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Addressing Police Misconduct Laws Enforced By The Department Of Justice

The vast majority of the law enforcement officers in this country perform their very difficult jobs with respect for their communities and in compliance with the law. Even so, there are incidents in which this is not the case. This document outlines the laws enforced by the United States Department of Justice (DOJ) that address police misconduct and explains how you can file a complaint with DOJ if you believe that your rights have been violated.

Federal laws that address police misconduct include both criminal and civil statutes. These laws cover the actions of State, county, and local officers, including those who work in prisons and jails. In addition, several laws also apply to Federal law enforcement officers. The laws protect all persons in the United States (citizens and non-citizens).

Each law DOJ enforces is briefly discussed below. In DOJ investigations, whether criminal or civil, the person whose rights have been reportedly violated is referred to as a victim and often is an important witness. DOJ generally will inform the victim of the results of the investigation, but we do not act as the victim's lawyer and cannot give legal advice as a private attorney could.

The various offices within DOJ that are responsible for enforcing the laws discussed in this document coordinate their investigative and enforcement efforts where appropriate. For example, a complaint received by one office may be referred to another if necessary to address the allegations. In addition, more than one office may investigate the same

complaint if the allegations raise issues covered by more than one statute.

What is the difference between criminal and civil cases? Criminal and civil laws are different. Criminal cases usually are investigated and handled separately from civil cases, even if they concern the same incident. In a criminal case, DOJ brings a case against the accused person; in a civil case, DOJ brings the case (either through litigation or an administrative investigation) against a governmental authority or law enforcement agency. In a criminal case, the evidence must establish proof "beyond a reasonable doubt," while in civil cases the proof need only satisfy the lower standard of a "preponderance of the evidence." Finally, in criminal cases, DOJ seeks to punish a wrongdoer for past misconduct through imprisonment or other sanction. In civil cases, DOJ seeks to correct a law enforcement agency's policies and practices that fostered the misconduct and, where appropriate, may require individual relief for the victim(s).

Federal Criminal Enforcement

It is a crime for one or more persons acting under color of law willfully to deprive or conspire to deprive another person of any right protected by the Constitution or laws of the United States. (18 U.S.C. §§ 241, 242). "Under color of law" means that the person doing the act is using power given to him or her by a governmental agency (local, State, or Federal). A law enforcement officer acts "under color of law" even if he or she is exceeding his or her rightful power. The types of law enforcement misconduct covered by these laws include excessive force, sexual assault, intentional false arrests, theft, or the intentional fabrication of evidence resulting in a loss of liberty to another. Enforcement of these provisions does not require that any racial, religious, or other discriminatory motive existed. **What remedies are available under these laws?** These are criminal statutes. Violations of these laws are punishable by fine and/or imprisonment. There is no private right of action under these statutes; in other words, these are not the legal provisions under which you would file a lawsuit on your own.

Federal Civil Enforcement

"Police Misconduct Provision"

This law makes it unlawful for State or local law enforcement officers to engage in a pattern or practice of conduct that deprives persons of rights protected by the Constitution or laws of the United States. (34 U.S.C. § 12601). The types of conduct covered by this law can include, among other things, excessive force, discriminatory harassment, false arrests, coercive sexual conduct, and unlawful stops, searches or arrests. In order to be covered by this law, the misconduct must constitute a "pattern or practice" --it may not simply be an

isolated incident. The DOJ must be able to show in court that the agency has an unlawful policy or that the incidents constituted a pattern of unlawful conduct. However, unlike the other civil laws discussed below, DOJ does not have to show that discrimination has occurred in order to prove a pattern or practice of misconduct. **What remedies are available under this law?** The remedies available under this law do not provide for individual monetary relief for the victims of the misconduct. Rather, they provide for injunctive relief, such as orders to end the misconduct and changes in the agency's policies and procedures that resulted in or allowed the misconduct. There is no private right of action under this law; only DOJ may file suit for violations of the Police Misconduct Provision.

Title VI of the Civil Rights Act of 1964 and the "OJP Program Statute"

Together, these laws prohibit discrimination on the basis of race, color, national origin, sex, and religion by State and local law enforcement agencies that receive financial assistance from DOJ. (42 U.S.C. § 2000d, et seq. and 34 U.S.C. § 10228). These laws prohibit both individual instances and patterns or practices of discriminatory misconduct, i.e., treating a person differently because of race, color, national origin, sex, or religion. The misconduct covered by Title VI and the OJP (Office of Justice Programs) Program Statute includes, for example, harassment or use of racial slurs, discriminatory arrests, discriminatory traffic stops, coercive sexual conduct, retaliation for filing a complaint with DOJ or participating in the investigation, discriminatory use of force, or refusal by the agency to respond to complaints alleging discriminatory treatment by its officers. **What remedies are available under these laws?** DOJ may seek changes in the policies and procedures of the agency to remedy violations of these laws and, if appropriate, also seek individual remedial relief for the victim(s). Individuals also have a private right of action in certain circumstances under Title VI and under the OJP Program Statute; in other words, you may file a lawsuit yourself under these laws. However, you must first exhaust your administrative remedies by filing a complaint with DOJ if you wish to file in Federal Court under the OJP Program Statute.

Title II of the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973

The Americans with Disabilities Act (ADA) and Section 504 prohibit discrimination against individuals on the basis of disability. (42 U.S.C. § 12131, et seq. and 29 U.S.C. § 794). These laws protect all people with disabilities in the United States. An individual is considered to have a "disability" if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

The ADA prohibits discrimination on the basis of disability in all State and local government

programs, services, and activities regardless of whether they receive DOJ financial assistance; it also protects people who are discriminated against because of their association with a person with a disability. Section 504 prohibits discrimination by State and local law enforcement agencies that receive financial assistance from DOJ. Section 504 also prohibits discrimination in programs and activities conducted by Federal agencies, including law enforcement agencies.

These laws prohibit discriminatory treatment, including misconduct, on the basis of disability in virtually all law enforcement services and activities. These activities include, among others, interrogating witnesses, providing emergency services, enforcing laws, addressing citizen complaints, and arresting, booking, and holding suspects. These laws also prohibit retaliation for filing a complaint with DOJ or participating in the investigation. **What remedies are available under these laws?** If appropriate, DOJ may seek individual relief for the victim(s), in addition to changes in the policies and procedures of the law enforcement agency. Individuals have a private right of action under both the ADA and Section 504; you may file a private lawsuit for violations of these statutes. There is no requirement that you exhaust your administrative remedies by filing a complaint with DOJ first.

How to File a Complaint with DOJ

Criminal Enforcement

If you would like to file a complaint alleging a violation of the criminal laws discussed above, you may contact the Federal Bureau of Investigation (FBI), which is responsible for investigating allegations of criminal deprivations of civil rights. You may also contact the United States Attorney's Office (USAO) in your district. The FBI and USAOs have offices in most major cities and have publicly-listed phone numbers.

You can find your local office here:

<https://www.fbi.gov/contact-us>

Civil Enforcement

If you would like to report a violation of the Police Misconduct Statute, Title VI, or the OJP Program Statute, contact the Justice Department at civilrights.justice.gov.

How do I file a complaint about the conduct of a law enforcement officer from a Federal agency?

If you believe that you are a victim of criminal misconduct by a Federal law

enforcement officer (such as Immigration and Customs Enforcement; the FBI; Alcohol, Tobacco, Firearms and Explosives; Drug Enforcement Agency, United States Marshals Service, or the Border Patrol), you should follow the procedures discussed above concerning how to file a complaint alleging violations of the criminal laws we enforce. If you believe that you have been subjected by a Federal law enforcement officer to the type of misconduct discussed above concerning "Federal Civil Enforcement," visit civilrights.justice.gov.

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NEWS & COMMENTARY

Protecting and Serving All, Regardless of Faith



Edward L. Smith, Former Chief of Police

May 1, 2013

As a former police chief of numerous Oklahoma towns, including Seminole, Clinton, Blackwell, Owasso, Bethany, and Chickasha, I have seen officers disciplined for a variety of insubordinate acts. During my 35 years in law enforcement, however, I have never had to discipline an officer for refusing to carry out an assignment because he objects to the faith of the individuals he has been ordered to serve. Indeed, no officer serving under me has claimed that right because every law enforcement official knows that refusing orders on these grounds would not only amount to insubordination, but would also violate the oath sworn by all officers to uphold the U.S. Constitution. That oath requires that as, police officials, we serve and protect *all* members of the community, regardless of faith or belief.

That's why I am deeply troubled by a lawsuit filed by a Tulsa police officer, who claimed the extraordinary right to ignore an assignment that involved followers of the Muslim faith. As part of its community-policing initiative, the Tulsa Police Department decided to participate in a Law Enforcement Appreciation Day hosted by the Islamic Society of Tulsa. In my experience, community policing is an essential part of any comprehensive crime prevention plan. It allows police departments to build relationships, trust, and credibility with the community so that citizens cooperate and assist with criminal investigations and rely on the police to resolve disputes.

Like the 300-plus local events hosted by religious organizations and attended by Department officials in recent years, the Islamic Society Appreciation Day offered the Department a crucial opportunity to build bridges with a growing, but often-marginalized community population. Captain Fields and other shift supervisors were ordered to assign several officers to attend the event, or to attend themselves. Attending officers were not required to participate in any religious discussion, prayer, or worship service, and the Department assured Fields that officers would not have to be present in the building at all when the day's planned worship service began.

Nevertheless, Captain Fields refused to carry out the orders, claiming that he could not attend – or even order subordinates to attend – because it would violate his belief that he must proselytize anyone who he knows does not share his Christian faith. After receiving a two-week suspension, Fields sued the city for violating his religious exercise rights.

From my perspective as a longtime law enforcement officer, the Department had no choice but to hold Captain Fields accountable for his insubordination. Allowing officers to refuse assignments because they deem them unimportant or because they conflict with their personal religious beliefs would set an unworkable precedent for law enforcement agencies across the state and nation and severely undermine their ability to effectively and efficiently protect the public.

What's more, allowing officers to reject orders to serve people of other faiths would give rise to religious strife and hostility within the community and would likely result in a two-tiered law enforcement system that treats religious minorities as second-class citizens. As the ACLU correctly points out in a [friend-of-the-court brief](#) filed last week with the U.S. Court of Appeals for the Tenth Circuit, under the precedent that Captain Fields seeks to set, he or other officers could refuse an assignment to guard a Sikh Temple that has been targeted for violence, ignore orders to provide a police presence at a war protest featuring Buddhist or other non-Christian speakers, decline to give a safety presentation at a Catholic school, avoid conducting foot patrols in neighborhoods with large Orthodox Jewish populations, or refuse to aid an injured woman in a hijab.

The right claimed by Captain Fields is fundamentally inconsistent with his sworn oath, which applies equally to reactive calls for assistance and more proactive duties, such as community policing—a critical part of any comprehensive crime prevention plan. It is, therefore, Captain Fields's professional responsibility to comply with all assignments issued by his superiors and his constitutional obligation to do

so without regard to the faith of members of the public who will be served.

Edward L. Smith is the former president of the Oklahoma Association of Chiefs of Police. In his 35-plus years in law enforcement, he has served with the Oklahoma City Police Department and as the chief of police for a number of Oklahoma towns. In these positions, he led the first two law enforcement agencies in Oklahoma to be nationally accredited by the National Commission on Accreditation for Law Enforcement Agencies, Inc. Smith is a graduate of the Oklahoma City University and the FBI National Academy. He currently serves as the Director of Public Safety and campus chief of police at the University of Arkansas at Little Rock.

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Free Exercise of Religion

Religious and Belief Discrimination

Overview

The Equality Act 2010 ("the Act") provides protection against discrimination because of religion or belief.



The definition of religion or belief

In the Act, 'religion or belief' is defined as being any religion, religious belief or philosophical belief. Individuals with no religious beliefs, such as atheists, are also protected. Major religions and beliefs (such as Christianity, Islam, Judaism, Hinduism, Sikhism, Humanism, Secularism and Paganism) are covered by the Act.

To amount to a philosophical belief under the Act, the individual must genuinely hold the belief, and meet the following, fairly vague, criteria:

- It cannot be a mere opinion on information currently available, it must be an actual belief
- It must relate to a weighty and substantial aspect of human behaviour
- It must attain a certain level of cogency, seriousness, cohesion and importance
- It must be worthy of respect in a democratic society, not be incompatible with human dignity, and not conflict with the fundamental rights of others
- It must be similar to a religious belief (only in the sense of status or cogency, but not in ideas).

Case law has established that the definition covers a belief in the need to cut carbon emissions to avoid climate change, or pacifism, or veganism, although not a belief in Jedi Knights. It can even extend to political beliefs such as Marxism, Communism or free-market Capitalism, but not merely to membership of a political party.

Scientific beliefs can also be covered, for example a belief in Darwinism, if this is the basis for discrimination suffered. A belief also need not be shared by others to constitute a 'belief' under the Act.

It remains unclear how far the Act will provide protection to those people who follow less traditional faiths. Consideration is given to whether there is collective worship, whether there is a clear belief system and whether there is a profound belief affecting way of life or view of the world in determining whether the religion or belief is covered by the Act.

The protection provided by the Act

Who is protected? - In the police sphere, the Act applies to recruitment, service and vocational training. It is unlawful to discriminate against someone because of religion or religious belief, from the initial job application process through to termination of service. Under the Act, 'employment' is widely defined to include the police service.

What is prohibited? - The Act outlaws direct and indirect discrimination, victimisation and harassment. The prohibited behaviour does not have to be directly committed by the force. The Act also extends in limited circumstances to discrimination after the working relationship has ended.

Discrimination, victimisation and harassment

Direct discrimination

It is unlawful to treat a person less favourably because of religion, or belief, or lack of a religion or belief. In order to succeed in a claim of direct discrimination, you must show:

- That you have been treated less favourably because of religion or belief
- That you can compare your treatment to someone (actual or hypothetical) with similar characteristics to yourself save for the religion or belief in issue
- That you were subject to disadvantage or detriment as a result of that treatment.

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There is no need to show motive or intention behind the discriminatory treatment as it is accepted that discriminatory treatment can be unconscious. Further, it does not matter if the discriminator shares the religion or belief of the individual being discriminated against.

The Act requires that 'like must be compared with like', so the less favourable treatment must be compared with that of someone of a different religion, known as a comparator. Your comparator must be a person who in all other respects is in a similar or 'not materially different' position to you. The comparator can be a real person or hypothetical. A useful test is the 'but for' test: for example would I have been treated the same way 'but for' the fact that I am a Christian?

The less favourable treatment does not necessarily have to be because of your own religion or belief. For example, someone who is treated less favourably because of his wife's religion would be protected. The Act also protects those who are treated less favourably because of their perceived religion or belief. One example of this is where someone who is not a Muslim is treated less favourably because he is perceived to be a Muslim.

Indirect discrimination

The Act provides that a force also discriminates if an arrangement or feature relating to the service (technically known as a provision, criterion or practice (PCP)) is applied or would be applied equally to all officers, but –

- Puts people of a particular religion, belief or lack of religion at a particular disadvantage when compared with people of another religion or belief;
- Puts the complainant at that disadvantage; and is not a proportionate means of reaching a legitimate aim (in other words the PCP is not objectively justified).

The PCP must have been applied universally to all. For example, a PCP that all officers must work on a Friday evening would probably adversely affect those of the Jewish faith compared to other religions. Whether or not the PCP puts one religious group at a particular disadvantage compared to another will often depend upon the 'pool' of people considered. The force must satisfy the tribunal that the PCP can be objectively justified. If this is established, a discrimination claim will fail.

“

The less favourable treatment does not necessarily have to be because of your own religion or belief.

”

In the case of *Cherfi v G4S Security Services Ltd* (2011), for example, the EAT ruled that the employer did not discriminate against by refusing an employee time off work each Friday to attend Friday prayer at his local mosque. The EAT ruled that due to the nature of the work required it was essential that the security guard was on site and the refusal was a proportionate means of achieving a legitimate aim.

Victimisation

It is unlawful to treat a person unfavourably because they have been involved in a complaint of discrimination. Discrimination by way of victimisation occurs when you are treated unfavourably because you have done, you are about to do, or you are suspected of doing a protected act'. A protected act includes:

- Bringing proceedings against the discriminator or any other person under the Act or the 2003 Regulations; or
- Giving evidence or information in connection with proceedings against the discriminator or any other person under the Act or the 2003 Regulations; or
- Doing anything in relation to the discriminator or any other person under or by reference to the Act or the 2003 Regulations; or



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- Making allegations that the discriminator or any other person has committed an act which contravenes the Act or the 2003 Regulations. This would include raising a grievance of religious discrimination.

So for example, if you have made a complaint about religious discrimination and are later treated unfavourably for doing so, you should be covered by the Act. Victimisation following termination of employment is also unlawful. A protected act must be done in good faith.

Harassment

Harassment related to religion, belief or lack of religion is a form of discrimination. It is defined as being:

- Unwanted conduct related to religion or belief that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

An essential characteristic of the behaviour is that it is unwanted. In considering the effect of the conduct, the Tribunal will consider the individual's own subjective experience together with whether it was reasonable for the conduct to have had that particular effect.

A claim can also be brought if harassment occurs because of an association with someone of a particular religion or belief, or if someone is perceived to hold a particular religion or belief.

Exceptions

Discrimination in employment is generally prohibited. However, in certain circumstances, the Force may have a defence to an act of discrimination that is otherwise unlawful.

The general occupational requirement exception. This is available where, having regard to the nature or context of the work, being of a particular religion or belief, is an occupational requirement. The defence will only succeed if the application of the requirement is a proportionate means of achieving a legitimate aim.

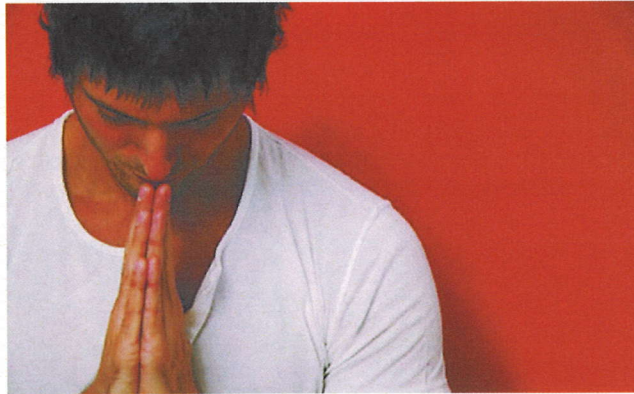
There are two positive action provisions:

1. The general positive action rule can apply where the Force reasonably thinks that persons with a particular protected characteristic are disadvantaged, have different needs or are disproportionately under-represented. In those circumstances, the Force can take proportionate measures to enable or encourage persons with the relevant characteristic to overcome that disadvantage, to meet their needs, or to enable or encourage their increased participation
2. The provision concerning positive action in recruitment and promotion. This applies where a Force reasonably thinks that persons with a particular protected characteristic are disadvantaged or disproportionately under-represented. In those circumstances, the Force can treat a person with the relevant characteristic more favourably than others in recruitment or promotion, as long as the person with the relevant characteristic is "as qualified as" those others.

Otherwise positive action is generally outlawed.

Burden of proof

It has long been recognised as difficult for those bringing discrimination claims to find evidence to support their case. To combat this, the Act provides that the claimant is required to establish clear facts which could enable the tribunal to conclude that discrimination has occurred. It is then for the respondent to provide evidence for the reason why the claimant was treated in that way. In the absence of an adequate non-religious/belief based explanation from the respondent, the tribunal must draw an inference of discrimination. Where a force has failed to comply with relevant statutory Codes of Practice, the tribunal may also draw inferences from this failure.



Time limits and the correct legislation

Most claims will need to be brought in the employment tribunal within three months less one day of the treatment you are complaining about.

Where that treatment amounts to a continuing course of conduct by the force, the claim may be brought within three months less one day from the end of the conduct. In some instances, if a claim is lodged out of time, the Employment Tribunal has the power to extend the time limits if it is just and equitable to do so. However, this power should not be relied on. This time limit applies even if you are going through the force's internal grievance procedure.

Questionnaire

You can serve a questionnaire on the force to obtain useful information relating to your complaint. ACAS have prepared guidance on 'asking and responding to questions of discrimination in the workplace' which is available on their website at www.acas.org.uk.

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Remedies

If the tribunal finds that you have been unlawfully discriminated against, it may grant whichever of the following remedies it considers just and equitable:

- A declaration of the rights of the parties
- A recommendation that the force take a particular course of action and,
- Compensation (plus interest) for loss of past and future earnings (if any), loss of congenial employment, injury to feelings and in some cases injury to health. There is no limit on the amount of compensation that can be awarded, but you can only be compensated for the damage which was directly caused by the force's discrimination as found by the tribunal.

Mandatory ACAS Early Conciliation

If you are thinking about making an employment tribunal claim, you will first need to notify details of your claim to ACAS, who will then offer early conciliation to try to resolve the dispute. The conciliation period can be up to one month. If the claim does not settle, ACAS will issue a certificate confirming that the mandatory conciliation process has concluded.

There are changes to time periods within which to lodge claims to allow for the period during which a claim is with ACAS. The period within which a claim is with ACAS will not count for calculation of time limits; and if the time limit would usually expire during that period, or within the month after the certificate is issued, then you will have up to one month following receipt of the conciliation certificate in which to lodge a claim.

The process makes the calculation of time limits in employment tribunal cases more complicated. Claimants are advised to be aware of limitation issues and seek legal advice promptly. For further information on the ACAS early conciliation process visit: www.acas.org.uk

Employment Tribunal Fees

You have to pay a fee when you file your claim in the employment tribunal. Fees are payable when you issue your claim and prior to a final hearing. A fee remission scheme is in place- see the employment tribunal website at www.employmenttribunals.service.gov.uk for further details. The booklet on the website "EX160A Court and Tribunal fees – do I have to pay them?" Provides details for claiming a remission of fees.

If you need further assistance, in the first instance please contact your local Joint Branch Board.

W: www.slatergordon.co.uk/policelaw

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