

Case Elements for Use in Reality Checking

I. GENERAL PRINCIPLES

In a discrimination case, a complainant must present a sufficient “threshold” of evidence. In analyzing a case for potential litigation risk and possible settlement, it is necessary to determine whether the complainant has met this minimum threshold. There are three categories of discrimination with which you may be involved: (1) disparate treatment, (2) disparate impact, and (3) failure to make reasonable accommodation in religious discrimination or disability claims.

Disparate treatment is probably the most common form of discrimination--that is, different treatment because of race, color, sex, religion, national origin, age, or disability. Disparate impact means that a policy or program may appear, on its face, to treat everyone equally, but in application it actually discriminates. Examples of disparate impact are general intelligence tests or educational requirements that disproportionately disqualify members of certain protected groups and are not job-related. Examples of a reasonable accommodation may be making a jobsite readily accessible or restructuring a job for the disabled employee or modifying work schedules for religious accommodation.

The complainant may prove the discriminatory intent by either direct or indirect evidence. Direct evidence is rare--for example, is there a memorandum written by the selecting official stating that he did not select the complainant because she is a female, or because he is a Hindu or because she is a Hispanic. Indirect evidence is circumstantial in nature--the evidence does not by itself prove a motivation--but rather it allows one to infer the existence of a fact. For example, management records demonstrate that the selecting official, although provided numerous opportunities to do so, has never hired a woman, a Hindu, or a Hispanic. In most cases, there will not be that “smoking gun” of direct evidence, and the complainant will thus need to prove discrimination indirectly by inference.

The adjudication of a complaint of discrimination by indirect evidence follows a three-step evidentiary analysis adopted by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973). This three-step process has been applied in cases brought under Title VII, Age Discrimination, and Rehabilitation Act.

A complainant must first present a *prima facie* case of discrimination. A *prima facie* case is that minimum amount of evidence necessary to raise a legitimate question of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973). Section II and III below explain the specific elements required in particular types of cases.

Second, if the complainant meets the burden of presenting a *prima facie* case, then management has a burden of production to articulate some legitimate, nondiscriminatory

reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981). The evidence presented by management need not establish management's actual motivation, but must be sufficient to raise a genuine issue of material fact as to whether management discriminated against the complainant. If management meets this burden of production, the presumption of discrimination raised by the prima facie case is rebutted and drops from the case altogether. Examples of this second step include lesser comparative qualifications, inability to get along with supervisors or co-workers, or poor performance.

Third, in order to prevail, the complainant must show by a preponderance of the evidence ⁴¹ that management's stated reason is pretext for discrimination. The complainant may show pretext by evidence that a discriminatory reason more likely than not motivated management, that management's articulated reasons are unworthy of belief, that management has a policy or practice disfavoring the complainant's protected class, that management has discriminated against the complainant in the past, or that management has traditionally reacted improperly to legitimate civil rights activities. The complainant must prove *both* that the reasons given were false, *and* that the real reason was discrimination (i.e., *pretext*).

Finally, two terms need to be explained. First, a "protected class" or "protected group" represents a group that is recognized *by the law* to have protection against discrimination. Second, "similarly situated employees" has been defined to mean a person or group of persons who are of the same GS rating, occupation, or office for the purposes of comparing the treatment received. These terms of art should be discussed with your labor counsel when reviewing a case for possible settlement or litigation.

The elements that make up the *prima facie* case address the first prong of the *McDonnell Douglas* test.

II. PROTECTED CLASSES

A. Race, Color, and National Origin

Regardless of whether the claim is discrimination by race, color, or national origin, the elements are the same. The Complainant must prove that:

1. He/she is a member of a protected class,
2. The complainant experienced an adverse action, and
3. The complainant was treated differently than similarly situated individuals not in his/her protected class under similar circumstances.

⁴¹ Preponderance of the evidence is that degree of proof which is more probable than not; it does not necessarily mean the greater number of witnesses.

B. Sex Discrimination

You may find that sex discrimination complaints may be filed on one or more of the three types of discrimination claims: (1) disparate treatment, (2) disparate impact, and (3) sexual harassment.

The *prima facie* elements for **disparate treatment** (treating someone differently based on gender) are the same as for race, color, or national origin discrimination. To make a *prima facie* case of **disparate impact discrimination**, the complainant must show that a challenged practice or policy disproportionately impacted members of his/her protected class. Specifically, the complainant must:

1. Identify the specific practice or policy challenged;
2. Show a statistical disparity; and
3. Show that the disparity is linked to the challenged policy or practice.

Sexual harassment may be seen as either *quid pro quo* harassment or **hostile environment**. *Quid pro quo* harassment is a case where favorable treatment or punishment is promised for, or conditioned upon, the complainant providing sexual favors. A complainant makes a *prima facie* case of *quid pro quo* harassment by proving:

1. The harassment occurred in an employment context;
2. The promised or threatened action was work related; and
3. The harasser was in a position, or was reasonably perceived as being in a position, to carry out the promised or threatened action.

The second type of sexual harassment is known as the **hostile environment**. A complainant makes a *prima facie* case in this area by proving:

1. He or she is a member of a protected class;
2. The Complainant was subjected to unwelcome sexual advances, requests for favors, or other verbal or physical contact of a sexual nature;
3. "But for" complainant's gender, he/she would not be subject to the harassment;
4. The harassment affected a term or condition of employment, and/or had the purpose or effect of unreasonably interfering with the work environment, and/or created an intimidating, hostile, or offensive work environment; **and**

5. The employer knew or should have known about the harassment, and failed to take prompt remedial action.

D. Religious Discrimination

The elements of a *prima facie* case of discrimination based upon religion are the same as those for race, color, or national origin.

E. Age Discrimination

While the elements of a *prima facie* case are the same for age as for race, color, and national origin, the protected group is specifically identified as people over 40 years of age.

F. Disability Discrimination

A complainant must prove:

1. He or she has a disability.⁴² There are detailed requirements and recently developed modifications of those requirements from the United States Supreme Court on this point, so check with an attorney on this element.
2. The Agency knew of the disability;
3. The Complainant was qualified to fill the position with or without reasonable accommodation of the disability; and
4. The Complainant was treated differently because of the disability, or because the Agency failed to accommodate the disability (depending on what is alleged.)

G. Reprisal

Reprisal cases may be the one type of complaint in which you are more likely to see direct evidence. To make a *prima facie* case of reprisal:

1. Proof by **direct evidence** of the intent to punish the complainant for engaging in some protected activity (such as involvement in the EEO process or whistleblowing).
2. Proof by **indirect evidence**, which requires the complainant to show:
 - a. The Complainant engaged in a protected activity;

⁴² Even if the complainant does not have an *actual* disability, if they are *perceived* by the employer as having a disability, it is tantamount to having one.

- b. The responsible management officials knew about the activity;
- c. The Complainant was subjected to an adverse employment action within a reasonable amount of time following the protected activity; and
- d. There is a causal connection between the action and the protected activity.

III. PRIMA FACIE ELEMENTS FOR COMMON TYPES OF UNLAWFUL DISCRIMINATION COMPLAINTS

A. Not Selected For Promotion

- a. The Complainant meets the basic qualification standard for the job;
- b. The Complainant is a member of a protected class;
- c. There was a vacancy for which the Agency sought applicants and the Complainant applied;
- d. The Complainant was not selected; and
- e. The Agency continued to seek applicants with similar qualifications or selected someone not in the Complainant's protected group.

B. Disciplinary Actions

- a. The Complainant is a member of a protected class;
- b. The Complainant was subjected to a disciplinary action; and
- c. The Agency treated him/her more harshly than similarly situated employees who were not part of the protected group.

C. Appraisals

- a. The Complainant is a member of a protected class;
- b. He/she is similarly situated to employees outside his protected class; and
- c. The Complainant got a lower performance rating.

D. Harassment

Harassment may be based on any of the protected bases--race, color, national origin, religion, sex, age, or disability. Most frequently, complainants allege harassment based on race or sex.

A complainant must show:

1. The existence of a pattern of harassment or intimidation. The harassment must be more than a few isolated incidents. It must be "sufficiently pervasive" so as to alter a condition of the victim's employment and create an abusive working environment;
2. That the employer or agency knew or should have known of the illegal conduct; and
3. That the employer or agency failed to take reasonable steps to cure the harassment.

E. Failure to Provide a Reasonable Accommodation to a Qualified Disabled Person

In order to establish a prima facie case of disability discrimination under a reasonable accommodation theory, complainant must show:

1. That he/she is an "individual with a disability";
2. That he/she is a "qualified individual with a disability"; and
3. That the agency failed to reasonably accommodate his/her disability

An "individual with a disability" is defined as "one who: (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment." 29 C.F.R. § 1614.203(a)(1).

Major life activities are functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1614.203 (a) (3). A "qualified individual with a disability" is one who meets the education and/or experience requirements for the job and can perform the essential functions of the job with or without reasonable accommodation. 29 C.F.R. § 1614.203(a)(6).