



*Oklahoma Attorney General Scott Pruitt's
Office of Civil Rights Enforcement Presents*

TITLE VII 50TH ANNIVERSARY OCRE EDUCATIONAL OUTREACH

50th Anniversary of the Civil Rights Act of 1964

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Emphasizing Practical, Best Practices for Complying
With Oklahoma's Anti-Discrimination Act

[RACE DISCRIMINATION]

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Since joining the firm in 1988, Mr. Broussard has practiced in the areas of landlord/tenant law, oil and gas law and immigration matters. In 1989, Mr. Broussard expanded his practice and joined the Labor & Employment Law Section where he now specializes in employment matters ranging from labor disputes to discrimination claims. Mr. Broussard is a member of the firm's Board of Directors and Executive Committee.

He was named 2014 Best Lawyers Lawyer of the Year Litigation Labor and Employment and has an individual AV rating through Martindale-Hubbell, has been selected as a Best Lawyer in America in Employment Law-Management, Labor Law-Management and Litigation-Labor & Employment; has been recognized as an Oklahoma Super Lawyer in Employment Litigation: Defense; and has been ranked in Band 1 in Labor & Employment Law by Chambers USA. In addition, in 2011 he was presented with the Leadership in Law award by the Oklahoma Bar Association and the Journal Record, while in 2013 he was named to the Power Attorneys & Legal Professionals list by the Tulsa Business & Legal News.

Mr. Broussard has presented numerous employment-related seminars, speeches and programs for employees, managers, supervisors and staff, and has successfully defended numerous employers and supervisors in employment litigation and administrative proceedings in various jurisdictions.

Race Discrimination

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Title VII of the Civil Rights Act of 1964

- Prohibits discrimination in employment based on race, color, religion, sex, or national origin.
- Employers with 15 or more employees.
- Charge of discrimination must be filed with the Federal Equal Employment Opportunity Commission ("EEOC") within 300 days of the discriminatory event.
- Lawsuit must be brought within 90 days of notice of right to sue.
- Injunctive relief, back pay, front pay, fees, costs and compensatory and punitive damages in cases of intentional discrimination.
- Caps on compensatory and punitive damages (\$300,000 max).

Civil Rights Act of 1866, as amended, 42 USC 1981

- Guarantees all people the same right to make and enforce contracts that “white citizens” enjoy.
- Limited to intentional race discrimination.
- Employers of all sizes.
- No administrative filing required.
- Individual supervisors may be liable if they personally harassed or discriminated against the plaintiff.
- Limitations period may be 4 years.
- Injunctive relief, back pay, front pay, fees, costs, compensatory and punitive damages.

The Oklahoma Anti-Discrimination Act

- Prohibits discrimination in employment based on race, color, religion, sex, national origin, age, genetic information or disability.
- Applies to almost all Oklahoma employers.
- Complaints of employment discrimination must be filed with the Attorney General's Office of Civil Rights Enforcement (the "OCRE") or the EEOC within 180 days from the last alleged discriminatory act.
- Lawsuit must be brought within 90 days of receipt of notice of right to sue.
- Injunctive relief, back pay and an additional amount as liquidated damages are recoverable.
- Prevailing plaintiff or defendant may be awarded a reasonable attorney fee.

What is “Race” Discrimination?

- Ancestry
- Physical Characteristics
- Race-linked Illness
- Culture
- Perception
- Association
- Subgroup or “Race Plus”
- “Reverse” race discrimination

Race discrimination prohibited by Title VII

■ Disparate Treatment

- Treating applicants or employees differently because of their race. Was race a motivating factor in the “adverse job action” - significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits (“tangible employment actions”).

■ Direct Method

- **Direct evidence** – Employer admits that it was motivated by discriminatory intent or that it acted pursuant to a policy that is discriminatory on its face.
- **Circumstantial evidence** – suspicious timing, ambiguous statements, behavior or comments directed at members of certain races, and evidence that similarly situated employees outside the protected class received systematically better treatment.

Race discrimination prohibited by Title VII

■ Disparate Impact

- Title VII prohibits an employer from using a facially neutral employment practice that has an unjustified adverse impact on members of a particular race.

- The EEOC Four-Fifths Rule

- Adverse impact is found if members of protected class are selected at a rate less than four fifths (80%) of that of another group.

- Standard deviation analysis

- Difference between the number of members of the protected class selected and the number that would be anticipated in a random selection system is more than two or three standard deviations.

- Nonscored objective subjective criteria

- Job requirements that are not linked to job performance.

Race discrimination prohibited by Title VII

■ Hostile Work Environment

- Under the totality of the circumstances (1) the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of employment and (2) the harassment was racial or stemmed from racial animus. The plaintiff must show "more than a few isolated incidents of racial enmity." Instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments.

Strict liability for race discrimination resulting in an adverse employment action?

- **Supervisor?** Under Title VII, a supervisor is an employee whom the employer has empowered, directly or indirectly, to take “tangible employment actions” against the alleged victim. A manager who works closely with his or her subordinates and who has the power to *recommend* or otherwise substantially influence tangible employment actions qualifies as a “supervisor” under Title VII. Supervisor status may also exist based on apparent authority.
- **Was the tangible employment action a result of some sort of official act of the enterprise or company?**

Liability for race discrimination absent adverse employment action?

The *Faragher/Ellerth* defense.

- Did the employer exercise reasonable care to prevent and correct promptly any racial harassment;
- Did the employee unreasonably fail to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Disparate impact discrimination when no racial animus by decisionmaker?

■ Cat's Paw Theory

The formal decisionmaker does not discriminate against the employee, the discriminatory animus of the subordinate causes the employer to be liable under Title VII.

- (1) a supervisor performs an act motivated by racist animus that is intended to cause an adverse employment action, and (2) that act is a proximate cause of the ultimate employment action.
- The decisionmaker's reliance on a subordinate's biased recommendation must be an "uncritical" reliance, with no independent verification of the asserted reason for the proposed employment action.

Are “reverse discrimination” cases different from “traditional” race discrimination claims?

- Not sufficient that plaintiff was qualified and another employee of a different race benefited from the challenged decision.
- Background circumstances that support an inference that the employer is one of those unusual employers who discriminates against the majority; or
- Evidence supporting a reasonable inference that but for the plaintiff’s race the challenged decision would not have occurred.

Do voluntary diversity or affirmative action plans violate Title VII?

■ EEOC

- “Title VII permits diversity efforts designed to open up opportunities to everyone.”
 - Employer could expand applicant pool for qualified African Americans by recruiting at schools with high African American enrollment.
 - Change minimum qualifications for positions (require a college degree or two years of relevant experience).
- “[E]mployers may implement voluntary affirmative action plans . . . to eliminate a manifest imbalance in a traditionally segregated job category.”
 - Quota or inflexible goal;
 - Is the plan flexible enough so that each candidate competes against all other qualified candidates;
 - Does the plan unnecessarily trammel the interests of third parties;
 - Is the plan permanent.

Can employers ignore tests in order to guard against disparate impact claims?

RICCI v. DeSTEFANO

- *[U]nder Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.*
- *[E]ssentially, a threshold showing of a significant statistical disparity, ... and nothing more—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results. That is because the City could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City’s needs but that the City refused. We conclude there is no strong basis in evidence to establish that the test was deficient in either of these respects.*

What about racial discrimination by non-employees?

- Does the employer have control over the third party?
- Has the employer adopted reasonable steps to guard against or prevent such discrimination?
- Has the employer responded promptly and reasonably to the employee's concerns?

Are appearance and grooming standards ok?

- Appearance standards generally must be neutral, adopted for nondiscriminatory reasons, consistently applied to persons of all races and ethnic groups.
- If there is a disparate impact, must be job-related and consistent with business necessity.
 - Height and weight?
 - Dress?
 - Hair?
 - Beards?

Best Practices to prevent and address racial discrimination.

- Develop and implement policy against illegal discrimination and harassment.
- Make sure senior management is committed to implementation of the policy.
- Provide training to all employees.
- Examine your recruitment strategies and plans.
- Conduct self-analyses of workforce.
- Foster an environment of inclusion.
- Employees should be required to report possible discrimination or harassment.
- No retaliation for reporting discrimination.

Best Practices to prevent and address racial discrimination.

- Promptly respond to charges of discrimination.
- Evaluate job descriptions and the requirements of each job.
- Treat employees with respect.
- Supervisors must be honest in their evaluations of employees.
- Consistent and honest documentation of employee conduct.
- Try to be consistent in the application of policies.
- Carefully review recommendations related to possible adverse actions.