

CHAPTER 7

**EQUAL EMPLOYMENT OPPORTUNITY
AND AFFIRMATIVE ACTION**

Authority

N.J.S.A. 10:5-1 et seq., 11A:7-1, 11A:7-2, 11A:7-3, 11A:7-4, and 11A:7-5(a) and (b); P.L. 2006, c. 100 and 103; and 42 U.S.C. §2000e(a).

Source and Effective Date

R.2008 d.217, effective July 1, 2008.
See: 40 N.J.R. 1408(a), 40 N.J.R. 4521(b).

Chapter Expiration Date

In accordance with N.J.S.A. 52:14B-5.1b, Chapter 7, Equal Employment Opportunity and Affirmative Action, expires on July 1, 2015. See: 43 N.J.R. 1203(a).

Chapter Historical Note

Chapter 7, Equal Employment Opportunity and Affirmative Action, was adopted as R.1987 d.403, effective October 5, 1987. See: 19 N.J.R. 1020(a), 19 N.J.R. 1827(a). See, also, Title Historical Note prior to N.J.A.C. 4A:1.

Pursuant to Executive Order No. 66(1978), Chapter 7, Equal Employment Opportunity and Affirmative Action, was readopted as R.1992 d.420, effective September 22, 1992. See: 24 N.J.R. 2496(c), 24 N.J.R. 3721(a).

Pursuant to Executive Order No. 66(1978), Chapter 7, Equal Employment Opportunity and Affirmative Action, was readopted as R.1997 d.437, effective September 22, 1997. See: 29 N.J.R. 3104(a), 29 N.J.R. 4457(a).

Chapter 7, Equal Employment Opportunity and Affirmative Action, was readopted as R.2003 R.114, effective February 13, 2003. See: 34 N.J.R. 3573(a), 35 N.J.R. 1408(a).

Subchapter 3, Policy Prohibiting Discrimination, Harassment or Hostile Work Environments in the Workplace; Complaint Procedure, and Appeals, was renamed Policy Prohibiting Discrimination in the Workplace; Complaint Procedure, and Appeals, by R.2007 d.244, effective August 20, 2007. See: 39 N.J.R. 1340(a), 39 N.J.R. 3499(a).

Chapter 7, Equal Employment Opportunity and Affirmative Action, was readopted as R.2008 d.217, effective July 1, 2008. See: Source and Effective Date.

Subchapter 3, Policy Prohibiting Discrimination in the Workplace; Complaint Procedure, and Appeals, was renamed Policy Prohibiting Discrimination in the Workplace; Complaint Procedures, and Appeals by R.2014 d.099, effective June 2, 2014. See: 45 N.J.R. 500(a), 46 N.J.R. 1331(c).

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SUBCHAPTER 1. EQUAL EMPLOYMENT OPPORTUNITY

4A:7-1.1 General provisions

(a) There shall be equal employment opportunity for all persons in, or applicants for, the career, unclassified and senior executive services, regardless of race, creed, color, national origin, nationality, ancestry, sex/gender (including pregnancy), affectional or sexual orientation, gender identity or expression, age, marital status, civil union status, domestic partnership status, familial status, religion, atypical hereditary cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States, or disability, except where a particular qualification is specifically permitted and is essential to successful job performance. See N.J.A.C. 4A:4-4.5 on bona fide occupational qualification.

(b) Equal employment opportunity includes, but is not limited to, recruitment, selection, hiring, training, promotion, transfer, work environment, layoff, return from layoff, compensation and fringe benefits. Equal employment opportunity further includes policies, procedures and programs for recruitment, employment, training, promotion, and retention of minorities, women and persons with disabilities. Equal employment opportunity but not affirmative action is required with respect to persons identified solely by their affectional or sexual orientation.

(c) Persons with disabilities shall include any person who has a physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection. See N.J.S.A. 10:5-5(q). See also N.J.A.C. 4A:4-2.14 for accommodation and waiver of examinations for persons with disabilities.

(d) The following race/ethnic categories shall be used by the Department of Personnel:

1. W: "White, not of Hispanic origin" means persons having origins in any of the original peoples of Europe, North Africa or the Middle East;

2. B: "Black, not of Hispanic origin" means persons having origins in any of the Black racial groups of Africa;

3. H: "Hispanic" means persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race;

4. I: "American Indian or Alaskan Native" means persons having origins in any of the original peoples of North America, and who maintain cultural identification through tribal affiliation or community recognition; and

5. A: "Asian or Pacific Islander" means persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands and Samoa.

(e) Sexual harassment is a form of prohibited gender discrimination that will not be tolerated.

(f) This chapter prohibits all forms of discriminatory conduct against any State employee by any other State employee or person doing business with the State. In addition, this chapter prohibits any form of discriminatory conduct by a State employee against a person doing business with the State. A "person doing business with the State" means an independent vendor performing services or supplying goods pursuant to a contract with the State.

(g) In local service, an appointing authority may establish policies and procedures for processing discrimination complaints.

Administrative Correction to (a): Changed cross-reference cites from "4:1-12.7, 4:2-6.3 and 4:3-6.4" to "4A:4-4.5".

See: 22 N.J.R. 2266(a).

Amended by R.1992 d.420, effective October 19, 1992.

See: 24 N.J.R. 2496(c), 24 N.J.R. 3721(a).

Revised (a)-(c).

Amended by R.1994 d.72, effective February 7, 1994.

See: 25 N.J.R. 4821(b), 26 N.J.R. 794(b).

Amended by R.2002 d.10, effective January 7, 2002.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

Rewrote (a); in (d)3, substituted "Rican" for "Rico" and "American" for "America"; added (e) through (g).

Amended by R.2005 d.65, effective February 22, 2005.

See: 36 N.J.R. 4566(a), 37 N.J.R. 586(a).

In (a), inserted "domestic partnership status," following "age, marital status".

Amended by R.2007 d.244, effective August 20, 2007.

See: 39 N.J.R. 1340(a), 39 N.J.R. 3499(a).

In (a), inserted "nationality," "/gender (including pregnancy)," "gender identity or expression," and "civil union status,"; rewrote (c); in (e), substituted "prohibited" for "unlawful"; and in (f), deleted "unlawful" preceding "discriminatory conduct" two times, deleted "including sexual harassment," preceding the first occurrence of "against", and deleted "sexual harassment or" following "prohibits" and "other" following "any".

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-2.2.

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

Hackensack Meadowlands Development Commission, disability discrimination grievance procedure, see N.J.A.C. 19:3A-3.3.

Case Notes

Review of selection process; use of written test as qualifying and ranking device requires testing only in areas where higher scores relate to better job performance; adverse impact of test on minorities demonstrated; violation of consent decree by State on firefighter promotion selection process; examination inadequate to select fire captain/lieutenant (citing N.J.A.C. 4:1). *Vulcan Pioneers, Inc. v. New Jersey Dep't of Civil Service*, 625 F.Supp. 527 (D.N.J.1985) affirmed 832 F.2d 811.

Temporary restraining order granted to prohibit the appointment of entry level firefighters based on statistical showing of race discrimination should hiring take place as planned (citing former N.J.A.C. 4:1). *U.S. v. State of New Jersey*, 23 F.E.P. Case 1717, 22 EPD # 30, 287, 473, 473 F.Supp. 1199 (D.N.J.1980).

Sex Discrimination. *Terry v. Mercer Cty. Freeholder Bd.*, 173 N.J.Super. 249, 414 A.2d 30 (App.Div.1980) modified 86 N.J. 141, 430 A.2d 194 (1981).

Sex discrimination claim. *Kiss v. Community Affairs Dep't*, 171 N.J.Super. 193, 408 A.2d 450 (App.Div.1979).

Sex discrimination in regard to veteran's preference. *Ballou v. State Department of Civil Service*, 75 N.J. 365, 382 A.2d 1118 (1978).

Where the nature and extent of a county clerk's mental condition and accompanying alarming behavior precluded her from successfully performing her job, the appointing authority was not precluded from pursuing termination (adopting in part and rejecting in part 2007 N.J. AGEN LEXIS 574). In re *Wilson*, OAL Dkt. No. CSV 9640-04, 2007 N.J. AGEN LEXIS 1180, Final Decision (October 10, 2007), aff'd per curiam, No. A-1291-07T1, 2009 N.J. Super. Unpub. LEXIS 1055 (App.Div. May 5, 2009).

Denial of appointment based on applicant's sexual discrimination complaint constituted retaliation. *Graham v. Kearny Board of Education*, 97 N.J.A.R.2d (CRT) 173.

Police department's failure to apply male hiring standards to female candidate justifies unlawful discrimination damages. *McEvoy v. Borough of Glassboro and Glassboro Police Department*, 97 N.J.A.R.2d (CRT) 136.

Employee lacking appropriate job skills under operations reorganization loses age discrimination claim. *Botterman v. Bergen County Community Action Program*, 97 N.J.A.R.2d (CRT) 129.

Race discrimination claims dismissed after individuals hired were determined to be more qualified for position than complainant. *Parker v. Glassboro State College*, 96 N.J.A.R.2d (CRT) 24.

4A:7-1.2 Discriminatory inquiries

(a) A preemployment application shall not require an applicant to provide information covering subject matters which may be discriminatory, except where related to a job requirement or required by law. See Division on Civil Rights rules at N.J.A.C. 13:7-1.1.

(b) Preemployment and employment information which is required by the State or Federal government for statistical

purposes may be obtained by an appointing authority or the Department of Personnel.

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

4A:7-1.3 (Reserved)

Amended by R.1994 d.618, effective December 19, 1994.

See: 26 N.J.R. 3507(a), 26 N.J.R. 5000(a).

Repealed by R.2002 d.10, effective January 7, 2002.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

Section was "Prohibition of sexual harassment in State government".

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

Case Notes

Employee's inappropriate touching of another employee warrants removal. *West v. Trenton Psychiatric Hospital*, 97 N.J.A.R.2d (CSV) 297.

Employer and supervisor liable to employee for sexual discrimination base on vulgar conduct and language and post-filing retaliation and hostile work environment. *Peoples v. Gloria Limousine and Charter Bus Company and Willie White*, 97 N.J.A.R.2d (CRT) 115.

Dismissal of training recruit for improper physical contact and inappropriate comments affirmed. *Goodman v. Monmouth County Police Academy*, 97 N.J.A.R.2d (PTC) 17.

SUBCHAPTER 2. DIVISION OF EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION

4A:7-2.1 Division responsibilities: State service

(a) The Department of Personnel, Division of Equal Employment Opportunity and Affirmative Action (Division of EEO/AA) shall develop, implement and administer an equal employment opportunity and affirmative action program for all State employees in the career, senior executive and unclassified services. Such program shall:

1. Ensure that each State agency's equal employment opportunity and affirmative action goals for minorities and women are in accordance with their availability (for recruitment, transfer, or promotion). Availability is defined as the percentage of minorities and women in the State agency or the relevant recruitment area who have the requisite skills for appointment in a specific job category or group, or who are capable of acquiring such skills;
2. Ensure that each State agency undertakes good faith efforts to make employment opportunities available to persons with disabilities at all levels within the State agency's organization;
3. Monitor each State agency to ensure compliance with all laws and rules relating to equal employment

opportunity and affirmative action and to determine that the purposes of this subchapter are implemented through the State agency's Equal Employment Opportunity/Affirmative Action Officers;

4. Seek correction of discriminatory policies, practices and procedures;
5. Recommend appropriate sanctions for non-compliance to the Commissioner;
6. Review State personnel policies, practices and procedures, and where appropriate, eliminate artificial barriers to equal employment opportunity;
7. Act as liaison with Federal, State and local enforcement agencies;
8. Ensure that minorities, women and persons with disabilities are among the pool of applicants for all vacant positions in the career, unclassified and senior executive services;
9. Review its rules, selection devices and testing procedures in order to amend or eliminate those which are discriminatory;
10. Analyze job specifications to eliminate artificial barriers to employment;
11. Review all certification dispositions for compliance with this chapter;
12. Review all discrimination complaints under Title VII of the Civil Rights Act of 1964, the New Jersey Law Against Discrimination, and the New Jersey State Policy Prohibiting Discrimination in the Workplace; and evaluate trends and recommend appropriate policy changes;
13. Transmit to the Governor, at least semi-annually, progress reports on affirmative action in all State agencies; and
14. Perform such other duties as prescribed by law and these rules.

Amended by R.1992 d.420, effective October 19, 1992.

See: 24 N.J.R. 2496(c), 24 N.J.R. 3721(a).

Revised (a)1.

Amended by R.1994 d.72, effective February 7, 1994.

See: 25 N.J.R. 4821(b), 26 N.J.R. 794(b).

Amended by R.2002 d.10, effective January 7, 2002.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

Rewrote the section. Recodified in part from N.J.A.C. 4A:7-2.2.

Amended by R.2007 d.244, effective August 20, 2007.

See: 39 N.J.R. 1340(a), 39 N.J.R. 3499(a).

In (a)1, inserted "State" preceding "agency"; in a(2) and a(3), inserted "State" preceding "agency's"; and in (a)12, substituted a comma for "and" following "1964", and inserted "and the New Jersey State Policy Prohibiting Discrimination in the Workplace; and".

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

4A:7-2.2 Equal Employment Opportunity Advisory Commission: State service

(a) An Equal Employment Opportunity Advisory Commission shall be established and shall consist of 11 members appointed by the Governor, at least six of whom shall be minorities, women and persons with disabilities, and shall meet at least quarterly.

(b) The Commission shall advise the Division of EEO/AA and make recommendations on improving the State's affirmative action efforts.

Amended by R.1994 d.72, effective February 7, 1994.

See: 25 N.J.R. 4821(b), 26 N.J.R. 794(b).

Recodified from N.J.A.C. 4A:7-2.3 by R.2002 d.10, effective January 7, 2002.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

Former N.J.A.C. 4A:7-2.2, Department of Personnel responsibilities: State service, recodified in part to N.J.A.C. 4A:7-2.1.

Amended by R.2007 d.244, effective August 20, 2007.

See: 39 N.J.R. 1340(a), 39 N.J.R. 3499(a).

In (b), substituted "State's affirmative action efforts" for "State affirmative action plan".

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

4A:7-2.3 Appointing authority responsibilities

(a) In local service, an appointing authority may establish equal employment opportunity and affirmative action programs. Upon request, the Division of EEO/AA shall advise and assist local appointing authorities in the development of such programs.

(b) Each State agency shall:

1. Ensure equality of opportunity for all of its employees and applicants seeking employment;

2. Appoint at least one person as the Equal Employment Opportunity/Affirmative Action Officer who shall report to the State agency head or a designee within the office of the State agency head, and who shall serve on a full-time basis, unless otherwise requested by the State agency head and approved by the Commissioner of the Department of Personnel and the Director of the Division of EEO/AA;

3. Submit an affirmative action plan to the Director for approval, which shall include, but not be limited to, a policy statement, organization of the State agency, a description of how the plan is communicated to its employees, an analysis of the workforce and job categories, goals and timetables and specific recruitment/training programs to meet its goals;

4. Submit to the Director quarterly affirmative action reports and an annual update of its affirmative action plan which shall include an evaluation of the goals set for the prior year, the goals for the upcoming year and the number,

subject matter, time for processing and disposition of all discrimination complaints filed with the State agency;

5. Make a good faith effort to meet the affirmative action goals and timetables set forth in its affirmative action plan and updates. Any State agency which fails either to achieve or make a good faith effort to achieve its goals may be subject to sanctions and penalties;

6. Ensure that minorities, women and persons with disabilities are considered for employment opportunities where the need for aggressive efforts have been identified;

7. Explore and, where appropriate, implement innovative personnel policies to enhance equal employment opportunity and affirmative action;

8. Adopt and implement the Model Procedures for Internal Complaints Alleging Discrimination in the Workplace, N.J.A.C. 4A:7-3.2; and

9. In accordance with procedures established by the Division of EEO/AA for handling internal discrimination complaints, issue final letters of determination signed by the State agency head or a designee who shall be a deputy or assistant commissioner or a chief of staff or equivalent.

Amended by R.1992 d.420, effective October 19, 1992.

See: 24 N.J.R. 2496(c), 24 N.J.R. 3721(a).

Revised (b)6; stylistic changes in (b).

Amended by R.1994 d.72, effective February 7, 1994.

See: 25 N.J.R. 4821(b), 26 N.J.R. 794(b).

Recodified from N.J.A.C. 4A:7-3.1 and amended by R.2002 d.10, effective January 7, 2002.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

In (b), rewrote 2, substituted "recruitment/training programs" for "remedial action" in 3, and added 8. Former N.J.A.C. 4A:7-2.3, Equal Employment Opportunity Advisory Commission: State service, recodified to N.J.A.C. 4A:7-2.2.

Amended by R.2007 d.244, effective August 20, 2007.

See: 39 N.J.R. 1340(a), 39 N.J.R. 3499(a).

In (b)2 through (b)5, inserted "State" preceding "agency" throughout; in (b)2, inserted "the" preceding "Director"; in (b)7, deleted "and" from the end; in (b)8, deleted "Harassment or Hostile Environments" following "Discrimination" and substituted "; and" for a period at the end; and added (b)9.

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

Case Notes

Jury's verdict in favor of a police detective in her suit claiming reverse discrimination in the denial of a promotion based on race was not against the weight of the evidence as the city's argument that it was permissible to use race as a plus factor was never asserted at trial in any respect. Further, race was held to be a usable plus factor only pursuant to an established affirmative action plan, which the city did not have. *Klawitter v. City of Trenton*, 395 N.J. Super. 302, 928 A.2d 900, 2007 N.J. Super. LEXIS 280 (App.Div. 2007).

Race can be considered in an employment decision only pursuant to and in accordance with an established affirmative action plan. Without such a plan in place, an employer would be in violation of Title VII and the Law Against Discrimination, N.J.S.A. 10:5-1 through 10:5-49. *Klawitter v. City of Trenton*, 395 N.J. Super. 302, 928 A.2d 900, 2007 N.J. Super. LEXIS 280 (App.Div. 2007).