

QUICK PRIMER ON DISCRIMINATION

Civil rights laws are complex, and **neither direct evidence of discrimination nor direct proof of intent to discriminate is needed for discrimination to be found.** Therefore, past actions -- e.g., patterns in decisions, statements made in any contexts, or rules followed/not followed -- or actions taken regarding other persons -- e.g., sent to training, given warning in lieu of a reprimand or termination -- may determine the outcome of a claim of discrimination, even if the past action appears to have no relationship to a present discrimination claim.

Definition of Discrimination

Dictionary Definition:	Different treatment
Legal Definition:	Different treatment because of a difference in race, color, religion, sex, national origin, age, mental or physical disability, sexual orientation, or political affiliation
Regulatory Expansion:	Different treatment because of reprisal for: (a) participation in the discrimination complaint process, or (b) expressing opposition to an action made illegal by the civil rights acts or other applicable laws.

Determination of Discrimination

When direct, straightforward evidence of discrimination exists, it is relatively easy to determine whether legally discrimination occurred. Such evidence could include:

- Racial epithets, sexual slurs, repeated jokes about accent or heritage.
- A recruitment brochure which describes a job as "Fit for a Queen," or a recruitment poster asks, "Are you the right man?"
- Interview notes read "too old for this job" or qualification requirements call for "trainee between the ages of 21 and 24."

Such evidence is not needed, however, for discrimination under the law to have occurred. Discrimination may be inferred when two persons of different race, sex, etc. groups receive different treatment. Different treatment is determined by comparing persons who are **similarly situated**, i.e., they are so situated that it is reasonable to expect they would receive the same treatment in the context of a particular employment or service decision.

The determination as to whether an action was **because of** race, sex, etc., uses the following disparate treatment analytical model:

Step One: Complainant must establish a "prima facie" case of discrimination, i.e., establish enough so that the case is not immediately dismissed and the employer or grantee must respond to the allegation(s). This establishes a rebuttable presumption of discrimination. Often comparative evidence is presented that a similarly situated person of another race, sex, etc. group was treated more favorably than the complainant. That is, the complainant was treated less favorably than a person who is so situated that it is reasonable to expect he or she would receive the same treatment in terms of a particular employment or service decision.

If the complainant establishes a prima facie case, the employer's or grantee's response is examined. If the complainant does not do so, a finding of no discrimination must be made.

Step Two: **The employer or grantee must set forth a legitimate, nondiscriminatory reason** for its action. If the employer or grantee does this, pretext is examined. If employer or grantee does not do so, a finding of discrimination must be made.

Step Three: The complainant must establish the employer's or grantee's stated reason is pretext for prohibited discrimination, i.e., stated reason is not credible or it masks/cloaks the real reason which is prohibited discrimination. If the complainant establishes pretext, a finding of discrimination must be made. If the complainant does not do so, a finding of no discrimination must be made.

Burden of Proof

Generally, the **complainant carries the burden of proof** and must establish his or her case by a **preponderance of the evidence**, i.e., if evidence is a football field, complainant must carry the ball over the 50 yard line, into the employer's territory.

Exception One: Direct, straightforward evidence of discrimination shifts burden of proof to the employer or grantee, who must prove it did not discriminate by clear and convincing evidence (a much higher standard than preponderance of the evidence)

Exception Two: Mixed motive cases (both discriminatory and nondiscriminatory motives established). The employer or grantee must prove, by the higher level clear and convincing evidence, that, absent discrimination, the same action would have occurred (e.g., same person would have been selected); if the employer or grantee meets its burden of proof, it is still liable for discrimination, but relief is limited to declaratory relief, certain injunctive relief, and attorney's fees and costs (relief may not include personal relief such as retroactive hiring, reinstatement, and compensatory damages)

Interview Questions

Interview or application questions (i.e., questions during the selection process) which are not directly job- or position-related are oftentimes considered direct evidence of discrimination. (There is no problem requesting necessary information **after** the selection process is complete, however.)

At a minimum, to protect from liability, it is **always** advisable to avoid certain types of questions during the selection process. If a manager does not have information available during the selection process, the manager will **always** be able to legitimately state that the selection was not based on that information.

Non job- or position-related questions, i.e., questions that do not directly address the applicant's ability to perform the essential duties of the position, include the following:

- **Questions related to marital status** (also preferred forms of address).
- **Questions related to children** (also ages of children and child care arrangements made or needed) or to pregnancy and/or reproduction (including future family planning).
- **Questions related to the ability to work overtime or to travel** (with reference to dependents or family life). When overtime and/or travel are duties of the position, it is acceptable, however, to describe duties and ask if applicant foresees any problem in fulfilling the duties.
- **Questions related to disability or medical conditions** (including questions on nature or origin of a disability, commuting arrangements, sick leave usage, or ability to perform marginal duties of the position).

Special Requirements Related to Disability or Medical Conditions

General Rule: The employer or grantee **may not** conduct a pre-employment or pre-service medical examination or ask applicant prior to employment or service **whether he or she has disabilities or question the nature or severity of a disability.**

Essential Functions

The employer or grantee may, however, make pre-employment or pre-service inquiry into applicant's ability to meet the *essential functions* of the position, with or without reasonable accommodation, or to fulfill bona fide medical qualification requirements, if applicable.

Essential functions are the minimum abilities necessary for safe and efficient performance of the duties of the position in question.

Care must be exercised, however, in inquiring about the ability to perform essential functions, with or without reasonable accommodation, because a selection decision may not generally consider whether an accommodation is required or how much it will cost. That is, **unless** an accommodation constitutes an undue financial or administrative burden or fundamentally alters the nature of the program or activity, the need for or cost of an accommodation may not influence a selection decision.

It is acceptable to exclude an applicant with a disability, even though the person can perform the essential functions of the position, **only if** the disability endangers the health and safety of others **or** if performing the essential functions endangers the health and safety of the applicant.

Persons with contagious diseases (e.g., tuberculosis) in remission may not be passed over for selection based on their disability if they can perform the essential functions of the position. Further, all HIV-positive persons are persons with disabilities, and not selecting an applicant solely on the basis of this illness is discrimination.

Medical Examinations

Nothing prohibits employer or grantee from conditioning offer of employment or service on results of a medical examination conducted prior to person's entrance on duty, **provided all entering persons are subjected to such an examination regardless of disability** and results of such an examination are used only in accordance with these guidelines.

Records Maintenance

Information concerning the medical condition or history of applicants must be collected and maintained on separate forms that are treated as confidential medical records, except that:

- Supervisors and managers may be informed regarding restrictions on duties of disabled persons and necessary accommodations;
- First aid and safety personnel may be informed if the condition might require emergency treatment;
- Government officials investigating compliance with laws, regulations, and instructions relevant to equal opportunity must be provided information upon request; and
- Statistics generated from information obtained may be used to manage, evaluate, and report on equal opportunity.

Accessibility and Reasonable Accommodation

General Rules:

1. No qualified individual with disabilities shall, on the basis of disability, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity receiving federal financial assistance.
2. All programs and activities must be accessible to, and usable by, persons with disabilities.
3. Persons with disabilities shall be provided reasonable accommodation to participate in the program or activity.

Statutes: Section 504 of the Rehabilitation Act prohibits disability discrimination in federally assisted programs. The Corporation is responsible for enforcing this provision in terms of its grantees and subgrantees. *(For civil rights purposes, all programs, projects, and sites funded or receiving volunteers or service members under Corporation statutes are programs or activities receiving federal financial assistance.)*

The Americans with Disabilities Act (ADA) applies to virtually all CNCS grantees and subgrantees, but the Corporation does not enforce it. The ADA's nondiscrimination, accessibility, and reasonable accommodation standards for state and local governments are identical to Section 504 standards. Public places like museums, day care centers, schools, have lower accessibility and reasonable accommodation standards under the ADA (and religious institutions are exempt), but by virtue of receiving federal financial assistance, the higher Section 504 standards apply to them.

New construction and alterations (built or altered since May 30, 1979): Each building or part of a building that is constructed or altered by or for the use of any grantee or subgrantee shall be designed, constructed, or altered so as to be readily accessible to and usable by disabled persons.

Existing facilities (built before May 30, 1979): Grantees must operate each program or activity so that, when viewed in its entirety, it is readily accessible to and usable by disabled persons. For this purpose, a project plus all sites is considered. Grantees are not necessarily required to retrofit to make each existing facility accessible or to take action that would result in undue financial or administrative burdens, but the overall program must be accessible. Programmatic modifications are acceptable to achieve and maintain accessibility in buildings built before May 30, 1979.

Communications: Grantees must ensure program and employment communications are available to persons with impaired vision and hearing, and that no disabled person is denied benefits or participation because no auxiliary aids were provided for persons with impaired sensory, manual, or speaking skills.

Sexual Harassment

Definition: Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:

- a. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or service.
- b. Submission to or rejection of such conduct by an individual is used as the basis for employment or volunteer or participation decisions affecting the individual.
- c. Submission to or rejection of such conduct has the purpose or effect of unreasonably interfering with an individual's work or service performance or creating an intimidating, hostile or offensive working or service environment.

The key is that the conduct is unwelcome.

Examples: Sexual harassment includes, but is not limited to, the following work or service conduct:

- a. Explicit or implicit demands for sexual favors in return for job or service benefits.
- b. Unwelcome letters, telephone calls, or distribution or display of materials of a sexual nature.
- c. Physical assaults of a sexual nature.
- d. Unwelcome and deliberate touching, leaning over, cornering, or pinching.
- e. Unwelcome sexually suggestive looks or gestures.
- f. Unwelcome pressure for sexual favors or dates.
- g. Unwelcome sexual teasing, jokes, remarks, or questions.
- h. According favorable treatment to those who grant sexual favors.

Relationships vis-à-vis Sexual Harassment

Sexual harassment is not limited to prohibited conduct by a male toward a female or by a supervisor toward a subordinate. It includes prohibited conduct by a Corporation employee towards a volunteer, service member, project director, or program beneficiary, as well as such conduct by grantee employees.

- A man may be the victim of sexual harassment.

- A woman may be the harasser.
- The victim does not have to be the opposite sex from the harasser.
- The harasser does not have to be the victim's supervisor. The harasser could be:
 - a supervisor who does not supervise the victim,
 - a non-supervisory employee, volunteer, or service member, or
 - a co-worker or another volunteer or service member.
- The victim does not have to be the person toward whom the unwelcome sexual conduct is directed, but may be someone who is affected by such conduct when it is directed toward another person.

For example, the sexual harassment of an employee, volunteer, or service member may create for another employee, volunteer or service member an intimidating, hostile, or offensive working environment.

- Sexual harassment does not depend on the victim's having suffered an economic loss as a result of the harasser's conduct.

For example, improper sexual advances which do not result in the denial of a promotion or the discharge of the victim may, nonetheless, constitute sexual harassment where they interfere with the victim's work or service, or create an intimidating, hostile or offensive work or service environment.

Harassment on sexual, racial, national origin, religious harassment, or on any other grounds is strictly prohibited in Corporation or grantee offices, other work- or service-related settings, including, but not limited to site visits or work- or service-related social events and training.

Corporation or Grantee Responsibilities Regarding Harassment

The Corporation or grantee is ultimately responsible for violations of prohibitions against any form of prohibited harassment and for taking corrective action and/or disciplinary action if violations occur. They are responsible for:

- (1) **Acts of "quid pro quo" sexual harassment**, wherein a supervisor demands sexual favors for employment or service benefits, regardless of whether the Corporation or grantee, its agents or supervisory employees knew, or should have known, of the acts.
- (2) **Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature which have the purpose or effect of creating an intimidating, hostile or offensive working or service environment**, where the Corporation or grantee, its agents or supervisory employees knew, or had reason to know,

of acts and failed to take immediate and appropriate corrective action.

- (3) **Acts of prohibited harassment toward fellow employees, volunteers, or participants (co-workers)**, where the Corporation or grantee, its agents or its supervisory employees knew, or should have known, of the conduct, unless it took immediate and appropriate corrective action.
- (4) **Acts of prohibited harassment by non-employees**, where the Corporation or grantee, its agents or its supervisory employees knew, or should have known, of the conduct and failed to take immediate and appropriate corrective action.

Discrimination Claims

Any volunteer, service member, client, employee, or beneficiary of a program or project who believes he or she has been subjected to discrimination in violation of nondiscrimination provisions of applicable laws, regulations or this policy may raise a claim with the Corporation's Office of

Civil Rights and Inclusiveness (OCRI). However, discrimination claims not brought to the attention of the OCRI Office within 45 days of their occurrence of the alleged discriminatory event may not be accepted in a formal complaint of discrimination and may be procedurally dismissed.

We first attempt to resolve discrimination claims through the informal counseling process. In addition, although people are not required to do so, we encourage people to try first to resolve discrimination claims directly with programs and projects, and most service members may use their grievance system to do so. However, raising matters through a program or project grievance system does not stop the running of the 45-day time frame.

The Corporation's Office of Civil Rights and Inclusiveness

The Corporation's Office of Civil Rights and Inclusiveness (OCRI) is available to provide further information to any Corporation or grantee official, volunteer, or service member. The OCRI may be reached at (202) 606-7503, (voice), (202) 606-5256 (TDD), eo@cns.gov, or through <http://www.nationalservice.gov>.

Civil Rights Compliance Evaluation during Site and Monitoring Visits

The following is designed to allow evaluation of civil rights compliance during any type of on-site visit. Most items can be observed during the regular course of a visit, thereby taking no additional time or effort.

1. Is there a flat, non-gravel route from parking/street through the front entrance? Does the parking lot have spaces reserved for persons with disabilities?
2. Are doors (entrance, rest room, etc.) no heavier to open than refrigerator door? Are door knobs throughout push/pull or lever-type, not twist knobs?
3. Are halls and passageways at least one yard wide? Are they level, with non-slip, stable surfaces and no trip hazards?
4. Are there no steps without alternate routes (elevators, ramps, other entrance) available? Are stairs of uniform heights?
5. Do publicity information, brochures, handbooks, etc. state they are available in alternate formats upon request and do they identify how to request formats?
6. If eyes are closed or sound turned down during a video or PSA, do you still receive the message?
7. Is there adequate maneuvering clearance at entrances, especially rest rooms?
8. Does an accessible restroom have an accessible stall 5' x 5'? (There are other legal configurations, but check to see if a person in a wheelchair can close the door)
9. Does an accessible restroom have a sink with level faucets, hot water pipes wrapped to prevent burns, and paper towels lowered?
10. Are emergency alarms both audible and visual? Are evacuation plans and areas of rescue assistance accessible to individuals with mobility impairments?
11. Is there a non-discrimination policy statement that applies to services provided by the site, and addresses nondiscrimination on the basis of race, color, religion, sex, national origin, age, disability, sexual orientation, and political affiliation? Have they received any claims or complaints of prohibited discrimination?
12. Are there any policies, procedures, or technology which excludes, directly or indirectly, a person with (a) mobility impairments, (b) visual impairments, (c) hearing impairments, (d) mental or emotional impairments, or (e) diseases (including HIV but excluding currently contagious diseases) or addictions (other than current illegal drug use, or current alcohol or legal drug abuse which prevents performing duties or is a direct and current threat to self or others)?