

## Topic of the Month:

# FAQs: Employees Ask About Job Discrimination

### *What exactly is employment discrimination?*

Job discrimination happens whenever an employer, or potential employer, changes the terms and the conditions of your employment, or won't hire you, or fires you (wrongful termination) for any of the following reasons:

- because of your race, color, religion, national origin, age, sex, disability or handicap and, in New York and New Jersey, your sexual orientation or your marital status;
- because you have filed a claim of discrimination or assisted someone else with his or her claim
- because you have taken a medical leave or family leave
- because your employer makes decisions based on stereotypes or false assumptions about the abilities or performance of members of certain racial groups, skin colors, religions, ages, genders, disabilities or handicaps or sexual orientations
- because you are married to a member of one of those groups. It can also include retaliation for bringing or filing a workers compensation claim.

### *What does “terms and conditions of employment” mean?*

Besides hiring and firing, terms and conditions can include: (1) compensation and benefits, (2) hours of work; (3) promotions, transfers, layoffs or recalls; (4) training opportunities; (5) use and access to the employer's facilities; (6) the language spoken in the workplace; (7) the use of personal breaks; (8) assistance on the job; (9) personal privacy; (10) light duty policies; (11) policies or procedures on discipline.

### *What is a “hostile workplace”?*

It means harassment on the job. Originally, it applied to sexual harassment, which included *quid pro quo* harassment, or requests for sexual favors in return for a benefit, or an additional benefit, of employment. Sexual harassment also includes other actions, like offensive comments about a person's appearance, based upon his or her gender or sexual orientation, physical touching, threats, or assault, display of pictures, photographs or cartoons of an offensive nature and jokes about gender or sexual orientation. But a hostile workplace can also be based on other violations of civil rights or human rights, because of discrimination based on race, color, religion, national origin, age and disability or handicap.

#### Inside this issue:

- Frequently Asked Questions Employees Ask About Job Discrimination
- The “Dirty Half-Dozen” Mistakes Employers Make with Workers

## *What about a temporary disability or medical condition?*

Temporary physical or mental conditions and/or disabilities are protected, as are permanent disabilities and long term illnesses. A pregnancy, for example, or a cancer survivor, are conditions protected from discrimination. However, for a disabled person to be protected by the laws against discrimination, the employer must have some knowledge of the condition.

## *What is a “reasonable accommodation”?*

Some examples, which are by no means exclusive, include making an existing workplace more convenient to a person with a disability (wheelchair ramps), or modifying work schedules (to allow for therapy), or purchasing or modifying equipment (special pagers or sign language interpreters for the hearing-impaired). But an employer doesn't have to lower its production standards or incur an “undue hardship” in the operation of its business, either financially or in its day-to-day operations. Nor must an employer, usually, provide personal items like eyeglasses or hearing aides.

## *Can I pray at work?*

Yes, because the concept of “reasonable accommodation” also applies to religious beliefs, unless it would cause an “undue hardship” to the employer. This can mean requiring an employer to set aside areas for prayer, in addition to allowing workers time off for religious holidays.

For more information, call  
Mike Farhi  
at 201-488-7211

## *Can I speak my native language at work, instead of English?*

Yes, unless the employer can show that speaking English is a requirement for conducting its business. For many jobs, that is not the case. And two or more employees speaking their native language on breaks, for example, does not involve doing their jobs. But if an employer believes that an “English only” rule is necessary, it should let its workers know and inform them of the consequences of violating that rule.

## *What are my rights to medical and family leave?*

There are two *unpaid* family leave laws: one is the federal Family and Medical Leave Act and the other is New Jersey's Family Leave Act. Both apply to employers of 50 or more people and cover workers employed for at least 12 months with at least 1,250 hours (for the federal law) and 1,000 base hours (for the New Jersey law) during the past year. Leave can be taken for up to 12 weeks in a 24 month period (New Jersey law) or a 12 month period (federal law). While New Jersey's law applies to leave for birth or adoption of a child and a serious health condition of a child, parent, or spouse, the federal law includes care of a child, placement of a child with an employee for foster care and medical leave for *a serious health condition of an employee himself or herself*, including disability due to a workers compensation injury. There are *advance notice requirements* for both laws (essential to keeping your job) and workers may be required to provide an affidavit from a doctor or other health care provider. Also, an employer may require a second opinion. While family and medical leave is unpaid, an employer must maintain group health care coverage. An exception to the reinstatement requirement is if the employee would have lost his or her job because of a reduction in force or a legitimate layoff.

## Am I entitled to severance pay if I'm fired or laid off? What about a reference?

There is no law requiring severance pay for employees who are fired or laid off. But if an employer has an established policy of giving severance pay, someone who is terminated is entitled to it. If there is a severance policy, an employer should be asked how it is determined. Is a formula used based on length of service? Is it just unused vacation pay or a "two weeks' notice" payment that is applied to everyone?

As with severance pay, there is no requirement that an employer give a reference, or a good reference. What often happens is that a "neutral reference" is given. This means that a former employer gives a potential new one an employee's length of service, job title and job duties. A person's salary can also be disclosed, if he or she wants it to be. Requiring a former employer to go beyond this creates a risk of something defamatory being said, or the former employer risking legal action for not disclosing important information about the employee. Some employers are not burdened by those concerns – if a termination is on "good terms" or if an employee can negotiate things like severance, a written letter of reference may be part of the "package."

## The "Dirty Half-Dozen" Mistakes Employers Make With Workers

**1. IGNORANCE ISN'T BLISS.** Employment in New Jersey and New York is "at will," meaning that an employer has the right to fire a worker for any reason— or for no reason. The major exceptions to this rule are when employee rights are based on **laws against discrimination** and **contract**. Sometimes an employer will "squander" his rights (because he doesn't know them) by *creating the appearance of discrimination*, or by actually violating an individual employee's contractual rights, either written or oral. This substantially increases the chances of a lawyer's letter, an administrative charge, or a lawsuit.

**2. WHO'S IN CHARGE HERE?** Business owners, presidents and CEOs don't have much day to day contact with their employees. It's the supervisors and managers who have to deal with most problems. Usually, when a female employee complains about sexual harassment, or when a disabled worker asks for a job accommodation, the supervisor is ill-trained and perhaps ill-suited to deal with the issue. Some supervisors will ignore or belittle the problem, or even become a party to the harassment or discrimination,

enhancing an employer's exposure.

**3. NO PROCEDURES.** Even the smallest business should have some procedures in place for managers to follow. Personnel policies or employee manuals with appropriate disclaimers can provide guidance to supervisors and employees alike. If those policies are applied "neutrally" to everyone, regardless of gender, race, color, religion, national origin, age, disability/handicap or sexual orientation, a business can add a "layer of protection" against a meritless claim.

**4. NO PAPER TRAIL.** Many employers don't keep a written record of employee problems and/or problem employees. It's inconvenient and time consuming. But it can refresh recollections, as well as corroborate a version of events. On the other hand, it's an obvious problem when it's time to explain why an employee, now a plaintiff, was disciplined or terminated, but there's no record or clear recollection of what really happened.

*continued from page 3*

**5. DON'T BE CRUEL.** Most workers who've been let go or disciplined think it's "unfair" or "wrongful" That feeling can be enhanced – or confirmed - by "angry" or "nasty" actions by an employer. A company doesn't owe an employee an explanation of its actions. But at a very difficult time, it should have some consideration for his or her dignity and self-respect. Humiliating a worker by "treating him or her like a criminal" (unless he or she is one) or creating baseless reasons for a reprimand or firing are unnecessary and unwise.

**6. PENNY WISE, BUT POUND FOOLISH.** It's not a panacea, but sometimes an employer can save itself lawyers' fees and other expenses by "paying off" a terminated employee. While there's no statutory obligation for severance, there remains in the workforce a belief of entitlement to "two week's pay" upon termination. Of course, if it's done once, it could become a "policy." But especially for a small employer, a modest payment, in return for a signed release, can be a good investment.

## About

Nashel,  
Kates, Nussman,  
Rapone & Ellis LLP

Since 1913, the members of Nashel, Kates, Nussman, Rapone & Ellis, LLP, have served as outstanding litigators, legal advisors and valued members of their communities. The firm's attorneys believe that the practice of law requires an unstinting dedication to their clients and the legal matters for which they are retained. The firm provides legal representation of the highest caliber in the areas of:

- |   |  |
|---|--|
| * <b>Business and Corporate Law</b>             | * <b>Municipal Law and Land Use</b>          |
| * <b>Complex Litigation and Appeals</b>         | * <b>Condominium Associations and</b>        |
| * <b>Probate Estate Administration and</b>      | * <b>Co-op Corporations</b>                  |
| * <b>Tax Planning</b>                           | * <b>Alternate Dispute Resolution</b>        |
| * <b>Commercial and Residential Real Estate</b> | * <b>Professional Licensing</b>              |
| * <b>Entertainment Law</b>                      | * <b>General &amp; Commercial Litigation</b> |
| * <b>Real Estate Tax Appeals</b>                | * <b>Employment &amp; Discrimination Law</b> |

To learn more about Nashel, Kates, Nussman, Rapone & Ellis, visit the website at <http://nashelkates.lawoffice.com>.  
190 Moore Street, Suite 306 • Hackensack, New Jersey 07601 • 201-488-7211 • fax: 201-488-1210

**Michael Farhi, Esq.**

For a **FREE** Phone Consultation, call **201.488.7211** or e mail [mfarhi@nklaw.com](mailto:mfarhi@nklaw.com)

- **Employment & Discrimination Law**
- **General & Commercial Litigation** • **Municipal Court & Traffic Violations**