LAW ENFORCEMENT MANAGEMENT INSTITUTE

DISCRIMINATION AND HARASSMENT IN THE WORKPLACE

A RESEARCH PAPER
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MODULE II

BY
ROBERT L. WATSON

HOUSTON POLICE DEPARTMENT
HOUSTON, TEXAS

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I. Introduction

With the possible exception of the expansion of the civil litigation in federal courts under 42 U.S.C. §1983 and §1985, no other area of recent legal developments has revolutionized police management concepts so much as have discrimination laws. The advent of Title VII and its race, sex, and ethnic origin ramifications, the Age Discrimination in Employment (ADEA), Equal Pay Act, the Bennett Amendment to Title VII, and various federal sexual harassment, handicapped and veteran's statutes all serve to present police and law enforcement executives with a variety of problems and concerns. 1

The first time a police administrator faces an allegation of violation can be a very traumatic experience. Contributing to the stress is the lack of understanding that many officers have about the applicable laws.

The popular misconception is that management has forfeited its executive prerogatives in this area of law. Nothing can be further from the truth. Executives still maintain discretionary alternatives when dealing with personnel problems. 2 The only real change necessitated by these federal statutes is a greater burden on the agency to document the legitimate basis for its action.

In order to properly defend and protect itself against a complaint of employment discrimination, a law enforcement agency must understand the applicable law. Even though various federal statutes generally preclude discrimination on the basis of religion, sex, race, national origin, age and handicap a thorough understanding is needed in each case.

The simplest way to examine closely related complex legal issues is to take each and review them independently of the others.

II. Historical Background

Equal employment opportunity legislation is not a recent phenomenon. Both the Thirteenth and Fourteenth Amendments to the U.S. Constitution gave Congress the right to provide for the enforcement of equal treatment and "due process". This eventually lead to the civil rights legislation of 1866 and 1871 that dealt with the issue of employment discrimination.3

The Act of 1866 prohibited racial discrimination in the making, granting, or enforcement of contracts, including those for employment. The 1871 Act prohibited the denial of an individual's federally granted civil rights by anyone acting under any conflicting state or local law. Though enacted by Congress, there was virtually no enforcement.

Ironically both Acts are vigorously used today to bring

action against employers too small to be covered by Title VII of the Civil Rights Act of 1964 and for their longer statute of limitations.

In 1941 President Roosevelt, and later President Kennedy in 1961, attempted to stimulate compliance by the issuance of executive orders for fair employment of minority groups. The 1961 order was significant in that it imposed for the first time, affirmative action in government employment. 4 Though important, the real impact resided not with the executive orders themselves but with their cultivation of the Civil Rights Act of 1964.

III. Federal Regulatory Statutes

Civil Rights Act of 1964

There are numerous sections dealing with various facets of discrimination in the Civil Rights Act of 1964. The most significant of these is Title VII.

Title VII provided in [Public Law 92-261, Section 703(a)] that:

> It shall be unlawful employment practice for an employer (1) to fail or refuse to hire, or discharge any individual or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunity or otherwise adversely effect his status as an employee because of such individual's race, color, religion, sex or national origin.

This Title is the most frequently cited statute in the Equal Employment Opportunity Law. Although it was a major milestone in fair employment practices, it was not the panacea that most expected it to be.

Originally the Title only applied to public employers and labor organizations with twenty-five (25) or more persons as well as to all private employment services. Two years later the Act was amended to cover both public and private employment agencies, companies employing fifteen (15) or more persons, and expanded the definition of "employers" to include state and local governmental agencies. 5 Discrimination due to pregnancy was prohibited by an amendment to the Act in 1978. Even with these amendments, the Title has limitations to its scope and even sanctions preferential treatment under certain circumstances.

This nondiscrimination act does not include the practices of the United States government, a corporation owned by the government, Indian tribes, the District of Columbia or a "bona fide" private membership club. Schools, colleges, and other institutions of learning are also exempt if it is supported, controlled or managed by a particular religion. Neither does unlawful employment practices outlined in Title VII apply to any individual who is a member of the Communist Party or related organization. 6

It does allow for a continuation of special rights granted veterans. Nothing in the Title was to be construed as "limiting, modifying, or repealing, any Federal, State, territorial, or local law creating special preferences for veterans."

The Title also is not to be applied to "any business or enterprise on or near an Indian reservation." This is to continue the promotional and preferential hiring practices of native American Indians living on or near governmental lands.

The Title does establish that occupational qualifications can be set by employers if the qualifications are "reasonably necessary to the normal operation of that particular business or enterprise." A contention that an employment practice is required by business necessity is not a defense to intentional discrimination practices.

The Title goes even further to protect employment applicants. A person can not be denied employment solely on his opposition made to existing unlawful employment practices. It also became illegal for employers, labor associations, or employment agencies to publish a notice or advertisement indicating any preference to race, color, religion, sex, or national origin. The only exception granted is if the preference is bases solely on an occupational qualification. 7

Another protection provided for in Title VII is the applicant's use of drugs. No longer can an employer deny employment to an individual who uses or is known to possess drugs if such criteria is applied with the intent to discriminate against that individual. 8 This does not preclude an employer from denying a person employment if such restriction on drug use is uniformly applied to all and can be shown that prohibiting its use is "reasonably necessary to the normal operation of that business or enterprise."

It is commonly believed that Title VII is an affirmative action statute. This is not the intent. Section 2000c - 2, paragraph (j) states:

> Nothing contained in this shall be interpreted to require any employer, employment agency, labor organization, or joint-management committee subject to this chapter to grant preferential treatment to any individual or to any group because of the race, color religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization .

The affirmative action use of Title VII arises from the discretion of the courts. In litigation filed under Title VII a court can decide and grant "appropriate equitable relief". That relief may be in the form of court mandated hiring practices or quotas.

An allegation of unlawful employment practice can also be established under Title VII if it can be substantiated that the practice causes a disparate impact. Disparate impact in this context is defined as a hiring or employment practice that disproportionally effects a particular group of persons.

An unlawful employment practice based on disparate impact can only be established under this statute if an employer uses a particular practice that causes the disparate impact and if that practice is not an occupational qualification.
An employer may also be in violation if it can be determined that though the practice is an occupational qualification an alternative practice which would result in a lesser degree of impact but still serve the business necessity was not used. Employers must use practices with the least disparate impact.

Though title VII made monumental strides in the equality of employment opportunities, it did not address discrimination due to age and physical disabilities. It would not be until years later that these inequities would be addressed.

Equal Pay Act

While the Civil Rights Act was being debated in 1963 the Equal Pay Act was passed. A last minute effort successfully attached itself to the Fair Labor Standards Act and became 86(d) of that law.

In general the Act required employers to pay equal wages regardless of sex, "for work equal in skill, effort, responsibility." Different pay scales could exist if they were based on: "a system that uses quality or quantity of production standards to measure earnings, a merit or seniority system, or any other bona fide reason." 9 The Act in its original form applied only to those employes subject to the minimal wage provisions of the Wage-Hour Law.

The following year the Civil Rights Act of 1964 continued in this vein by incorporating into its Title VII provisions that again assured equal pay. This time equal pay was mandated for all without regards to race, color, religion, sex or national origin. The same exceptions were applied as in the Equal Pay Act with the addition to an exemption for the same work performed at different geographic locations. Again, no pay inequalities would be allowed if the intent was to discriminate again a particular group.

The real teeth to the Equal Pay Act itself came in its revision in 1972. An amendment was passed that would apply to white collar employees that had been previously exempt from the provisions of the Wage-Hour Law. Now executives, administrators, professionals, outside salespersons, teachers and academic administrative personnel were covered. 10

The Age Discrimination in Employment Act (ADEA)

The Age Discrimination in Employment Act of 1967 was designed to address the omission of the aged in the Civil Rights Act of 1964. Its intent was to promote the hiring of workers over forty (40) and to ban discrimination against these older workers. In 1978, amendments to the law increased the protected age group from sixty-five (65) to seventy (70) years of age. It also eliminated the mandatory retirement age for all federal governmental agencies. 11

In 1986, the ADEA extended its protection to any who were over forty (40) years old. Specific exemptions were granted for state and local government public safety employes. 12 It also allowed institutions of higher learning, until 1994, to force tenured faculty employees to retire at seventy (70) years of age. High-level employees can be forced into retirement at age sixty-five (65) only if their pension benefits exceeded $44,000.00.

The 1986 amendment also abolished mandatory retirement for most employees. This superseded any requirement that may have been imposed by the employer's fund system or retirement benefit plan.

Labor Contracts with the Federal Government

The Rehabilitation Act of 1973, the Vietnam-Era Veteran's Readjustment Assistance Act of 1974, and Executive Order

11246 all pertain specifically to companies or agencies who contracts with the federal government.

The Rehabilitation Act of 1973 prohibits employers seeking to secure federal contracts of over $2,500.00 from discriminating against handicapped individuals and provides for affirmative action to provide employment opportunities for them.

The Vietnam-Era Veteran's Readjustment Assistance Act of 1974 requires that federal contractors take affirmative action to actively hire and promote Vietnam veterans.

Executive Order 11246, dated September 24, 1965, bans discrimination by employers who have contracts with the federal government or employers who are assisted by federal funds. This order in most cases call for affirmative action to insure non-discriminatory practices. 13

Civil Rights Act of 1991

The primary impetus for the Civil Rights Act of 1991 was to overturn a series of United States Supreme Court rulings that were unfavorable to employment bias complaints. The Act reverses seven (7) court decisions that were adverse to the interests of the alleged victims and provided for increased damage awards. 14

In Wards Cove Paking Co. v. Atonio, the Court ruled that an employer did not have to prove "business necessity"

to defend a case in which an individual had shown that the employer's practices had a disparate impact on a protected group. The Court required only that an employer provide business justification for the questioned hiring practice.

The Act requires the employer to now demonstrate that the questioned hiring practice is job-related and is consistent with "business necessity." 15

In Patterson v. McLean Credit Union, the Court held that protection against racial bias was limited to hiring and promotion decisions but did not extend to post-hiring conduct by the employer.

The Act specifies that the statute now covers all forms of racial bias in employment. 16

In Martin v. Wilks, the Court permitted white firefighters to challenge a consent decree involving affirmative action years after it had been ordered by a court.

The Act prohibits challenges to consent decrees by individuals who had reasonable opportunity to object to the decree. 17

In Price Waterhouse v. Hopkins, the Court held that an employer could avoid liability for intentional discrimination if he could demonstrate that the same action would have been taken without discriminatory motives.

The Act stipulates that any intentional discrimination is unlawful and that the employer should be held accountable. 18

> In Lorance v. AT&T, the Court held that the period for challenging an allegedly discriminatory seniority rule begins when the rule is adopted, rather than when the employee is affected.

The Act now allows employees to challenge a seniority system at any time. 19

> In Equal Employment Opportunity Commission v. Aramco, the Court ruled that federal job discrimination law was limited to the territorial jurisdiction of the United States.

The Act extends coverage to United States citizens employed by American companies abroad. 20

> In West Virginia University Hospitals v. Casey, the Court ruled that expert witness fees are separate from attorney's fees and thus could not be recovered by successful civil rights plaintiffs.

The Act now includes expert witness fees in the definition of recoverable costs. 21

Another key provision in the Civil Rights Act of 1991 was the establishment of a "glass ceiling" commission. This commission is charged with the study of barriers to the advancement of women and minorities in the workplace. They are also to recommend means of overcoming these barriers.

Americans with Disabilities Act

While considering the Americans with Disabilities Act

Congress found that some 43,000,000 Americans have one or more physical or mental disabilities. Unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals discriminated on the basis of disabilities often have no legal recourse. 22

It was decided that a proper goal for the Nation would be to assure individuals with disabilities equality of opportunity, "full participation, independent living, and economic self-sufficiency." 23 This Act was an attempt to set a national mandate for the elimination of such discrimination.

The Americans with Disabilities Act, commonly referred to as the ADA, was signed into law in 1990. The employment portion of the Act took effect in 1992. Employers of smaller companies must comply by 1994. The Act provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedure, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

According to the ADA, employers may not discriminate against an individual with a disability in hiring or promotion if that person is otherwise qualified for the position. Employers do not need to provide accommodations that impose

an "undue hardship" on their business but must provide "reasonable accommodations" to individuals with disabilities. This may include special furniture, job restructuring or equipment modifications. 24

Employers are still permitted to ask about an individual's ability to perform a job, but cannot inquire into the extent of a person's disabilities. A medical examination cannot be requested of the disabled person prior to his employment and can only be requested after his employment if the examination is required of all employees.

The thrust of the ADA is not entirely toward employment. Public accommodations, government services, transportation, private industry, and telecommunications are effected as well. All must comply with providing access, removing physical barriers, and eliminating discriminating practices.

IV. Sexual Harassment

Sexual harassment, in essence, is an extension of the Civil Rights Acts. It became covered under Title VII when sexual harassment was defined as a form of discrimination (differential treatment). As mentioned earlier the Civil Rights Act of 1991 reversed the Supreme Court ruling in Patterson v. McLean Credit Union and specified that the Civil Rights Act of 1964 applied to "harassment on the job."

Though laws and statutes can be found at all levels of government, the focus on discriminatory hiring and employment practices seem to be by the federal government and the individual states. Local governments, it appears, have concentrated their attention on issues of sexual harassment.

Where there may still be instances of discrimination in hiring and in the workplace, most cities have taken a strong stand against such action and have developed stern policies to guard against violations. Hiring and promotion procedures have been modified to eliminate bias. Employees understand what discrimination is and understand such conduct will not be tolerated. Conversely sexual harassment, in many instances, is subjective and difficult for some to see the infraction.

It is relatively easy to theorize about the motivation for sexual harassment - power struggles, stereotyping, resentment of opposite genders - but defining it can be illusive. The fact that the workplace is often a milieu for meeting people, some may confuse harassing behavior with courtship. What is seen as flirtation by one may be seen as harassment by another. 25

The most frequently cited definition of sexual harassment was offered by the Equal Employment Opportunity Commission. It states:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

This definition was affirmed by the Supreme Court in 1986 by its ruling in Meritor Savings Bank v. Vinson. The court held that sexual harassment in the workplace is sex discrimination and is prohibited under Title VII of the Civil Rights Act of 1964. The Court also ruled that harassment is illegal not only when it results in the loss of a job or a promotion, but also when it creates an "offensive or hostile working environment." 26

Both males and females can be victims or perpetrators of harassment. Though it is in the majority of the reported cases, one that harasses need not be the victim's supervisor. It can also be a co-worker, a sub-contractor, a service provider, a consultant, and in some cases, even a customer. Sexual harassment can also occur between persons of the same sex. 27

The victim of sexual harassment is not only confined to the person at whom the unwelcome sexual advances or contact was directed. The sexual harassment of one employee may create an

atmosphere that is "intimidating, hostile or offensive" to a third, non-involved party. 28 Contrary to other laws, it is not how the perpetrator intended his actions to be taken but how the victim perceived them.

There are three (3) types of sexual harassment; verbal, non-verbal, and physical.

Verbal sexual harassment is the actual audio communication of an actual or suggestive sexual nature. Some examples that can be construed as verbal sexual harassment are:

Sexual comments about a person's body

Telling sexual jokes or stories

Whistling (cat calls)

Referring to an adult as girl, hunk, doll, babe, or honey

Making sexual comments or innuendos

Turning work discussions to sexual topics

Asking about sexual fantasies, preferences, or history

Asking personal questions about social or sexual life

Making sexual comments about a person's clothing or looks

Repeatedly asking out a person who is not interested

Making kissing sounds, howling, smacking lips

Spreading rumors about a person's sex life 29

Non-verbal sexual harassment is a sexually suggestive act

taken by the harassor to get the attention of another. This form of sexual harassment is the most subjective and therefore unintentional acts may be misinterpreted. Examples are :

Slowly looking a person up and down (elevator eyes)

Leering or overt stares

Blocking a person's path

Following a person

Standing unnecessarily close

Giving intimate or personal gifts

Displaying sexually suggestive materials

Making sexual gestures with hands or by moving body parts

Making facial expressions such as licking lips, winking, or throwing kisses 30

Physical sexual harassment is the unwanted physical touching of another. This is the most obvious act of sexual harassment but to establish a violation the aggressor must know or should have known that his actions were unwanted. The following are examples:

Massaging a person's neck or shoulders

Repeatedly touching a person's clothing hair, or body

Hugging, kissing, patting, or stroking another

Intentionally brushing up against another

Touching, grabbing, or rubbing oneself sexually while around another person 31

Gauging the actual incidence of sexual harassment is difficult. Several surveys covering disparate sectors of society have varied widely in their findings. Some rank the incidence of sexual harassment as low as twenty-six (26) per cent and others as high as eighty-eight (88) per cent. 32

Proponents of laws prohibiting sexual harassment vigorously proclaim that the incidence is significantly underreported. Some women may think there is nothing they can do about it. Many others may decline to file a complaint for fear of confronting superiors, being labeled as a troublemaker, or subjecting their personal lives to scrutiny. Others may fear jeopardizing their income.

V. Reporting Discrimination or Sexual Harassment

Concerned that the reporting process may discourage reporting most states and local governments have simplified their procedures. As many barriers as possible have been removed. Employees are now encouraged to report violations and are afforded protection against retaliation.

In most major cities, an employee of that city that believes that they have been a victim of either a sexual harassment or a discriminatory practice, can file their complaint with any of three different agencies. A complaint can be filed through the city's Affirmative Action Division, the state's

Commission on Human Right's, or directly with the Equal Employment Opportunity Commission.

Persons who are not employees of the city can not avail themselves of the services of the Affirmative Action Division but have a choice of reporting their complaint to the State or to the E.E.O.C.

A complaint filed through the city or the State is handled virtually in the same manner. The person lodging the allegation must do so in writing within one hundred and eighty (180) days of the offending action. The complaint is then investigated. Evidence is gathered, documents are collected, and witnesses are interviewed.

If the analysis of the information substantiates a claim, the case is reviewed for completeness then presented to the department head in the case of a city, the company executive in private industry. A conciliation is then mediated. If an agreement is reached and the offending condition is eliminated, the complaint is considered resolved.

In the event the findings are disputed the case is appealed to the mayor of a city, or to the Attorney General, in the case of a company. Here another examination of the facts will be made. The mayor will make the final determination for the city but, the Attorney General is obligated to pursue civil

litigation on each disputed case received. Complaints filed directly with the Equal Employment Opportunity Commission are handled similarly. The complaint must be filed in writing within one hundred and eighty (180) days. If the allegations are proven to be true, the violator has thirty (30) days to respond in "an acceptable manner." If an acceptable response is not received, the Commission has the authority to bring civil action on its own or issue a "right to sue" notification to the complainant permitting them to pursue legal action. 33

An exception to the Commission's authority to bring legal action is if the violator is a governmental agency. An agency refusing to take corrective action is referred to the respective attorney general's office, be it state or federal, for litigation.

Once in court several judgements can be imposed against a violator found guilty. The court can enjoin the company or governmental agency from a continuation of its practices in question, order a re-hire in a case of dismissal, and grant backpay for up to two (2) years. The court has also been given the latitude to order "any other equitable relief", including but not limited to imposing affirmative action. 34

Penalties for discrimination violations has always been civil in nature, resulting in a monetary fine at most. The State of

Texas in 1989 placed criminal penalties on some aspects. It is now a criminal offense, as well as a civil violation for a "public employee acting in an official capacity to intentionally, through verbal or physical conduct, sexually harass another employee." 35 A separate offense was created to include "official oppression through sexual harassment." Under this statute, "a public employee who acts or purports to act in an official capacity, or who takes advantage of such capacity, commits an offense if he or she intentionally subjects another employee to sexual harassment." 36

Violation of these State statutes is a misdemeanor and is punishable by a fine not to exceed two thousand dollars ($2,000.00), up to one year imprisonment, or both. Corrective action administered at the local level does not relieve a violator of further punitive action. Punishment can be accumulative. An employee, found to be in violation of a city's policy, can be terminated. Criminal charges can be pursued in State court. In addition or conjunction of, a Civil petition can be filed on behalf of the State in civil court. Any and all of the above does not negate litigation being filed at the federal level.

A fundamental issue in defending against discrimination allegations is often overlooked. A person alleging violation of a federal discrimination law does not necessarily have to

prove intent to win a case. A successful complaint can be made if it can be established that an employment practice, while apparently neutral, had a discriminatory effect. 37

VI. Interviews and Inquiries

Much of the confusion over federal employment regulations comes in the pre-employment interview. "What questions can I ask?" "Can I require documentation?" "How far can I probe without violating some statute?" "What things can I consider?" These are all questions that employers in private companies and public agencies have voiced.

Below is a list of interview subjects with permissible questions along with suggested areas to avoid. (This is offered as a guide and is not intended to be used as a comprehensive interview format.)

1. Name

Permissible Inquiries

Additional information relative to a change of name, a use of an assumed name or a nickname necessary to enable a check on work and education records.

Avoid

Anything which would indicate the applicant's lineage, ancestry, national origin, or descent.

The previous name of an applicant where it has been changed by court order or otherwise.
Preferred courtesy title: Miss, Mrs. Ms.

2. **Marital and Family Status**

Permissible Inquiries

Whether an applicant can meet specific work schedules or their are activities, commitments or responsibilities that may hinder the meeting of the work attendance requirements.

Avoid

Asking the applicant their marital status.

If the applicant is engaged or dating.

Number of children and their ages.

Information on child-care arrangements.

Any question regarding pregnancy.

3. **Age**

Permissible Inquiries

Requiring proof of age in the form of a work permit or certificate of age, if a minor. Inquiry as to whether the applicant meets the minimum age requirements if one is required by law.

Avoid

Requiring the applicant to state age or date of birth.

Require applicant to produce proof of age in the form of a birth certificate or baptismal record.

4. **Disabilities**

Permissible Inquiries

The ability of an applicant to perform the job and job

related functions with and without reasonable accommodation.

Avoid

Asking an applicant whether they are disabled.

The nature, cause, or severity of a disability.

Any previous worker's compensation history.

5. **Sex**

Permissible Inquiries

Inquiry or restriction of employment is permissible only where there is a "bona fide occupational qualification." The burden of proof rests with the employer to show that all members of the affected class are incapable of performing the job. Sex of the applicant may be requested for affirmative action purposes but may not be used as an employment criterion.

Avoid

Any inquiry which would indicate sex.

Questions about the applicant's size, unless necessary as requirements for the job.

Questions relating to the applicants dating habits, social activity or sexual activities.

6. **Race or Color**

Permissible Inquiries

General distinguishing physical characteristics such as scars, tattoos, etc. can be requested for identification

purposes only. Race may be requested for affirmative action purposes but can not be used as a selection criterion.

Avoid

Asking the applicant's race.

Their ethic origin, lineage, or ancestry.

Color of applicant's skin, eyes, hair, etc. or other questions directly or indirectly indicating race or color.

7. **Birthplace**

Permissible Inquiries

Requiring proof of U.S. citizenship.

Avoid

Asking the birthplace of an applicant or his family.

Requiring an applicant to submit a birth certificate before employment.

Asking any question into national origin.

8. **Religion**

Permissible Inquiries

An applicant may be advised of normally scheduled hours and days required by the job to avoid a possible conflict with religious or other personal conviction. However, except in cases of "undue hardship", employers must make "reasonable accommodations" for religious practices of an employee.

Avoid

Asking an applicant their religious denomination or affiliation, church, parish, or religious holidays observed.

Any inquiry that would indicate or identify religious denominations or customs.

Telling applicants that a particular religious group is required to work on their religious holiday.

9. **Military Record**

Permissible Inquiries

Any type of education or experiences in service as it relates to a particular job.

Avoid

Asking type of discharge.

Geographical areas where the applicant served.

Activities or military engagements that the applicant may have been involved in.

10. **Photograph**

Permissible Inquiries

May be required for identification only after employment.

Avoid

Requiring an applicant to affix a photograph to the application.

Suggesting that an applicant "at their option" submit a photograph.

11. **Citizenship**

Permissible Inquiries

Applicants can be asked if they are a citizen of the United States.

Avoid

Asking what country the applicant is a citizen of.

Whether the applicant or his family is naturalized or native-born U.S. Citizens.

The date an applicant or his family acquired U.S. citizenship.

Requiring an applicant to produce naturalization papers.

12. **Ancestry or National Origin**

Permissible Inquiries

Languages that the applicant reads, writes, or speaks fluently if that language is necessary to perform the job.

Avoid

Inquiries into the applicant's lineage, ancestry, national origin, descent, birthplace, or native language.

Inquiries into the origin of the applicant's family or parents.

13. **Education**

Permissible Inquiries

Applicant's academic, vocational, or professional education and schools attended. Inquiry into foreign language skills if those skills are required in the job.

Avoid

The nationality, racial or religious affiliation of a school.

Asking how a foreign language was learned.

14. **Experience**

Permissible Inquiries

Prior work experience, including names and addresses of

employers, dates of employment, reason for leaving, and salary history.

15. **Convictions, Arrests, and Court Records**

Permissible Inquiries

Inquiries into actual convictions which relate to an applicant's fitness to a particular job.

Arrest records and conviction records though permissible should be viewed with caution and considered in the totality of the application. Mere arrests does not constitute a conviction and has a disproportionate effect on the employment opportunities of some groups.

Avoid

Federal courts have ruled that an employer may give fair consideration to the relationship between a conviction and the applicant's fitness for a particular job but that a conviction by itself may not constitute an absolute bar to employment. The number, nature, and recentness must be considered.

Any questions relating to arrests.

Requests for a person's arrest, court, or conviction record if it is not substantially related to the functions and responsibilities of the particular job.

16. **Relatives**

Permissible Inquiries

Names of an applicant's parent's or guardian if the applicant is a minor.

Avoid

Names or addresses of any relative of an adult applicant.

Names of friends or relatives already employed by an agency or firm.

17. **Organizations**

Permissible Inquiries

Inquiries into any organization that the applicant is a member providing that the name or character of the organization does not reveal the race, religion, color, or ancestry of the membership.

Avoid

Requiring the applicant to "list all organizations, club, societies, and lodges" to which he belongs.

Asking for the names of organizations that would reveal an individuals race, color, ancestry, or religious beliefs.

Naming any organization that does not effect the applicants work or employment.

Requesting information concerning membership to organizations by other family members.

18. **References**

Permissible Inquiries

By whom was the applicant referred.

Names of persons willing to provide professional or character references.

Avoid

Requiring the submission of a religious reference.

(Source: "Pre-Employment Inquiry Guide", City of Houston, Affirmative Action and Contract Compliance Dept.)

The increased cost of training and employees benefits, along with dwindling budgets for public service, has made the selection process of a suitable employee a paramount concern. It is for this reason, along with increased litigation, that the interview and selection process of an employee be taken with all the care and diligence as possible. A properly planned and conducted interview can result in acquiring the most productive employee without threats of costly discrimination allegations.

VII. Summation of Federal Employment Regulations

As vast, complex and possibly confusing as all of the major federal employment regulations may appear, their purpose and intentions are quite clear and can be capsulated easily.

Employee Selection

An employer, be it a public agency or a private firm, still retains the right and privilege of selecting the best possible person for the position. Minimum job qualifications can be set if those qualifications are "reasonably necessary" and are applied to all applicants equally. No quota system, or preferential treatment of a particular group are imposed on an employer, except those under court ordered affirmative action. An employer only needs to apply the job related standards to all, fairly and equally, and in the case of the handicapped, provide "reasonable accommodation."

Employment

An employer is held responsible for creating a workplace free of discrimination of any type. Policies must be established and rigorously enforced to prevent a "hostile or offensive work environment". Workers are to be treated equally. No policy or procedure should be establish to discriminate toward a particular group. No disparate distinction should be made toward the worker's age, sex, color, race, religion, or national origin. They are to be paid equally for equal work performed.

Intent to discrimination is not an issue. The fact that a disparate effect did occur is sufficient for a substantiated complaint. It is the employer's responsibility to constantly evaluate his operation for fairness and be vigil for inequitable treatment. It is the employer's mandated responsibility to operate with the least disparate impact.

Sexual Harassment

Employers are required to provide a workplace free of a "intimidating, hostile or offensive work environment." An employee may be reluctant to report sexual harassment. It is the employer's legal obligation to install a sense of trust and to encourage the exposure of such violations. 38

An employer is not only held accountable for his own action but also for those of his employees. They can also be held

culpable for the actions of their sub-contractors, vendors, and even customers. Assumptions made by the courts are that the attitude of management is reflected in the attitudes of their subordinates. Explicit prohibititory policies must not only be established but vigorously enforced.

The intent of the violator's actions is not an issue, it is how they are perceived by the victim that is paramount. It is not even necessarily for a victim to warn a violator to stop an unwanted sexual advance if a "reasonable person" would have known that such actions were offensive or unwelcome. A person not the focus of a unwelcome sexual advances could also be a victim of a 'intimidating or hostile work environment."

VIII. Responding to an E.E.O.C. Investigation

With an understanding of the applicable federal rules and regulations governing discrimination and sexual harassment, a law enforcement administrator can now be prepared for an E.E.O.C.'s investigation. For a governmental agency of any relative size it is not "if" but "when" a complaint will be filed.

A properly filed complaint will trigger a review. An initial conference will be requested by the Commissioner's investigator. Before attending such a meeting a thorough and

honest investigation of the complaint should be made. After evaluating the case a position should be established.

In some cases, it may be desirable to settle the matter as soon as possible and avoid further federal litigation. If this is the position taken, an attempt should be made to deal with the complainant directly. In the instances were this is not possible, the initial conference with the E.E.O.C. investigator would be the best opportunity to negotiate a settlement. Representatives with the authority to enter into a formal and binding agreement need to be present. 39

If the challenged practice was legitimate and defensible, an appropriate stance to resist federal interference should be maintained. A stand against discrimination charges should be done so with sufficient documentation to demonstrate and support a legitimate exercise of managerial discretion. 40

In finding a discriminatory practice, the E.E.O.C. will encourage a conciliation. If the evidence is convincing and overwhelming, then a settlement may be warranted. If the findings are not valid and documentation is present to support the position, one should not feel compelled or intimidated into settling simply because of an initial adverse conclusion.

A sexual harassment or discrimination investigation by the

E.E.O.C. or any other agency can be dealt with in a competent, professional manner if an entity understands the laws, takes appropriate measures to comply with those laws, and is prepared to support its position by adequate documentation.

IX. Conclusion

As vast and complex as the major federal employment regulations may appear, their purpose and intentions are clear. Set reasonable and necessary job related qualifications. Apply those legitimate qualifications to each and every applicant fairly. Select the best possible person for the position regardless of their race, sex, religion, age, national origin, or physical impairment.

After selecting an employee, create a workplace free of discrimination and harassment of any type. An employer is not only responsible for his actions but actions of those who constitute the "working environment" of the employee as well. No disparate distinction should be made toward any worker or group.

The most costly endeavor of any law enforcement agency is the selection and retention of its employees. Compliance to these federal statutes should be seen not only as mandated but as

an avenue to reduce needless expense and to retain valuable, productive employees.

ENDNOTES

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