

Fundamental Supervisory Practices

Center for Public Leadership and Governance

UNC-School of Government

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Topics covered in today's session:

- Identify the legal issues and key employment laws you have to navigate as a supervisor.
- Review EEOC protected classes and review best practices to prevent discrimination claims.
- Discuss strategies for creating a productive and safe working environment free from harassment.
- Evaluate common employment situations and determine possible response strategies and resources needed for an appropriate response.
- Begin the creation of a personal development plan to assist in the transfer of training from the classroom to the job.

The information presented in the session “Navigating Legal Issues” and the attached materials is not an attempt to present a comprehensive overview of all employment laws impacting supervisors in local government. The materials were not prepared by a lawyer and should not be relied upon in any particular situation to guide legal analysis.

NAVIGATING LEGAL ISSUES WHAT DO YOU THINK?

Directions: Next to each item below, circle the answer that indicates whether you think the statement is True - T or False - F.

- | | | |
|---|---|--|
| T | F | 1. It is OK to have different performance expectations for employees doing the same job since some employees can handle more work than others. |
| T | F | 2. The laws on sexual discrimination and harassment protect men as well as women. |
| T | F | 3. It is OK to choose not to hire someone who has a heavy foreign accent that you can barely understand. |
| T | F | 4. During a job interview, the candidate tells you she is divorced and has 2 children. Since she brought it up, then this means that I can ask her questions about her family. |
| T | F | 5. If an employee engages in conduct of a sexual nature in the presence of ten people, and only one person is offended, that person can complain of sexual harassment. |
| T | F | 6. If you are telling jokes to your friends that are "not politically correct" and another employee overhears the conversation, that individual cannot complain of harassment because the jokes were not directed at him or her. |
| T | F | 7. An employee does not have to repeat an act of a sexual nature before it can constitute sexual harassment. |
| T | F | 8. If an employee I do not supervise tells me about another coworker making sexually suggestive and inappropriate comments, but asks me not to say anything, I should keep her confidence. |
| T | F | 9. An employer can be held responsible if a customer, contractor, or other nonemployee harasses an employee. |
| T | F | 10. In order to sexually harass a person, you must have the intention of unreasonably interfering with that individual's performance or creating a hostile, intimidating, or offensive environment. |
| T | F | 11. It's OK to joke around and call one of your Muslim co-workers "the terrorist" if he laughs about it and also refers to himself as "the terrorist." |
| T | F | 12. It is OK to re-assign an employee who complained of harassment to a different job to separate her from the person she is accusing of harassment. |
| T | F | 13. Michelle is one of 3 engineers reporting to Mr. Smith. The other two are men. Whenever a meeting is scheduled, Mr. Smith assigns the arrangements for room set-up and coffee to Michelle. This is not sexual harassment. |

- T F 14. Denise is terribly attracted to her boss, Jeff. As a ruse to be alone with him, she asked him to join her for a drink after work on the pretense that she wants to discuss a troubling work situation. After a few drinks, Denise accepts Jeff's offer to drive her home. She insists he come in, and they end up spending the night together at her invitation. This is not harassment.
- T F 15. You cannot discipline an employee for any reason when that employee has filed an EEO complaint.
- T F 16. An individual you are interviewing for a position comes into the interview in a wheelchair. You can ask her why she needs to use a wheelchair.
- T F 17. If an employee has been out on sick leave, I can ask that employee to submit a note from the doctor that he is cleared to return to work.
- T F 18. I must create a "light duty" assignment for a pregnant employee.
- T F 19. A staff member who has diabetes has requested moving to a private office where she can dim the lights since bright lights irritate her eyes and give her headaches. I don't have to provide her with this office space if it will create complaints of unfairness among the rest of the staff.
- T F 20. I must provide a private space for nursing mothers in the workplace that is not the women's restroom.
- T F 21. The Fair Labor Standards Act (FLSA) requires that you provide regular breaks to your employees.
- T F 22. If an employee voluntarily chooses to do work after normal business hours, he or she does not have to be paid for this work.
- T F 23. I can ask my employees to come to work early to get things organized for the day so they will be "ready to roll" when we officially begin work.
- T F 24. A staff member has a bumper sticker on his personal car that some of his co-workers find offensive. I can ask him to remove it to "keep the peace" among the staff.
- T F 25. One of your employees brings you a facebook post of another one of your staff members in his work uniform with the caption "Don't come work for the County unless you want to be abused." You can take a disciplinary action against the staff member who made the post.

NOTE: Quiz items on this list are intended to check awareness of employment laws and provoke discussion in a training session facilitated by an HR professional who is not an attorney. Supervisors may need to consult their organization's personnel policy or an attorney to answer specific questions applying to an individual situation.

Key EEO and Employment Information for Supervisors

Excerpts from EEOC.gov

Prohibited Employment Policies/Practices

Under the laws enforced by EEOC, it is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

The law forbids discrimination in every aspect of employment.

The law makes it illegal for an employer to make any employment decision because of a person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. That means an employer may not discriminate when it comes to such things as hiring, firing, promotions, and pay. It also means an employer may not discriminate, for example, when granting breaks, approving leave, assigning work stations, or setting any other term or condition of employment - however small.

Pre-Employment Inquiries (General)

As a general rule, the information obtained and requested through the pre-employment process should be limited to those essential for determining if a person is qualified for the job; whereas, information regarding race, sex, national origin, age, and religion are irrelevant in such determinations.

Employers are explicitly prohibited from making pre-offer inquiries about disability.

Although state and federal equal opportunity laws do not clearly forbid employers from making pre-employment inquiries that relate to, or disproportionately screen out members based on race, color, sex, national origin, religion, or age, such inquiries may be used as evidence of an employer's intent to discriminate unless the questions asked can be justified by some business purpose.

Therefore, inquiries about organizations, clubs, societies, and lodges of which an applicant may be a member or any other questions, which may indicate the applicant's race, sex, national origin, disability status, age, religion, color or ancestry if answered, should generally be avoided.

Similarly, employers should not ask for a photograph of an applicant. If needed for identification purposes, a photograph may be obtained after an offer of employment is made and accepted.

Dress Code

In general, an employer may establish a dress code which applies to all employees or employees within certain job categories. However, there are a few possible exceptions.

While an employer may require all workers to follow a uniform dress code even if the dress code conflicts with some workers' ethnic beliefs or practices, a dress code must not treat some employees less favorably because of their national origin. For example, a dress code that prohibits certain kinds of ethnic dress, such as traditional African or East Indian attire, but otherwise permits casual dress would treat some employees less favorably because of their national origin.

Moreover, if the dress code conflicts with an employee's religious practices and the employee requests an accommodation, the employer must modify the dress code or permit an exception to the dress code unless doing so would result in undue hardship.

Similarly, if an employee requests an accommodation to the dress code because of his disability, the employer must modify the dress code or permit an exception to the dress code, unless doing so would result in undue hardship.

Age Discrimination and Employment Act of 1967 (ADEA)

<https://www.eeoc.gov/laws/guidance/fact-sheet-age-discrimination>

Actions Prohibited By the ADEA

Under the ADEA, it is unlawful to discriminate against a person because of his or her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training. Harassing an older worker because of age is also prohibited.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.

The ADEA permits employers to favor older workers based on age even when doing so adversely affects a younger worker who is 40 or older.

Americans with Disabilities Act (ADA) and Americans with Disabilities Act Amendments Act of 2008 (ADAAA)

<https://www.eeoc.gov/laws/guidance/ada-your-responsibilities-employer>

Disability discrimination occurs when an employer or other entity covered by the Americans with Disabilities Act, as amended, or the Rehabilitation Act, as amended, treats a qualified individual with a disability who is an employee or applicant unfavorably because she has a disability.

Disability discrimination also occurs when a [covered employer or other entity](#) treats an applicant or employee less favorably because she has a history of a disability (such as cancer that is controlled or in remission) or because she is believed to have a physical or mental impairment that is not transitory (lasting or expected to last six months or less) and minor (even if she does not have such an impairment).

The law requires an employer to provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer ("undue hardship").

The law also protects people from discrimination based on their relationship with a person with a disability (even if they do not themselves have a disability). For example, it is illegal to discriminate against an employee because her husband has a disability.

Harassment

<https://www.eeoc.gov/harassment>

Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA).

Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.

Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Harassment can occur in a variety of circumstances, including, but not limited to, the following:

- The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee.
- The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.
- Unlawful harassment may occur without economic injury to, or discharge of, the victim.

Prevention is the best tool to eliminate harassment in the workplace. Employers are encouraged to take appropriate steps to prevent and correct unlawful harassment. They should clearly communicate to employees that unwelcome harassing conduct will not be tolerated. They can do this by establishing an effective complaint or grievance process, providing anti-harassment training to their managers and employees, and taking immediate and appropriate action when an employee complains. Employers should strive to create an environment in which employees feel free to raise concerns and are confident that those concerns will be addressed.

Employees are encouraged to inform the harasser directly that the conduct is unwelcome and must stop. Employees should also report harassment to management at an early stage to prevent its escalation.

Employer Liability for Harassment

The 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) it 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.

The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.

When investigating allegations of harassment, the EEOC looks at the entire record: including the nature of the conduct, and the context in which the alleged incidents occurred. A determination of whether harassment is severe or pervasive enough to be illegal is made on a case-by-case basis.

Pregnancy Discrimination Act

<https://www.eeoc.gov/laws/guidance/fact-sheet-pregnancy-discrimination>

The Pregnancy Discrimination Act (PDA) is an amendment to Title VII of the Civil Rights Act of 1964. Discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII. Women affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees who are similar in their ability or inability to work.

Hiring and Working Conditions

An employer cannot refuse to hire a woman because of her pregnancy related condition as long as she is able to perform the major functions of her job. An employer cannot refuse to hire her because of its prejudices against pregnant workers or because of the prejudices of co-workers, clients, or customers. The PDA also forbids discrimination based on pregnancy when it comes to any other aspect of employment, including pay, job assignments, promotions, layoffs, training, fringe benefits, firing, and any other term or condition of employment.

Pregnancy and Maternity Leave

An employer may not single out pregnancy related conditions for medical clearance procedures that are not required of employees who are similar in their ability or inability to work. For example, if an employer requires its employees to submit a doctor's statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy related conditions to do the same.

Pregnant employees must be permitted to work as long as they are able to perform their jobs. If an employee has been absent from work as a result of a pregnancy related condition and recovers, her employer may not require her to remain on leave until the baby's birth. Nor may an employer have a rule that prohibits an employee from returning to work for a predetermined length of time after childbirth.

Under the PDA, an employer that allows temporarily disabled employees to take disability leave or leave without pay must allow an employee who is temporarily disabled due to pregnancy to do the same. Employers must hold open a job for a pregnancy related absence the same length of time that jobs are held open for employees on sick or temporary disability leave.

Further, under the Family and Medical Leave Act (FMLA) of 1993, enforced by the U.S. Department of Labor, a new parent (including foster and adoptive parents) may be eligible for 12 weeks of leave (unpaid, or paid if the employee has earned or accrued it) that may be used for care of the new child. To be eligible, the employee must have worked for the employer for 12 months prior to taking the leave and the employer must have a specified number of employees. For more information please see: www.dol.gov/whd/regs/compliance/whdfs28.htm.

Pregnancy and Temporary Disability

If an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee; for example, by providing light duty, modified tasks, alternative assignments, disability leave, or leave without pay.

Additionally, impairments resulting from pregnancy (for example, gestational diabetes) may be disabilities under the Americans with Disabilities Act (ADA). An employer may have to provide a reasonable accommodation for a disability related to pregnancy, absent undue hardship (significant difficulty or expense). For example, an employer may be required to provide modified duties for an employee with a 20-pound lifting restriction stemming from pregnancy related sciatica, absent undue hardship. The ADA Amendments Act of 2008 makes it much easier to show that a medical condition is a covered disability. For more information about the ADA, see www.eeoc.gov/laws/types/disability.cfm. For information about the ADA Amendments Act, see www.eeoc.gov/laws/types/disability_regulations.cfm.

Reasonable Accommodation & Religion

The law requires an employer to reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause difficulty or expense for the employer. This means an employer may have to make reasonable adjustments at work that will allow the employee to practice his or her religion, such as allowing an employee to voluntarily swap shifts with a co-worker so that he or she can attend religious services.

Retaliation

<https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-retaliation-and-related-issues>

The EEO laws prohibit punishing job applicants or employees for asserting their rights to be free from employment discrimination including harassment. Asserting these EEO rights is called "protected activity," and it can take many forms. For example, it is unlawful to retaliate against applicants or employees for:

- filing or being a witness in an EEO charge, complaint, investigation, or lawsuit
- communicating with a supervisor or manager about employment discrimination, including harassment
- answering questions during an employer investigation of alleged harassment
- refusing to follow orders that would result in discrimination
- resisting sexual advances, or intervening to protect others
- requesting accommodation of a disability or for a religious practice
- asking managers or co-workers about salary information to uncover potentially discriminatory wages.

Participating in a complaint process is protected from retaliation under all circumstances. Other acts to oppose discrimination are protected as long as the employee was acting on a reasonable belief that something in the workplace may violate EEO laws, even if he or she did not use legal terminology to describe it.

Engaging in EEO activity, however, does not shield an employee from all discipline or discharge. Employers are free to discipline or terminate workers if motivated by *non-retaliatory and non-discriminatory* reasons that would otherwise result in such consequences. However, an employer is not allowed to do anything in response to EEO activity that would discourage someone from resisting or complaining about future discrimination.

For example, depending on the facts, it could be retaliation if an employer acts because of the employee's EEO activity to:

- reprimand the employee or give a performance evaluation that is lower than it should be;
- transfer the employee to a less desirable position;
- engage in verbal or physical abuse;
- threaten to make, or actually make reports to authorities (such as reporting immigration status or contacting the police);
- increase scrutiny;
- spread false rumors, treat a family member negatively (for example, cancel a contract with the person's spouse); or
- make the person's work more difficult (for example, punishing an employee for an EEO complaint by purposefully changing his work schedule to conflict with family responsibilities).

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

Other Employment Laws – enforced by Department of Labor

Fair Labor Standards Act (FLSA)

<https://www.dol.gov/agencies/whd/flsa>

The FLSA sets rules for minimum wage, overtime pay, equal pay, recordkeeping and child labor protection. Some employees are exempt from the overtime pay provisions. Exemptions are narrowly defined under the FLSA, and generally apply only to a limited number of positions in local government.

The *Patient Protection and Affordable Care Act (PPACA)* amended the FLSA in 2010 and requires reasonable break time and a private space (not a bathroom) for nursing mothers to express milk.

Supervisor “Need to Know”

- Ensure all hours worked by a “non-exempt” employee are accurately recorded. A supervisor approval or signature on a time record indicates agreement.
- Work hours include everything an employee does for work including answering emails from home, getting a vehicle ready for the shift or answering phone calls on a non-paid lunch break. An employer may not refuse to pay for actual hours worked, even if the work was not authorized. If an employee engages in unauthorized work for the organization, the work hours must be compensated. (Follow your disciplinary procedures to address the unauthorized work concern.)
- A non-exempt employee cannot “volunteer” to begin work early or work from home without compensation. This time is considered actual hours worked under the FLSA.

Family and Medical Leave Act (FMLA)

<https://www.dol.gov/agencies/whd/fmla>

The FMLA provides up to 12 weeks of job-protected leave for serious health condition affecting the employee, to care for a child/spouse/parents including bonding time with a child within the first year after birth or adoption, or for military exigency.

A “*serious health condition*” covers someone who is unable to work or perform other regular activities for three consecutive days and requires continuing treatment from the health care provider. Pregnancy is covered as a serious health condition as well as chronic conditions (such as migraines or asthma) if the condition continues over an extended period of time and the employee requires periodic visits (two or more per year) to a health care provider for treatment.

Supervisor “Need to Know”

- Recognize when an employee's need for leave (including intermittent leave) may be covered under FMLA and provide the employee with information on how to apply for FMLA leave. Follow any FMLA procedures adopted by your organization.
- An employee cannot be treated differently due to the use of FMLA leave. (For example - denied promotion or merit increases.) The use of FMLA leave cannot be used as a basis for any employment decision or action.

USERRA – Uniformed Services Employment and Reemployment Rights Act

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a federal law, passed in 1994, that protects military service members and veterans from employment discrimination on the basis of their service, and allows them to regain their civilian jobs following a period of uniformed service.

USERRA is administered by the United States Department of Labor, through the [Veterans' Employment and Training Service \(VETS\)](#). VETS provides assistance to those persons experiencing service connected problems with their civilian employment and provides information about the Act to employers.

Supervisor "Need to Know"

- Seek assistance from HR, your attorney, or VETS services if you have questions related to an employee's use of military leave.
- Be aware that an employee's need for regular military leave (such as weekend duty) cannot negatively influence any decision about an employee's work assignment or work schedule. (Example – not assigning Police Officer to Investigations unit because monthly absences easier to handle in Patrol Unit.)
- You don't have a "right of refusal" for military leave and cannot take any adverse action against the service member, or threaten to take adverse action, for leaving for service. Similarly, you may be prohibited from taking adverse action against the service member, or threatening to take adverse action, if the service member doesn't provide notice. However, if your employee's absence would cause a significant burden, you may contact the commander of your employee's military unit to ask if the duty could be rescheduled or performed by another service member. If this request isn't fulfilled, you must still provide unpaid leave so your employee can perform his or her military duty, and you can't take any adverse action against the employee.

Prohibited Employment Interview or Discussion Topics

<u>ITEM</u>	<u>PROHIBITED INFORMATION</u> (Cannot be used to disqualify candidates. Any discussion should be avoided.)	<u>LAWFUL INFORMATION</u> (May be used to disqualify candidates where relevant).
AGE	Any inquiry on age, birth certificate. Any inquiry for purpose of excluding persons over 40.	Whether candidate meets minimum age requirements. Whether candidate can meet physical requirements of job with or without reasonable accommodations.
ARREST RECORD	Any inquiry relating to arrest.	None
CONVICTION RECORD	Inquiries regarding convictions that do not relate to performing the particular job under consideration.	Inquiries about actual convictions that relate reasonably to performing a particular job. Examples: Job involving public safety or handling money <i>after contingent offer of employment</i> .
CREDIT RATING	Any inquiries concerning charge accounts, credit rating, etc., that do not relate to performing the particular job under consideration.	Inquiries about credit rating, charge accounts, etc., that relate reasonably to performing the particular job in questions. Example: Job involving handling money.
EDUCATION	Disqualification of a candidate who does not have a particular degree unless employer has proven that the specific degree is the only way to measure a candidate's ability to perform the job in question.	Inquiries regarding degrees or equivalent experience. Information regarding courses relevant to a particular job.
DISABILITY	General inquiries that are likely to elicit information about handicaps or a health condition that do not relate to job performance.*	You may ask if a person can do the essential functions of the described job with or without reasonable accommodation if you ask all applicants.*
MARITAL AND FAMILY STATUS	Child care plans or issues, unwed motherhood, contraceptive practices, spouses' preferences regarding job conditions. Inquiries indicating marital status, number of children, pregnancy. Any question directly or indirectly resulting in limitation of job opportunity in any way.	Whether candidate can meet work schedule. Whether candidate has activities, responsibilities, or commitments that may hinder meeting attendance requirements. (Should be asked of candidates of both sexes.)

MILITARY RECORD	Discharge status, unless it is the result of a military conviction.	Type of experience and education in service as it relates to a particular job.
NAME	Inquiries to determine national origin, ancestry, or prior marital status.	Whether candidate has ever worked under a different name.
NATIONAL ORIGIN	Lineage, ancestry descent, mother tongue, birthplace, citizenship. National origin of spouse or parents.	Whether candidate is legally eligible to work in the United States.
ORGANIZATIONS	Inquiries about membership to determine the race, color, religion, sex, national origin, or age of candidate.	Inquiries that should not elicit discriminatory information.
RACE OR COLOR	Complexion, color of skin.	None

RELIGION	Religious preference, affiliation, denomination.	Whether candidate can meet work schedules of job with reasonable accommodation by employer if necessary.
SEX	Sex of applicant, where sex is not a bona fide occupational qualification (BFOQ).	None - The City has no positions where sex is a bona fide occupational qualification.
WORK EXPERIENCE	Inquiries of protected class members based on generalizations about that class.	Candidate's previous job-related experience.
WORKERS' COMPENSATION	Any inquiries about prior worker's compensation claims*	None

NOTE:

Even if discriminatory information is volunteered by the applicant it can still result in a discrimination charge. Should this happen, even if it happens informally (i.e. during a tour) it is necessary for you to provide a disclaimer. Inform the applicant that *"While that's interesting we will not be using that information in making our selection decision."*

In the case of an applicant with a disability, you may discuss "reasonable accommodation" once the job has been fully described to the applicant. Most applicants requiring reasonable accommodations will initiate this discussion. They are almost always the best source for determining what is the most reasonable of accommodations, because they must constantly devise strategies to offset any limitations. Remember, most applicants with disabilities will need little or no accommodation to perform the essential functions of a job.

SUGGESTIONS FOR INTERVIEWING PERSONS WITH DISABILITIES

- Ensure that the interview location is accessible.
- Focus on the ability of an applicant to perform a job - not on the disability.
- Provide the applicant with accurate and sufficient information about the job, including physical and mental requirements.
- Ask the applicant if he/she is able to perform the functions of the position as described without asking questions concerning the disability. The applicant should not be disqualified because of the inability to perform a non-essential function.
- You may ask the applicant to describe or demonstrate how he/she will perform specific job functions, as long as you ask all applicants.
- Tests must be job-related and must be administered to all applicants applying for the position. You must provide reasonable accommodation if requested for the applicant to perform the test, unless the test is intended to measure a job skill that is affected by the applicant's disability.
- Allow the applicant to observe the worksite.
- Avoid making assumptions about an individual's ability to perform the essential functions of the position simply based on your knowledge of the particular disability or your knowledge of another individual with the same or a similar disability.
- Consult a specialist in disabilities and employment before concluding that a particular disability cannot be accommodated at the worksite. Vocational Rehabilitation and the Department of Insurance employ such specialists. The Federal Job Accommodation Network <https://askjan.org/> sponsored by the President's Committee on the Employment of People with Disabilities, offers ADA-related fact sheets and materials that answer questions on how to accommodate specific disabilities.

Defensibility Tips to Reduce Risks of Discriminatory Actions (aka - Top Ten Tips for Staying out of Jail)

1. **Have courage. Address inappropriate behavior once you observe it. Don't ignore it!**
A supervisor has responsibility for ensuring a respectful workplace. Failure to take action on harassment complaints can lead to both personal and organizational liability through tort claims.
2. **Set expectations for employee performance and behavior.**
Set clear expectations about what type of behavior is expected in the workplace, and what type of behavior is not allowed. Train your employees to understand that harassment in the workplace is prohibited.
3. **Focus on BFOQ's (Bona fide Occupational Qualifications) when making decisions.**
Make decisions based on fact and analysis rather than assumptions and stereotypes. Be sure any pre-employment test is valid, job-related and does not cause adverse impact.
4. **Treat all employees/applicants fairly and consistently.**
Look at how you have handled previous situations. Think about what precedent you are setting when making decisions. Be consistent in applying discipline to similar situations. Use the same interview questions for all applicants.
5. **Focus on organization's needs, not personal preferences.**
When making decisions, focus on what is best for the organization. Make sure you can explain to others the rationale behind your decisions.
6. **Follow the same procedures for promotions as for hiring.**
Create an equal opportunity for all to apply for the promotion; use a standard set of interview questions and selection procedures.
7. **Know and follow your personnel policy and other workplace policies.**
If your normal practice is different than policy, change or eliminate the policy. If you make a rare exception to the policy, document the reasons for the exception.
8. **Document your actions and decisions. Leave an audit trail.**
Create notes of counseling sessions with employees. In any disciplinary letter, be clear about reasons for taking the disciplinary action.
9. **Address concerns raised by employees.**
Do not assume everyone sees the workplace as you do. Take employee complaints and concerns seriously. Listen to the employee's concerns and keep communications open. Follow your organization's procedures for reporting any complaints about harassment or unfair treatment. If applicable, make sure employees understand the grievance process.

Use available resources to assist you.

Consult with your supervisor, HR, city/county attorney or other appropriate resources when you are unsure of how to handle a situation. Use legal resources (such as UNC School of Government) as necessary for advice and guidance.

Case Studies

What Would You Do?

For each scenario below, please describe the potential issues, and how you would handle each situation.

1. One of your employees tells you that she is tired of hearing her co-worker John complain about immigrants. Yesterday she overheard John telling a citizen “we need to completely shut the border and stop letting those sub-humans into the country.” She says that she was embarrassed when this happened and could tell the citizen was uncomfortable. She also says that John makes some type of derogatory comment every day. She tells you that she knows Jose (another co-worker) is especially bothered by John’s behavior, but that he won’t speak up because he doesn’t want to make things worse with John.
2. You are in the breakroom when you hear one of your male employees say to a female employee, “Why on earth do you want to be a Police Officer? A woman’s place is at home having babies, not at work fighting bad guys. I would never let my wife work as a cop.”
3. Your employee Amy has been out on Family Medical Leave for the last 6 weeks following a recent surgery. Her doctor has released her to come back to work, but you are friends with Amy’s husband who told you that Amy was still very weak and not really ready to come back to work but that she had to return because they needed her income to pay the bills.
4. Your employee Josh tells you that he spent last night at home completing his police reports because he did not have time during his shift. He did not ask permission to work on the reports at home and doesn’t seem to be too upset that he spent time at home. When you receive his timesheet at the end of his shift, he does not indicate that he worked any hours at home.
5. You have noticed that several of your employees who hang out together often joke around about each other’s love life (or lack thereof) and make rowdy remarks about each other’s sexual escapades. It seems that everyone is enjoying the casual banter and joking among friends. The only female in the workgroup often laughs at some of the comments and makes comments about how immature they are, but she has not said this behavior bothers her.
6. You think your employee Pete has been taking some of his mechanic work tools home and using them on his personal equipment because he has been talking about repairing and restoring an old truck and you saw his work tools in his personal vehicle the last 2 days. Pete is also in the Army Reserves and has to serve weekend duty once per month. For the last 3 months he has told you that he needs to report for weekend duty on Wednesday (rather than Friday) to help

set up for the drill weekend. You suspect that Pete is volunteering for this extra duty and are frustrated because this leaves you short-staffed in the garage when he is gone. Today when Pete told you he needed to leave for drill on Wednesday, he also told you that his wife was having surgery next week and he would need to take off at least one week of work to help her during her recovery. This is the same week that another one of the mechanics will be on vacation.

7. Your employee Jill recently told you that she has an autoimmune disorder and when she is having flare-ups of her condition, she is not able to perform her duties as a firefighter because she tires too easily. She has asked to be assigned to light duty when these episodes occur. She wants to keep her health condition private from the employees she works with because she doesn't want them to be afraid of working with her. She is only telling you with hopes that you can find her light duty since her accrued vacation and sick time are running low and she cannot afford to take a leave without pay.

Employment-related legal questions answered by attorneys at the UNC School of Government and found in the following blog posts:

<https://canons.sog.unc.edu/firing-at-will-employees-legal-limitations/>
<https://canons.sog.unc.edu/hey-job-applicant-have-you-ever-been-arrested-or-convicted/>
<https://canons.sog.unc.edu/public-employers-beware-new-rule-violate-a-policy-your-employee-may-sue-you/>
<https://canons.sog.unc.edu/secretly-putting-a-gps-tracker-on-your-employees-car-can-you-do-that/>
<https://canons.sog.unc.edu/when-an-employee-wants-to-record-a-meeting-with-a-supervisor/>
<https://canons.sog.unc.edu/employment-at-will-vs-right-to-work/>
<https://canons.sog.unc.edu/questioning-an-employee-about-possibly-criminal-conduct/>
<https://canons.sog.unc.edu/bad-employee-suggest-he-resign/>
<https://canons.sog.unc.edu/confidentiality-of-applicants-names/>
<https://canons.sog.unc.edu/do-we-have-to-advertise-this-position/>
<https://canons.sog.unc.edu/governmental-employees-and-religious-email-sign-offs/>
<https://canons.sog.unc.edu/the-first-amendment-and-facebook-rants-a-case-example/>
<https://canons.sog.unc.edu/understanding-the-limitations-of-north-carolinas-whistleblower-protection-act/>

. Use legal resources (such as UNC School of Government) as necessary for advice and guidance.