



EMPLOYMENT DISCRIMINATION

*Information for
School Employees*



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Contents

Introduction	4
Legal and Illegal Discrimination	4
An Overview of Employment Discrimination Laws	4
Some Warning Signals of Illegal Employment Discrimination	7
Race	7
National Origin	7
Religion	8
Sex	9
Age	10
Disability	11
Genetic Information	14
Retaliation	15
Remedies for Employment Discrimination	15
Filing Employment Discrimination Charges	16
Filing Complaints & Grievances with Your Employer	16
Filing an Administrative Charge with a Government Agency	16
Deadlines	16
How to File	16
Types of Evidence	16
What to Request	17
The Agency Process	17
Consider Mediation	17
Filing in Court	17
Proof Needed for Employment Discrimination Cases	18
Assistance from the AEA	19
Special Issues for Gay and Lesbian Employees	20
Discrimination Based on Sexual Orientation	20
Sex Discrimination and Sexual Harassment	20
Keeping Sexual Orientation Private or “Coming Out”	21
General Issues	22
Constitutional Protections	22
Criminal Charges	23
Resources	24
A Final Note about Treating Students with and About Respect	26



Introduction

Although much progress has been made, Arizona's schools are not free from stereotypes, bigotry, and hate. The struggle for human and civil rights must continue until every individual, every employee, and every student is treated with respect and dignity. The Arizona Education Association is proud to be part of that effort.

Employment discrimination issues can be complex and confusing. It is hoped that this booklet will help school employees assess their rights regarding employment discrimination on the bases of race, color, national origin, religion, sex (which includes gender identity and sexual orientation), genetic information, disability, and age.

The Arizona Education Association thanks the Washington Education Association and the Arizona Center for Disability Law for their assistance in creating this member booklet.

Legal and Illegal Discrimination

“Discriminate” is defined in the dictionary as “to see the difference between things” and “to make distinctions in treatment.” Each worker brings a unique set of skills, experiences, and personality traits to the job. Employers frequently see those differences and legally discriminate among employees. For example, employers often favor employees who work cooperatively, produce high quality work, or have seniority. Similarly, employers may be more strict or more punitive with employees who perform poorly, argue with others, or violate work rules.

Some employment discrimination is illegal. Federal and state laws prohibit employment discrimination based on race, color, national origin, religion, sex, age, genetic information, and disability. Employers may distinguish between employees for many legitimate reasons, but not for these specifically prohibited reasons.

These legal protections are relatively recent. The primary federal law prohibiting employment discrimination is *Title VII of the Civil Rights Act of 1964*, which faced major opposition before being adopted. Years of civil rights demonstrations, legal challenges, and political efforts helped change public opinion and led to laws protecting employees from some of the worst types of workplace discrimination.

An Overview of Employment Discrimination Laws

Many different laws prohibit specific types of employment discrimination. The laws listed below and marked with an asterisk (*) are federal laws enforced by the Equal Employment Opportunity Commission (EEOC).

**Title VII of the Civil Rights Act of 1964* (Title VII) prohibits discrimination against employees and job applicants on the basis of race, color, religion, sex, and national origin. Title VII bans discrimination in all aspects of employment,

including hiring, training, classifying, recruiting, interviewing, evaluating, promoting, demoting, firing, and pay. Some severe workplace harassment based on sex, race, religion, color, and national origin is included in Title VII's ban of discrimination. In rare circumstances, an employer legally can discriminate based on sex, religion, or national origin if the discrimination is founded on a "bona fide occupational qualification." Title VII applies to employers with 15 or more employees.

**The Pregnancy Discrimination Act (1979)* specifies that discrimination on the basis of pregnancy and childbirth is unlawful sex discrimination under Title VII.

**The Equal Pay Act of 1963* (Equal Pay Act) requires that employers provide the same rate of pay to men and women who perform substantially equal work. Sex discrimination in pay is prohibited when men and women perform work of equal skill, effort, and responsibility under similar working conditions for the same employer. However, employers can provide different pay and conditions of employment based on seniority, merit, quantity and quality of work, differences in job locations, and differences other than sex. The Equal Pay Act is part of the Fair Labor Standards Act and generally applies to all employers subject to that Act.

**The Age Discrimination in Employment Act of 1967* (ADEA) prohibits discrimination in hiring, firing, and other terms and conditions of employment based on age for employees and job applicants who are at least 40 years old. It does not protect employees younger than 40. ADEA applies to most employers with 20 or more employees, but employees cannot sue the State of Arizona as an employer.

**The Americans with Disabilities Act* (ADA), enacted in 1990, and significantly amended in 2008, prohibits discrimination against employees and job applicants on the basis of disability. The ADA applies to qualified individuals with a disability, those individuals who can perform the essential functions of their jobs, with or without reasonable accommodation. Employers must provide reasonable accommodation for disabled employees if they can do so without undue hardship. The ADA also prohibits discrimination against non-disabled individuals who experience discrimination because their employers regard them as disabled or because they associate with a disabled individual. The ADA applies to most employers with 15 or more employees, but employees cannot sue the State of Arizona as an employer.

The Rehabilitation Act of 1973 also prohibits employment discrimination based on disability. This Act applies to employers who receive federal funding and is similar, but not identical, to the ADA.

Title IX of the Education Amendments of 1972 prohibits sex discrimination in educational institutions receiving federal funds. Although Title IX is most frequently applied to sex discrimination in athletic or academic programs for students, it also covers most public school employees. The federal agency that enforces Title IX is the Office for Civil Rights of the U.S. Department of Education



(OCR). The OCR investigates claims and tries to resolve matters administratively before seeking to cut off federal funds to discriminatory educational institutions.

Section 1981 of the Civil Rights Act of 1866 (Section 1981) and *Section 1983 of the Civil Rights Act of 1871* (Section 1983) were adopted after the Civil War to prohibit government discrimination against former slaves. These laws still are used today to prohibit discriminatory action by governments and government officials. Section 1981 prohibits discrimination based on race, color, and national origin in the making and enforcement of contracts, including the terms and conditions of employment contracts. Section 1983 prohibits discrimination on the basis of race, religion, sex, national origin, and alienage. No federal agency is responsible for enforcing these laws. Individuals must file lawsuits to obtain a remedy under Section 1981 or Section 1983.

Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits the use of genetic information in making employment decisions, limits the employer's ability to obtain genetic information, and requires covered entities to keep genetic information confidential. Genetic information is defined broadly to include genetic tests, family health history, and even things such as cholesterol tests, liver function tests, HIV tests, and drug and alcohol tests.

Arizona laws, primarily *Arizona Revised Statutes §§ 41-1461 through 41-1467*, also prohibit employment discrimination on the basis of race, color, religion, sex, age, disability and national origin. These Arizona laws are similar, but not identical, to the federal laws that prohibit employment discrimination. For example, Arizona law generally applies to employers with 15 or more employees, but applies to employers with just one (1) employee for allegations of sexual harassment. The Arizona Civil Rights Division (ACRD) of the Arizona Attorney General's Office is the agency that enforces state employment discrimination laws. The ACRD and the EEOC have a work sharing agreement so that only one agency will investigate each charge or case. Charges filed with one agency are considered filed with both agencies.

Several local governments have enacted their own employment discrimination ordinances. For example, a Tucson city ordinance prohibits employment discrimination based on "sexual orientation" or "gender identity" by most Tucson employers. Some Arizona employers, including a few school districts, have adopted policies that prohibit employment discrimination based on sexual orientation. Employees can enforce those policies by filing grievances or complaints with their employers or by filing lawsuits for breach of contract. According to a 2020 ruling from the U.S. Supreme Court, LGBTQ discrimination violates Title VII. The Arizona Attorney General's position is that the Arizona Civil Rights Act also protects LGBTQ employees from discrimination.



Some Warning Signals of Illegal Employment Discrimination

Race

Courts have been reluctant to limit “race” to its anthropological definition. In general, “race” can include groups identified by their ancestry or ethnic characteristics. “Race” or “national origin” discrimination cases have been brought by people of many backgrounds, including African-American, Hispanic, Native American, Caucasian, and Asian.

Each employee’s situation is unique. You may be experiencing illegal employment discrimination if your situation is similar to those listed below AND there is no legitimate, nondiscriminatory reason for your employer’s conduct.

Here are some warning signs of racial discrimination:

- Your employer treated you differently than employees of a different race.
- You were affected by employment decisions based on racial stereotypes.
- Your employer treated you differently because you are married to or associate with an individual of another race.
- Your employer discriminated on the basis of “color” by favoring light complexioned individuals over those with dark complexions — even within the same race.
- Your employer harassed you on the basis of race, by using or permitting racial “jokes,” derogatory comments, ethnic slurs, or other verbal or physical conduct based on your race AND the harassment was sufficiently severe or persistent to create an intimidating, hostile, or offensive working environment AND unreasonably interfere with your work performance.
- Your employer segregated you and others of your race from others by assigning you to or excluding you from certain geographic areas or work sites.

National Origin

National origin discrimination includes discrimination based on birthplace, ancestry, culture, or linguistic characteristics common to an ethnic group.

Please read the warning signs in the section above. They also apply to national origin discrimination and harassment. Here are additional warning signs of national origin discrimination if your employer does not have a legitimate, nondiscriminatory reason.

- Your employer treated you differently than employees of a different ethnic group or national origin.
- Your employer treated you differently because your surname is associated with an ethnic group, whether or not you are a member of that group.
- Your employer treated you differently because of your accent or manner of speaking, unless your accent or manner of speaking has a detrimental effect



on job performance. (It is illegal to discriminate against you because of your accent; it is legal to require that you communicate well in English if English communication skills are needed in your job.)

Religion

Religion is broadly defined and includes all aspects of sincere religious observance, practice, and belief. Title VII protects sincere beliefs in traditional religions, unusual religions, and even atheism. Religious beliefs are considered sincere when employees have acted consistently with respect to those beliefs, especially over a period of time.

Title VII also requires an employer to “reasonably accommodate” an employee’s religious observances and practices unless the accommodation would create an “undue hardship” on the employer’s business. “Undue hardship” means more than minimal administrative costs, disruption of business, or imposition on co-workers. Paid and unpaid leave, flexible scheduling, voluntary substitutions, job reassignments, and lateral transfers are examples of reasonable accommodations to religious beliefs.

Most school districts provide leave, with or without pay, for employees to observe religious holidays, periods of mourning, and devotional prayers. If employees have personal or vacation leave, they should be permitted to use that leave for religious holidays so long as they ask for leave in advance and their absences do not cause undue hardship for their employers. During religious holidays, employees should not be pressured to perform work tasks or attend school events in violation of their sincerely held religious beliefs. Some problems can be avoided by informing employers about religious holidays and obligations far in advance and requesting that once-a-year events (such as open house, science fair, and graduation) be scheduled on other days.

Please read the warning signs in the sections above. Here are additional warning signs of religious discrimination if your employer has no legitimate, nondiscriminatory reason.

- Your employer treated you differently because you are a member of, have attended, or associate with a school, organization, or place of worship generally associated with a religious group.
- Your employer has not permitted you to take unpaid leave for religious holidays even though you requested leave in advance and substitutes were available.
- Your employer required you to teach subjects that violate your religious beliefs even though others offered to trade classes with you.
- Your employer required you to participate in training programs that incorporated yoga, meditation, or other practices that conflict with your religious beliefs.

Sex

Discrimination on the basis of sex means that employees are treated differently due to their sex, gender identity, or sexual orientation. Sex discrimination includes discrimination based on pregnancy, marital status, and child care arrangements. Pregnant employees must be permitted to work as long as they are able to do so. If employees are not able to work due to pregnancy or pregnancy-related conditions, they must be treated the same as any other temporarily disabled employee.

Under federal and Arizona law, illegal sex discrimination includes sexual orientation, e.g., an employer cannot discriminate against a homosexual employee based on her failure to “act like a girl.” Also, it may be sex discrimination for an employer to ignore workplace complaints by homosexual males while actively seeking to resolve similar complaints from female employees.

For a very few jobs, sex is a *bona fide* occupational qualification. Employers are permitted to favor individuals of one sex when hiring individuals of both sexes would undermine the essence of the business or clash with fundamental rights such as privacy. For example, employers may give preference to female employees required to visually supervise females during showers.

Sexual harassment is a form of discrimination based on sex. The victim can be either male or female. “*Quid pro quo*” sexual harassment occurs when supervisors grant a job or job benefit conditioned upon a sexual favor, such as offering better working conditions if employees will date or have sex with their supervisors. It is also sexual harassment when supervisors retaliate against employees who refuse to comply with requests for sexual favors.

Another type of sexual harassment, often called a “hostile work environment,” occurs when employees are subject to unwelcome and unsolicited sexual advances, requests for sexual favors, or verbal or physical conduct of a sexual nature. The unwelcome and unsolicited offensive conduct must be sufficiently severe or pervasive to alter the conditions of employment, unreasonably interfere with work performance, or create an intimidating, hostile, or offensive work environment. Isolated or trivial conduct, such as one instance of offensive language or one unwelcome hug, does not constitute illegal sexual harassment. However, such offensive or unwelcome conduct may violate school policies and standards for professional conduct. In determining whether conduct constitutes illegal sexual harassment, courts consider the frequency of the conduct, the severity of the conduct, whether the conduct is physically threatening or humiliating, and whether the conduct unreasonably interfered with work performance. (For more information, obtain the AEA booklet *Sexual Harassment* from AEA staff.)

Please read the warning signs in the sections above. Here are additional warning signs of sex discrimination if your employer has no legitimate, nondiscriminatory reason.



- Your employer treated you differently than individuals of another gender or sexual orientation.
- You were paid less than a person of another gender or sexual orientation who was performing substantially the same work under similar working conditions.
- Your employer repeatedly used demeaning or humiliating words to describe you and others of your gender or sexual orientation.
- Your employer did not permit you to work because of your pregnancy or pregnancy-related condition, and you were able to perform the major functions of the job.
- Your employer treated you differently because of prejudices or stereotypes about your gender, sexual orientation, or about pregnancy.
- Your supervisor requested sexual favors in exchange for improved working conditions or job benefits.
- You faced retaliation because you denied your supervisor's requests for sexual favors.
- You experienced unwelcome sexual advances or offensive verbal or physical conduct of a sexual nature. This unwelcome conduct was sufficiently severe or pervasive and so unreasonable that it interfered with your work or created an intimidating, hostile, or offensive work environment.

Age

Illegal age discrimination occurs when employers discriminate on the basis of age against employees or job applicants who are at least 40 years old. Most programs that require retirement by a certain age are illegal. In rare instances, age may be a bona fide job qualification due to legitimate safety concerns. For example, a mandatory retirement age might be appropriate for certain transportation workers.

Employees with many years of experience often perceive that their employers want to replace them with newer, less expensive employees. This usually is not age discrimination if the employment practices and decisions are based on financial benefit to the employer and not the ages of the employees. Age does not always correspond to years of employment experience. Many new teachers begin working at a school district later in life, after a career change or geographic move. Many experienced teachers at the top of the salary scale are comparatively young because they began employment directly after college.

Age discrimination is often a concern when employers dismiss older employees shortly before they become eligible for significant benefits. In order to lessen the risk that older employees will be cheated out of their benefits, federal law makes it difficult for older workers to waive their claims under the Age Discrimination in Employment Act (ADEA). A valid ADEA waiver must: 1) be in writing and written in a manner that can be understood; 2) refer to ADEA rights; 3) not waive rights that may arise in the future; 4) be in exchange for valuable consideration (such as money

in a settlement agreement); 5) advise the employee to consult an attorney before signing the waiver; and 6) provide the employee at least 21 days to consider the waiver and 7 days to revoke it after signing. Longer time limits (generally 45 days to consider the waiver) and other rules apply when the ADEA waiver is in connection with an exit incentive for a group of employees or a settlement is for more than one employee.

Please review the warning signs listed in the sections above. Here are additional warning signs of possible age discrimination if you are at least 40 years old and your employer has no legitimate, nondiscriminatory reason.

- Your employer treated you differently than employees who are under 40 or substantially younger than you.
- Your employer repeatedly used demeaning and derogatory terms when referring to you and other older workers.
- Your employer sought to dismiss you unfairly shortly before you became eligible for significant benefits based on longevity.
- Federal law prohibiting age discrimination cannot be used by employees of the State of Arizona, including school employees, to gain monetary or other remedies to address their rights. Arizona law provides similar, but not identical, protection for state employees..

Disability

The Americans with Disabilities Act (ADA) prohibits employment discrimination against qualified individuals with a disability. The ADA also requires employers to provide reasonable accommodation to qualified individuals with a disability if the employers can do so without undue hardship. Undue hardship means a significant difficulty or expense.

Many types of reasonable accommodation can enable disabled employees to successfully perform essential job tasks. For example, reasonable accommodation can include modified work equipment (such as special desks or computer software), modified work sites (such as a first floor assignment or a closer parking space), job restructuring (such as exchanging a nonessential task like playground duty for another nonessential task like cafeteria duty), and modified work schedules (such as a daily rest break or leave for therapy appointments). Failure to provide such reasonable accommodation to a qualified individual with a disability is a form of discrimination.

Under the ADA, individuals with a disability have a physical or mental impairment that substantially limits one or more major life activities, such as breathing, hearing, seeing, walking, lifting, learning, performing manual tasks, or working (a wide class of jobs, not just a single job). A major life activity also includes major bodily functions such as normal cell growth, digestive, respiratory, circulatory, and reproductive functions. Mitigating measures other than ordinary



eyeglasses or contact lens are not considered in determining whether an individual has a disability.

Disabilities under the ADA must be more than temporary physical or mental problems. For example, employees generally are not considered disabled under the ADA when they suffer for a month or two from a broken leg, routine surgery, or temporary emotional problems due to a divorce or a death. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

Determining whether an impairment is a disability under the ADA is complex and must be done on a case-by-case basis.

Disabled individuals are qualified under the ADA when they (1) have all of the skills, education, and experience necessary for the job, and (2) can perform the essential functions of the job, with or without reasonable accommodation. In other words, qualified teachers must be able to perform essential job functions, such as supervising students, teaching students, grading student work, and communicating with parents and students. Teachers remain “qualified” even if their disabilities require that they have a little help or accommodation to perform those essential functions.

Employees who request reasonable accommodation should be prepared to provide proof of impairment. Frequently the name of a disease is not enough information because individuals with the same disease can have very different levels of impairment.

No specific form is required for requesting an ADA accommodation, but the following format may be helpful. The employee should write a memo to the human resources or personnel director, with a copy to the immediate supervisor or principal. The memo should be labeled clearly as an “Americans with Disabilities Act Accommodation Request.” The employee’s memo should state that:

- The employee works at a specific job, assignment, and job site.
- The employee needs accommodation to perform job duties because of a disability.
- The employee has a specific disease, injury, or diagnosis.
- The condition affects the employee in the following ways (list impairment, the specific ways that the employee is limited or impaired).
- The employee needs the following accommodation (list possible accommodations).
- The employee would like to meet with the appropriate persons to discuss a reasonable accommodation plan.
- The employee wants the accommodation request and medical information kept confidential to the extent possible.
- The employee needs to attach documentation from a physician, therapist, or other qualified professional. This medical information should state that:
 - The employee has the following physical or mental impairment (list disease, injury or diagnosis).

- The impairment causes functional limitations in at least one major life activity (list breathing, hearing, seeing, walking, lifting, learning, performing manual tasks, working, or other applicable activity).
- The employee is impaired in the following way (list specific impairment, such as inability to walk more than a few steps or severe fatigue).
- The employee needs reasonable accommodation in the workplace because of the impairment.
- The medical professional's recommendation for reasonable accommodation.

Sometimes disabled employees do not know what accommodation will help them. Brainstorming, creativity, and additional information often are needed. Employees seeking reasonable accommodation may wish to consult their treating physician, therapist, or rehabilitation counselor to determine the types of accommodation that might help.

The Job Accommodation Network (JAN) is a free consulting service provided by the U.S. Department of Labor. It is a wonderful resource for information about reasonable accommodations under the ADA. Check out their Web site and publications at <https://askjan.org> or call 800-526-7234 for personal assistance. Other individuals with similar disabilities also are a helpful source of information about inexpensive technology, equipment, and accommodation ideas. Remember, employers are not required to honor all accommodation requests, especially if an alternative method for accommodating the disability is more convenient or less expensive, or more effective.

The ADA also prohibits discrimination against individuals who have a record of a disability or who are non-disabled and are regarded as having a disability, or associate with a disabled individual. For example, it is illegal for employers to discriminate against employees solely because they are cancer survivors, are HIV positive, are mistakenly perceived as suffering from a serious mental illness, or have a seriously disabled child. Districts do not need to accommodate school employees who are not disabled but are associated with a disabled individual.

Employers can require employees to take medical examinations or answer questions about disabilities only when the exams and questions are job-related and consistent with business needs. The results of all medical examinations and most other medical information must be kept confidential. Most medical information should not be placed in personnel files and should be kept in a separate location with limited access. Employers can share employee medical information with others under very limited circumstances. For example, supervisors may need information related to work restrictions and reasonable accommodations, nurses may need to know about special needs for emergency medical treatment, and safety personnel may need to plan for special procedures in case of fire. Please note that this is **NOT** a HIPAA privacy matter.



Please review the warning signs listed in the sections above. Here are additional warning signs of disability discrimination if your employer has no legitimate, nondiscriminatory reason.

- Your employer knew that you were disabled, you can perform the essential functions of your job, and your employer treated you more harshly than non-disabled employees.
- Your employer knew that you had a disability, you can perform the essential functions of your job with reasonable accommodation, and your employer denied your request for reasonable accommodation.
- Your employer treated you differently than other employees because your employer thought you had a disability, even though you did not.
- Your employer treated you differently than other employees because of your association with a disabled individual.
- ADA remedies do not apply to employees of the State of Arizona, including schoolemployees. Arizona law provides similar, but not identical, protection for state employees. The federal Rehabilitation Act does provide monetary remedies against the school districts.

Genetic Information

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other covered entities from requesting or requiring genetic information of an individual or family member of the individual in most cases. Genetic information includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services. Genetic information can include HIV tests, cholesterol tests, and many other medical tests.

Violations of GINA could include:

- Requiring an employee to provide her cholesterol test before accepting an ADA request
- Telling coworkers that an employee's unborn baby has Down Syndrome
- Firing an employee because her HIV test was positive.
- GINA does not apply to the following circumstances: (1) accidentally learning the information, such as overhearing you tell a coworker that you are pregnant; (2) voluntary wellness programs; (3) some Family Medical Leave certifications; (4) commercially and publicly available sources, like the Internet; (5) as required by law; and (6) DNA testing for law enforcement purposes.

Retaliation For Opposing Prohibited Employment Discrimination

Title VII and other employment discrimination laws also make it illegal for employers to retaliate against employees who reasonably and in good faith oppose prohibited discriminatory practices, file employment discrimination charges, or otherwise participate in employment discrimination proceedings. You can file a charge with the EEOC or the ACRD for this type of retaliation.

Here are warning signs of illegal retaliation if your employer has no legitimate, nondiscriminatory reason.

- You objected to employment discrimination, and shortly thereafter you received a much worse evaluation than ever before.
- You testified in support of a co-worker’s EEOC claim of illegal discrimination, and shortly thereafter you were transferred to the worst job in the department.

Remedies for Employment Discrimination

1. You can report the problem informally to anyone in authority. Go to the person in authority with whom you feel most comfortable. Sometimes minor problems can be resolved quickly when brought to your employer’s attention.
2. You can file a formal employment discrimination complaint or grievance with your employer. In some instances, you may have to file with your employer in order to preserve your right to seek other remedies. Check your district’s Board policies on reporting. Failure to follow policy may result in forfeiting your rights. Perhaps your employer can provide a legitimate, business reason for conduct that at first seemed discriminatory. On the other hand, your employer may invent a reason as a pretext to cover up discriminatory acts.
3. You can file a charge of discrimination with the federal (EEOC) or state (ACRD) civil rights agencies. This may result in mediation, investigation, or settlement of your problem. The government agencies also may take little or no action to resolve your problem, except to provide you with a “right to sue” letter giving you the right to file a lawsuit in court. Frequently it takes a year or longer for the government agencies to process discrimination charges.
4. You can sue in court for employment discrimination and other claims. Before filing most employment discrimination lawsuits, you must file an employment discrimination charge with the EEOC or the ACRD and receive a “right to sue” letter. Exception: For age discrimination claims under the ADEA, you can file a lawsuit 60 days after you file a charge, whether or not you have received a “right to sue” letter. For some lawsuits against school districts and other public employers, you may need to file a notice of claim (usually a demand letter written by an attorney) within 180 days of the illegal act.
5. If the conduct involved physical assault or other crimes, you can report it to the police for possible criminal charges. Be sure to inform the police that the crime was a hate crime.



6. If you were injured, in certain circumstances you can file a worker compensation claim for the injuries. Consult with an attorney to see if this is advisable. It is very difficult to receive worker compensation for psychological injuries.

Filing Employment Discrimination Charges

Filing Complaints and Grievances with Your Employer

Many district agreements with local associations have language forbidding employment discrimination, and you may file a grievance objecting to such discrimination. Other districts have a separate process for filing employment discrimination complaints, generally by making a report to the human resources or personnel department. Arbitrators and district administrators generally do not award monetary damages for pain and suffering. However, a grievance or internal complaint can be an excellent way to stop the discrimination relatively quickly.

Filing an Administrative Charge with a Government Agency

Deadlines: Most employment discrimination complaints must be filed with the Equal Employment Opportunity Commission (EEOC) within 300 days of the alleged discrimination or with the Civil Rights Division of the Arizona Attorney General's office within 180 days. Do not delay!

The U.S. Supreme Court held that the time for filing an employment discrimination lawsuit begins running with the original discriminatory act. If you miss a deadline, contact an attorney or the government agency immediately. There may be some additional days to file, especially if the discrimination arises out of an employer policy which is consistently in force, as opposed to separate incidents of discrimination.

How to File: You do not need an attorney to file an employment discrimination charge with the EEOC or the ACRD. If you contact the EEOC, you will be directed to its public portal at www.eeoc.gov. State employees, such as employees of state universities, must file age and disability discrimination claims with ACRD. You can call the agency and ask for a charge form or an appointment for an intake interview or go to the EEOC portal on the Internet. Fill out the form carefully and attach relevant documents and correspondence. An intake person from the EEOC or the ACRD will assist you. Frequently, individuals prepare a carefully written chronology of events that demonstrate discrimination and then submit the same chronology to their employers and to the agency.

Types of Evidence: If others know what happened to you and are willing to tell the agency about it, then you should provide the agency with their names, addresses, telephone numbers, positions, and brief summaries of what they know that will support your discrimination charge. A partial list of witnesses is better than none. You also should submit any relevant documents to the agency. Documents might include policies, procedures, letters, memos, notes, and records of the discrimination complaint submitted to your employer. You also should tell the



agency if you know of any documents that the employer possesses that might help support your discrimination charge. For example, your employer might have records of your attendance, evaluations, or job interview responses.

What to Request: It is important to think about what you want ahead of time. You may wish to seek more than just back pay and lost benefits, if any. You also may seek front pay for loss of future wages, reimbursement for out-of-pocket expenses, therapy or medical costs, credit for lost sick leave, and compensation for pain and suffering. Other kinds of damages which may be available are purging of negative materials from your file and development of acceptable policies, practices, and training to prevent future discrimination. Punitive damages are not available against public entities.

The Agency Process: The agency investigation may take one year or even longer. The agency will ask your employer to state its position and to provide information from your personnel file and other relevant documents. The agency may interview witnesses or seek a reasonable compromise between you and your employer. After the investigation, the agency will issue a decision. The decision will spell out the agency's conclusion in your case, including whether the agency believes unlawful discrimination occurred. The agency investigator also may recommend mediation or terms for settling the claim. Whether or not it concludes that discrimination occurred, the agency will issue a "right to sue" letter upon completion of its investigation, unless the agency pursues the case on your behalf, which is rare.

Consider Mediation

Both ACRD and EEOC have mediation programs. Mediation permits you and your employer to meet with an agency-provided mediator to attempt to reach a resolution of the dispute early in the process. There is no cost to you and you can bring counsel if you wish. More information is available at the agency websites.

Filing in Court

If the ACRD or the EEOC does not take your discrimination charge to a hearing (which is usually the case), you may file your own lawsuit in court. You have a very limited time to file, usually 90 days from the time you receive the ACRD or the EEOC "right to sue" letter. (Exception: You can file an age discrimination lawsuit under the ADEA without waiting for a "right to sue" letter, although you must wait 60 days after filing the charge with the agency.)

You can file a discrimination lawsuit whether or not the agency decides in your favor. Winning a lawsuit can be quite difficult, and most individuals require an attorney to assist them. If you succeed, the employer will be required to pay for your attorney fees and costs.



Proof Needed for Employment Discrimination Cases

Often it is difficult to prove discrimination. You need more than just an intuitive or “gut” feeling that discrimination has occurred. A government agency will look for evidence of the following facts in order to proceed with your discrimination case.

For most cases involving discriminatory dismissal and discipline:

1. You were treated differently than someone of a different sex, race, national origin, color, religion, or age. (You must be at least 40 years old to claim age discrimination.) Usually you will need to show that you were qualified for the job and were performing at a satisfactory level. It is useful, but not always required, to show that you were replaced by someone of a different category than you.
2. Someone who is very similar to you in position, rank, or job duties, and who is of a different category was treated more favorably under similar circumstances. You will be asked about the person or persons you believe were treated more favorably than you.
3. There was no legitimate, nondiscriminatory reason why the employer treated you differently. In an age-discrimination case, you must show that age was the reason for the employer’s action.

For cases involving failure to provide reasonable accommodation to religious beliefs:

1. Your sincere religious beliefs required accommodation at work.
2. Your employer refused your request for reasonable accommodation although it would not have caused an undue hardship.

For cases involving hostile environment harassment:

1. You were subjected to unwelcome (both to you and a reasonable person) and unsolicited comments or physical conduct based upon your race, sex, national origin, or other protected category.
2. The conduct was sufficiently severe or pervasive to unreasonably interfere with your work performance or create a hostile environment.
3. Your employer knew or should have known of the harassment and failed to take appropriate corrective action or reasonable steps to prevent the harassment.

For cases involving sexual harassment as a condition of employment:

1. A supervisor made unwelcome sexual advances to or requested sexual favors from you.
2. A supervisor took action or threatened to take action against you because you refused the sexual advances or offered a job or job benefits if you complied.



For cases involving failure to provide reasonable accommodation to a disability:

1. You are a qualified individual with a physical or mental impairment that substantially limits one or more major life activities.
2. You notified your employer of your disability and need for accommodation.
3. There is an accommodation available that would allow you to perform the essential functions of the job, and providing that reasonable accommodation would not have caused an undue hardship for your employer.
4. Your employer failed to provide reasonable accommodation.

For cases involving retaliation for opposing prohibited employment discrimination:

1. You opposed a practice that you reasonably believed was illegal employment discrimination or you participated in employment discrimination proceedings.
2. Your employer knew about your opposition or participation.
3. You were subjected to adverse treatment.
4. The adverse treatment was caused by your opposition or participation. (This may be proven by the timing of adverse treatment soon after your opposition or participation.)

Assistance from the AEA

Most assistance to AEA members is provided by volunteer local leaders and AEA Organizational Consultants. AEA Organizational Consultants are paid professional staff who assist local association leaders. They provide training in association activities, consultation on local association issues, and hands-on assistance to individuals in trouble and local associations at the bargaining table. The AEA also provides a wide variety of workshops and training materials to assist members and local associations with educational employment concerns. This booklet is part of AEA's commitment to helping members learn more about their rights and responsibilities.

Your local association representative or Organizational Consultant can assist you in resolving an employment discrimination dispute through a grievance, disciplinary appeal, or internal discrimination complaint filed with your district. They also may review documents that you plan to file with the EEOC or the ACRD. However, they cannot tell you whether to file a claim or how to file a lawsuit.

The AEA Defense Fund primarily funds legal representation to defend members in adverse job actions initiated by their employers, such as dismissal hearings and certificate revocation proceedings. For other employment-related legal problems, you may be authorized to meet with an AEA-approved attorney for a brief initial consultation to help explain legal rights and options. Due to limited resources, it is unlikely that the AEA will provide funding to file a lawsuit.



The AEA Defense Fund finances very few court cases. Funding for court cases is based on many factors, including: 1) whether the member has exhausted all other possible remedies; 2) whether there is a strong likelihood of success; and 3) whether resolution of the legal issues in the case will benefit members throughout the state. Employment discrimination cases generally do not meet these criteria because they rarely involve a legal issue or interpretation of a statute that would benefit members statewide. Funding of court cases must be recommended by the AEA General Counsel and approved by the AEA Board of Directors. If you would like further information about the AEA Defense Fund, ask your Organizational Consultant or arizonaaea.org/helpdesk for a copy of the Defense Fund Guidelines.

Special Issues for Gay and Lesbian Employees

Discrimination Based on Sexual Orientation

The U.S. Supreme Court ruled in *Bostock v. Clayton County*, 590 U.S. ____ (2020) that discrimination on the basis of sex in Title VII of the federal Civil Rights Act covers both sexual orientation and gender identity. The Arizona Attorney General's position is that the Arizona Civil Rights Act's prohibition of sex discrimination also covers sexual orientation and gender identity. Gay, transgender, bisexual, queer, and lesbian school employees who experience work problems based on their sexual orientation and gender identity can now utilize the same processes to grieve or complain as explained above. Sexual harassment laws and policies apply to LGBTQ employees.

Sex Discrimination and Sexual Harassment

For example, a male employee can be sexually harassed by male co-workers. In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998 (1998), male employees threatened another male employee, physically assaulted him in a sexual manner, repeatedly picked on him, and called him names. The employee's complaints to supervisors produced no remedial action. Finally, he left his job due to fear of assaults and forced sex. Although the Supreme Court determined that this type of extreme conduct could constitute illegal sexual harassment, it also noted that occasional teasing and roughhousing do not qualify as the type of serious and pervasive conduct required for sexual harassment.

Another federal court held that a gay male student could sue school officials for denial of equal protection due to gender discrimination. School officials ignored and laughed at his repeated complaints about harassment and physical harm from other male students, but aggressively responded to similar complaints by female students. In *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), a gay male student complained to school officials about serious incidents over a period of several years, including repeated name calling, a mock "rape" witnessed by twenty students, physical assaults, urination upon the student, and a serious beating by eight other students



that resulted in internal bleeding. School officials took minimal action. The victim alleged that various school officials told him that “boys would be boys” and that he “deserved” a beating because he was gay. The court held that the student could claim that the school engaged in gender based discrimination because the school treated male and female victims differently. The school had aggressively punished male students who harassed and assaulted female students. The court found it “impossible to believe that a female lodging a similar complaint [of harassment and assault] would have received the same response.”

Keeping Sexual Orientation Private or “Coming Out”

Many gay and lesbian school employees have chosen to keep their sexual orientation very confidential. Many school employees who have “come out of the closet” continue to be highly valued employees. Others suffer personal or employment difficulties.

It is very difficult to predict how a specific school community will react, but the following list may help you decide whether to keep quiet or “come out.”

1. Evaluate your strength as an educator or school employee. Consider evaluations, relationships with co-workers, and the difficulty in finding a replacement for your job. Assess whether potential negative pressure will jeopardize your position. Evaluate the strength and support you will receive from your building administrator. Consider if coming out might cause more concern because of the nature of your job or community (e.g., a coach supervising showers or a probationary teacher in a small town dominated by one religion that is very opposed to homosexual conduct).
2. Consider whether any other gay or lesbian employees at your site have “come out,” and if so, learn from their experiences.
3. Carefully consider at what level you desire to be “out,” if at all. Being “out” can occur at many different levels, with corresponding different degrees of risk. None of the activities listed below is entirely risk-free. However, conduct at levels a and b may have some protection as free speech. Conduct at levels c, d, e, and f is moderately risky. Conduct at levels g, h, and i is highly risky, especially in hostile environments.
 - a. Join gay or lesbian rights organizations.
 - b. Become involved politically in LGBT, Lesbian, Gay, Bisexual and Transgender, issues (e.g., support gay candidates, write letters to the editor on public issues, lobby for changes in the law).
 - c. Lobby for more sensitivity to gay and lesbian issues at your school (e.g., suggest gay/lesbian books for the library, advocate training for school employees concerning problems faced by gay and lesbian students).



- d. Provide curriculum-related and age-appropriate information to students (e.g., mention an artist's sexual orientation in an art class when discussing other influential biographical facts; discuss a controversial gay rights case when discussing other controversial political topics in a social studies class).
- e. Interact socially with your partner at school events without actually stating sexual orientation (e.g., bring same sex partner to faculty parties).
- f. Come out to co-workers (e.g., make statements concerning sexual orientation to friends or at faculty meetings).
- g. Wear gay or lesbian symbols at school.
- h. Disclose your own sexual orientation to students, if appropriate.

General Issues

Constitutional Protections

Although school employees enjoy the same constitutional rights as other individuals, no government agency enforces these rights. Employees sometimes must file expensive lawsuits to seek uncertain remedies.

Freedom of speech: The First Amendment of the U.S. Constitution may protect the speech of public employees speaking as *individual citizens* about a matter of public concern. A court balances the employees' free speech rights against their employers' need to run efficient operations without disruption. The U.S. Supreme Court limited the free speech rights of public employees and decided that the First Amendment does not protect speech by public employees carrying out their official job duties.

Freedom of association: Public employees have the right to associate with others. For example, public employers cannot retaliate against employees solely because they are union members or they associate with union members.

Freedom of religion: Government employers, such as school districts, cannot establish or endorse religion and must permit individuals to freely exercise their religious beliefs.

Equal protection: The constitution guarantees "equal protection" under the law. Government employers, such as school districts, can differentiate among classes of individuals for many reasons so long as they have a "rational basis" for the distinctions. This is a very low standard with a very low level of court scrutiny and protection. However, a few court cases have found that employers denied equal protection to employees who were viciously targeted and scapegoated without any rational reason. (Please note that courts apply a much higher standard of scrutiny, and require much stronger reasons, when government employers make distinctions based on protected classes, such as race, sex, etc.)

Privacy: Although a right to privacy is not specified in the U.S. Constitution, courts have found that individuals do have fundamental privacy rights, primarily related to marriage, procreation, and abortion.



Criminal Charges

Violence against individuals based on their race, sex, or other protected categories is a serious problem. If employees have been assaulted or threatened with violence, they can contact the police and state that they are victims of a hate crime.

If subjected to serious abuse and harassment, employees can seek an injunction against harassment from their local court. These court orders are designed to protect individuals from seriously annoying or abusive behavior, such as stalking, repeated use of profanity, violence, and threats of violence. *Violence and Threats at School, Help for Employees*, an AEA booklet, contains information about seeking an injunction against harassment. You can obtain that booklet from AEA staff.



Resources

Government Resources

State Agency

Arizona Attorney General's Office
Civil Rights Division
2005 N. Central Ave.
Phoenix, AZ 85004-2926
(602) 542-5263 • www.azag.gov/civil-rights
and
400 W. Congress St., Ste. S215, Tucson, AZ 85701
(520) 628-6500
Find Arizona statutes at azleg.gov

Federal Agencies

Equal Employment Opportunity Commission (EEOC)
3300 N. Central Ave., Ste. 690, Phoenix, AZ 85012-2504
(602) 640-5000 • (800) 669-4000 • www.eeoc.gov

U.S. Department of Education: Office for Civil Rights
400 Maryland Ave. SW, Washington, DC 20202
(800) 421-3481 • www.ed.gov/ocr
ocr@ed.gov

U.S. Department of Labor
Office of Disability Employment Policy
Job Accommodation Network
(800) 526-7234 • <https://askjan.org>



Non-Government Resources

American Civil Liberties Union (ACLU)
P.O. Box 17148, Phoenix, AZ 85011
(602) 650-1854 • www.acluaz.org

Anti-Defamation League of The B'nai Brith
3200 N. Central Ave., Ste. 2120, Phoenix, AZ 85012
arizona@adl.org
(602) 274-0991 • www.adl.org

Arizona Center for Disability Law
5025 E. Washington St., Ste. 202, Phoenix, AZ 85034
(602) 274-6287 • (800) 927-2260 • www.azdisabilitylaw.org
and
177 N. Church Ave., Ste. 800
Tucson, AZ 85701-1119
(520) 327-9547 and (800) 922-1447

Chicanos por La Causa
1112 E. Buckeye Rd., Phoenix, AZ 85034
(602) 257-0700 • www.cplc.org

The Gay, Lesbian and Straight Education Network (GLSEN)
GLSEN, Inc.
110 William St., 30th Fl., New York, NY 10038
info@glsen.org
212-727-0135 • www.glsen.org

National Association For The Advancement of Colored People (NAACP)
AZ Locations (arizonastateconferencenaacp.org) • www.naacp.org

National Conference for Community and Justice
820A Prospect Hill Rd., Windsor, CT 06095
(860) 683-1039 • www.nccj.org

NOW—National Organization for Women
1100 H St., NW, Ste. 300, Washington, DC 20005
(202) 628-8669 (628-8NOW) • TTY: (202) 331-9002 • www.now.org

Southern Poverty Law Center
400 Washington Ave., Montgomery, AL 36104
(334) 956-8200 • www.splcenter.org



A Final Note about Treating Students with and About Respect

Discrimination against students is a complex topic, far beyond the scope of this employment discrimination booklet. However, school employees are in a unique position to observe that some students are targeted by their peers and face frequent slurs, scapegoating, and even violence. Creative curriculum materials are available for teaching tolerance and promoting respect among students.

Here are a few ideas to help foster a climate of respect and safety for all students.

A school board and administration can:

- Establish anti-discrimination and anti-harassment policies.
- Search for, hire, and retain a diverse staff.
- Provide staff development on issues faced by students due to their culture, disability, sexual orientation.
- Support student-led human rights groups and peer education projects.
- Ensure that the curriculum teaches about prejudice and dispels stereotypes.

A principal can:

- Make it safe to report an incident of discrimination or harassment.
- Consider both educating and disciplining the offenders.
- Consider the needs of the targeted person for safety and for support.
- Consider the needs of the witnesses and the rest of the school community.

Every adult in a school can:

- Show respect and consideration for everyone.
- Intervene in harassment (do not permit slurs or stereotypes at school).
- Encourage acceptance of diversity.



arizonaea.org/helpdesk
(877) 828-1983

A Final Note

For more information and assistance, contact your local association, arizonaaea.org/helpdesk, or your AEA Organizational Consultant.

arizonaaea.org/helpdesk

(877) 828-1983



This booklet is a general guide for AEA members and is not intended to provide complete information or legal advice on specific problems. Changes in laws and cases may modify the information provided. To find Arizona statutes on the Internet, go to www.azleg.gov.



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