

Fact Sheet – Discrimination and sexual harassment

1. Discrimination

1.1. What is discrimination?

Discrimination can be described as treating a particular person, because of a particular characteristic or circumstance of that person, less favourably than a person who does not have that particular characteristic or is not in the same circumstance.

You have protections against discrimination when you are applying for a job, while you are working and if you lose your job.

1.2. What characteristics or circumstances?

Under both state and federal legislation, it is unlawful to discriminate against another person because of specified characteristics or circumstances of that other person. This can include the other person's:

- race;
- colour;
- sex;
- sexual preference;
- gender identity/history;
- age;
- physical or mental disability;
- marital status;
- family or carer's responsibilities (including family violence related matters);
- pregnancy (including potential pregnancy and/or breastfeeding);
- religion (including lack or absence of religious conviction);
- political opinion;
- ethnicity;
- national extraction; or
- social origin.

In some circumstances, an employer must also not discriminate against someone on the basis of a person's criminal conviction or spent conviction.

1.3. What are some of the different types of discrimination?

(a) Direct discrimination

Direct discrimination is where a person is treated less favourably on the basis of one of the above characteristics than a person who does not have that characteristic. This can take many forms, including:

- making offensive “jokes” or comments about another worker’s racial or ethnic background, sex, sexual preference, gender identity, age or disability;
- expressing negative stereotypes of a particular group (e.g. “married women shouldn’t be working”);
- judging a person on characteristics such as political or religious beliefs, cultural practices, sex, gender identity, age, and similar factors rather than work performance;
- denying a person access to premises because that person is accompanied by a guide dog;
- denying leave entitlements or flexible working arrangements to employees wishing to attend to family violence related matters;
- displaying pictures, calendars, posters etc which are offensive and/or derogatory;
- not hiring an applicant for a position because of the applicant’s race, gender, age or other characteristic where that characteristic does not affect the applicant’s ability to fulfil the inherent requirements of the position;
- firing a person or forcing a person to quit their job because of a particular characteristic; and
- generally making a person feel uncomfortable or unwelcome in the workplace on the basis of a particular characteristic.

(b) Indirect discrimination

Indirect discrimination occurs when a rule or practice is implemented which, on the face of it, appears neutral but with which a high proportion of persons of a particular race, sex or other group cannot comply.

Examples of indirect discrimination include:

- a company decision to make all workers who commenced employment after a certain date redundant could be indirect discrimination if a disproportionate number of women commenced work after this date and are therefore adversely affected by this policy;
- an office that is ill-equipped or unsafe for employees with disabilities; and

- a company policy that no staff are allowed to work part-time may be indirectly discriminate against women who have families and are therefore unable to work full-time.

1.4. What is NOT discrimination?

Enforcing a company policy or rule because of the inherent requirements of a position is not discrimination. For example:

- not hiring a person who is severely hearing impaired and therefore cannot answer phone calls in a position where the job description clearly states that the successful applicant must be able to handle a high volume of phone calls on a daily basis; and
- giving a woman with family responsibilities who has asked for flexible working arrangements fewer hours than a woman without family responsibilities who wishes to work full-time hours.

2. Sexual harassment

Sexual harassment can be defined as an unwelcome sexual advance or request for sexual favours. It involves some form of unwelcome conduct of a sexual nature, where, in the circumstances, a reasonable person would have anticipated that the other person would be offended, humiliated or intimidated. It is important to note that intention to cause such effect is irrelevant.

3. What to do if you are being discriminated against or sexually harassed at work

If you feel that you are being sexually harassed or discriminated against at work, you can take a number of steps to rectify the situation.

3.1. Diarise all incidents of workplace discrimination or sexual harassment so you can easily report them to your employer

If you do want to report the discrimination or harassment at some stage, it will be necessary to report the specific incidents of offensive behaviour. Having a record of the time, place, date, person and behaviour involved will be very important.

3.2. Verbally notify the person about his or her inappropriate conduct

If you feel comfortable doing so, you could approach the person who is harassing you directly. Inform him or her that the conduct is inappropriate, and that you want it to stop. If the person is unaware that their conduct is hurtful or upsetting, this may rectify the problem.

3.3. Notify your employer in writing about the incidences of discrimination or sexual harassment

If speaking to the perpetrator directly does not rectify the situation, you can take your complaint to your employer. Write a letter to your employer outlining the incidents of harassment or discrimination, along with the reasons why you find this conduct offensive or upsetting, and what action you would like the employer to take.

3.4. Retain copies of all correspondence sent and received

It is important for you to keep dated copies of all correspondence. If the dispute cannot be resolved by negotiation, the correspondence will provide a succinct summary of the events. It also demonstrates your initiatives to resolve the problem and will assist you if you decide to pursue further action against the person harassing you and/or your employer.

3.5. Contact the Equal Opportunity Commission (EOC) or Australian Human Rights Commission (AHRC)

If you do not feel comfortable reporting the incidents to your employer, or you believe that the issue has not been handled effectively by your employer, you can report the discrimination or harassment to either the EOC or AHRC.

The EOC and AHRC specialise in discrimination and harassment. They should be able to assist you in making a complaint or attempting to rectify the situation with your employer. You can find the details of both of these organisations at the end of this fact sheet.

You generally have one year from the date of the discrimination or sexual harassment to make a complaint to the EOC.

You generally have six months from the date of the discrimination or sexual harassment to make a complaint to the AHRC.

If you are a national system employee, another option is to make a general protections claim. For more information, see our fact sheet "General protections for national system employees". If you are not sure whether you are a national system employee call Wageline on 1300 655 266 or see our fact sheet "National or state system employee: which one are you?".

You generally have 6 years to make a general protections claim for discrimination at work. If you have been dismissed from your job, you only have 21 days to make a general protections claim about your dismissal.

4. Dismissal from employment and constructive dismissal

A dismissal occurs where an employee's employment is terminated at the employer's initiative. This is usually called "being fired".

Constructive dismissal may occur where the employee resigns from employment but felt that he or she was forced to do so because of conduct, or a course of conduct, engaged in by the employer. The employee is said to be constructively dismissed if he or she had no other alternative but to resign.

If you have experienced ongoing discrimination or sexual harassment and your employer has not dealt with the issue reasonably, you may feel like you have no choice but to resign. In this circumstance you may be able to successfully argue that you have been constructively dismissed. Constructive

dismissal can be difficult to prove, and you need to show that you had no alternative except to resign.

If you have been fired or constructively dismissed for discriminatory reasons, you may be able to make an unfair dismissal, unlawful termination or general protections claim.

For more information, see our fact sheets – “Constructive dismissal: when you are forced to resign”, “Unfair dismissal for state system employees”, “Unfair dismissal for national system employees”, “Unlawful termination for state system employees” and “General protections for national system employees”.

If you are unsure whether you are a national or state system employee, call Wageline on 1300 655 266 or see our fact sheet “National or state system employee: which one are you?”

It’s important to remember that time limits for these types of claims can be very short. In some cases you only have 21 days from the date of a dismissal or constructive dismissal to make your claim.

If you can’t make any of these claims because of the time limit or another issue, you may also be eligible to make a claim to the EOC or the AHRC.

You generally have one year to make a complaint to the EOC.

You generally have six months to make a complaint to the AHRC.

5. Not being given a job

If you were not given a job because of one of the characteristics listed above at section 1.2, you may be able to make a claim to the EOC or the AHRC. If you are a national system employee, you may also be eligible to make a general protections claim. For more information on the EOC or the AHRC see their details at the bottom of this fact sheet. For more information on general protections see our fact sheet “General protections for national system employees”.

You generally have one year to make a complaint to the EOC.

You generally have six months to make a complaint to the AHRC.

You generally have 6 years to make a general protections claim where you are alleging that you were not given a job for discriminatory reasons.

If you are unsure whether you are a national or state system employee, call Wageline on 1300 655 266 or see our fact sheet “National or state system employee: which one are you?”.

6. Workers' compensation

Workers' compensation protects injured workers by providing for loss of earning capacity, payment of medical expenses and vocational rehabilitation to assist employees to remain in or return to work.

If a person suffers from an injury or illness at work, he or she may consider making an application with WorkCover for workers' compensation. Anxiety or stress as a result of workplace discrimination or harassment may be considered an illness or injury for the purposes of workers' compensation claims.

The Employment Law Centre of WA does not advise in relation to workers' compensation. You should contact WorkCover for information.

7. Further information

The Employment Law Centre of WA (Inc)

Advice Line 1300 130 956 or 08 9227 0111
Web www.elcwa.org.au

Australian Human Rights Commission

Tel (02) 9284 9600
Complaints Info Line 1300 656 419
TTY (hearing impaired) 1800 620 241
Web www.humanrights.gov.au/
Email complaints@humanrights.gov.au

Equal Opportunity Commission

Address Level 2
Westralia Square
141 St George's Terrace, Perth 6000
Tel 1800 198 149 or 08 9216 3900
Web www.eoc.wa.gov.au

Fair Work Commission

Address Level 16
111 St George's Terrace, Perth 6000
Tel 1300 799 675
Web www.fwc.gov.au
Email perth@fwc.gov.au

Unions WA

Tel 08 9328 7877
Web www.unionswa.com.au

Wageline

Information Service 1300 655 266
Web <https://www.commerce.wa.gov.au/labour-relations/contact-wageline>

WorkCover WA

Advisory Service 1300 794 744
TTY (hearing impaired) 08 9388 5537
Web www.workcover.wa.gov.au

WorkSafe

Tel 1300 307 877 or 08 6251 2200
Web www.commerce.wa.gov.au/worksafe

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