



# How to Prove Discrimination

AFGE WOMEN'S & FAIR PRACTICES DEPARTMENTS



*“That it shall be the policy  
of the United States to insure  
equal employment opportunities  
for Federal employees  
without discrimination...”*

- Title VII of the Civil Rights Act of 1964



## ***Table of Contents***

|   |    |
|---|----|
| Non-Selection for a Promotion                                 | 3  |
| Termination or Disciplinary Actions                           | 5  |
| Reprisal / Retaliation  | 7  |
| Failure to Provide a Reasonable<br>Accommodation (Religion)   | 9  |
| Failure to Provide a Reasonable<br>Accommodation (Disability) | 11 |
| Quid Pro Quo Sexual Harrasment                                | 13 |
| Hostile Work Environment<br>Because of Protected Class        | 15 |





## ***How do I prove I have been discriminated against?***

This is not an easy task, since the complainant has the burden to prove to an Administrative Judge that he/she was discriminated against by the agency. The burden is entirely on the employee who filed the EEO complaint.

Here are some elements of proof that will guide you in proving your case.

### **NON-SELECTION FOR A PROMOTION**

#### **Prima Facie Case:**

- ① Establish membership in a protected group (race, color, age, sex, religion, disability, national origin, genetic information or retaliation);
- ② Establish complainant was qualified and applied for the vacancy;
- ③ Establish complainant was denied promotion; and
- ④ Establish vacancy was filled and selectee was not a member of complainant's protected group(s).

#### **Identify agency's legitimate non-discriminatory reason (LNDR) for the selection**

#### **Agency's LNDR is pretext for discrimination:**

- ① Establish agency's LNDR is unworthy of belief.
- ② Establish agency action is not supported by evidence or is inaccurate.
- ③ Establish complainant's qualifications are superior.
- ④ Establish the selection process was biased or flawed.
- ⑤ Establish true reason was because of protected status.



## TERMINATION OR DISCIPLINARY ACTIONS

### **Prima Facie Case:**

- ① Establish membership in a protected group (race, color, age, sex, religion, disability, national origin, genetic information or retaliation);
- ② Establish complainant was qualified for current position;
- ③ Establish complainant is/was satisfying the normal requirements of position;
- ④ Establish complainant was fired or disciplined; and
- ⑤ Establish complainant was replaced by an employee outside of complainant's protected group, and he/she was discharged or disciplined while similarly situated employee was retained or not comparably disciplined.

### **Identify agency's LNDR for negative employment action**

#### **Agency's LNDR is pretext for discrimination:**

- ① Establish LNDR is unworthy of belief.
- ② Establish discipline was not applied alike between complainant and comparator.
- ③ Establish agency's LNDR not supported by evidence or is inaccurate.
- ④ Establish true reason was because of protected status.





## REPRISAL/RETALIATION

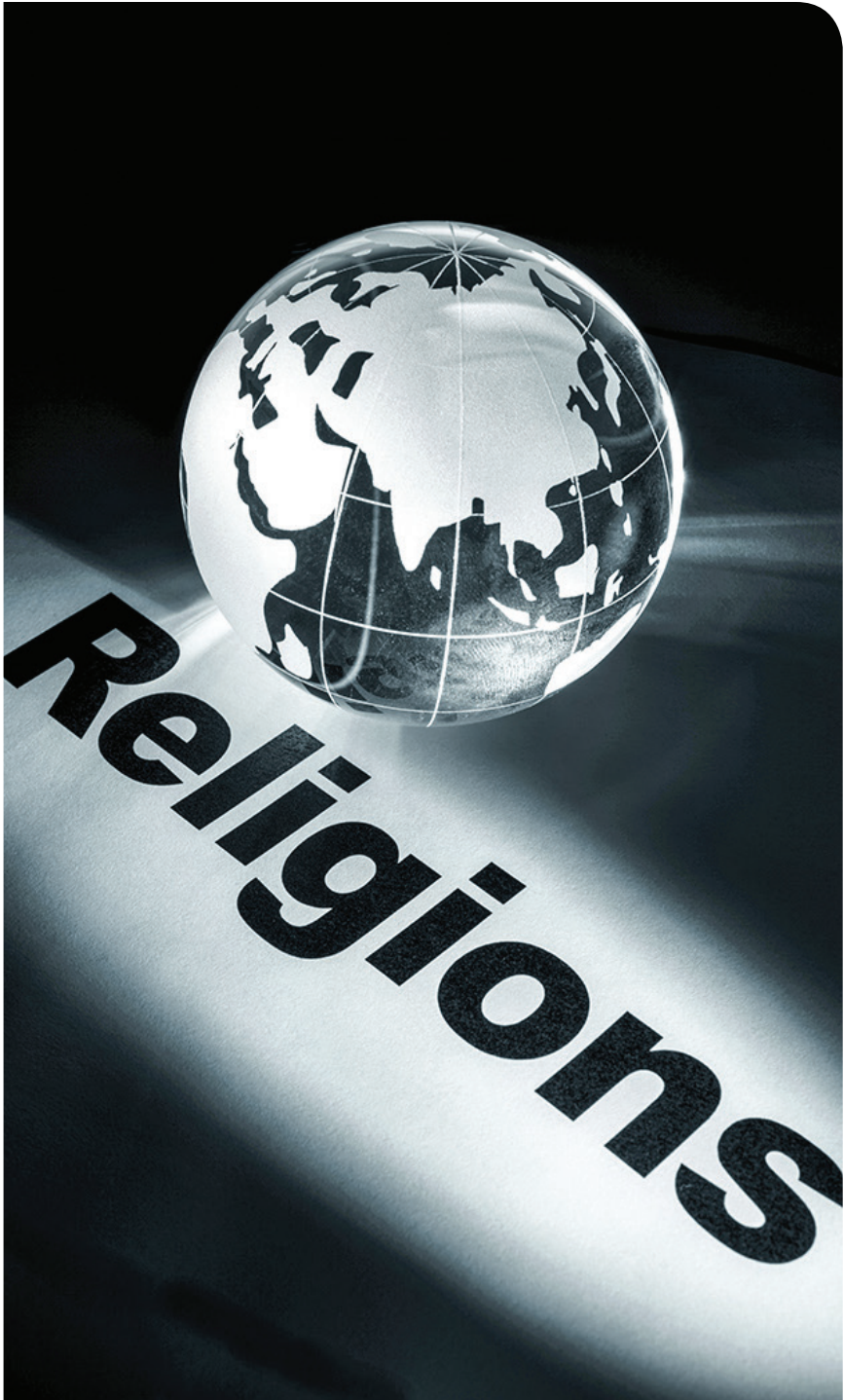
### Prima Facie Case:

- ① Establish complainant previously engaged in protected EEO activity (complainant, witness, representative, request reasonable accommodation or opposed discrimination in the workplace);
- ② Establish responsible management official was aware of the EEO activity;
- ③ Establish adverse treatment or conduct occurred that would likely deter a reasonable person from engaging in EEO activity; and
- ④ Establish the adverse treatment followed the protected EEO activity within such a short period that a court can infer retaliatory motivation.

### Identify Agency's LNDR for negative employment action

#### Agency's LNDR is pretext for discrimination:

- ① Establish LNDR is unworthy of belief.
- ② Establish agency action not applied alike between complainant and comparator.
- ③ Establish agency's LNDR not supported by evidence or is inaccurate.
- ④ Establish true reason was because of protected EEO activity.



## FAILURE TO PROVIDE A REASONABLE ACCOMMODATION (RELIGION)

### **Prima Facie Case:**

- ① Establish complainant has a sincere religious belief that conflicts with employment requirement;
- ② Establish supervisor was informed of need for accommodation; and
- ③ Establish adverse employment action was taken against complainant for failure to comply with employment requirement.

### **Identify agency's LNDR for not providing accommodation; undue hardship.**

### **Agency's LNDR is pretext for discrimination:**

Establish accommodation would not cause undue hardship (overall size of agency; type of operation; and, nature and cost of accommodation).



## FAILURE TO PROVIDE A REASONABLE ACCOMMODATION (DISABILITY)

### **Prima Facie Case:**

- ① Establish complainant is a qualified individual with a mental or physical impairment that substantially limits one or more major life activities;
- ② Establish agency knows of complainant's disability; and
- ③ Establish complainant requested and was denied an accommodation.

### **Identify agency's LNDR for denial of reasonable accommodation; undue hardship**

#### **Agency LNDR is pretext for discrimination:**

Establish the agency's reasons are insufficient to establish undue hardship (agency's program size; type of operation; and, nature and cost of accommodation).

**\*NOTE:** *If the agency makes a good-faith effort to accommodate the complainant, the complainant will not be entitled to compensatory damages.*





## QUID PRO QUO SEXUAL HARASSMENT

- ① Establish the harasser was a member of management;
- ② Establish the harasser made unwelcome requests for sexual favors or unwelcome sexual advances toward the employee;
- ③ Establish the harasser stated or implied that the employee must comply to receive or keep a job benefit; and
- ④ Establish the employee suffered a tangible employment action.

**\*NOTE:** *Agency is strictly liable if harassment is by a supervisor in complainant's chain of command which results in a tangible employment action (personnel action).*



**Unsolicited**  
**Repetitive**  
**Offensive**  
**Intimidating**  
**Humiliating**

## HOSTILE WORK ENVIRONMENT/HARASSMENT BECAUSE OF PROTECTED CLASS

- ① Establish membership in a protected group (race, color, age, sex, religion, disability, national origin, genetic information or retaliation);
- ② Establish complainant was subjected to harassment in the form of unwelcome verbal or physical conduct;
- ③ Establish the harassment complained of was based on complainant's protected class;
- ④ Establish the harassment affected a term or condition of complainant's employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and,
- ⑤ Establish there was a basis for imputing agency liability.

**\*NOTE:** *When no tangible employment action has taken place, then the employer has an affirmative defense that consists of two elements:*

- 1) employer exercised reasonable care to prevent or correct harassing behavior; and*
- 2) the employee failed to take advantage of any preventative or corrective opportunities provided by employer.*

**\*NOTE:** *When an agency does not follow its anti-harassment policies and procedures, no affirmative defense is available.*









AFGE Women's & Fair Practices Departments

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