# CHAPTER ONE
# Equal Employment Opportunity: An Overview

The EEO counselor does not make legal findings of discrimination. Your job is to find out what happened and then try to resolve the case. However, it can help you do your job better if you have a good basic understanding of the legalities of EEO. Before we examine EEO complaints and the functions of the counselor, we will look at the basic laws and regulations in EEO, to whom they apply, theories of discrimination, and how discrimination is proven.

## THE MOST IMPORTANT EEO LAWS AND REGULATIONS

### The Civil Rights Act of 1964

Although we can trace principles of EEO in the federal government back to the earliest days of the republic, the first law with significant impact was the Civil Rights Act of 1964, which banned discrimination in housing, education, and employment based upon race, color, religion, national origin, or sex. The retaliation or reprisal provisions of the Civil Rights Act also protected those who either opposed discrimination or who participated in discrimination complaint proceedings at any level.

However, Title VII of the Civil Rights Act, the section on employment discrimination, did not initially apply to federal employees. The federal government already had Executive Orders and regulations that addressed discrimination on race, color, and creed (religion), and Congress felt these were sufficient at the time to ensure nondiscrimination in the federal civil service.

### The EEO Act of 1972

In 1972, Congress extended the Civil Rights Act of 1964 to federal civil servants. This so-called EEO Act brought federal employees under the protection of Title VII of the Civil Rights Act. Further, the Act directed the US Civil Service Commission to set up an administrative complaint mechanism for federal employees to file administrative EEO complaints against the government. The process the Civil Service Commission set up in 1972 remains basically the same today. This is the procedure that created, among other steps, the informal stage of the complaint with the EEO counselor.

The EEO Act of 1972 excluded active duty military personnel and local nationals of American forces overseas from its coverage.

## The Rehabilitation Act of 1973

Congress created the sixth category of prohibited discrimination in 1973 when it passed the Rehabilitation Act that prohibited discrimination against "Qualified Handicapped Employees." Several years later, the Attorney General brought alcoholics and drug addicts under the protection with a gratuitous interpretation defining alcoholism and drug addiction as disabilities.

## The Age Discrimination in Employment Act (ADEA) of 1978

In 1978, Congress extended the Age Discrimination in Employment Act of 1967 to federal employees. This extension added age as the eighth prohibited category. Initially, the act only applied to those between 40 and 65. Later laws raised this upper limit to 70 and then abolished the upper limit entirely. The ADEA now states that federal agencies may not discriminate against anybody 40 or older.

## The Pregnancy Discrimination Act of 1979

The Pregnancy Discrimination Act did not add a separate category of prohibited discrimination. Rather, it merely redefined an existing category. The Act classified pregnancy discrimination as a form of sex discrimination and essentially told federal agencies to treat pregnant women as they did other employees with a temporary medical condition. This does not, however, mandate preferential treatment for pregnant women. It merely requires agencies to handle pregnancies like all other temporary medical situations.

## EEOC Sexual Harassment Regulations of 1981

The Equal Employment Opportunity Commission (EEOC) is the federal agency responsible for EEO in the federal government (as well as in the private sector). In 1981, it issued regulations prohibiting sexual harassment by characterizing sexual harassment as sex discrimination.

## The Civil Rights Act of 1991

The Civil Rights Act of 1991 was a combination of technical amendments and adjustments to existing EEO laws. Significant, however, for federal employees were provisions that allowed plaintiffs to collect compensatory damages. Prior to 1991, complainants could only collect back pay remedies. However, after 1991, they could collect up to $300,000 in compensatory damages.

## The Genetic Information Nondiscrimination Act

I guarantee you'll not run across this one, and you can safely file it in your EEO trivia file, but in 2009, Congress passed a law that bans discrimination based on genetic information.

## Executive Orders

Two Executive Orders also create forms of prohibited discrimination. An Executive Order in 1993 prohibits discrimination in the executive branch based on sexual orientation, and another in 2000 bans discrimination based on parental status. However, you have to go back to your high school civics to sort out the legal significance. Since they are Executive Orders, they are only binding on the executive branch and not on the courts. Subject to internal agency regulations, an employee could file an administrative EEO complaint over discrimination based on sexual orientation or parental status and go through the entire administrative process up to a final agency decision. However, they could not then go into federal court because no law prohibits discrimination based on those factors.

# PROHIBITED FORMS OF DISCRIMINATION

The Civil Service Commission set up the discrimination complaint process to examine employee allegations of discrimination based upon race, color, religion, national origin, sex, handicap, age, and reprisal. Other laws and regulations prohibit other forms of discrimination, such as marital status, partisan political affiliation, and union activity. However, an employee would have to bring the allegations of other forms of illegal discrimination through another forum. Also, do not confuse federal civil service requirements with those of other jurisdictions. Most city, state, and local governments have their own nondiscrimination laws that prohibit discrimination based upon everything from physical appearance to financial status. None of these other prohibitions is binding upon the federal civil service. Let's look at each of the eight categories and see what they address and whom they cover.

## Race

Surprisingly, the Civil Rights Act has no list of racial categorizations. We have no Nuremberg Laws that define which mixes are included in which category. Therefore, in an EEO complaint, a person's race is based upon self-identification.

What confuses people is that the government does have a five-category coding system that classifies employees and applicants as either black, Hispanic, Asian/Pacific Islander, American Indian, and other. However, the government uses this coding system only for statistical-gathering purposes. The five categories do not create the only possible bases for a race discrimination complaint.

For example, if during your initial interview, the complainant alleged racial discrimination against Slavs, just write it down. Don't argue with him or try to tell him that Slavs are not an authorized race. Remember, race is essentially a matter of self-identification. If there is to be a dispute about what the employee's race is, let the later stages of the complaint process sort it out.

The prohibition on racial discrimination is almost absolute. The only practical exception is in cases requiring authenticity or role-playing. For example, a federal law enforcement agency could legitimately discriminate on the basis of race by choosing an Asian employee for an assignment involving infiltrating an Asian smuggling ring. However,

these exceptions are rare. Americans consider race discrimination so insidious that our courts have not been liberal in allowing exclusions from the Civil Rights Act.

Further, for purposes of the Civil Rights Act, all races are equal and there is no such thing as "reverse discrimination." Any discrimination on the basis of race is illegal.

## Color

The Civil Rights Act distinguishes color from race to address situations where people may be of the same race but have different skin color. In eastern Kentucky, and I'm not making this up, live a bunch of white folks they call "The Blue People of Troublesome Creek" who suffer from an inherited genetic condition that affects the oxygen level in the blood causing them to have blue skin. The idea is that if one of them leaves Troublesome Creek and applies for a federal job inside the Beltway, you cannot refuse to hire him or her because of their blue skin.

Similarly, the term, "black" is obviously a misnomer and can include every possible skin color from the light to dark as well as everything in between. Somebody might discriminate against a black employee or applicant because he or she was lighter or darker than somebody else from the same race.

As with race discrimination, the only practical exception to the prohibition on color discrimination is in those situations requiring authenticity or role-playing. These situations only arise in rare cases such as in law enforcement/intelligence work or in film producing.

## Sex

For purposes of the Civil Rights Act, sex refers to one's basic biologic gender, of which there are only two—male and female. The federal courts have stated repeatedly that the Civil Rights Act does not protect sexual preference or transsexuality. The Act refers only to what a person was wearing on his or her birthday and to nothing that was discarded or acquired since.

However, as we mentioned in the above history of EEO, an executive order in 1993 prohibits discrimination based on sexual orientation. Since this exists in executive order not law, this means that it prohibits discrimination only within the executive branch of the federal government and has no effect on private industry or other levels of government. What this means is that an employee of a federal agency could therefore file an EEO complaint based on sexual orientation and have it be processed up through the final agency decision. However, unlike other EEO complaints where the employee could then go to court, complaints of discrimination based on sexual orientation could not go into federal court.

The Civil Rights Act allows sex discrimination only when the agency can show that sex is what it calls a "*Bona Fide* Occupational Qualification" (BFOQ) necessary to carry out the purpose of the agency. A BFOQ refers to a situation in which an agency may discriminate based upon sex. Law books give many farcical examples. However, practically speaking, in the federal service, there are only two situations where agencies could legitimately use sex as a BFOQ:

1. *Authenticity*– As with race and color, an agency could legitimately discriminate on the basis of sex in those situations or positions involving role playing. These are usually limited to law enforcement, intelligence operations, or acting. There are federal agencies, for example, that have actors and actresses who make movies or appear in role-play situations in training academies. Agencies, therefore, could legitimately discriminate by having women play the parts of women and men playing men.

2. *Privacy/Common Decency*– Known as "contact" positions, these jobs or work situations have frequent private or intimate visual or physical contact with people. Prison guards who perform the detailed, intimate cavity searches of stripped prisoners are a good example of the privacy/common decency BFOQ. Another example is resident supervisors of school dormitories segregated by sex at government schools. Since those positions require the supervisor to go into places such as the childrens' showers, toilets, and sleeping rooms, the agency may establish a male-only or female-only position.

However, this privacy/common decency exclusion only applies to positions with extensive unavoidable intimate contact. In the example above of the dormitory supervisors, the agency could not justify a one-sex only position if the contact were only occasional and privacy accommodations were possible. For example, up until the early 1990s, NOAA would not send women inspectors out on large commercial fishing boats like you see on *Deadliest Catch* because of the close confined living quarters and the lack of female toilets, showers, and sleeping facilities. A federal court ruled the practice illegal sex discrimination.

## *Not BFOQs*

The courts have also dispensed with several other situations that agencies have tried to use to establish BFOQs. Some common examples that they have ruled are violations of Title VII:

1. *Client Preference*– It is illegal to base a discriminatory selection or act upon the desires of the customer or client. This is an insidious form of discrimination in which an agency rationalizes discrimination by saying that although it has nothing against a person's race, color, or religion, it cannot select or otherwise utilize the person since the people with whom the agency deals with would object.

The term "client preference" stems from a federal court case in the early days of the Civil Rights Act where a man challenged Pan American Airlines' practice of only hiring women to be stewardesses, as they were called then. Pan Am tried to justify its women-only rule by arguing that its customers preferred being attended by women and that hiring men would hurt business. The court told Pan American that its purpose was to fly people from one place to another as safely and as quickly as possible. There is no evidence that the gender of the person serving drinks and issuing pillows would have a material impact on that mission.

In another example, one military base would not put blacks into positions as claims inspectors who checked damaged household goods. I shall withhold the name of the agency, but its rationale was that it would upset the Admirals' wives if a black were to enter their base quarters. Another agency refused to select a man for the position of Federal Women's Program Coordinator contending that women would prefer dealing with a woman in the position. Both cases are patently illegal discrimination.