

## **1. Who is protected under California Employment Discrimination Law?**

Except in cases of harassment, an employee must work for an employer who regularly employs five or more people to be entitled to protection under California Discrimination law. However, a harassment claim can be brought against an employer who employs at least one person and if an employee is retaliated against because they complain about discrimination, the retaliation claim can be brought against any employer who employs at least one person.

Generally speaking the rights of employees of non-profit religious organizations are limited in terms of their ability to bring discrimination claims.

## **2. What if I am an independent contractor and not an actual employee of a company?**

An employee is considered anyone under the direction and control of an employer regardless of whether their employment relationship was based on an oral or written contract. Independent contractors may or may not fall outside of the definition of "employee" for discrimination claims based on the amount of control that the company in question exercises over their work. However, independent contractors can bring harassment claims against the company.

## **3. Are all forms of discrimination prohibited under California Law?**

No. Only the following forms of discrimination are prohibited: race, religion, disability, age, sex, national origin and marital status. If the discrimination does not fit into one of those categories it is not actionable. Thus, if an employer discriminates against an employee because, for instance, he does not like him, this does not constitute an actionable discrimination claim unless the employee can also prove that the action taken against him was based on one of the forms of discrimination listed above.

Please note that cases of sexual harassment are considered discrimination cases, although special rules apply to these cases.

## **4. What forms of discrimination are most typically litigated?**

Most non-harassment discrimination cases fall into one of four categories: (1) individual "disparate treatment" cases in which an employee claims that an employer treated the employee less favorably than other employees because of race, religion, age, sex, etc.; (2) retaliation cases in which the employee claims that the employer retaliated against the employee for opposing discrimination practices; (3) "disparate impact" or "adverse impact" cases in which employee claims that the employer's employment practice has an unfavorable impact on a protected class of employees; (4) cases involving a class-wide pattern or practice of systemic disparate treatment where a plaintiff shows a statistical difference between protected class members and similarly qualified members of the majority group.

## **5. What evidence is required to prove discrimination in a disparate treatment case?**

The law recognizes that a plaintiff will rarely have access to direct evidence of intentional discrimination; therefore, an employee is allowed to prove discrimination through "circumstantial" or indirect evidence. Thus, through circumstantial evidence the plaintiff must first prove that: (1) he or she is a member of a protected class; (2) that the plaintiff was qualified for his or her position; (3) that he or she was discharged or demoted; and, (4) that the employee was replaced by a person outside of the protected class.

The employer then has an opportunity to demonstrate that the employee was terminated or demoted for a legitimate, non-discriminatory reason.

The plaintiff then has an opportunity to produce evidence that the supposed legitimate reason for terminating or demoting the plaintiff was simply a pretext for discrimination. If the plaintiff can meet that burden he or she will win the case.

## **6. How can I prove retaliatory discrimination?**

In order to prevail on a retaliatory discrimination case the plaintiff must establish that he or she suffered an adverse employment action as a result of complaining of protected forms of discrimination. The employer then has the opportunity to demonstrate that there was a non-retaliatory explanation for the employment action and the plaintiff must, again, show that the explanation is pretextual (i.e., fake).

## **7. What do I need to do to pursue my claim?**

Under California law before bringing a lawsuit an employee must first make a claim with the Department of Fair Employment and Housing (DFEH) or with the Equal Employment Opportunity Commission (EEOC). An employee can request an investigation or immediately receive a right-to-sue letter and bring a lawsuit against the employer. Under certain circumstances union employees must also exhaust their administrative remedies through the union.

## **8. What damages can I recover in an employment discrimination case?**

If a plaintiff can prove discrimination he or she is entitled to recover damages for past and future medical treatment, past and future wage loss, damages for pain, suffering and emotional distress and, if the plaintiff can establish bad enough conduct on the part of the company, punitive damages (i.e., damages intended to punish the employer). Government entities cannot be sued for punitive damages.

## **9. Should I retain an attorney?**

It would be very difficult for an employee to pursue a discrimination case in civil court without an attorney. Employees do bring administrative claims without an attorney; however, they eventually recognize that they will need the services of an attorney to receive the full compensation for their damages. It is best for an employee to retain an attorney at the beginning of the case, even before a claim is filed, because the content of the claim may limit an employee's ability to recover damages in a civil lawsuit. It is important that the employee retain an attorney with special knowledge and skills in the area of discrimination law.

## **10. Can I recover my attorney fees if I win?**

If the employee prevails on a claim of discrimination, harassment or retaliation, they are entitled to be compensated for their attorney's fees by the employer. This is true whether or not the attorney has been hired on a contingency fee basis and the plaintiff is entitled to recover for all of their attorneys' hourly work even if that amount of money exceeds the contingency fee and the amount of plaintiff's verdict.

## **11. How long do I have to bring my discrimination lawsuit?**

You have to file a claim with the DFEH or EEOC within one year of the date your claim "accrued." This is sometimes a difficult date to ascertain if there has been discrimination over a long period of time. To be safe, an employee should bring a claim within one year of the first known act of discrimination. However, if you have waited longer, you may still be able to bring a claim so you should consult with an attorney. Be careful. Your claim may "accrue" while you are still an employee. Employees are allowed to bring discrimination claims even while still employed.

## **12. Will my employment discrimination case settle out of court?**

Probably, since most employment discrimination cases settle at some time before trial. However, most significant settlements do not occur until there has been at least some litigation.

*This article was authored by John D. Winer, an eminent sexual harassment attorney in California. The Law Offices of Winer & McKenna, LLC focuses on sexual harassment and abuse cases in California.*