CHAPTER ONE
PROHIBITED DISCRIMINATION

The foundation of understanding EEO in federal service is a solid grasp of what the various laws prohibit and to whom they apply. In this chapter, we'll briefly list them, and then go into more detail about each prohibited factor.

FEDERAL NONDISCRIMINATION LAWS

The laws on nondiscrimination in federal service come from different sources, are in different parts of the US Code, and are applied differently in many cases. It's important for us laypeople to have a basic understanding of which laws govern which prohibitions.

CIVIL RIGHTS ACT OF 1964

Different parts of the Civil Rights Act of 1964 (now in Title 42 US Code) prohibit discrimination based on race, color, sex, religion, and national origin in voting rights, education, public accommodations, public facilities, public education, federal programs, and for our purposes, employment. In EEO jargon that we'll also adopt in this book, they refer to "Title VII," which is the section on discrimination in employment.

I avoid inserting excerpts of laws, and prefer explaining them in plain language, but here it's important because we'll be referring back to many of the specific words. The first part of the Act states:

> It shall be an unlawful employment practice for an employer
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (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 opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 USC 2000e

Another section of the Act also prohibits reprisal against, (a) anybody who participates in the discrimination complaint process, and (b) anybody who opposes discriminatory practices.

Congress amended the Civil Rights Act section on sex discrimination with the Pregnancy Discrimination Act of 1978, which made pregnancy discrimination illegal sex discrimination. It also added amendments to allow employees to collect compensatory damages of up to $300,000.

In the Act, Congress created the Equal Employment Opportunity Commission (EEOC) to enforce the provisions of the Civil Rights Act, to include federal civil service where it both regulates EEO programs and serves as the final administrative tribunal for complaints of discrimination by federal employees.

Age Discrimination in Employment Act of 1974

The Age Discrimination in Employment Act (ADEA) of 1974 originally prohibited age discrimination against employees between 40 and 65 but Congress eliminated the upper limit so it now covers everybody on the downward side of 40.

Rehabilitation Act Of 1973

The Rehabilitation Act of 1973 prohibited discrimination in federal service against "qualified handicapped employees" whom the law described as: "… persons who, with reasonable accommodation, can perform the essential functions of the job for which they have applied or have been hired to perform."

The Americans With Disabilities Act (ADA) of 1990

The Rehabilitation Act above only applied to federal service, but the ADA prohibited discrimination against "qualified individuals with disabilities" in all employment, public entities, and public accommodations. While the ADA technically does not apply to federal employment, federal regulations have extended provisions of the Act to federal service, and everybody now refers to the ADA as the controlling law in federal employment. In 2008, Congress amended the ADA to broaden its scope.

Genetic Information Act of 2008

In 2008, Congress passed the Genetic Information Nondiscrimination Act (GINA). It is essentially a preventive measure that recognizes the great advances medicine has made in identifying genetic characteristics that make individual people susceptible in varying degrees of all manner of illnesses or medical conditions. The law prohibits employment actions against people because of genetic information.

PROHIBITED DISCRIMINATION

What we have now are laws that prohibit discrimination in federal service based on race, color, sex, religion, national origin, age (over 40), disability, genetic information, and reprisal. Let's now look at each.

Discrimination, broadly defined, is the act of distinguishing between people or objects based on any real or imagined characteristic. We discriminate when we buy cars, place bets on teams, choose mates, and adopt flavors as our own. And to discriminate in federal employment is to distinguish between employees.

Most discrimination is perfectly legal. You are allowed and encouraged, when selecting candidates for a job not to randomly pull names out of a hat. When you are giving out awards, the system demands that you distinguish among employees by performance. However, as we've discussed, in federal service we have specific prohibitions against certain types of discrimination.

To start, keep in mind throughout this book that we are discussing only EEO in federal civil service. This is important because all levels of government have their own anti-discrimination laws and regulations that are not always the same as those controlling Feds. For example, the D.C. Human Rights Law prohibits, among other things, discrimination based marital status, personal appearance, family responsibilities, matriculation, or political affiliation. Here in California, in addition to those in federal service, our state laws also cover medical conditions (far more expansive than disabilities), military or veteran status, and marital status.

Another part of this difference in federal service EEO is that while the Civil Rights Act applies to both government and private sector, there are variations in the EEOC regulations that govern both. Let's now go into detail about each category.

Race

When Congress passed the Civil Rights Act of 1964, it deliberately chose not to create any racial categorizations. The EEO laws and regulations make no attempt to define what races "qualify" as races or what distinguishes one from another. We have no Nuremberg Laws, which means that race is completely a matter of self-categorization. It is, without exaggeration, whatever you choose to call yourself, and race discrimination complaints have been filed by employees who identified themselves, with good argument, as Semitic, Slavic, Celtic, Levantine, or a host of others.

The Equal Employment Opportunity Commission (EEOC), the federal agency that is the final deciding authority on complaints of discrimination, has had several cases with complainants who listed their *race* as "Jewish." In the lower

stages of the EEO complaint process, the agencies unilaterally changed the basis to discrimination based on religion, but EEOC overruled them every time and allowed the complainant's basis of race to stand. If that's what the complainant says, the Commission felt, that's the way it is. The debate also persists over whether Hispanics are a race or national origin. The fact is that third parties accept whichever the person chooses.

What causes confusion is that the federal government uses a five-category coding system to classify us when they gather statistics: Black, Hispanic, Asian, American Indian, and the all-encompassing "Other." However, this is only a statistical-gathering device and has nothing to do with the categories of illegal discrimination in federal service. You are whatever race you call yourself.

The prohibition against race discrimination includes several subordinate issues that are worth spending some time on:

Reverse Discrimination

All races are equal and unlike in George Orwell's *Animal Farm,* some are not more equal than others. There is no such thing as "reverse discrimination." It is just as illegal to discriminate against a white as it is a minority, or a man instead of a woman. EEOC itself abandoned the term "reverse discrimination" decades ago and handles such cases like any other racial discrimination complaint.

Associational Race Discrimination

In 2004, Iona College in New York fired the men's basketball Associate Head Coach, a White man, purportedly because of the team's recent poor performance. In a Title VII federal lawsuit, however, the coach alleged that the real reason was that he had recently married a Black woman. Not the least of the powerful, if not atomic evidence he presented in court was that when he invited to his wedding the official who later played a major role in his firing, the official replied, "You really going to marry Aunt Jemima? I knew you were a n-------- lover."

Author's Note: When quoting third-party cases that use profanity, racial slurs, and other offensive language, I always leave it in exactly the way the third party did. This book is not for children. It was EEOC who used the blank spaces. In other parts of the book, the third party left in whatever epithet or profanity in its entirety, and so did I.

Despite this and other weighty and credible evidence, the federal district court threw the case out without a trial because he had not alleged racial discrimination against himself *per se*, but only because of his relationship with somebody of a different race.

However, when the case went to the federal appeals court in New York City, it

ruled that such an allegation was within the purview of Title VII, and sent the case back to the district court for a jury trial.

This was the landmark case because while EEOC and several federal district courts had already found illegal discrimination in such cases, their decisions are not precedent, and this was the first court to issue a precedent decision on the issue of what they now call associational discrimination—being discriminated against not because of the complainant's race, but based on with whom they associate.

Most of the previous cases EEOC had ruled on were like the Iona case—a White person marrying a Black spouse. In discussing the issue, though, EEOC notes, however, that associational discrimination involves more than marriage or other familial relations, but also prohibits, "discrimination because of the race of the people the individual associates with in his or her family, professional, social or other circles."

Discrimination by or Within the Same Race

EEOC and the federal courts have also consistently ruled that, while such cases are not common, the race of the person who allegedly discriminated against a complainant is not determinative one way or another. A complaint by a Black applicant alleging discrimination by a Black selecting official is within the purview of Title VII, and federal courts will hear the case and decide on its merits.

It is not determinative if comparative employees were of the same race. EEOC gives the fascinating example of what it calls "intra-group discrimination" where members of the same racial group were distinguished because some possessed a stereotypical racial quality. It discusses a selection where two Black applicants were being considered by a White selecting official. EEOC characterized one applicant as presenting himself as "subservient," while the other was not. The selecting official selected the "subservient" Black applicant because of a racial stereotype that Blacks with that characteristic are more trustworthy.

EEOC found illegal race discrimination. Even though both applicants were Black, one was hired because he exhibited what were believed to be stereotypical characteristics associated with race.

Exceptions?

American law takes race discrimination seriously, so it is not sympathetic to those asking for exceptions to the prohibition on race discrimination and allows only one.

Authenticity

The Civil Rights Act itself does not have any listed exceptions. However, third

parties have allowed the rare common sense exception of what they call "authenticity" in situations involving role-playing where the race is central. Common sense alone tells us that it cannot be illegal for a movie producer making a movie about a historical figure to pick an actor of the same race to play the lead.

The second place where you commonly see role-playing exceptions is in law enforcement and intelligence work. If ICE is trying to infiltrate an Asian smuggling ring, it could choose only Asian agents to do the infiltration work.

Client Preference

A practice that is not allowed as an exception is what they call client preference—where an employer discriminates because of the desires of the client. Up until the 1960s, ATT would not put Blacks into direct customer service jobs because of their fears that customers would not want Blacks telling them how to plug in their phones. ATT only stopped when it was sued under the Civil Rights Act.

Up until the 70s, the Navy would not put Blacks into positions of claims inspector who went to Navy base housing to inspect household items damaged during PCS moves because it might upset the admirals' wives.

Be on the watch for this one, though: even in recent years, some federal agencies, wanting to appease clients, agree to use only employees from a certain group. In some cases, it seems benign enough, but it is completely illegal.

The Chief of Interpretation at one of the National Park Service's National Historic Site on African-American history supervises the site's tour guides. She frequently has requests from visiting African-American groups that she provide them with an African-American tour guide. She handles it perfectly by telling them, "all of our tour guides are perfectly competent." Do the same.

Color

Color refers to skin color and is distinguishable from race for the reason that you can have people from the same race who have different skin colors. The issue comes up most often with African-Americans where a Black complainant alleges that they were less favorably than another Black with lighter skin. As with race, the only exception to the prohibition on discrimination by color is in situations requiring authenticity—intelligence/law enforcement work or the performing arts.

Sex

You may have noticed during our discussion of race discrimination that the interpretations, with few minor exceptions, have remained consistent from the

signing of the Civil Rights Act to the release of this book. However, the history of the sex discrimination prohibition is different. Supreme Court Justice Neil Gorsuch, writing the 2020 decision ruling that Title VII's prohibition on sex discrimination included sexual orientation and transgender status, noted:

> Those who adopted the Civil Rights Act [prohibition on discrimination based on sex] might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees.

Originally, the Act was interpreted as prohibiting discriminating against people because of their basic binary biologic sex: man or woman. But, as Justice Gorsuch explained, subsequent federal court decisions using the words "because of… sex" in the Civil Rights Act to find sex discrimination have included the following.

Discrimination Against Women With Children

In 1971, the Supreme Court found Martin-Marietta Corporation guilty of illegal sex discrimination when it had a policy that barred hiring women with young children. This was, of course, based on the stereotype that women with young children will be absentee problems since they will be more likely than men to have to miss work because of issues with the children. Men with children the same age were routinely hired.

Martin-Marietta feebly argued that they weren't discriminating against women, but only against those with children. No complicated legal reasoning here, as the Court said that the women were discriminated "because of sex" since if they were men, they would have been hired.

As both EEOC and the courts have pointed out, rules that prohibit hiring employees of both sexes who have children, while suspicious and even unjustified, are not violations of Title VII.

Sex and Marital Status

EEOC and the courts have made it clear that Title VII does not cover marital status. No claimant can raise allege sex discrimination based on marital status alone.

However, many federal complainants have successfully raised complaints where practices on hiring or promoting married employees favored men over women. This is based on the stereotype that married women will at some point leave their jobs to raise a family.

Pregnancy Discrimination

Congress resolved the question of whether discrimination based on pregnancy was illegal with the Pregnancy Discrimination Act, which declared that to discriminate based on pregnancy was to discriminate based on sex.

We'll spend time on how to deal with the real work pregnancy issues in Chapter Nine, but suffice it to say for the present that the Pregnancy Discrimination Act does not mandate preferential treatment for pregnant women, but requires agencies to treat pregnant women exactly as they would anybody else, man or woman, suffering from a temporarily medical condition that might or might not affect performance.

Gender Non-Conforming Behavior

On a BBC show in 1948, British philosopher and logician Bertrand Russell discussed how we characterize the same trait differently depending on whether we're referring to ourselves or others. Now called Russell's Conjugation or Emotive Conjugation, Russell's examples were:

> I am firm, you are obstinate, he is a pig-headed fool.
>
> I am righteously indignant, you are annoying, he is making a fuss over nothing.
>
> I have reconsidered the matter, you have changed your mind, he has gone back on his word.

Russell's Conjugations have a perfect parallel in EEO case law that holds that employers acting based on employees' failure to conform with gender stereotypes that are acceptable when exhibited by another gender is sex discrimination. It's the old hack about men being resolute, but women always wanting to get their way.

A woman manager at Price Waterhouse with an excellent record was considered for a partnership by an evaluation committee. However, her consideration was put on hold because of the large number of committee members voting against her.

In her lawsuit alleging sex discrimination, she asserted among other allegations that her rejection was based in large part because of the perception that she did not conform to classic women stereotypes and was therefore evaluated not as a manager, but as a *woman* manager.

Comments made by evaluators noted that, "she may have overcompensated for being a woman." Another suggested that she needed to take, "a course in charm school." Another noted her frequent use of profanity, "because it's a lady using

foul language." One of her defenders even described the stereotype, saying, "she had matured from a tough-talking, somewhat masculine hard-nosed mgr. to an authoritative, formidable, but much more appealing *lady partner* candidate [emphasis added]." When she talked with a head partner who strongly supported her, he told her of the concerns the committee had and told her to walk more femininely, talk more lady-like, dress more womanly, wear make-up, have her hair styled, and wear jewelry.

Both the federal district court, the federal court of appeals, and later the Supreme Court found illegal sex discrimination. Neither the district court nor court of appeals agonized over the decision and the only reason the Supreme Court heard it was because the two lower courts used slightly different analyses to reach the same conclusion. While that was the lead case, from the earliest days after the Civil Rights Act, EEOC and the courts have found sex discrimination in cases where both men and women employees suffered harm because they did not conform with sexual stereotypes of how men and women should act.

Sexual Harassment

Beginning in the early 1970s, lawsuits started hitting the federal courts, mostly from women, alleging what we now call sexual harassment when management either required sex in exchange for a favorable employment decision, or created or allowed a hostile work environment. We'll discuss hostile environment in Chapter Six, but the teaching point for right now is that such activity was sex discrimination in violation of Title VII because the actions were taken, "because of sex." But for the fact that the victims were women, the discrimination would not have occurred.

In 1981, EEOC codified all the federal court decisions with regulations that described hostile environment discrimination and *quid pro quo* discrimination. We'll discuss these concepts in Chapter Six.

Same Sex Harassment

In 1998, the Supreme Court resolved the question of whether same-sex sexual harassment was a violation of Title VII. The case involved a man worker on an oil rig being sexually harassed by other men. Even if you didn't know the outcome before you reached this section, you should have been able to figure it out based on the consistent theme in Title VII sex discrimination cases. As a matter of law, the Supreme Court found it a violation of Title VII since he was treated this way was because he was a man. But for his sex, he would not have suffered harm.

Sexual Orientation and Transgender Protection Under Title VII

Federal courts consistently interpreted Title VII to cover biologic gender and they rejected claims of discrimination based on sexual orientation or transgender

status. Beginning around the early 2000s, EEOC and some lower federal courts, and two appeals courts, began using the gender nonconforming behavior analysis we discussed just above to find discrimination in cases involving sexual orientation and transgender status. However, none of these decisions were government-wide precedent, until several cases hit the Supreme Court in 2020.

The Court ruled that discrimination on the basis of sexual orientation or transgender status is sex discrimination. It declined to adopt or distort the gender-stereotyping analysis EEOC and lower courts used, and took the issue head-on and said that discrimination based on sex violates, "the ordinary public meaning of Title VII's command," and that "homosexuality and transgender status are inextricably bound up with sex."

Exceptions?

The Civil Rights Act uses the term "*Bona Fide* Occupational Qualification" (BFOQ) to describe situations where agencies may discriminate based on sex, national origin, or religion. Note carefully, though, that the law only allows BFOQs in religion, sex, or national origin and not in the other prohibited factors. 42 USC 2000e-2 at (e)(1) states:

> It shall not be an unlawful employment practice for an employer to hire and employ employees…on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a *bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.…

The courts have generally recognized two BFOQs in sex discrimination. The first is in situations involving "privacy and common decency" where non-medical professionals deal on an intimate basis with people of the opposite sex. In those situations, management may assign duties based on sex, or even in some cases have a specific sex requirement in the position description.

When the airport screeners or customs agents do a strip search, women officers search women and men officers search men. Many large national parks have Youth Conservation Camps with 16- to 20-year olds living in barracks. The supervisors of the male dorm are men and the girl's dorm are women because they are supervising workers when using showers, toilets, and sleeping facilities.

Most of the third-party cases on the privacy/common decency issue come from law enforcement agencies like Federal Bureau of Prisons, other federal detention centers and jails, TSA, Customs and Border Protection, and other related agencies.

If you're with one of those agencies, or any agency where a privacy/common decency issue arises, go to your agency counsel for help. While I love to give as