

Gender Discrimination

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Statutory Basis

It shall be an unlawful employment practice for an employer—

(1) 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 . . . Sex [gender] . . . Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. 2000e-2 (a).

(1) No employer . . . shall discriminate between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . Equal Pay Act, 29 U.S.C.A. §206(d).

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Statutory Basis (continued)

(k) The term "because of sex" or "on the basis of sex" includes, but is not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . . Pregnancy Discrimination Act, 42 U.S.C. §2000e.

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Does it Really Exist?

- Recognizing gender discrimination
- Gender discrimination covers both males and females
 - The vast majority of EEOC gender claims are filed by women
- From 1997-2000 gender suits accounted for the highest percentage of cases brought under Title VII
- “Contraceptive equity”
- Hiring discrimination vs. on the job issues

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Does it Really Exist? (continued)

- Nearly half the workforce is female
 - Females represent two-thirds of all poor adults
- Only 15 percent of women work in jobs typically held by men
- Women earn about 77 percent of men’s pay
- The gender-based wage gap is present in every profession
- Women in management
- Gender was not originally part of Title VII

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Gender Myths

- Women are better suited to repetitive, fine motor skill tasks.
- Women are too unstable to handle jobs with a great deal of responsibility or high pressure.
- Men make better employees because they are more aggressive.
- Men do not do well at jobs requiring nurturing skills, such as day care, nursing, elder care, and the like.
- When women marry they will get pregnant and leave their jobs.
- When women are criticized at work, they will become angry or cry.
- A married woman’s income is only extra family income.
- It is inappropriate for a male employee to take leave to deal with the arrival of a new child.

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Gender Discrimination in General

- Advertising
- Application questions
- Interview questions
- Different hours or job positions
- Discipline
- Training
- Seniority systems
- Wages and benefits
- Terms or conditions of employment
- Termination

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Appearance-Based Discrimination

- Attractive men and women earn more than plain men and women
- Overweight men and women earn less than men and women who are average or underweight
- Taller men and married men earn more than shorter men and single men
- Plain women tend to attract the lowest quality husbands; beautiful women do no better in marriage than average women; looks don't seem to affect men's marriage prospects.

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Recognizing Gender Discrimination

- Does the policy exclude members of a particular gender from the workplace or some workplace benefit?
- Do height and weight requirements statistically exclude certain groups?
 - Do these requirements directly correlate to ability to do the job?

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“Gender-Plus” Discrimination

- Women who:
 - Are pregnant
 - Are married
 - Are over a certain age
 - Have children of a certain age
 - Are unmarried with children
- Males are not subject to the same limitations

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Gender Stereotyping

- Workplace decisions based on:
 - Ideas of how a particular gender should act or dress
 - What roles they should perform
- Prohibited by Title VII
- Frequently leads to actions that form the basis of unnecessary liability for the employer

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Grooming Codes

- Title VII does not prohibit an employer from using gender as a basis for reasonable grooming codes.
- Employers can use reasonable standards of what is generally thought to be male- or female-appropriate attire in a business setting.
- Perceptions of the employee in the workplace
- Gender-based grooming policies

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Customer or Employee Preferences

- Customer preference is not a legitimate and protected reason to treat otherwise-qualified employees different based on gender.
- Hooters
- U.S. citizens employed by American-owned or controlled companies doing business outside the United States

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Logistical Considerations

- Employers may not forgo hiring those of a certain gender because of logistical issues unless it involves an unreasonable financial burden.
- Examples:
 - Female sports reporters
 - Female firefighters
 - Bathroom facilities

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Equal Pay and Comparable Worth

- Despite the Equal Pay Act, women earn on average 77 cents for every dollar earned by men.
 - Women's salaries may be equal by the year 2050.
- The EPA overlaps with Title VII's general prohibition against discrimination in employment on the basis of gender.
 - EPA is concerned with the **content** of the job

Comparable worth

A Title VII action for pay discrimination based on gender, in which jobs held mostly by women are compared with comparable jobs held mostly by men who are paid more than the women, to determine if there is gender discrimination.

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Gender as a BFOQ

- Title VII permits gender to be used as a bona fide occupational qualification under certain limited circumstances.
- BFOQ can be used when there is a legitimate need for authenticity.
- BFOQ as a defense generally found inapplicable.

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Pregnancy Discrimination

- 182 percent increase in the filing of pregnancy discrimination charges over the past 10 years
- The Pregnancy Discrimination Act amended Title VII's definitions to include discrimination on the basis of pregnancy.
- Maternity and short-term disability policies
- Inability to perform vs. pregnancy

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Parental Leave Policies: The Family and Medical Leave Act

- Entitlement to leave
- FMLA guarantees employees who have been on the job at least a year up to 12 weeks of unpaid leave per year for:
 - A birth
 - An adoption
 - Care of sick children, spouses, parents or their own illness
- Requirements
 - Employer
 - Vacation
 - Medical confirmation
- Affects about 5 percent of U.S. employers and about 40 percent of U.S. employees
- Employer confusion

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Fetal Protection Policies

- Limit or prohibit employees from performing certain jobs or working in certain areas
- Many times these policies only exclude females

Fetal protection policies

Policies an employer institutes to protect the fetus or the reproductive capacity of employees.

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Summary

- Discrimination on the basis of gender is illegal.
- Gender discrimination has many manifestations.
- In determining whether employment policies are gender biased, look at the obvious, but also look at the subtle bias that may arise from seemingly neutral policies adversely impacting a given gender, such as height and weight requirements. Both types of discrimination are illegal.
- Where employees must be treated differently, ensure that the basis for differentiation is grounded in factors not gender-based but, instead, address the actual limitation of the employee or applicant's qualifications.
- Under the PDA, employers must treat a pregnant employee who is able to perform the job just as they treat any other employee with a short-term disability.

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Summary (concluded)

- Because of health and other considerations, an employer may use pregnancy as a BFOQ and may have policies excluding or limiting pregnant employees if there is a reasonable business justification for such policies.
- If there are legitimate bases for treating pregnant employees differently, an employer has ample flexibility to make necessary decisions.
- Outmoded ideas regarding pregnant employees may not be the basis of denying them equal employment opportunities.
- Covered employers must provide covered employees with leave under the FMLA.
- Fetal protection policies may not operate to discriminate against employees and fail to extend to them equal employment opportunities.

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