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AN OVERVIEW OF ANTIDISCRIMINATION LAW

Introduction

As we have seen, "employment at will" is a shorthand way of saying that employment may be ended at the will or pleasure of either the employer or the employee. An employer can fire an employee for any reason or for no reason at all. An employee can quit for any reason or for no reason at all.

Because the employment at-will rule is a common law rule, a legislature may overrule it by passing a statute to the contrary. One of the most important and most comprehensive set of exceptions to the rule of employment at will are found in federal and state antidiscrimination laws. Six federal statutes prohibit discrimination in public and private employment on ten different bases. Four state statutes prohibit discrimination in public and private employment on nine of those bases. Anti-discrimination law is extensive and sometimes complex. What follows is a summary of each of these laws:

1. Title VII of the Civil Rights Act of 1964
2. The Age Discrimination in Employment Act of 1967
3. North Carolina Law Prohibiting Discrimination on the Basis of Race, Color, Gender,
4. Religion, National Origin or Age
5. The Americans with Disabilities Act of 1990
6. North Carolina Law Prohibiting Disability Discrimination
7. The Pregnant Workers Fairness Act
8. The Genetic Information Nondiscrimination Act of 2008
9. North Carolina Law Prohibiting Discrimination Based on Genetic Information
10. The Uniformed Services Employment and Reemployment Rights Act
11. North Carolina Law Protecting Those Who Serve in the Military from Discrimination
12. North Carolina Law Prohibiting Discrimination Based on the Lawful Use of Lawful Products

Title VII of the Civil Rights Act of 1964: ***Prohibiting Discrimination in Employment on the Basis of Race, Color, Gender, Religion or National Origin***

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, gender, religion and national origin. Codified at 42 U.S.C. § 2000e-2, it provides:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

The categories of race, color, religion, gender and national origin are referred to as "protected classes." When an employer fails to hire or discharges someone because of their race, for example, employment lawyers say that the employer is discriminating against them because of their membership in a protected class or in the protected class of Blacks, Whites or Asians, as the case may be.

Discrimination on Account of Sexual Orientation, Gender Identity, or Transgender Status

In June of 2020, the United States Supreme Court ruled that Title VII's prohibition on discrimination on account of "sex" includes a prohibition on account of sexual orientation, gender identity, or transgender status. The Supreme Court's decision goes by the name of *Bostock v. Clayton County*,[1] but it covered three cases that were combined for consideration by the Supreme Court. One case involved a male instructor at a sky-diving business. He told a female student that because he was gay she did not need to be concerned about the fact that he would be hugging her tightly during the training. A second case involved an employee of a county in Georgia who was fired for "unbecoming" conduct when he joined a gay softball league. A third case involved an employee of a funeral home. She had, six years earlier, begun

[1]590 U.S. __, 140 S. Ct. 1731 (2000).

work at the funeral home presenting as a male, but when she announced that she would begin living her life as a female, the funeral home fired her because it was "not going to work out."

In all three cases, the Supreme Court ruled, the fired employees were the subjects of unlawful discrimination under Title VII because of their sex. The Court said it in no uncertain terms:

> An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.
>
> [I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.

Here is an excerpt from the Court's reasoning:

> Consider two employees, both attracted to men. One is a man and one is a woman. They are otherwise materially identical from the employer's point of view. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

The Court emphasized that its ruling was solely on the facts before it: employees who were fired because of their sexual orientation or gender identity. Other questions will have to wait for future cases:

> [W]e do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex.

Religion

Title VII not only protects employees from discrimination based on their membership in a particular religion (Christian, Muslim, Jew, for example, or Methodist, Lutheran, Catholic or Sunni or Shiite Muslim), but it also requires employers to reasonably accommodate an employee's religious practices. Once on notice that a religious accommodation is needed, an employer *must reasonably accommodate an employee who's sincerely held religious belief, practice, or observance conflicts with a work requirement.* This means an employer may be required to make reasonable adjustments to the work environment that will allow an employee to practice his or her religion, unless doing so would pose an undue hardship. In the 2023 case *Groff v. DeJoy*, the Supreme Court explained that "undue hardship is shown when a burden is substantial in the overall context of an employer's business," "tak[ing] into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer."[2]

Examples of some common religious accommodations include flexible scheduling, voluntary shift substitutions or swaps, job reassignments, and modifications to workplace policies or practices.

Disparate Treatment or Intentional Discrimination: The Basic Theory

Imagine that Mike, a department head in Paradise City government, is interviewing candidates for the position of deputy department head. He needs a second in command on whom he can rely. As he shifts through the applications, he decides that his number two should be a man. "It's not that a woman couldn't do the job," he tells himself. "It's that there always leaving to have a baby or calling in because their kids are sick." Mike doesn't think he is prejudiced against female employees, and he doesn't think he has committed employment discrimination. "Hey, I think that

[2]*Groff v. DeJoy*, 600 U.S. 447, 470-71 (2023)

a woman can do this job as well as a man!" he says later. But Mike has engaged in unlawful discrimination. He has consciously and deliberately decided not to hire any of the female applicants for the assistant department head position ***because*** they are women. The law refers to this as *disparate treatment* discrimination. **Disparate treatment discrimination is the *intentional* decision not to hire (or to fire) a person because of membership in a particular protected class.**

How does an applicant or employee prove that an employer intentionally discriminated against them because of race, color, sex or any other protected characteristic? These days it is the rare employer who states frankly, "We didn't even bother to read the applications from Black candidates." In the absence of direct and indisputable evidence such as this, plaintiffs must prove intent through circumstantial evidence – that is, evidence from which a fact-finder may infer discrimination. In a series of cases, the United States Supreme Court developed a structure of proof for use in disparate treatment cases dependent on circumstantial rather than direct evidence. We'll use hiring as an example. A plaintiff establishes a *prima facie* or "first look" case of discrimination in hiring when he or she demonstrates that

(i) he or she belongs to a protected class,

(ii) he or she applied and was qualified for a job for which the employer was seeking applicants,

(iii) despite his or her qualifications, he or she was rejected, and

(iv) after the rejection, the position remained open and the employer continued to seek applicants from persons with similar qualifications.

This structure of proof is usually referred to by the name of the case which gave rise to it, *McDonnell Douglas Corp. v. Green*.[3] A plaintiff who has made this very limited showing is said

[3] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Price v. Thompson*, 380 F.3d 209, 212 (4th Cir. 2004*); E.E.O.C. v. Sears Roebuck and Co.*, 243 F.3d 846, 851-52 (4th Cir. 2001).

to have established a McDonnell Douglas *prima facie* case, and the burden of introducing evidence then shifts to the employer.

If the employer does nothing to defend itself in response to the plaintiff's prima facie case, the court will presume intentional discrimination, and a violation of law, on the part of the employer. To avoid such a result, the employer must put forward a legitimate, nondiscriminatory reason why this plaintiff was rejected.[4] Legitimate nondiscriminatory reasons include reasons such as failure to meet the minimum qualifications for the position, lack of experience or required certifications, poor professional and personal references, or a lackluster performance in a personal interview. Sometimes the legitimate, nondiscriminatory reason is simply that the employer preferred the package of experience, qualifications and self-presentation that another candidate offered. This list is not meant to be exclusive, but merely to illustrate the types of reasons that the courts have found legitimate and nondiscriminatory.

Once an employer does offer a legitimate, non-discriminatory explanation for failing to hire the plaintiff, the case ends unless the plaintiff brings forth evidence that the reasons offered by the employer were not its true reasons but were a pretext for discrimination.[5] This evidence is rarely direct; it is almost always circumstantial. Mere evidence of pretext does not require a verdict for the applicant. Not only must the judge or jury believe that the employer is not being straightforward or truthful about its reasons for rejecting the plaintiff's application, they must also believe the plaintiff's explanation – that the reason for the employer's lack of forthrightness and for its failure to hire the plaintiff is intentional discrimination on the basis of membership in

[4]*Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *E.E.O.C. v. Sears Roebuck and Co.*, 243 F.3d at 851-52.
[5]*See Burdine*, 450 U.S. at 253; *Sears Roebuck*, 243 F.3d at 851-52.

a protected class.[6] Examples of circumstantial evidence that employer discriminated include requiring the plaintiff to complete certain application steps not required of other applicants, making, but then withdrawing a job offer without explanation, and unevenly applying employment criteria to the disadvantage of the applicant.[7]

Title VII requires that all complaints of employment discrimination be filed with the United States Equal Employment Opportunity Commission (EEOC) before applicants or employees may bring suit in federal court.[8] The EEOC investigates claims of employment discrimination and issues a non-binding finding to the effect that it is reasonably likely that discrimination did – or did not – occur. Once the EEOC has issued that finding, or where the EEOC has not issued a finding within 180 days, the applicant or employee receives a so-called right-to-sue letter that allows him or her to proceed with a lawsuit in federal court. The EEOC also attempts to mediate the dispute between the parties where possible. Sometimes the EEOC itself will bring suit against an employer on behalf of the rejected applicant or discharged employee.

Title VII applies to all local government entities with 15 or more employees.

The Bona Fide Occupational Qualification Defense to a Charge of Disparate Treatment or Intentional Discrimination

Employers sometimes require that applicants be male or female, or of a certain religion or national origin in order to be considered for particular positions. For example, a sheriff might prefer male jailers for positions involving supervision of male prisoners and female jailers for positions involving supervision of female prisoners. A public works director might want to hire

[6]*See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993).
[7]*See, e.g., Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1195 (9th Cir. 2003), opinion amended on denial of reh'g, 2003 WL 21027351 (9th Cir. 2003) (different treatment than other candidates.
[8]*See* 42 U.S.C. §§ 2000e-4 and 2000e-5; 29 CFR §§ 1601.6(a) and 1601.7(a).

men for sanitation and roadwork crews because the director does not think women are capable of lifting the weight necessary to do these jobs. A county social services or health department might only want caseworkers or nurses of Latino background to work in outreach programs directed toward South American immigrants. Restaurants such as Hooters and Playboy clubs are known to prefer an all-female wait staff because those businesses use sexual allure as a theme to attract it majority male clientele.[9]

With a few exceptions, preferences like those in the examples above are unlawful. For an employer to make hiring decisions based on preferences like these would violate Title VII. But where it is **necessary** for a particular business or organization to hire employees based on *religion, sex, or national origin*, an employer may defend itself against a disparate treatment claim by asserting what is known as the *bona fide occupational qualification* or *BFOQ* defense. The BFOQ defense gets its name from the text of the Title VII provision in which it is recognized. Title VII provides that

> it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where *religion, sex, or national origin is a bona fide occupational qualification* reasonably necessary to the normal operation of that particular business or enterprise . . . .[10]

The BFOQ defense is not available as a defense to charges of race or color discrimination. In practice, the BFOQ defense is rarely used in the context of religious discrimination because those entities that discriminate on the basis of an applicant's religion tend to be religiously-

[9]On Hooters' justification for its hiring policies, see the corporate statement on its website: http://www.hooters.com/About.aspx . Several employment discrimination lawsuits brought by male applicants against Hooters have settled out-of-court.
[10] *See* 42 U.S.C. § 2000e-2(e)(1).

affiliated employers, who are entitled to an independent exemption from Title VII's nondiscrimination mandate as it applies to religion.[11]

The employer bears the burden of proof when it asserts a BFOQ defense. It must prove by a preponderance of the evidence that 1) the job qualification justifying the discrimination is reasonably necessary to the existence of its business; 2) gender or national origin is a legitimate proxy for qualification because either (a) it has a substantial basis for believing that all or nearly all members of the protected class lack the qualification, or (b) it is impossible or highly impractical to insure by individual testing that its employees will have the necessary qualification for the job.[12]

Disparate Impact or Unintentional Discrimination in Hiring: The Basic Theory

A Title VII disparate treatment claim requires an applicant to prove that the employer intentionally discriminated on the basis of race, color, gender, religion or national origin. Employers can unintentionally violate Title VII, as well. If an employer adopts a hiring or promotional practice that causes a disparate impact on members of a protected class, then it has engaged in unintentional discrimination, known as disparate impact discrimination. Imagine the following situation:

> *Paradise County, North Carolina, decides that it will consider only county residents for county jobs. The county hopes that it will engender greater employee commitment and loyalty since employees will have a personal stake in the success of county government. The population of Paradise County is and has been historically predominantly white. Because the City of Paradise, where Paradise County government is based, is in the northeast corner of the county, there is a large pool of potential applicants for Paradise County jobs to be found in Heavenly County, which adjoins Paradise County a mere ten miles from the City of Paradise. Heavenly County is predominantly Black. By adopting a residency requirement, Paradise County will have a disparate*

[11] *See* 42 U.S.C. §§ 20003-1(a) and § 2000e-2(e)(2).

[12] *See Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 36, 369 n. 10 (4th Cir. 1980) (gender discrimination); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977) (in context of age discrimination); *Brenier v. Nevada Dep't of Corrections*, 610 F.3d 1202, 1210 (9th Cir. 2010) (gender BFOQ in prison context).

impact on Blacks. They will necessarily be hired disproportionately to the available labor market, which is measured by commuting distance, not by county lines. Without meaning to do so, Paradise County will have violated Title VII.

Under Title VII, disparate impact cases can be brought on the basis of race, color, gender, religion and national origin. A 1981 case involving the North Carolina Highway Patrol illustrates how a job requirement that is, like the residency requirement in the hypothetical above, neutral on its face can nevertheless have an adverse impact on a protected class. Prior to 1981, the North Carolina Highway Patrol had had a minimum height requirement of 5'6" for a state trooper. In a case brought by the United States Department of Justice, the district court found that this requirement had a substantial adverse impact on women: it automatically eliminated 77.3% of women between the ages of 18 and 34 from the pool of women who could apply for a position as a state trooper, while only eliminating 9.4% of men. In December 1980, there were 1,131 members of the highway patrol; only one trooper was female. The court further found that the state had never validated the height requirement – that is, had never shown statistically valid evidence that people taller than 5'6" were more likely to perform well in the position of state trooper than shorter people -- and that the evidence that the highway patrol did produce in support of its claim that the height requirement was job-related lacked factual foundation. Thus, the court concluded that the challenged height requirement discriminated against women in violation of Title VII. The state did not appeal.[13]

Plaintiffs do not have to prove intent in a disparate impact case as they must do in a disparate treatment case. Plaintiffs do, however, have to demonstrate that a particular employment policy or practice that on its fact appears to be neutral has in fact caused a significant statistical disparity in the proportionate numbers of protected class members who are

[13]*See United States v. State of North Carolina*, 512 F.Supp. 968 (E.D.N.C. 1981).

hired when this policy or practice was in effect.[14] A rejected applicant who has identified a practice – such as a residency requirement or a height requirement –and has produced evidence of a statistical disparity in the numbers of Blacks hired or the number of women hired, for example, *and* can show, in addition, that the identified policy or practice actually caused the statistical disparity has established a prima facie case of disparate impact or unintentional discrimination.

Once a rejected applicant establishes a *prima facie* case, the burden shifts to the employer to show either that the challenged employment practice does not cause a disparate impact or that even though it causes a disparate impact, it is job-related and consistent with business *necessity*.[15] Employers generally demonstrate job-relatedness and business necessity by showing that the practice in question has been validated, although sometimes job-relatedness and business necessity may be apparent and a formal analysis will not be needed. In the case of a residency requirement, the employer would establish its validity by showing that employees who lived within the employer's jurisdictional boundaries were likely to be better employees than those who lived elsewhere. Without actually doing a validity study, it seems reasonable to assume that persons who live in Buncombe County will make better employees for the city of Asheville than will persons living in Wake County. But it is less easy to see how in the hypothetical above residents of Paradise County will make better employees for Paradise County than residents of Heavenly County. Because the residency requirement disproportionately screened out Blacks from consideration for employment with Paradise County, the county will have to show evidence of the relationship between residency and job

[14]*See* 42 U.S.C. § 2000e-2(k)(1)(A)(i). *See also Lewis v. City of Chicago*, 130 S.Ct. 2191, 2197-98 (2010); *Ricci v. DeStefano*, 557 U.S. 557 (2009).
[15]*See* 42 U.S.C. § 2000e-2(k)(1)(A)(i). *See also Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Equal Employment Opportunity Comm'n v. Dial Corp.*, 469 F.3d 735, 742 (8th Cir. 2006).

performance in county positions. Where the practice in question is a written examination or a physical abilities test, the validity of the test is established by demonstrating that there is a greater probability that high scorers on the test will perform well on the job than will low scorers.

If the employer demonstrates that the practice is required by business necessity, the burden shifts to the plaintiff to prove that an alternative practice exists that 1) does not result in disparate impact and 2) would serve the defendant's stated objective equally well. Only if the applicant can establish the existence of such an alternate process, will liability for disparate impact discrimination in violation of Title VII have been established.[16]

What kinds of applicant selection procedures and employment tests have been show to result in adverse impact on a protected class? The EEOC's list includes (but is not limited to):

- background checks that provide information on arrest and conviction history;
- background checks that provide information on credit and financial history;
- English proficiency tests that determine English fluency;
- cognitive tests that assess reasoning, memory, perceptual speed and accuracy, and skills in arithmetic and reading comprehension;
- tests that assess knowledge of a particular function or job;
- physical ability tests that measure the physical ability to perform a particular task or the strength of specific muscle groups, as well as strength and stamina in general;
- tests that ask applicants to perform sample job tasks and assess performance and aptitude on particular tasks (for example, an assessment center);
- medical inquiries and physical examinations, including psychological tests, that assess physical or mental health.[17]

[16]*See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii). *See also EEOC v. Dial Corp.*, 469 F.3d at 742; *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1276 (11th Cir. 2000), *Ogletree v. City of Auburn*, 619 F.Supp.2d 1152, 1175 (M.D.Ala. 2009).
[17]See http://www.eeoc.gov/policy/docs/factemployment_procedures.html .

The Age Discrimination in Employment Act of 1967: *Prohibiting Discrimination in Employment on the Basis of Age Over 40*

Passed three years after Title VII and amended several times since, the Age Discrimination in Employment Act (ADEA) prohibits employers from refusing to hire, from discharging and from otherwise discriminating against a person in the terms and conditions of employment on the basis of age. The statute currently protects persons 40 years of age and older.[18] Sometimes, more than one applicant may be over 40, and the ADEA does not prohibit an employer from favoring an older individual over a younger individual, even if the younger individual is 40 or over.[19] The ADEA specifically prohibits employers from expressing preferences or limitations related to applicant age in job postings or vacancy notices and from denying or discriminating in the provision of benefits to older employees. With respect to the hiring process, the EEOC's ADEA regulations make clear what the prohibition on expressing age preferences in job advertisements means:

> Help wanted notices or advertisements may not contain terms and phrases that limit or deter the employment of older individuals. Notices or advertisements that contain terms such as age 25 to 35, young, college student, recent college graduate, boy, girl, or others of a similar nature violate the Act unless one of the statutory exceptions applies. Employers may post help wanted notices or advertisements expressing a preference for older individuals with terms such as over age 60, retirees, or supplement your pension.[20]

The ADEA covers both intentional discrimination on the basis of age (disparate treatment) and unintentional discrimination on the basis of age (disparate impact).

Maximum Hiring Ages and the BFOQ Defense under the ADEA

Local government employers may want to set maximum age requirements for certain positions for which they believe that relative youthfulness is necessary. Setting a maximum age

[18]*See* 29 U.S.C. §§ 623(a), 631(a).
[19]*See General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 599 -600 (2004). *See also* 29 CFR § 1625.2.
[20]*See* 29 CFR § 1625.4(a).

requirement that is under age 40 would appear to constitute a violation of the ADEA on its face. But like Title VII, the ADEA recognizes the bona fide occupational qualification (BFOQ) defense.[21] In the hiring context, this means that it will **not** be a violation of the ADEA to reject an applicant **because of his or her age** when the employer can show that "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." The U.S. Supreme Court made clear that the reasonably necessary standard is a much higher standard than a "reasonable" standard.[22] A reasonably necessary standard requires an employer to show that there are **no** alternative means for safe operation of its business.

Most ADEA cases that involve the BFOQ defense involve mandatory retirement ages, but the same principles apply equally to hiring cases. The BFOQ defense has been primarily used to justify age limits on positions that affect public safety.

The ADEA's Exception Allowing Maximum Hiring and Mandatory Retirement for Law Enforcement Officers and Firefighters

Under section 623(j), the ADEA allows state and local governments to set age restrictions on law enforcement officers and firefighters *without* establishing that age is a BFOQ for those positions:

> It shall not be unlawful for an employer which is a State [or] a political subdivision of a State ... to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken-
>
> (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer ... and the individual has attained- . . . .
>
> (A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or
>
> (B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; . . . and

[21]*See* 29 U.S.C. § 623(f)(1).
[22]*See Western Airlines*, 472 U.S. at 417 - 23.

> (2) pursuant to a bona fide hiring . . . plan that is not a subterfuge to evade the purposes of this chapter.[23]

Public employers may therefore set maximum ages above which they will not consider an applicant for employment in law enforcement or firefighting. They may reject any applicant who has reached that maximum age at the time of his or her application. Public employers may not, however, reject a law enforcement or firefighting applicant because they are over age 40 *unless they adopt an ordinance setting forth an age restriction*, and they may not reject an applicant because the applicant is only a year or two away from reaching the maximum age restriction.[24]

Note that public employers may also adopt mandatory retirement provisions, so long as the mandatory retirement age is not lower than age 55.

Unintentional or Disparate Impact Discrimination under the ADEA

Like Title VII, the ADEA prohibits employers from engaging in practices that have an adverse impact on persons protected by the statute. The ADEA, however, does allow employers to differentiate among applicants or employees "where the differentiation is based on reasonable factors other than age."[25] The "reasonable factors other than age" (RFOA) defense is an affirmative defense, which means that the employer must prove it by a preponderance of the evidence. Thus, some employment criteria may be reasonable and may allow an employer to escape liability using the "reasonable factor other than age" (RFOA) defense even where there is an adverse impact on older workers.

The RFOA defense to a claim of adverse impact remains somewhat easier for an employer to prove than is the business necessity defense required by Title VII. The business

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[23]*See* 29 U.S.C. § 623(j). *See also Correa-Ruiz v. Fortuno*, 573 F.3d 1, at *9, ftnte. 12 (1st Cir. 2009); *Kannady v. City of Kiowa*, 590 F.3d 1161, 1166 (10th Cir. 2010); *Feldman v. Nassau County*, 434 F.3d 177, 184 (2d Cir. 2006).
[24]For a clear and concise history of the ADEA's exemption for public safety, *see Correa-Ruiz*, 573 F.3d at *5 - *6.
[25]*See* 29 U.S.C. § 623(f)(1); 29 CFR § 1627.7.

necessity defense requires employers to show that there are no other ways for it to achieve its goals that do not result in a disparate impact on a protected class. The RFOA defense has no such requirement. It requires that the way an employer chooses to achieve its goals be reasonable:

> To establish the RFOA defense, an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer.[26]

Thus, in the case Smith v. City of Jackson, the city's decision to give larger raises to lower-level law enforcement employees than to those with more seniority was reasonable given its stated goal of bringing salaries into line with that of surrounding police departments and improving its retention rate. Despite the fact that it resulted in a statistical imbalance in the number and dollar amount of raises awarded to older as compared to younger employees, the city was not liable for disparate impact.[27]

North Carolina Law Prohibiting Discrimination on the Basis of Race, Color, Gender, Religion, National Origin or Age

The North Carolina Equal Employment Practices Act, found at General Statutes §§ 143-422.1 through 143-422.3, declares that it is the public policy of the state to "protect and safeguard the right and opportunity of all persons to see, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more persons." The courts treat claims brought under the Equal Employment Practices Act as claims of wrongful discharge in violation of public policy.[28]

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[26]*See* 29 CFR § 1625.7(e)(1). Subsection (e)(2) set forth some of the considerations relevant to whether a practice is based on a reasonable factor other than age.
[27]*See City of Jackson*, 544 U.S. at 242-43.
[28]*See, e.g., Bendross v. Town of Huntersville*, 159 N.C. App. 228 (2003); Gibbs v. Guilford Technical Cmty. Coll., 149 N.C. App. 972 (2002).

The Americans with Disabilities Act

The Americans with Disabilities Act (the ADA) prohibits employers from against a qualified individual discriminating on the basis of disability with respect to job application procedures, the hiring, advancement and/or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.[29]

The ADA may be the most complex of the federal anti-discrimination statutes in that it is the only statute that requires employers to take certain actions in addition to abstaining from other actions: the ADA requires employers to provide a reasonable accommodation to the known physical or mental limitations of applicants and employees, unless doing so would impose an undue hardship on the employer's operations. *The obligation to make reasonable accommodation is a form of non-discrimination.* Each situation is based on an individual assessment of the applicant or employee's disability with respect to the position in question.

The ADA also prohibits employers from asking any questions of job applicants that are likely to reveal the existence of a disability until it has extended a condition offer of employment. This prohibition effectively means that an employer cannot ask any questions about the applicant's medical history or conditions, nor may it require a medical examination, before offering the applicant a job.[30]

While Title VII protects everyone who might experience discrimination on the basis of race, color, gender, religion or national origin and the ADEA protects anyone age 40 or above, whom the ADA protects is less clear. Analyzing whether an individual falls within the ADA-protected class requires applying a series of definitions. So to understand what it means to say that

[29]The employment provisions of the ADA are codified at 42 U.S.C. §§12111-12213. The EEOC's ADA regulations may be found at 29 CFR Part 1630.
[30]*See* 42 U.S.C. § 12112(d); 29 CFR § 1630.14(a) and (b).

the ADA prohibits employers from discriminating against a qualified individual on the basis of disability, we must define the term "disability," as well as the phrase "qualified individual." The ADA defines *disability* as a physical or mental impairment that substantially limits a person in performing one or more major life activities. This definition, in turn, requires definition of another phrase, that of "major life activities." Major life activities are defined by the statute and EEOC regulations through examples. Major life activities include, but are not limited to:

- caring for oneself
- performing manual tasks
- walking
- seeing, hearing, speaking
- breathing
- learning
- eating
- bending
- reading
- working
- sitting
- standing
- sifting
- reaching
- thinking
- interacting with others
- sleeping
- speaking
- concentrating
- communicating.[31]

Major life activities also include major bodily functions, such as

- functions of the immune system
- normal cellular growth
- digestive and bowel functions
- endocrine functions.[32]
- neurological and brain functions
- respiratory and circulatory function
- reproductive functions, and

Persons who have a record of such an impairment or are regarded as having such an impairment are also covered by the ADA. The ADA provides that the definition of disability is to be construed in favor of broad coverage of individuals.[33]

Once they have established whether an individual has a disability within the meaning of the law, employers and applicants must consider the meaning of the phrase *qualified individual*. A qualified individual means one who has the prerequisite skills, experience, education and other

[31]*See* 42 U.S.C. § 12102(2)(A); 29 CFR § 1630.2(i)(1)(i).
[32]*See* 42 U.S.C. § 12102(2)(B); 29 CFR § 1630.2(i)(1)(ii).
[33]*See* ADA Amendments Act (ADAAA), Pub. L. No. 110-325, § 3(4)(A)(2008).

job-related requirements of the position and who, *with or without reasonable accommodation*, can perform the *essential functions* of the job. The essential functions of the job, in turn, are the basic, fundamental duties that the employee must perform. The term "essential functions" does not include the marginal functions of the position.

The ADA applies to all local government entities with 15 or more employees.

The ADA and Small Public Employers

As noted above, Title I of the ADA and the ADA regulations issued by the EEOC (29 C.F.R. Part 1630) cover all state and local government employers with 15 or more employees. But that doesn't mean that smaller government employers are off the hook as far as accommodating persons with disabilities goes. Local government employers with fewer than 15 employees are covered by regulations issued under the Rehabilitation Act of 1973 (29 U.S.C. §§ 701),[34] which also prohibits discrimination in employment against handicapped persons. The substance of the law that governs the treatment of disabled persons by local government employers is not measurably different for those small jurisdictions with fewer than fifteen employees than it is for jurisdictions with fifteen or more employees because the ADA is based on the earlier Rehabilitation Act and later Rehabilitation Act cases have looked to ADA cases for precedent and guidance.

Disparate Impact or Unintentional Discrimination under the ADA

The disparate impact or unintentional discrimination theory of discrimination is available to ADA plaintiffs as it is under Title VII and the ADEA. The standard of proof that a rejected applicant must meet under the ADA, however, is lighter than that under Title VII and the ADEA. As noted above, the general rule against discriminating on the basis of disability in set forth in 42 U.S. § 12112(a):

> No covered entity shall discriminate against a qualified individual on the

[34]*See* 42 U.S.C. § 12132 (2002); 28 C.F.R. § 35.140(a).

> basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

The statute gives very specific definitions of what the phrase "discriminate against a qualified individual on the basis of disability" means in subsection (b). In subsections (b)(6) and (7), it addresses the use of qualification standards and testing, which are the areas in which disparate impact on the basis of disability is most likely to occur:

> (b) As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes—
>
> (6) using qualification standards, employment tests or other selection criteria that *screen out or tend to screen out an individual with a disability* ***or*** *a class of individuals with disabilities* unless the standard, test or other selection criteria, as used by the covered entity, is shown to be *job-related for the position in question and is consistent with business necessity*; and
>
> (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure) (emphases added).[35]

So, like Title VII and the ADEA, the ADA allows rejected applicants to show that a facially neutral employment practice – here, the use of qualifications or tests to screen and evaluate applicants – has had the effect of removing applicants with given disabilities from further consideration for employment. Where the ADA differs from Title VII and the ADEA is in the fact that a plaintiff does not need to show that the qualification standard or test has had a disparate impact on a group or class of applicants with disabilities – the plaintiff need only show

[35]See 42 U.S.C. §§ 12112(b)(6) and (7).

that the employer used a selection device that screened him or her out. Under the ADA, the plaintiff does not need to prove that others were similarly screened out or to make a statistical showing comparing the number of persons with the disability that one would find in the demographic pool compared to the number considered for the position.[36] Another way of saying this is that under the ADA, a recruitment or hiring practice can have a disparate impact against a single person.

The ADA expressly says, however, that an employer may use a qualification standard, test or other selection device that screens out persons with particular disabilities if that selection device is "job-related and consistent with business necessity" and satisfaction of the standard or performance of the test or selection process cannot be accomplished through reasonable accommodation.[37] The burden is on the employer to prove job-relatedness and business necessity.

Once an employer demonstrates that the pertinent qualification standard is job-related and consistent with business necessity, the burden shifts to the plaintiff to offer a reasonable accommodation that would seem to allow him to satisfy that standard. The employer would then have to show that performance of the job could not be accomplished through the proposed accommodation or that it would pose an undue hardship. But as noted earlier, reasonable accommodation may include acquiring or modifying equipment or devices, job restructuring, providing readers and/or interpreters, or making physical changes to the workplace.[38]

[36]*See Gonzales v. City of New Braunfels, Tex.*, 176 F.3d 834, 839 (5th Cir. 1999).
[37]*See* 42 U.S.C. § 12113(a). *See also Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 995 (9th Cir. 2007).
[38]*See* 42 U.S.C. § 12111(A); 29 CFR § 1630.2(a).

Three Things That Make the ADA Different from Title VII and the ADEA

Difference #1: The ADA Prohibits Pre-Offer Medical Inquiries

Under Title VII and the ADEA, application questions such as "what is your race?" or "date of birth" or "age," are not unlawful on their face. But the fact that an employer has asked those questions will certainly be used as evidence of discriminatory intent in a failure to hire case. The ADA is different in that it expressly prohibits employers from directly asking a job applicant about a disability or asking any other questions that are likely to reveal the existence of a disability.[39] An employer may not, therefore, ask "Do you need a reasonable accommodation to perform this job?" or "Do you have any medical conditions that would prevent you from performing this job?" or even "Have you ever filed a workers' comp claim?" [40]An employer may ask, however, about the applicant's ability to perform specific job functions, such his or her ability to lift a certain amount of weight, about the applicant's non-medical qualifications and skills, such as work history, education, required licenses and certifications, and for applicants to describe or demonstrate how they perform job tasks.

Once an offer has been extended, the employer may require the successful applicant to take a medical examination -- provided that it requires medical exams of all new employees in the same job category. Once an offer has been extended, the employer may also ask disability related questions, including questions about an applicant's workers' compensation history, attendance record at previous jobs, and health. If a conditional offer is withdrawn after a post-offer medical examination or discussion of the applicant's medical history, the reasons for withdrawal of the offer must be job-related and consistent with business necessity.[41]

[39]*See* 42 U.S.C. § 12112(d). Note that the ADA has separate rules for pre-offer medical inquiries and examinations and post-offer medical inquiries and examinations, and for inquiries and examinations of current employees.
[40]*See* 29 CFR Part 1630 App. § 1630.13(a).
[41]*See* 29 CFR § 1630.14(b)(3).

Once an applicant becomes an employee, an employer is absolutely prohibited from requiring a medical examination or making inquiries of an employee as to whether the employee is disabled and about the nature or severity of the disability *unless the examination or inquiry is shown to be job-related and consistent with business necessity*.[42]

Difference #2: Employers Must Make the Recruitment and Selection Process ADA-Compliant

What affirmative obligations does the ADA place on employers in the hiring process? First, an employer must ensure that the job application process itself is accessible to persons with disabilities. For example, although an employer need not have its job postings or standard form application pre-printed in Braille, it should be prepared either to do so if requested, or to provide a vision-impaired applicants with readers or transcribers to assist them in completing the application. Employers should also make job postings available in TDD form for those with visual impairments.

In addition, the human resources office should be easy to reach for persons with a disability. There should be clearly marked and ample parking for applicants who will arrive using wheelchairs or who cannot walk for long distances. The entrance to the building where the human resources office is located should be wheelchair-accessible. If the human resources office is not located on the ground floor, then there should be a wheelchair accessible elevator that brings applicants to it. Similarly, if managers, department heads and hiring committee will interview candidates somewhere other than the human resources office, then the employer must either schedule interviewing and testing in another handicap-accessible location or it must have

[42]*See* 42 U.S.C. § 12112(d)(4).

an accessible contingency location set aside in case a candidate arrives and needs wheelchair or elevator accessibility without that need having been apparent earlier.[43]

Sometimes a job applicant will ask for a change or modification of the some of the evaluative processes that the employer uses such as tests or assessment centers.[44] These may include requests for additional time to complete an examination, use of a written test in lieu of an oral examination where the candidate is hearing-impaired and the use of an oral examination in place of a written test where the applicant's vision is impaired.[45] Other types of accommodations could include giving an examination in an individual rather than a group setting. Sometimes an applicant's disability is obvious, as is the need for a modification of the application process. But sometimes it is not. The ADA requires an employer to provide a reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability, not to any request for a change in the application process. An employer may, therefore, ask an applicant to document a disability.

*Documenting a Disability***.** An employer may ask an applicant for medical documentation that establishes the existence of a disability entitling that applicant to a reasonable accommodation in the application process itself or to the job itself, should the applicant be successful. That being said, an employer cannot ask for more information than is necessary to

[43]*See, e.g., . Adeyemi v. Dist. of Columbia*, 525 F.3d 1222, 1224 (D.C. Cir. 2008) (where deaf applicant showed up for interview without giving enough notice that hearing interpreter would be needed, city accommodated applicant by typing questions on a computer screen and allowing employee to type responses).
[44]*See* 29 CFR § 1630.11.
[45]*See, e.g., Digianni v. Bloomberg*, 311 F. App'x. 492, 494 (2d Cir. 2009) *cert. denied*, 129 S. Ct. 2880 (U.S. 2009) (affirming grant of summary judgment to employer who had reasonably accommodated applicant with learning disability who requested and received extra time to complete timed writing sample and still failed to meet minimum competency requirements); *Fink v. New York City Dept. of Pers.*, 53 F.3d 565, 567 (2d Cir. 1995) (city reasonably accommodated visually impaired candidates for promotion with a tape recording of the examination, a tape recorder, as well as permission to use their own tape recorder if they preferred, a reader-assistant to help with the operation of the recorder and to read them questions and answers, a private room, and double the time afforded to other test-takers).

establish the existence of a disability. For example, an employer is not entitled to the complete psychiatric history of an applicant suffering from post-traumatic stress disorder, only to documentation of the disorder, its current effects and the long-term outlook for the applicant's recovery.[46]

Difference #3: An Employer Has a Duty to Reasonably Accommodate a Disability

A reasonable accommodation may be needed by an applicant or a current employee. The definition of reasonable accommodation is the same in either situation: a reasonable accommodation is any change or adjustment to a job or work environment that allows a qualified applicant or employee with a disability to enjoy equal employment opportunities. There are three major kinds of reasonable accommodations:

1. changes to a job application process or the promotional process (for example, modifying examinations);

2. changes to the work environment, or to the way a job is usually done to enable a qualified person with a disability to perform a position's essential functions; or

3. changes that allow an employee with a disability to enjoy equal benefits and privileges of employment enjoyed by other similarly-situated employees (for example, access to training).[47]

Most accommodations fall into the second category, and may include changes or modifications to training materials or policies, acquiring or modifying equipment or devices. In the case of applicants who have been offered the position or current employees, reasonable accommodations may include job restructuring, modified work schedules, reassignment to a vacant position, providing readers and/or interpreters, offering leave without pay, or making physical changes that make the workplace more readily accessible to persons with disabilities.[48]

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[46]*See* Equal Employment Opportunity Commission, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act*, No. 915.002, 7/27/00, p. 12.
[47]See 29 CFR § 1630.2(o).
[48]*See* 42 U.S.C. § 12111(9); 29 CFR § 1630.2(o)(2).

The ADA requires the employer and the applicant or employee to work together to identify appropriate accommodations by using an informal, interactive process. In other words, the burden of finding a reasonable accommodation, if one exists, is on neither the individual with the disability nor the employer. The burden is on both. A reasonable accommodation is an effective accommodation – one that removes the workplace barrier at issue. But if there are two possible reasonable accommodations, the employer may choose which one to implement; it does not have to choose the accommodation that the applicant or employee prefers.[49]

North Carolina Law Prohibiting Disability Discrimination

In 1985, prior to the passage of the federal Americans with Disabilities Act, the North Carolina General Assembly enacted the North Carolina Persons with Disabilities Protection Act.[50] The Persons with Disabilities Protection Act applies to any employer with 15 or more full-time employees. The act makes it a discriminatory practice to:

> fail to hire or consider for employment or promotion, to discharge, or otherwise to discriminate against a qualified person with a disability on the basis of a disabling condition with respect to compensation or the terms, conditions, or privileges of employment.[51]

Like the ADA and the federal Rehabilitation Act on which that statute was based, the Persons with Disabilities Act requires employers to investigate and make any possible reasonable accommodations to the hiring process or to the job that would enable a disabled applicant or employee to complete the application process or perform the job.[52] Courts usually look to analogous ADA and Rehabilitation Act cases to assist in interpreting this statute.[53]

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[49]*See* 29 CFR Part 1630, App. 1630.9.
[50]*See* G.S. §§ 168A-1 – 168A-11.
[51]*See* G.S. § 168A-5(a)(1).
[52]*See* G.S. § 168A-4.
[53]*See, e.g., Johnson v. Bd. of Trustees of Durham Technical Cmty. Coll.*, 157 N.C. App. 38, 46 (2003) (applying U.S. Supreme Court's decision in *McKennon* to facts at bar).

The Pregnant Workers Fairness Act (PWFA)

While Title VII, the Family and Medical Leave Act and the Americans with Disabilities Act already offer some protections for pregnant workers, the new federal Pregnant Workers Fairness Act (PWFA) fills in some key gaps. First, it explicitly prohibits discrimination based on pregnancy, childbirth, or related medical conditions. This includes discrimination in hiring, pay, job assignments, promotions, firing and more. But like the ADA, it also requires employers to take affirmative actions. The PWFA tells employers to treat pregnancy-related conditions as temporary disabilities that qualify for accommodations –the pregnant employee does not need to prove a separate ADA-qualifying disability. The PWFA requires employers to offer a broad range of potential accommodations like modified work schedules, lifting assistance, food and bathroom breaks, changes to seating, temporary reassignment and more. It also requires accommodation of conditions *related to pregnancy*, such as menstruation, miscarriage and abortion. Employers must engage in a timely, good faith interactive process with pregnant workers to determine appropriate reasonable accommodations, in a process similar to that required by the ADA. Again, as with the ADA, employers can deny an accommodation if would cause an undue hardship. While the PWFA applies to all federal and state agency employers, not every local government is subject to it. Like Title VII and the ADA, only local government employers with 15 or more employees fall under the PWFA.

Genetic Information Nondiscrimination Act (GINA)

Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers from discriminating based on genetic information and medical history.[54] An employer may never use genetic information to make an employment decision because genetic information is not

[54]*GINA* is codified at 42 U.S.C. §§ 2000ff – 2000ff-11. The EEOC's GINA regulations are at 29 CFR Part 1635.

relevant to an individual's current ability to work. Although the two statutes are related, GINA is distinct from the ADA in that the ADA prohibits discrimination on the basis of manifested conditions that meet the ADA's definition of disability, while GINA prohibits discrimination based on genetic information that may indicate that a condition may manifest itself in the future. GINA applies to employers with 15 or more employees.[55]

GINA prohibits the use of genetic information to discriminate in employment. This is an absolute prohibition. Unlike other nondiscrimination statutes, GINA provides no defenses for an employer: it recognizes no business necessity that would allow for the use of genetic information in making employment decisions. In addition to its prohibition against discrimination, GINA expressly prohibits employers from requesting, requiring or purchasing genetic information. It also requires employers to keep any genetic information that it accidentally acquires confidential.

What is genetic information for the purposes of GINA? Genetic information includes information about:

- an applicant or employee's genetic tests;
- genetic tests of the applicant or employee's family members;
- the manifestation of any disease or disorder in any of the applicant or employee's family members (with disease or disorder not limited to inheritable conditions);
- request for or receipt of genetic services by an applicant or employee; or
- genetic information concerning a fetus or embryo of an applicant, employee or family member.

Genetic information does not include information about an applicant, employee or family member's race, gender, ethnic background or age or the fact that a person currently has a disease or disorder (if, of course, the disease or disorder met the ADA's definition of disability, the

[55]*See* 42 U.S.C. § 2000ff(B)(i); 29 CFR § 1635.2(d).

person would be covered under that statute).

Some examples of genetic tests include:

- the test for the BRCA1 or BRCA2 gene, which indicates that the person has a greater risk of breast or ovarian cancer;
- the test for Huntington's Disease;
- carrier screening to determine whether a person is at risk of transmitting a disease-causing gene to his or her children (e.g., screening for the cystic fibrosis gene, sinckle cell anemia, spinal muscular strophy or fragile X syndrome); and
- DNA information about paternity.

Standard medical tests such as cholesterol tests, blood glucose tests or tests for drug or alcohol use are not genetic tests.

North Carolina Law Prohibiting Discrimination Based on Genetic Information

Like GINA, North Carolina General Statutes § 95-28.1A prohibits employers from denying employment to or refusing to hire someone on the basis of genetic information that concerns that person or a member of their family. G.S. § 95-28.1A applies to all state agencies and to all local government employers, regardless of size. Although the North Carolina statute predates GINA by more than 10 years, no reported cases have as yet arisen under it.

The Uniformed Services Employment and Reemployment Rights Act (USERRA)

The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") was enacted to prohibit employment discrimination against those who serve in the United States armed forces and to make it easier for people to perform non-career service in the armed forces by minimizing the disruption to their civilian careers.[56] USERRA protects any person serving in

[56]USERRA is codified at 39 U.S.C. §§ 4301 – 4333. The U.S. Department of Labor's administrative rules implementing USERRA may be found at 20 C.F.R. §§ 1002.1 – 1002.314.

the United States Army, Navy, Air Force, Marine Corps, and Coast Guard and their reserve units, as well as persons serving in the Army National Guard and Air National Guard, the commissioned corps of the Public Health Service, and "any other category of persons designated by the President in time or war or national emergency."[57]

USERRA impacts the recruitment and selection process in two ways. First, USERRA prohibits discrimination in hiring (and in all aspects of the employment relationship) against someone who is or ***shall be*** performing, has performed, or ***intends to perform*** military service. Thus, a person's initial employment application cannot be rejected on the ground that he or she is a member of the military reserves and is therefore likely to be absent when called up for duty. Similarly, if an employer were to learn that an applicant is not currently a member of the reserves, National Guard or other branch of the uniformed services, but intended to enlist, it could not reject the applicant on that basis.

Nor could an employer reject an applicant merely because his or her military service would make them unavailable to start employment on a particular day. A Massachusetts case involving an application to become a municipal police officer by a person on active service in the Army illustrates this principle.[58] Thomas McClain was an enlisted member of the U.S. Army. Before joining the Army, he took and passed the Massachusetts civil service examination required of all new police officers. Near the end of his term of service with the Army, the city of Somerville offered him a position as a police officer contingent on his availability to attend a previously scheduled police academy training session. McLain could not, however, obtain a release from the Army to attend the training session. Although the city considered McLain an "outstanding candidate" and freely admitted that it would have hired him if he had been available

[57]*See* 38 U.S.C. §§ 4303 (13), (16).
[58]*See McLain v. City of Somerville*, 424 F.Supp.2d 329 (D.Mass. 2006).

to start the training session, it withdrew its offer because of his unavailability. McLain sued the city of Somerville, alleging that it had violated his rights under USERRA by refusing to hire him because his military service prevented him from beginning his police training on a particular date. The court granted summary judgment in the case for McLain, finding that an employer may not discriminate in hiring based on a prospective employee's unavailability due to his obligation to perform military service. [59]

USERRA and the Promotional Process

Employees cannot be denied consideration for newly available promotions simply because they are on military leave and are not present to apply for them.[60] Where the promotional process involves sitting for an examination, as law enforcement and firefighting frequently require, failure promptly to offer an employee performing military service a make-up promotional exam may constitute discrimination.[61] USERRA is not, however, an affirmative action hiring statute. An employer need not hire a member of the armed forces if that person is not the best person for the job.[62]

[59]*See McLain*, 424 F.Supp.2d at 336-38..
[60]*See Haskins v. Department of Navy*, 86 MSPB 357 (2000) (allegation that agency failed to consider employee for promotion while he was serving in Operation Desert Storm states a claim for which relief may be granted under USERRA); *Brandsasse v. City of Suffolk, Virginia*, 72 F.Supp.2d 608, 619 (E.D.Va. 1999) (city's initial refusal to allow plaintiff to sit for a promotional exam that conflicted with his active duty orders, followed by retaliatory investigation when he insisted on enforcing his right to take the exam, constitutes discrimination under USERRA).
[61]*See Fink v. City of New York*, 129 F.Supp. 2d 511, 520 (E.D.N.Y. 2001) (reasonable jury could find that plaintiff's military status was a motivating factor in denying his request for a promptly-administered promotional exam upon SShis return from duty).
[62]*See Gambrill v. Cullman County Bd. of Educ.*, 395 F. App'x 543, 544 (11th Cir. 2010) (district court did not err in concluding that regardless of plaintiff's military involvement, the defendants would have hired the successful applicant because he was the most qualified candidate to be assistant principal). *See also Madden v. Rolls Royce Corp.*, 563 F.3d 636, 638 (7th Cir. 2009) (reason for not hiring temporary employee on permanently was not his military status, but his dangerously incompetent work as an engineer)..

Filling Vacancies Caused by Military Leave

The second way that USERRA impacts the hiring process is that it requires employers to grant employees job-protected leave to serve in the armed forces, whether they are called to duty voluntarily or volunteer for service. Employees are entitled to take military leave for cumulative periods as long as five years, and in some cases, for even longer periods.[63] Thus, USERRA creates temporary vacancies (and in some cases, long-term temporary vacancies) for which employers must hire new workers. When hiring an employee into a USERRA-created vacancy, the employer must make clear to applicants that they may be dismissed when the person who regularly holds the position returns from duty. This is especially important where an ordinance gives employees who have completed a probationary period the right to continued employment absent performance or conduct issues (a so-called "property right in employment"). A temporary employee whose performance is outstanding – perhaps even better than that of the employee on military leave – generally cannot displace the serviceperson from that position. If the employer wishes to keep the temporary employee on as a permanent employee, it will have to make room for both the returning serviceperson and the temporary employee.

North Carolina Law Protecting Those Who Serve in the Military from Discrimination

North Carolina General Statutes §§ 127B-12 and 127B-14 also prohibit discrimination in employment against military personnel by public entities. Specifically, the General Statutes enjoin an "officer or employee of the State, or of any county, city and county, municipal corporation, school district, water district, or other district" from discriminating against members of the Armed Forces "with respect to their employment, appointment, position or status" and from denying, disqualifying or discharging them "from their employment or position by virtue of

[63]*See* 38 U.S.C. §§ 4312 (a)(2), (c)(1)-(4), (f)(1).

their membership or service in the military forces of this State or of the United States."[64] These provisions do not, however, provide persons serving in the armed forces or reserves any greater rights in employment than does USERRA. Violations of these provisions of the General Statutes constitute Class 2 misdemeanors. In addition, G.S. § 127A-202.1 prohibits discrimination in employment on the basis that an applicant is a member of the North Carolina National Guard or has performed, applies to perform or has an obligation perform service in the National Guard.

While the General Statutes require state agencies and institutions to observe a veteran preference in employment, they do not require local government employers to do so.[65] Local government employers are, however, free to adopt such a policy.[66]

North Carolina's Statute Prohibiting Discrimination for the Lawful Use of Lawful Products

Like a number of other tobacco growing states, North Carolina adopted a statute prohibiting both public and private employers from discriminating against those who use tobacco products when they are not at work. North Carolina General Statutes § 95-28.2 provides applicants and employees with broader protections than simply the right to smoke off-duty: it prohibits any form of discrimination in employment because a person

> engages in or has engaged in the lawful use of lawful products if the activity occurs off the premises of the employer during nonworking hours and does not adversely affect the employee's job performance or the person's ability to properly fulfill the responsibilities of the position in question or the safety of other employees.[67]

[64]*See* G.S. § 127B-12, and more generally, G.S. §§ 127B-10 – 127B-15.
[65]*See* G.S. §§ 126-82 and 128-15.
[66]23 NCAC 02C .0210(a)(30) makes clear that community colleges are not considered state institutions for the purposes of the veterans' preference and that each community college has the authority to adopt its own policy on veterans.
[67]*See* G.S. § 95-28.2(b).

This statute does not prohibit employers from banning smoking (or any other legal substance, like alcohol) from their premises, but it does prohibit employers from taking into account the fact that an employee's use of tobacco, for example, might increase its health insurance costs.[68]

[68]G.S. § 95.28.2(d), however, allows an employer to charge an employee who uses tobacco or another lawful product a higher premium for insurance policies if it can prove that there is an actuarial differential.