

Project Consulting Group

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DISCRIMINATION IN THE WORKPLACE HANDBOOK

I. INTRODUCTION

It is well settled that an employment having no specified term may be terminated at the will of either party unnoticed to the other. An employee at will may be dismissed for any reason or no reason whatsoever. *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 627 (Minn. 1983). Legal and statutory exceptions to the employment-at-will rule include:

A. Discrimination

Federal and state laws prohibit discrimination in the work place in connection with hiring, discharge, and virtually all other terms and conditions of employment, including promotion, discipline, compensation, work assignments and fringe benefits.

1. Federal Law

Federal law, encompassed in Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (“ADEA”), the Rehabilitation Act (“Rehab”), the Americans with Disabilities Act of 1990 (“ADA”), and the new Civil Rights Act of 1991, prohibits discrimination in the following areas:

a. Race or Color (Title VII).

These areas generally include discrimination against Blacks, American Indians, Asians, etc.

b. National Origin (Title VII).

Includes discrimination against Hispanics, Poles, Italians, and any other discrimination based upon the person’s nationality or heritage.

c. Religion or Creed (Title VII).

Includes discrimination against Jews, Catholics, Moslems, Jehovah’s Witnesses, Seventh Day Adventists, etc.

d. Sex (Title VII).

This includes males as well as females. Sex discrimination includes related areas of pregnancy discrimination, sexual harassment, equal pay and comparable worth.

e. Age (ADEA).

This includes discrimination against anybody at least 40 years of age; an upper limit no longer exists.

f. Disability (ADA).

A new federal law, the Americans with Disabilities Act of 1990, prohibits discrimination against handicapped persons. The ADA went into effect in July of 1992 for employers of 25 or more people, and has subsequently become effective as of July of 1994 for employers of 15-24 people. A different Federal law, the Rehabilitation Act, prohibits discrimination against handicapped persons by government contractors and organizations receiving federal funds.

2. State Law

In addition to the foregoing, the Minnesota Human Rights Act also prohibits discrimination in the following additional areas:

a. Marital Status.

Includes discrimination against single parents, unwed mothers and divorcees, as well as refusal to hire spouses of current employees.

b. Disability.

Minnesota law prohibits discrimination by any employer on the basis of disability unless such action is based upon a bona fide occupational qualification (BFOQ) or legitimate physical or mental inability to perform the job in question. Minnesota law also requires certain employers to make "reasonable accommodation" for an otherwise qualified disabled person.

c. Age.

The Minnesota Human Rights Act also prohibits discrimination on the basis of age but it extends protection to anyone having attained "the age of majority" (19 years old).

d. Public Assistance.

The Minnesota Human Rights Act prohibits discrimination with regard to public assistance.

- e. Membership on a Local Human Rights Commission.
- f. Sexual Orientation.

The 1993 Minnesota Legislature amended the Minnesota Human Rights Act to extend prohibitions against discrimination based on “sexual orientation.” Sexual orientation means having or being perceived as having an emotional, physical or sexual attachment to another person with regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness. “Sexual orientation” does not include a physical or sexual attachment to children by an adult. Minn. Stat. §363.01, subd. 45.

The sexual orientation discrimination prohibition does not apply to religious or fraternal organizations or to non-public service organizations with respect to qualifications of employees that are volunteers based on sexual orientation (when the organization’s primary function is providing occasional services to minors such as youths’ sports organizations, scouting organizations, boys’ or girls’ clubs, programs providing friends, counselors, or role models to minors, youth theater, dance, music, or artistic organizations, agricultural organizations for minors and other use organizations).

3. Local Laws

Both Minneapolis and St. Paul have city ordinances prohibiting discrimination in employment. These ordinances tend to mirror those of the state law, but both also prohibit discrimination on the basis of sexual or affectional preference.

4. Reprisal

All of the foregoing laws prohibit an employer from retaliating against individuals for initiating, assisting or otherwise participating in an action to enforce any of the statutes, or for objecting to a practice made illegal under these laws.

5. Theories of Discrimination

Persons claiming unlawful employment discrimination may seek to prove their allegations either under the theory of disparate impact or disparate treatment.

6. Specific Issues of Discrimination

As noted above, the concept of illegal discrimination covers a wide range of employment actions that negatively impact upon protected persons. Within each area, certain discriminatory conduct may be quite subtle while other conduct will be rather overt.

B. Common Law

1. Contract Theories

a. Employee Handbooks.

Over 20 states now recognize that, under appropriate circumstances, language in an employee handbook can rise to the level of a contract and change an employee's "at-will" status.

b. Oral Representations.

It has also held that an exception to the employment-at-will doctrine should be made where an employer makes oral representations of permanent or definite employment. *Eklund v. Vincent Brass and Aluminum Co.*, 351 N.W.2d 371 (Minn. Ct. App. 1984).

c. Promissory Estoppel.

The doctrine of promissory estoppel can be applied in employment cases where no contract exists. A promissory estoppel theory is often used where the employer makes general assurances of job security to the employee before the employee is hired. This illustrates the overlap among theories of promissory estoppel, implied contracts and the implied covenant of good faith and fair dealing.

d. Implied Promises.

Minnesota does not recognize an implied covenant of good faith and fair dealing. *Hunt v. I.B.M. Mid-America Employees Federal Credit Union*, 384 N.W.2d 853 (Minn. 1986).

2. Statutory Exception

The public policy exception ("Whistleblower" Claims), Minnesota Statutes, Section 181.932, subdivision 1 provides that:

An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because: (a) the employee, or a person acting of behalf of an employee, in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official; (b) the employee is requested by a public body or office to participate in an investigation, hearing, inquiry; or (c) the employee refuses to participate in any activity that the employee, in good faith, believes violates any state or federal law or rule or regulation adopted pursuant to law.

3. Tort Claims

The traditional method of imposing liability on an employer for the acts of its employees was through vicarious liability – if an employee acted negligently within the scope of his or her employment, such negligence would then be attributed to the employer. However, employers in Minnesota may now face liability under the related and developing legal theories of negligent hiring, retention and supervision. Under a negligent hiring, retention or supervision theory, the employer is liable for its own negligence in failing to take adequate steps to keep a dangerous applicant or employee from harming others.

a. Negligent Hiring: Claim Recognized.

In *Ponticas v. K.M.J. Investments*, 331 N.W.2d 907,911 (Minn. 1983), the Minnesota Supreme Court recognized that employers may be held liable when one of their employees harms another in the course of employment, and the employer knew or should have known that hiring the employee would pose a risk of harm to some third person. In this case, a rental housing employer hired a maintenance person with a history of violence. The maintenance person, who was given a passkey to apartments to conduct repairs, assaulted a tenant in her apartment. The employer was held liable for negligent hiring for failing to adequately investigate the maintenance person's background before hiring him.

b. Negligent Hiring: Claim Rejected.

In *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419 (Minn.Ct.App. 1993), the Minnesota Court of Appeals refused to permit the estate of a murdered employee to recover against Honeywell under a negligent hiring theory despite the fact that Honeywell rehired the perpetrator after he was released from jail for previously murdering yet another Honeywell employee. The perpetrator (a man named Landin) and victim (a woman named Nesser) struck up a friendship at work, but when Landin expressed

romantic interest, Nesser stopped spending time with him. Landin then embarked on a course of harassing and threatening conduct towards Nesser both at work and at her home, including scratching a death threat on Nesser's locker door. Landin failed to come to work after July 1, 1988, and Honeywell accepted his formal resignation on July 11. However, on July 19, approximately six hours after her shift ended, Landin gunned down Nesser in her driveway. Landin was subsequently convicted of first degree murder and sentenced to life in prison, *Id.* at 421

In the civil action, the court ruled that Honeywell could not be liable for negligent hiring because it did not owe a duty of care to Nesser at the time of Landin's hire. Moreover, the court pointed out that the scope of an employer's duty of reasonable care in hiring is largely dependent upon the type of responsibilities associated with the particular job. *Id.* at 422. Unlike providing a dangerous resident manager with a pass key as in the Ponticas case, Landin's employment did not enable him to commit the act of violence against Nesser. Landin's job as a maintenance worker involved no exposure to the general public and required only limited contact with co-workers. *Id.* at 423. Thus, unlike the tenant in Ponticas, Nesser was not a reasonably foreseeable victim at the time Landin was hired. *Id.* The court also considered significant the public policy argument that to recognize a duty at the hiring stage in this case would essentially hold that ex-felons are inherently dangerous and that any harmful acts they commit against persons encountered through employment will automatically be considered foreseeable. The court concluded that such a rule would deter employers from hiring workers with a criminal record. *Id.* at 423.

c. The Related Claim of Negligent Retention.

However, even though not holding Honeywell liable for negligent hiring, the court held that Honeywell owed a legal duty of reasonable care under the related theory of negligent retention. Landin's post-imprisonment employment at Honeywell contained numerous incidents of sexual harassment and violence against Nesser and other workers. Based on these facts, the court ruled that it was foreseeable that Landin could act violently against a co-worker, and against Nesser in particular. *Id.* at 424. This foreseeability generated a duty of care to Nesser, and the policy considerations of employment opportunities for ex-felons "cannot predominate over the need to maintain a safe work place when specific actions point to future violence." *Id.*

d. Tort of Invasion of Privacy Recognized.

The Minnesota Supreme Court recently joined the majority of jurisdictions and recognized the common law tort of invasion of privacy. Before July

1998, only Minnesota, North Dakota, and Wyoming had not recognized any of the four privacy torts listed below.

- (1) The Court considered a case involving two women who had been photographed by a friend while standing nude together in the shower. The store which developed the film indicated it would not develop the particular photograph because of its “nature” – the photo was, however, subsequently shown by a store employee to various persons, and one or more copies of the photo were circulated in the community. The women sued the store and the unidentified employee, alleging four theories of invasion of privacy. The court recognized the common law right to privacy, and causes of action in tort for intrusion upon seclusion, appropriation, and publication of private facts. The Court declined to recognize the tort of false light publicity. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998).
- (2) In reaching its decision, the court considered the evolving nature of society and the law, and the reasoning of other jurisdictions in recognizing the right to privacy. The Court found that “[t]he right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close.”

e. Specific Causes of Action for Invasion of Privacy

The court recognized three of the four “traditional” invasion of privacy torts.

- (1) “Intrusion Upon Seclusion”
A plaintiff alleging intrusion upon seclusion must demonstrate that:
 - (a) The defendant intentionally intrudes, physically or otherwise,
 - (b) Upon the solitude or seclusion of another or his private affairs or concerns;
 - (c) In a manner that would be highly offensive to a reasonable person.
- (2) “False Light Publicity” – *Not Recognized*

The Court declined to recognize the tort of “false light publicity” on the grounds that it involves claims similar to defamation, and overlaps with that and other privacy torts to the extent “a case rarely succeeded squarely on a false light claim” in those jurisdictions recognizing the tort. Moreover, the Court expressed concern that false light inhibits First Amendment free speech rights to an unacceptable degree.

II. RECRUITMENT DOS AND DON'TS

ITEM	ILLEGAL INQUIRIES	LEGAL INQUIRIES
AGE	Age, date of birth, any inquiry for purpose of excluding persons of a particular age (e.g. What are your retirement plans? How long do you plan to work? How can someone so young handle this job?)	Whether candidate meets minimum legal age requirements. Inquiries as to date of graduation from high school or college.
ARREST RECORD	<u>Any</u> inquiry relating to arrest.	<u>NONE</u>
AVAILABILITY TO WORK	Inquiries directed only to persons of one sex, inquiries about religious observations or child care responsibilities	Inquiring of all candidates whether they can work the hours scheduled.
CITIZENSHIP	Inquiries relating to whether candidate is a citizen of the United States.	Inquiries relating to whether candidate is legally entitled to work in the United States.
CONVICTION RECORD	Inquiries regarding convictions that do not relate to performing the particular job at issue.	Inquiries about felony convictions which relate to performing a particular job. Include disclaimer stating that conviction does not automatically bar candidate.
CREDIT RATING	Any inquiries concerning charge accounts, credit rating, etc. that do not relate to performing the particular job under consideration	Specific inquiries about credit rating that relate reasonably to performing the particular job in question.
DISABILITIES	<u>Any</u> inquiries that elicit information about disabilities or health (e.g. Do you have any medical limitations that would prohibit performance of this job? How many sick days in last job? Have you ever sought treatment for a mental health condition?)	<u>NONE</u>
DRINKING	Inquiries relating to candidate's use of alcohol.	<u>NONE</u>
FOREIGN LANGUAGE	Inquiries relating to how fluency in foreign language was obtained	Inquiries as to whether the candidate is fluent in another language.
HEIGHT OR WEIGHT	Any inquiries regarding height or weight of candidate unless BFOQ exists	Inquiries regarding height or weight if BFOQ exists.
HOME OWNERSHIP	Any inquiries regarding whether candidate owns or rents his/her home	<u>NONE</u>
MARITAL AND FAMILY	Child care issues; unwed motherhood; spouse's preferences regarding job conditions. Inquiries indicating marital status, number of children, pregnancy. Maiden names, or request to circle Miss, Mrs., Ms., or Mr.; Spouse's protected characteristics.	Whether candidate can meet work schedule or job. Whether candidate has activities, responsibilities, or commitments that may hinder meeting attendance requirements. (Should be asked of candidates of both sexes.)

ITEM	ILLEGAL INQUIRIES	LEGAL INQUIRIES
MILITARY RECORD	Fact of service; Type or condition of military discharge, unless it is the result of military conviction.	Type of experience and education in service as it relates to a particular job.
NAME	Inquiries about the origins of the person's name (e.g. That's an interesting name, is it Dutch?). Inquiries regarding prior marital status (e.g. Is Robinson your maiden name?)	Whether candidate has ever worked under a different name (for purposes of checking references).
NATIONAL ORIGIN	Lineage, ancestry, descent, mother tongue, birthplace, citizenship. National origin of spouse or parents	Whether candidate is legally eligible to work in the United States. Investigating the applicant's ability to read and write English when required for a specific job.
ORGAN-IZATIONS	Inquiries about membership to determine race, color, religion, sex, national origin, or age of candidates.	Inquiries which do not elicit discriminatory information. Inquiring about membership in professional organizations related to the job.
RACE OR COLOR	Specific race, complexion, color of skin. Height or weight, where it is not related to the job.	<u>NONE</u>
RELIGION	Religious preference, affiliations, denominations.	Whether candidate can meet work schedules of job with reasonable accommodation by employer, if necessary.
SEX	Sex of applicant where sex is not a bona fide occupational qualification (BFOQ).	Sex of applicant where sex is a BFOQ, i.e. the physical characteristics of one sex are necessary to perform the job.
SEXUAL ORIENTATION	Sexual orientation of applicant.	<u>NONE</u>
SMOKING	Inquiries relating to whether or how much candidate smokes.	May inform candidate of no-smoking rules, smoke-free environment, etc.
WELFARE EXPERIENCE	Inquiries relating to candidate's history of receiving welfare.	<u>NONE</u>

1. Examples of Prohibited Interview Questions/Statements

a. Age

How old are you?
When do you plan to retire?
What are your retirement plans?
We're looking for someone younger with more energy.
We're looking for someone younger who can adapt to change more easily.
We're looking for someone younger who isn't tied to the old ways of doing things.
How did such a young person acquire such experience?
Do you think you are old enough to handle this responsibility?
We want someone old enough that she isn't going to get pregnant and leave next year.

b. Gender.

We're looking for a (woman/man) for this job.
Are you planning a family?
Does your spouse mind if you work nights? (if not asked of men)
What child care arrangements have you made? (if not also asked of men)
We are concerned that a woman will not be able to maintain discipline in this group.
What is your maiden name?
Do you prefer Miss or Mrs.?

c. National Origin.

Where were you born?
Where are you from?
Is English your native language?
How did you come to speak Spanish so fluently?
That's an interesting name – is it Dutch?
Where did your parents come from?
Is your husband Hispanic?
I hear you adopted a child – from what country?

2. EEOC Guidelines on Pre-Employment Inquiries Under the ADA

a. Legal Overview

The Americans With Disabilities Act prohibits, among other things, pre-employment inquiries into the existence, nature and/or severity of a disability. 42 U.S.C. § 12112(d)(2). In order to clarify its position on the permissibility of various pre-employment inquiries, the EEOC has issued guidelines that will aid its enforcement

staff (as well as the general public) in interpreting the foregoing statutory requirements. Those guidelines are compiled at 405 BNA FEP Manual 7191.

An inquiry concerning the existence, nature and/or severity of a disability is one in which an applicant could reasonably be expected to answer in a manner that would indicate the existence of a disability.

b. Types Of Inquiries

(1) Direct Inquiries.

The guidelines provide that direct inquiries about disabilities (e.g. Do you have AIDS? Are you an alcoholic?) are prohibited, even where the answer might legitimately disqualify the applicant from the position in question. For example, a taxi company could not make a pre-employment inquiry of an applicant that walks into the office with dark glasses, a guide dog and a white cane. Similarly, the question “Do you have a disability that will prevent you from performing the essential functions of the job with or without accommodation?” would be impermissible because it inquires directly into the existence of a disability.

(2) Inquiries Concerning Job Functions.

The guidelines do permit the employer to inquire into the ability to perform a particular job. Therefore, the employer may ask, “This job requires that you carry 50lb bags of material up two flights of stairs to the warehouse – can you perform this function with or without reasonable accommodation?” This is true even where the inquiry relates to something other than an essential function of the job.

(3) Inquiries Into Impairments.

Since impairments are not necessarily disabilities, the guidelines prohibit such inquiries only if they are likely to elicit information about a disability. For example, “How did you break your leg?” is a permissible inquiry because the answer will most likely relate to an event rather than a disability. However, follow-up questions such as, “Can you walk?” or “Will you ever regain full mobility?” relate more to major life activities and therefore would be prohibited.

(4) Inquiries About Ability To Perform Major Life Activities.

Similar to the above category, the permissibility of such inquiries depends upon the likelihood that the answer will divulge a disability and whether it relates to a specific job function. Thus, broad questions such as, “Can you walk?” or “Can you stand?” are likely to be deemed impermissible. On the

other hand, where the job requires such activities, such as asking a museum tour guide about the ability to walk, the inquiry would be lawful.

(5) Pre-employment Requests To Describe or Demonstrate Performance of Essential Job Functions.

These inquiries are permitted since they are obviously job related. However, if the applicant responds that he or she can not perform the function without accommodation, the employer must either provide the accommodation or allow the applicant to describe how the function would be performed with accommodation.

Where the disability is known to the employer, but is not reasonably believed to interfere with performance, the employer may request a description or demonstration only if such is required of all applicants. Where the known disability can reasonably be believed to interfere with performance, the applicant may be asked to describe or demonstrate performance regardless of whether other applicants also are required to do so.

(6) Inquiries Relating To The Need For Accommodation.

(a) For the hiring process

Employers may ask applicants if they need accommodation during the pre-employment process. If accommodation is required, and if the need for such is not readily apparent, the employer may request documentation from an appropriate professional to support the request.

(b) On the job

An employer may also ask an applicant whether they will need an accommodation and the type of accommodation needed if the employer reasonably believes that the applicant will require such accommodation. The “reasonable belief” requirement is fulfilled when:

- i) the employer reasonably believes that accommodation is necessary due to an obvious disability;
- ii) the employer reasonably believes that accommodation is necessary due to a non-obvious disability that the applicant has voluntarily disclosed; or
- iii) an applicant has voluntarily disclosed the need for an accommodation.

Important Reminder – Although these guidelines permit pre-employment questions regarding need for accommodation, the Minnesota Human Rights

Act has not been similarly interpreted. Therefore, it is still likely that such inquiries would violate the law in Minnesota.

(7) Inquiries Regarding Attendance.

Employers may ask about the ability to meet attendance standards. They also may inquire about previous absenteeism generally (How many days did you miss last year?) or specifically (How many Mondays and Fridays did you miss last year?). They may not, however, ask how many days off the applicant had due to sickness or medical treatment. Moreover, they may not ask how much time a known disabled person will require for treatment.

(8) Inquiries Relating To Previous Worker's Compensation Claims.

These are impermissible.

(9) Inquiries Regarding Drug Use.

Since current use of illegal drugs is not protected, questions regarding such use are permissible. Inquiries into current use of prescriptions or other lawful drugs are, of course, prohibited. Questions about past use of illegal drugs are permissible if the inquiry ends there. Questions such as "Have you ever used illegal drugs?" or "Have you used heroin in the last two years?" are therefore permitted but "How often did you use illegal drugs?" or "Have you ever been addicted to illegal drugs?" are prohibited.

(10) Inquiries Relating To Licensure or Certifications.

It is permissible to inquire as to whether the applicant has or intends to obtain necessary licensure or certification. An employer also may seek to find out why the applicant does not have the requisite credentials since this question is not likely to elicit protected information.

(11) Inquiries Relating To Lifestyle.

These inquiries are permissible as long as they are not tailored specifically to ascertain protected information, e.g. "Do you need to eat a number of small snacks during the day in order to maintain your energy level?" In the event such a question does elicit information relative to the applicant's disability, the employer may not ask follow-up questions.

Questions as to whether the applicant drinks alcohol are permitted; inquiries into the extent or frequency of alcohol use, or of current or past alcoholism, are not.

(12) Inquiries To Comply With Affirmative Action Obligations.

Employers may invite disabled applicants to disclose their disabilities voluntarily in order to comply with affirmative action obligations or otherwise to enhance their affirmative action efforts. In so doing, employers must state clearly on a written questionnaire (or orally if no such questionnaire is used) that:

- (a) the information is sought for affirmative action purposes only;
- (b) that disclosure is voluntary;
- (c) that the information will be confidential;
- (d) that refusal to disclose will not result in adverse treatment; and
- (e) the information will be used only in accordance with the ADA.

c. Specific Questions

- (1) Permissible Inquiries.
- (2) Can you perform the functions (essential and marginal) with or without reasonable accommodation?
- (3) Please describe and/or demonstrate how you would perform these functions (essential and marginal).
- (4) Do you have a cold? Have you ever tried Tylenol for a fever? How did you break your leg?
- (5) Can you meet the attendance requirements of this job? How many days did you take leave last year?
- (6) Do you illegally use drugs? Have you used illegal drugs in the last two years?
- (7) Do you have the required licenses for this job?
- (8) How much do you weigh? How tall are you? Do you regularly eat three meals a day?

d. Impermissible Inquiries.

- (1) Do you have AIDS? Do you have asthma?
- (2) Do you have a disability that would interfere with your ability to perform the job?
- (3) How many days were you sick last year?
 - (a) Have you ever filed for Worker Compensation? Have you ever been injured on the job?
- (4) How much alcohol do you drink each week? Have you ever been treated for alcohol problems?
- (5) Have you ever been treated for mental health problems?
- (6) What prescription drugs are you currently taking?