

Sex and Gender Discrimination

A SPECIAL Report on Sex and Gender
Discrimination in Employment



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The Purpose of This Book

The purpose of this book is to provide some basic information about sex and gender discrimination in employment. Hopefully, it will answer some of the initial questions that a person concerned about discriminatory treatment or practices may have. It does not aim to present a comprehensive analysis of those issues.

Please also understand that this book does not provide legal advice to anyone regarding their particular situation. It is to provide information, in a general way, about some aspects and issues of sex and gender discrimination in employment and to help individuals make a decision about whether they should consult a qualified and knowledgeable lawyer about their particular situation.

Examples of Sex and Gender Discrimination

Sex or gender discrimination occurs where individuals are treated differently in their employment because of their gender or sex, that is, because they are a woman or a man.

The basic idea behind sex discrimination and all anti-discrimination laws is simple: "the antidiscrimination laws entitle individuals to be evaluated as individuals rather than as members of groups that have certain average characteristics."

Examples of potential sex/gender discrimination that women, to use them as an example, may face include such things as the following:

Hiring: A woman applies for a job for which she is experienced and has excellent qualifications but is not hired because some of the company's long-standing clients are more comfortable dealing with men.

Firing: A woman was rejected for a position because a senior VP believed women should work closer to home, her direct supervisor repeatedly



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suggested that she should transfer and spend more time with her family, after she complained to human resources of discrimination by her supervisor and the senior VP, the supervisor stripped her of significant responsibilities and they began discussing her termination, and even though she was fired and told that her job had been eliminated, the company tried to replace her with a male. *Lettieri v. Equant, Inc.*, 478 F.3d 640 (4th Cir. 2007).

Promotion: The supervisor in charge of a promotion process seeks out and extensively interviews a male candidate and fails to even review a female candidate's experience, training or evaluations. Another female candidate was not given any consideration at all in the process, despite meeting all the written qualification criteria. *Dennis v. Columbia Colleton Medical Center*, 290 F.3d 639 (4th Cir. 2006).

Promotion: Neither the male nor the female candidates meet the employer's posted job qualifications but males are placed in the position and the females are deemed disqualified because they do not meet the posted qualifications. *Scheidemantle v. Slippery Rock University*, 470 F.3d 535 (3rd Cir. 2006).

Promotion: A well-qualified woman was not recommended for promotion by her supervisor, who frequently made sexist remarks to her such as "oh, isn't that just like a woman to say something like that," or "you're being a blonde again today," or "it's a blond thing," and had once when she expressed interest in a promotion shortly after getting married asked why "her husband wasn't going to take care of her." The supervisor also explained that he had not recommended her for promotion because he knew she had kids and he thought she would not want to move her family, even though she had expressed numerous times her desire for a promotion. *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004).

Job Assignment: A woman was injured on the job and, when cleared to return to work by her doctor, not allowed to return to her former position because the company nurse and doctor believed that women were more likely to be severely injured in the job than men. However, the company allowed more severely injured men to remain in more demanding jobs. *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429 (1st Cir. 1997)



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Firing: A woman was fired because she was considering having an abortion. *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6th Cir. 1996).

Both Federal and Kentucky State Law Prohibit Sex Discrimination in Employment

Both federal and Kentucky state law protect individuals from discrimination based upon sex. Title VII of the Civil Rights Act of 1964 and the Kentucky Civil Rights Act, KY Rev Stat. Chapter 344, are both laws that make it illegal for an employer to discriminate against individuals because of their sex in hiring, firing, and other terms and conditions of employment such as promotions, pay, other job opportunities, and benefits.

What Employers are Covered by the Law?

Whether an employer is covered by the law depends on their number of employees. KCRA 344 applies to all private employers, state and local governments, and educational institutions that employ eight or more individuals. The federal law, Title VII, requires that there be at least fifteen individuals employed by the employer. Both current employees and job applicants are covered by the protections against gender discrimination in both federal and state law. A current employee who is fired, not promoted or not paid fairly due to his or her sex or gender is protected. An applicant for employment who is not hired due to his or her sex or gender is also protected.

Is It Lawful to Pay a Woman Less Than a Man If They Do the Same Job?

The short answer is no. Both state and federal law make it illegal to discriminate on the basis of sex in the payment of wages or benefits. This includes all forms of compensation: salary, overtime, bonuses, stock options, profit sharing, bonus plans, insurance, vacation, and holiday pay along with all forms of benefits.

Basically, both state and federal law require that men and women be paid equally where they perform substantially the same work under substantially the same working conditions. It is not necessary for the jobs to be identical, but they must be substantially equal. Here's a test put in simplest form: is there a dime's worth of difference



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between the two jobs?

Whether jobs are substantially equal and performed under substantially similar working conditions requires consideration of the following factors:

Skill: Do the jobs require similar experience, ability, education, and training? training?

Effort: Do the jobs require similar amounts of physical or mental exertion?

Responsibility: Do the jobs have similar degrees of accountability and responsibility?

Working Conditions: Are the physical surroundings including the presence of hazards where the work is performed similar?

Pregnancy Discrimination

Both Kentucky and federal law prohibit pregnancy discrimination, which is defined as discrimination based on pregnancy, child-birth, and related conditions.

Pregnancy is considered as a temporary disability and employers may not treat pregnant women differently than other temporarily sick, injured, or disabled employees. The treatment and benefits that employers make available to employees with temporary disabilities must likewise be made available to pregnant employees.

Sexual Harassment as a Form of Sex Discrimination

Sexual harassment is a form of sex discrimination that violates both federal and Kentucky state law.

Sexual harassment is generally characterized by unwelcome sexual advances, request for sexual favors, other verbal or physical conduct of a sexual nature that either explicitly or implicitly affects an individual's employment, unreasonably interferes with her ability to perform his or her work or creates an intimidating, hostile, or offensive work environment.



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Situations involving sexual harassment and a hostile work environment raise a variety of different issues. For that reason there is a Special Report on harassment and hostile work environment issues.

Height, Weight, or Lifting Requirements

In some instances, the height, weight, or lifting requirements for a specific job necessary for its safe and efficient performance are lawful. It is necessary that such a requirement be a “bona-fide occupational qualification”.

The “Glass Ceiling”

A “glass ceiling is an unofficial but nonetheless real barrier based on attitudes or stereotypes that prevent qualified women from advancing into mid-level and senior-level management positions. A “glass ceiling” is the barrier to qualified and deserving woman from advancing as high and as far as her skills, ability, and performance warrant and justify.

Here’s an example of “glass ceiling” sex discrimination from a real case: *Conti vs. American Axle*, No. 08-1301 (6th Cir., 5/22/09). The female employee, Conti, claimed that she had not received the same salary increases or the same opportunities for advancement as her male counterparts. To support this claim, she presented evidence as follows:

- 1) That she received a promotion to a co-Director position only after a less-qualified male was promoted;
- 2) Even after this promotion, she was on a lower salary scale than the less-qualified male;
- 3) Another promotion she received was discriminatory because she received less pay and a lower title than her male predecessor, even though they did the same job.

In sum, a good employment record and a series or pattern of decisions or job actions or promotions that yielded less for a better-qualified female employee.



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What Can Be Done About Sex Discrimination?

Individuals who suffer from illegal sex discrimination in employment can recover remedies to include the following:

- Back pay
- Hiring
- Promotion
- Reinstatement
- Front Pay
- Compensatory damages for emotional distress and mental anguish
- Punitive damages

It may also be possible to recover payment for:

- Attorney’s fees
- Expert witness fees
- Court costs

Some employers have been required to post notices to all employees addressing the violations and advising the employees of their rights to be free from discrimination, harassment, and retaliation. Some employers have also been required to take corrective or preventive actions regarding the cause of discrimination toward eliminating or minimizing its recurrence.

Sex discrimination cases (like all employment discrimination cases in general) are very fact-intensive. That means they require careful and through investigation, consideration, and study prior to any lawsuit being filed. The above is intended only to provide a general outline of circumstances that might indicate sex discrimination, who is protected from sex discrimination, and what they might be able to do about it.



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About the Author

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Robert L. Abell has been representing, advising, and counseling individuals about employment law issues for over 20 years. In 2010, 2011, and in 2012, Robert was selected to Kentucky Super Lawyers for employment law. He graduated with honors from both the University of Kentucky and the Tulane University Law School. Robert is a member of the National Employment Lawyers Association, American Association for Justice, Kentucky Justice Association, and the Kentucky Bar Association. He has represented clients in state and federal courts and before administrative agencies throughout Kentucky, including the Kentucky Personnel Board, federal Merit System Protection Board and federal Equal Employment Opportunity Commission.

You can find out more at www.RobertAbellLaw.com, where you will also find additional information that you may either review online or download for reading on your own. You can also visit the **Kentucky Employment Law Blog** at http://abelllaw.typepad.com/kentucky_employment_law.