

FREQUENTLY ASKED QUESTIONS CONCERNING DISCRIMINATION AND THE LAW

Introduction

Many individuals who are considering or who have filed grievances challenging personnel actions have questions about pursuing their claims of violation of the anti-discrimination laws. These following questions and answers are intended to provide employees covered by the Rutgers AAUP-AFT collective agreement with a basic orientation regarding discrimination claims in the Equal Employment Opportunity Commission (EEOC), the New Jersey Division on Civil Rights (NJDCR), the United States Department of Labor (DOL) and the courts.

Although the AAUP-AFT has aimed to provide the most accurate information available, this commentary is not meant to be legal advice, and the AAUP-AFT is not responsible for any exceptions, mistakes or changes in the law or procedures. Because filing a charge of discrimination may affect any subsequent court action, if you are contemplating a lawsuit you should seriously consider consulting an attorney as early as possible, preferably before a charge is filed with any agency. Only a qualified lawyer can give competent legal advice and assistance regarding how to handle any particular claim of discrimination.

Frequently Asked Questions

1. What laws prohibit discrimination?

The following list contains the laws that are most frequently invoked concerning discrimination in employment and in education. There are numerous other laws that might apply to a particular situation that are not covered here, but which your attorney may be familiar with.

Title VII of the Civil Rights Act of 1964 (Title VII) covers discrimination and hostile work environment based upon race, sex, sexual harassment, national origin, color, religion, and retaliation for informal and formal complaints, advocacy and opposition.

The Civil Rights Act of 1866, 42 U.S.C. §1981 (Section 1981), prohibits race and national origin discrimination and retaliation for making formal and informal complaints.

The Civil Rights Act of 1871, 42 U.S.C. §1983 (Section 1983) prohibits race, national origin and sex discrimination by the state, as well as interference with free speech and other federally protected rights.

The Age Discrimination in Employment Act (ADEA) covers discrimination and hostile work environment based upon age and retaliation for filing complaints of

age discrimination. To be protected the individual must be more than 40 years old.

The Americans with Disabilities Act (ADA) covers discrimination for disability or perceived disability, and retaliation for complaints on this subject. This law defines disability as a physical or mental impairment that substantially limits one or more of the major life activities of an individual. The law also covers individuals with a record of a disability, or who are perceived as having a disability. It excludes persons impaired by the current use of illegal drugs. Employers have an affirmative obligation to make reasonable accommodation to an employee's handicap and engage in an interactive process with the employee to determine what accommodations are possible and appropriate. The scope and extent of a reasonable accommodation under the federal and state law depends on the particular circumstances involved.

Title IX of the Education Amendment of 1972 (Title IX) covers sex discrimination, sexual harassment and discrimination due to blindness in education.

Title VI of the Civil Rights Act of 1964 (Title VI) covers race, color and national origin discrimination and retaliation for making complaints involving federally funded programs.

The Family and Medical Leave Act (FMLA) provides full-time employees who have worked for a year or more the right to twelve weeks of unpaid leave for the employee's serious medical condition, for the serious medical condition of certain of the employee's dependents and for leave after childbirth or adoption. The employee may receive paid leave for the absence in whole or part if such right is specified under the collective agreement or the employer's policies. The law protects employees who are denied qualified leaves or who are not returned to their former positions after taking a qualified leave. The Act also permits certain family members to take up to 26 weeks of FMLA leave to care for members of the armed services who are receiving certain kinds of medical treatment, and 12 weeks of FMLA leave to handle certain non-medical matters for members of the armed services on active duty.

The New Jersey Law Against Discrimination (LAD) covers discrimination based upon race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy), familial status, marital status, domestic partnership status, affectional or sexual orientation, atypical hereditary cellular or blood trait (sickle cell), genetic information, liability for military service, and mental or physical disability, perceived disability, AIDS and HIV status and reprisal for making informal and formal complaints. While the tests for determining whether a person is the victim of discrimination are the same or similar under federal or state law, there are some differences which may make proving discrimination under state law less burdensome. In addition, disability has been defined more broadly under state law than federal law in many cases.

The New Jersey Conscientious Employee Protection Act (CEPA) prohibits retaliation for an employee's objecting to and/or refusing to participate in acts which the employee reasonably believes are illegal or against public policy. This would include situations where an employee raised concerns about discrimination or refused to participate in acts believed to be discriminatory. Filing a claim under this law may preclude pursuing the same claim under other laws.

The New Jersey Family Leave Act (FLA) provides similar protections to the FMLA but only regarding birth, adoption or serious health condition of a parent, child or spouse (not the employee's own condition). It provides better coverage for conditions of in-laws than the FMLA.

2. How do I file claims for discrimination under the different laws and what deadlines do I have to observe?

There is no uniform deadline for filing a charge or case of discrimination. The timing depends on the type of claim and where it is to be filed. Here is a summary of the different deadlines and where to file a claim under the most frequently used anti-discrimination laws. With respect to filing an administrative charge arising under Title IX of the Education Amendments of 1972 and Title VI of the Civil Rights Act of 1964, the agency where those charges must be filed varies, depending generally upon which federal agency administers the federal funding that provides the basis for the claim.

Title VII, ADEA, ADA – File with EEOC within **180 days** of the act of discrimination. The deadline is extended to **300 days** if a claim has also been filed with the NJDCR.

Section 1981 and Section 1983 – In New Jersey, file in court within **2 years** of notice of the act of discrimination. Even though these are claims under federal law, the statute of limitations varies from state to state.

Title IX – File with applicable federal agency within **180 days** of notice of the act of discrimination or file in court within **2 years** of notice of the act of discrimination.

Title VI – File with applicable federal agency within **180 days** of notice of the act of discrimination or file in court within **2 years** of notice of the act of discrimination.

FMLA – File with DOL within **2 years** of notice of the act of discrimination or file in court within **2 years** of notice of the act of discrimination. In certain cases where the plaintiff is able to show that the FMLA violation meets the applicable definition of "willful," a 3 year limitation period applies for filing a lawsuit.

LAD – File with NJDCR within **180 days** of notice of the act of discrimination or file in court within **2 years** of notice of the act of discrimination.

CEPA – File in court within **1 year** of notice of the act of retaliation for whistleblowing.

FLA – File with NJDCR within **180 days** of violation or file in court within **2 years of notice of the violation**.

Other claims – Many other claims related to discrimination can be filed in court within **2 years** of notice of the act of discrimination, but some laws have a shorter time for filing, such as claims with Public Employment Relations Commission (PERC) – **6 months** and claims of intentional torts – **1 year**.

3. Do I have to file a grievance in order to preserve my right to go to the EEOC, NJDCR, DOL or court?

Courts have generally not required civil rights claimants to exhaust grievance remedies in union contracts before going into civil rights agencies or the courts, nor have the courts barred grievants from filing civil rights claims with agencies or in courts because there is an alternate means to enforce the civil rights in the collective agreement.

Courts have required employees with individual contracts that contain arbitration clauses (as opposed to union contracts) to arbitrate disputes under the terms of the individual contracts, including claims under the civil rights laws. The lawyers representing Rutgers have not claimed, in any case of which the AAUP-AFT is aware, that union members have to file a grievance under the union collective agreement as a prerequisite for filing an outside claim of discrimination.

4. Can I file a grievance and wait to see how it turns out before I decide whether to file a charge with the EEOC, NJDCR, or DOL or before I go to court?

No, that is generally not a good idea. Filing a grievance does not affect the deadlines for filing civil rights claims in agencies and courts. The time limits will not be stopped or deferred pending the decision of the grievance. In all likelihood, a grievant who wishes to pursue civil rights claims will have to file those claims before the grievance process is complete. Time limits can be difficult to calculate.

For example, with regards to a denial of reappointment, promotion or tenure, the time to file with the EEOC may be calculated from the date the faculty member first learned of the adverse action rather than the later time when the action took effect.

5. Many of the laws seem to overlap, and some seem to cover the same claim. What law should I file under?

Deciding which laws to invoke for a charge or a lawsuit is a very complex task. The decision will govern such matters as which agency will investigate the charges, which precedents will be used, the forum in which the case will be heard, whether some claims will be precluded and numerous other issues. That is why the AAUP-

AFT recommends that you consult an attorney as early as possible, especially if there is any possibility that you will eventually want to take the case to court.

6. Should I go to EEOC or to the NJDCR?

There are no hard and fast rules to follow about which agency you should go to. It may make a difference, but there are too many ever-changing variables to be able to give a meaningful summary. Both agencies are chronically underfunded. The comprehensiveness of the investigation will often depend on the abilities of the individual investigator and the investigator's caseload at any given time. You can find good investigators and bad investigators at both agencies. An additional problem is that neither agency understands academic discrimination cases well, which decreases the chances of getting an adequate investigation from either agency. That fact makes it very important that you or your attorney be attentive to the needs of the investigator. Remember, too, that Rutgers defends many cases at these agencies and has a staff who are both trained and experienced in defending against charges of discrimination. The Rutgers' attorney will certainly be feeding the investigator negative information about your claim.

7. What basic information should I know about filing a charge or complaint of discrimination?

All complaints for discrimination under Title VII, the ADEA and the ADA must be filed first with the appropriate governmental agency (EEOC or DOL) before a lawsuit can be initiated. Claims for discrimination under Section 1981 and Section 1983, for race, sex, and national origin discrimination can be filed directly in court, but not every one and not every claim qualifies under these older laws. Suits for sex discrimination under Title IX and suits under the FMLA may be commenced in court without filing charges with federal agencies. The same rules do not apply to claims of race or national origin discrimination in federally-funded programs under Title VI of the Civil Rights Act of 1964. Under current law, administrative charges can be filed, and federal agencies can investigate such claims, but the ability of the injured party to file a lawsuit under Title VI is significantly restricted. Under the New Jersey state discrimination laws, there is an option to file with the NJDCR or to go directly into court for LAD and FLA claims.

In the EEOC, you file a "Charge" of discrimination. In the DCR, you file a verified "Complaint" of discrimination. It is only necessary to go to one agency. When a person files a charge with either the EEOC or the NJDCR, the agency receiving the charge "cross-files" it with the other one, so you only have to file in one place. The agency at which the charge was initially filed will take the lead in the investigation. You should still make sure to request the double filing, since you may be given the option to waive it.

8. Where can I file my charge or complaint?

The EEOC office covering Newark and New Brunswick is located at:

Equal Employment Opportunity Commission
Newark Area Office
1 Newark Center, 21st Floor
Newark, New Jersey 07102

EEOC charges from Camden may be filed with and handled out of the Philadelphia District Office:

Equal Employment Opportunity Commission
Philadelphia District Office
21 S. Fifth Street, Suite 400
Philadelphia, PA 19106

The offices of the NJDCR are located at:

26 Pennsylvania Avenue
3rd Floor
Atlantic City, NJ 08401

1 Port Center, 4th Floor
2 Riverside Drive
Suite 402
Camden, NJ 08103

31 Clinton Street
3rd Floor
PO Box 46001
Newark, NJ 07102

100 Hamilton Plaza
8th Floor
Paterson, NJ 07505-2109

140 East Front Street
6th Floor
PO Box 090
Trenton, NJ 08625-0090

The DOL in New Jersey is located at:

Northern New Jersey District Office
US Dept. of Labor
ESA Wage & Hour Division
200 Sheffield Street, Room 102
Mountainside, NJ 07092
Phone: 1-866-4-USWAGE (1-866-487-9243)

Southern New Jersey District Office

US Dept. of Labor
ESA Wage & Hour Division
3131 Princeton Pike, Bldg. 5, Rm. 216
Lawrenceville, NJ 08648
Phone: 1-866-4-USWAGE (1-866-487-9243)

9. What shall I say in my charge or complaint?

Both the EEOC and NJDCR have formats that they like to use for filing charges or complaints, which the investigator will tell you about when you file. In general you need only set forth a basic outline of your claim (e.g., I was terminated from my faculty position based upon my age; I am 50 years old; younger and less qualified faculty were retained). You will not set out all of your evidence in a charge or complaint, but you do have to mention every claim of discrimination and every person you think is involved in the discrimination. You may have to fight to include everything you want in the charge or complaint. Claims that are not presented to the agency may be excluded in court. Some investigators will want to include some parts of your claims and not others. While the investigator may have some useful views to consider, the investigator is not your representative, so do not rely on the investigator's advice, especially if you believe that the part you want included is important for your claim. Additional rules may apply to EEOC charges alleging class-wide discrimination, and the suggestion made above regarding the need for advice from an attorney applies here as well. Anyone who believes his/her employer has engaged in class-wide discrimination is encouraged to seek counsel to assure that the EEOC charge includes all information necessary in order to pursue a class claim. Failure to comply with applicable rules may preclude class-wide relief in a subsequent court action.

In filing an FMLA complaint with the DOL, no particular form of complaint is required, except that a complaint must be reduced to writing and include a full statement of the acts and/or omissions which constitute the violation, with pertinent dates.

10. What happens after I file the charge or complaint?

At the time of filing or shortly afterwards, you may be called in to the agency for a formal interview. At the interview you should be ready to provide details about the claims in your case, lists of witnesses and descriptions of what they know, and all pertinent documents. It is useful to get these ready in advance. Make copies of materials to give to the agency and keep copies for yourself. If you have something that you do not think the other side should see at this point, make sure that you tell the agency that you want it kept confidential. If the investigator cannot assure you of this, do not turn it over to the agency unless you are willing to risk disclosure. Generally, after the investigation is finally concluded, the employer will be able to obtain copies of everything you submitted, whether it was confidential or not. Have a written list ready of the information you think should be requested from the employer that is pertinent to your case. Give the list to the investigator and keep a copy.

The agent will generally write up a statement about what you have said for you to sign under oath. It is important to go over this carefully to determine whether important details have been omitted. If important details have been left out, insist that they be included. If you cannot get them included, you should write under your signature, "There are other details that I have given the investigator that have not been included."

If you are not called for a formal interview, you should still provide all information you think is relevant to your case, in writing and with supporting documentation. Take care to make your presentation reasoned and factual. Remember, whatever you say may become a part of the record of your case, and can be used in later proceedings in court.

The agent will also interview the employer and request information. You can request that the investigator ask for particular information from the employer that will be helpful in establishing the case, although the agency may decline to do so.

After the initial interview, the agency may suggest mediation. The EEOC, for example, encourages mediation and provides a free mediator if both sides agree to mediate. Mediation is a good idea if you think that a solution short of a formal finding of discrimination will resolve your issues. Mediation of faculty claims have often been successful. However, mediation is not the proper avenue if you want to have a formal finding of discrimination or are not willing to compromise your position.

There may be a fact-finding conference that includes the complainant, the employer and the investigator. There may also be attorneys present. The fact-finding conference is an opportunity for the agency to investigate the claim. You should take detailed notes about what the employer claims about your charge. This is a critical stage of the proceedings, and, if you get called for a fact-finding conference, you should think seriously about retaining a lawyer to assist you.

11. What happens to my EEOC charge after the investigation?

When the investigation is complete, the EEOC will make a determination about whether there is reasonable cause to believe discrimination is present. There is a 180 day deadline for this decision, but investigations may proceed past that deadline. It is not unusual for an investigation to take several months. Do not let investigations go on indefinitely, however, since if the decision is overly delayed (for example, a year or more), it may be attacked by the employer as invalid.

If there is no decision on your charge after 180 days or if you want to go into federal court as soon as possible, you can ask for a Notice of Right To Sue from the EEOC even though there has not yet been a positive or negative finding of reasonable cause. You cannot go into court on Title VII claims without a Notice of Right To Sue. The EEOC will issue a Notice of Right To Sue on request after the investigation has been pending for 180 days or more. Once you receive a Notice

of Right To Sue, there is a non-extendable deadline of 90 days to file a complaint in federal court. You are entitled to ask for a jury trial in Title VII and ADEA cases. Alternatively, you can withdraw the EEOC charge and go directly to court under New Jersey law (LAD), provided the statute of limitation has not expired and provided that you have also withdrawn any charge that was filed with the NJDCR.

If the EEOC investigation determines that there is reasonable cause, the agency will give you a finding of reasonable cause that can be used in an individual court suit. It will also give you a Right To Sue letter. As noted, you have 90 days to file a complaint in court from the day you received the Right To Sue letter. If you do not yet have a lawyer, it may be easier to find one if you have received a positive determination of reasonable cause. On the other hand, it is dangerous to wait to look for a lawyer until you receive the Notice of Right To Sue. Ninety days is a very short time to try to find a lawyer, to educate the lawyer about the case, and for the lawyer to prepare and file a complaint in court. There is a slight chance that the U.S. Department of Justice will sue on your behalf, but that is not common in individual cases even if there is a finding of probable cause. The DOJ generally only intervenes in cases where the impact affects groups of employees or where it is challenging a generalized practice. Nevertheless, you can ask the EEOC about this when you get a finding of reasonable cause.

If the EEOC finds that there is no reasonable cause, you may still go to federal court. You will be issued a Notice of Right to Sue and you must file a lawsuit within 90 days from your receipt of that notice. A negative finding can be used against you in court. Alternatively, you can file a lawsuit under the LAD in state court, as long as the statute of limitations has not expired.

12. What happens to my NJDCR complaint after the investigation?

The procedure under the NJDCR is different from that followed by the EEOC. If your case was investigated by the NJDCR, and it found reasonable cause, the agency will take your case to the Office of Administrative Law (OAL) for a hearing. The Attorney General's office will represent you there, or you can use your own attorney. An OAL hearing is before an administrative law judge (ALJ), not a jury. The ALJ issues a recommended decision that is then adopted or rejected by the Director of the NJDCR.

If the NJDCR has not made a reasonable cause determination within 180 days of the filing of the complaint, you may request that the case be transferred to the OAL without a finding. You can litigate the complaint there through private counsel, but you will not be entitled to be represented by the Attorney General.

If the NJDCR determines that there is not reasonable cause, you may still file a federal court complaint and get a completely new trial in federal court, provided that an EEOC charge was filed and a 90 day Notice of Right To Sue has not expired. After an adverse NJDCR finding, the right to proceed in state court under state law is limited to an appeal to the Superior Court, Appellate Division, which assesses

the adequacy of the NJDCR's investigation and findings and does not consider the merits or substance of the claims. These appeals are rarely successful.

As an alternative, you can file a suit under the LAD in state court, provided that the NJDCR has not already issued a negative decision and that the two-year statute of limitations has not expired. If there is a pending charge before the NJDCR, it must be withdrawn before or at the time the case is filed in court.

13. Are there any differences between proceeding before the OAL and proceeding in state or federal court?

Yes. As mentioned before, an OAL hearing takes place before an administrative law judge without a jury. You are entitled to ask for a jury trial if you file in state or federal court. There is also a difference in the damages you may be entitled to recover. Punitive damages may not be available against a public entity like Rutgers in a proceeding before the OAL. Also, there may be restrictions on non-economic damages, such as damages for humiliation and pain and suffering,

14. How long is it going to take me to get a decision?

The EEOC and the NJDCR are supposed to make a decision within 180 days. However, it often takes longer than that, because of backlogs in the agencies and requests by the parties for more time to present evidence and positions. And only a small percentage of charges and complaints get positive rulings at the agencies (the EEOC states that only one in twenty charges results in a finding of reasonable cause; the same percentage probably applies at the NJDCR). It takes an average of 2-3 years for an initial decision to be reached in court after a lawsuit is filed.

15. Where can I get more information about my rights under the different laws.

A good place to start is to review the agency websites. The EEOC website, with information on Title VII and the ADEA, can be found at www.eeoc.gov. The NJDCR website has information about the LAD and FLA at www.state.nj.us/lps/dcr/index.html. The Department of Justice has a web page on the ADA at www.usdoj.gov/crt/ada/adahom1.htm and on Title IX and Title VI at <http://www.usdoj.gov/crt/cor/byagency/ed.htm>. There is a wealth of material on the FMLA at the Department of Labor's site – www.dol.gov/esa/whd/fmla/. You can also search through New Jersey laws, cases and other legal material at http://lawlibrary.rutgers.edu/links/new_jersey/index.shtml.

16. Will the AAUP-AFT pay for my lawyer or for the costs of my discrimination case?

The Rutgers AAUP-AFT is only authorized to pursue grievances under the collective agreement with Rutgers, the State University. It does not provide members with lawyers or advice to pursue their outside discrimination claims. Claims under the federal or state laws are the sole responsibility of the individual employees. The AAUP-AFT does not provide or pay for individual legal representation for non-contractual proceedings or for individual suits alleging

discrimination. While in rare cases the Rutgers AAUP-AFT Executive Council has pursued legal actions challenging discriminatory practices affecting the bargaining unit as a whole, neither the AAUP-AFT, nor any other union, has the resources to pursue individual cases to outside agencies or to the courts, regardless of the merits of the case.

17. Can you recommend a good lawyer?

We can start you on the road to find some attorneys who have experience in litigating employment cases in New Jersey. The National Employment Lawyers Association–New Jersey Chapter maintains a website with its members who are available for referral at www.nelanj.org/. These attorneys have all litigated discrimination cases in New Jersey. You can contact several names on the list to find out if they can take on a new case, their experience with higher education, their track record against Rutgers, what costs may be involved and other relevant information. You can also use the search function at the Rutgers Law Library web site (see No. 15) to find the names of the plaintiff's attorneys who have recently litigated discrimination cases. You can search the internet for information on the best lawyers. For example, the list of labor and employment lawyers in New Jersey at www.bestlawyers.com/ contains many attorneys who have expertise in this area, although most represent employers and not employees. But, you may be able to obtain a referral from the employers' attorneys, since they know who are their most skilled adversaries. Make certain that you interview several attorneys about your case to get a frank assessment. It is often worthwhile to pay for a consultation with more than one attorney, especially considering that the costs may be large once you decide to commence a lawsuit.