BGSU
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# What is Evidence, and What It Takes to Prove Discrimination

There are many things that happen on the job that are unkind, unpleasant, unfair, or downright insulting! Sometimes these things happen because of poor management, or even because someone is mad at, or dislikes, someone else. If something like this has happened to you, it may or may not be unlawful.

An employment decision made by your employer can be unfair, and not be unlawful. An employment decision can be based on false information, or false assumptions, and not be unlawful. An employment decision can fail to comply with a union contract, or the employer's own policies, and not be unlawful under any of the laws enforced by EEOC.

By providing you with the information that follows, EEOC does not expect you to become an expert on proving discrimination or personally provide all of the evidence needed. Nor do we claim that the information contained in this document provides an adequate basis for assessing every conceivable factual circumstance, or legal interpretation. However, we do believe you should know that there are certain standards of proof that must be met before it can be concluded that the law was violated.

The information is presented to you so that you will have some understanding of, and appreciation for, the type of information that EEOC would need in order to prove that you have been discriminated against. The standards of proof that EEOC requires are those that have been established by regulation and by the courts in suits involving employment discrimination.

Because the laws prohibiting discrimination against individuals because of sex, race, national origin, color, religion, and age are somewhat different from he law prohibiting discrimination against qualified individuals with a disability, there are a few differences in the type of evidence required. The following discussion is broken down into two categories: One discussing the evidence requirements for sex, race, national origin, color, religion and age, and the other discussing evidence requirements for disability.

## A. SEX, RACE, NATIONAL ORIGIN, COLOR, RELIGION, AND AGE

In order for an employment action to be unlawful under either Title VII of the 1964 Civil Rights Act or the Age Discrimination in Employment Act, that action much have been taken because of your sex, race, color, national origin, religion, or age. In order to show that something happened to you because of your sex, race, etc., it is not enough to simply say, "Well, I am a female, and I was not promoted, therefore, I must have been denied promotion because of my sex, female." Nor is it enough to say, "I am a female, and a male was given the promotion, therefore, I must have been denied the promotion because of my sex, female." There must be some additional, independent factor that could be pointed to in order to show that your sex was a consideration in your employer's decision to deny you the promotion.

The most common way of showing that the action taken against you was because of your sex, race, age, etc., is to look at how other people of a different sex, race, etc., were treated who work under the same rule requirements as you. If something happens to you that does not happen to a person of a different race, sex, etc., or if that person was treated more favorably than you, that may be a matter for concern - but standing alone, it is not enough to prove that the person was more qualified than you. If you were disciplined and someone of a different sex, race, etc., was not, it may be that you violated the employer's rules, and the other person did not. Difference in treatment is not unlawful if there was some legitimate, nondiscriminatory reason for that difference in treatment.

Before EEOC can conclude that you were discriminated against, it would need to have proof that:

1. You were treated differently than someone of a different sex, race, national origin, color, religion, or age.

   EEOC will ask what you know about the person whom you believe was treated more favorable than you. You should be able to provide the person's name, their race, sex, approximate age, or other appropriate characteristic related to the legal coverage. You should know were they worked, who their supervisor was, and the job they did. You should also be able to tell EEOC how they were treated as compared to you. This is particularly true if you were on the job for quite awhile. If you were on the job only briefly, or if you were simply applying for a job, you may have less information. However, the more information you have, the better.

2. Someone who is very similar to you in position, rank, or job duties, and who is of a different sex, race, etc., was treated more favorable under similar circumstances.

   When looking at the person you believe was treated more favorably than you, EEOC will want to know whether that person worked under the same rules and regulations that you did. For example, did they work for the same company, the same division, the same department, the same supervisor? Did they do the same job that you did? Did they do a similar job, or a completely different job? Did they perform their work under similar physical conditions, such as in the office, outside in the plant? Were they a member of a union, while you were not, or the other way around? Were they a member of management, while you were not, or the other way around? How long had they been on the job as compared to you? Did they have more experience than you?

3. That there was no legitimate, nondiscriminatory reason why the employer treated you differently.

   Once you have identified the person whom you believe was treated more favorable than you, EEOC will then want to know whether there may have been some reason other than sex, race, color, national origin, religion, or age that might have caused the employer to treat this person more favorably. For example, was

the person treated more favorably because they earned the right to be treated more favorable, such as having higher ratings than you, or possessing more qualifications, or having more experience on the job than you? Was the boss mad at you because of something you did that did not relate to your sex, race, age, etc.? What did the employer tell you was the reason the action was taken? Do you believe what the employer says? If not, why?

Evidence takes several forms. It includes your testimony, which is the very first evidence gathered by EEOC. It also includes written materials such as evaluations, notes by your employer, letters, memos, and the like. You will be asked to provide any documents you may have that relate to your case. They types of evidence EEOC will be seeking may include one or more of the following:

1. **Testimony**: Testimony is simply a statement taken from someone who would be in a position to have firsthand knowledge about what happened to you. "Secondhand" information, or "hearsay" information is not as good as firsthand information, but it can be useful in certain circumstances. If you know someone whom you believe knows what happened to you, and is willing to tell EEOC about it, then you should provide EEOC with their name, position, home phone and address, (if known) and let EEOC know what that person can say that will help your case.

2. **Documents**: This category includes any record that is written such as policies, procedures, letters, handwritten notes, files, and so on. It also includes computer disks and tapes, and other types of recordings. If you have any document in your possession which would help your case, you should provide that to EEOC. If you know of any document such as a record of attendance, a production record, etc., that the employer has that would help your case, you should tell EEOC about that.

3. **Statistical**: In certain cases EEOC will look at the impact that a particular employment policy or decision has on others in your particular group, and compare that with how the policy affected members of a different group. For example, in a layoff case, EEOC might look at the age of everyone who was laid off. Statistical proof must meet certain scientific standards, and cannot be used in all situations.

## B. QUALIFIED INDIVIDUALS WITH A DISABILITY

To prove that an employment action taken against you was because of your disability, Item #1, and #2 or more of the remaining Items must be established, depending on the nature of your allegation.

1. **That you are a "Qualified Individual with a Disability."**

   The ADA is very specific about what is takes for a person to be covered by the law. To be covered, you must posses all of the qualifications required for the job,

and you must be able to perform the essential functions of the job, either with or without an accommodation. You must have some kind of medical condition that substantially limits one or more of your major life activities. A major life activity includes such things as seeing, hearing, breathing, walking, talking, bending, and lifting, and so on. The impairment to your major life activity must be substantial, and of significant duration. It cannot be merely slight or temporary. EEOC will ask you to provide information covering all of these areas.

If the impairment created by your disability is not readily apparent, EEOC will need verification from your physician as to the nature, extent, and duration of your disability. This documentation should be presented at the time you file a charge, or as soon thereafter as possible.

2. **The employer knew about your disability.**

   Some disabilities are immediately observable, and some are not. In order to take an action because of a disability, it is obvious that the employer must know that the disability exists. Usually, the employer will know because you tell them, because your medical records contain information about your disability, or because you were injured on the job. You should be able to provide, or tell EEOC where to find, information that will establish that the employer knew about your disability.

3. **The employer thought you had a disability, when you did not.**

   An employer may take an adverse employment action against an individual because the employer believes they have a disability when in fact, they do not. This usually occurs where the individual has some kind of illness or disease, but the condition does not, in fact, cause them to be disabled. For example, an individual might have cancer, and still be perfectly able to perform their job. However, the employer may think that because they have cancer they have a disability and take an employment action against them for that reason. The employer would usually find out about such "perceived" disabilities in the same manner as described in Item #2 above.

   In making an allegation of this nature, there would need to be some proof that the employer had reason to believe that you had a disability.

4. **You have record of a disability.**

   An employer may take an adverse employment action against an individual because that individual was identified as being disabled at some time in the past. An employer could become aware of such a record in the same manner as described in Item #2 above, and the proof requirements would be the same.

5. **The employer took an employment action against you because you have a disability, or a record of a disability, or the employer thought you had a disability.**

   Even if the employer knew, or thought it knew, that you had a disability, that is not enough to prove that the employment action taken against you was for this reason. There would have to be some independent testimony or some record that would establish the reason for the action. Fortunately in disability cases, the employer is often quite open about having taken an employment action against you because of your disability This usually occurs because the employer thinks that you are unable to perform your job, or because there is some dispute because the employer thinks that you are unable to perform your job, or because there is some dispute about your ability to return to work. The evidence here will be your own testimony, the employer's testimony, testimony of your doctor, the company doctor, any informed witnesses, and any documents such as doctor's statements.

6. **The employer denied you a reasonable accommodation, after you let it be known one was needed.**

   An individual with a disability has an obligation to let the employer know that they need an accommodation, and the employer has an obligation to provide a "reasonable" accommodation. You may also advise your employer as to what kink of accommodation you believe would be most suitable for your condition. However, an accommodation can be considered "reasonable" even though it may not be the exact accommodation you asked for. The proof that you let your employer know that you needed an accommodation would be your own testimony, and any documents you might have, such as doctor's statement. The proof that the employer either did or did not make an appropriate effort to provide you with a reasonable accommodation would include your testimony, the employer's testimony and any documents the employer may have accumulated during the process, such as written notes about conversations with you, medical examinations, contacts with accommodation experts, and so on.