WHO CAN BE HELD LIABLE FOR FLORIDA EMPLOYMENT DISCRIMINATION?

"Whether you are a victim of employment discrimination, an employer, or even another employee, you need to know who can be held liable for employment discrimination."

Richard Celler

Once upon a time in America discrimination in the workplace was commonplace as well as perfectly legal. During the civil rights decade of the 1960s, however, a number of federal statutes were passed that made many types of employment discrimination illegal. In the decades since, most states have passed similar legislation prohibiting discrimination in the workplace. Despite these laws, discrimination still exists in the workplace at an alarming rate. Whether you are a victim of employment discrimination, an employer, or even another employee, you need to know who can be held liable for employment discrimination.

Navigating Federal and State Laws

Before discussing who can be held liable for discrimination in the workplace it is necessary to briefly discuss the various laws that govern employment discrimination because they directly impact liability. At the federal level there are a number of laws that prohibit employment discrimination, including, but not limited to:

- Title VII of the Civil Rights Act of 1964 (Title VII)
- The Pregnancy Discrimination Act (PDA)
- Equal Pay Act of 1963 (EPA)
- Age Discrimination in Employment Act of 1967 (ADEA)

- Title I of the Americans with Disabilities Act of 1990 (ADA)
- Fair Labor Standards Act (FLSA)

In addition, the Florida Civil Rights Act (FCRA) was passed at the state level to combat discrimination in the workplace in Florida. Much of the FCRA mirrors the prohibitions found in various federal anti-discrimination laws.

Is Liability the Same under All Laws?

One reason the issue of liability for discrimination in the workplace is such a complex issue is that there is no universal answer to the question "Who is liable?" Not only does liability differ between state and federal law, but who can be held liable can change from one federal law to another. A supervisor might be held liable under one federal law, for example, but would not be held personally liable under another.

Employer Liability

Contrary to popular belief, not all employers are covered, and therefore are not potentially liable, under federal or state anti-discrimination laws. The FCRA, defines an employer as follows:

> "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

Title VII defines an employer as:

> *"a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5 [United States Code]),* ***or*** *(2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26 [the Internal Revenue Code of 1986], except that during the first year after March 24, 1972 [the date of enactment of the Equal Employment Opportunity Act of 1972], persons having fewer than twenty--five employees (and their agents) shall not be considered employers."*

On the other hand, the FLSA defines the term "employer" quite differently, as follows:

> "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

As you can see, some laws limit coverage to employers who employ a minimum number of employees, thereby protecting small businesses from the financial burden of defending discrimination lawsuits. The result, however, is that some employers cannot even be held liable for acts of workplace discrimination.

Employer Liability for Acts of a Supervisor

Clearly, a covered employer can be held liable for acts of discrimination perpetrated by the employer itself; however, what about acts of a supervisor? An employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages.

If the supervisor's harassment results in a hostile work environment, the employer can avoid liability only if it can prove that:

1. The employer reasonably tried to prevent and promptly correct the harassing behavior; AND
2. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

Employer Liability for Non-Supervisory Employees and Non-Employees

Sometimes, illegal discrimination takes the form of harassment in the workplace. Often, the individuals responsible for the harassment are other employees or

even non-employees, such as customers. Can an employer be held liable for acts of another employee or even a non-employee? The law says that it can if it *knew, or should have known about the harassment and failed to take prompt and appropriate corrective action*.

Employment Agency Liability

Historically, employers have sometimes tried to use employment agencies as a "shield" to hide behind for both liability issues and tax related issues. The Equal Opportunity Employment Commission, or EEOC, has long maintained that employment agency workers are generally covered under the anti-discrimination statutes. This is because they typically qualify as "employees" of the staffing

firm, the client to whom they are assigned, or both as opposed to being considered independent contractors. Although there are exceptions to this general rule, it is usually the case that an employment agency or staffing firm can be held liable for acts of employment discrimination that occur to a worker.

Individual Liability

The law is relatively clear on the issue of an employer's liability for discriminatory acts of its own and for acts of others under its control; however, can an individual be held personally liable? Federal courts have examined and considered this issue at length as it relates to several federal anti-discrimination statutes and have concluded that under most federal statutes an individual *cannot* be held personally liable. The rationale for that conclusion is found in the definition of the term "employer." In essence, the fact that an "employer", in most federal statutes (as well as in the FCRA) is defined, in part, by a minimum number of employees led the courts to conclude that Congress did not intend to extend liability to small businesses, much less individuals.

The exceptions to this general rule may be found in the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA) both of which use a different definition of "employer." An employer under the FLSA act is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee." The FMLA uses a similar definition. This broad definition opens up the possibility of personal liability for acts of discrimination in the workplace.

Finally, individuals who participate in harassment in the workplace may escape liability under state or federal anti-discrimination laws; however, they could still

face liability as a defendant in a state lawsuit based on tort claims such as emotional distress, defamation of character or wrongful discharge. A tort lawsuit is based in common law not on statutory law. As such, in a lawsuit based on torts, anyone can be named as a defendant and could potentially be held liable if the plaintiff is able to prove his/her case.

Whether you are a victim or an employer in the State of Florida, knowledge of state and federal employment discrimination laws is essential. When in doubt, always consult an experienced Florida employment law attorney.

Florida Statutes, Florida Civil Rights Act

EEOC, Harassment

Society for Industrial and Organizational Psychology, Individual Liability in Discrimination Cases

Employment Practices Solutions, Personal Liability and the HR Professional

EEOC, Enforcement Guidance – Temporary Employment Agencies

EEOC, Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors

About the Author

Richard Celler

Richard Celler is the Managing Partner of Richard Celler Legal, P.A., a/k/a the Florida Overtime Lawyer. He created this firm after having served as the Founding Member and Managing Partner of one of the largest employee/plaintiff side employment law divisions in the United States.

In November 2013, Mr. Celler left big firm life with the idea of reopening his own litigation firm with an emphasis on something most big firms cannot provide – - a lower volume of cases, and more focus on the needs and attention of every single client.

Mr. Celler's practice focuses on all areas of the employment context from discrimination, harassment, and retaliation under the Florida Civil Rights Act, Title VII, the Family Medical Leave Act, and other employment related statutes. Additionally, Mr. Celler represents individuals in whistleblower and wage and hour litigation (overtime, minimum wage, commissions, final paychecks).

Many firms charge clients for an initial consultation to discuss their claims. Mr. Celler does not. You can call him or email him to discuss your case for free. If he elects to represent you, your case will be handled on a contingency basis, which means that he only gets paid, if you get paid. We encourage you to look at the remainder of our website for information on your rights and benefits in the workplace – www.floridaovertimelawyer.com.

Richard Celler Legal, P.A.
7450 Griffin Road, Suite 230
Davie, FL 33314
Phone: 866-344-9243
Email: richard@floridaovertimelawyer.com
Website: floridaovertimelawyer.com