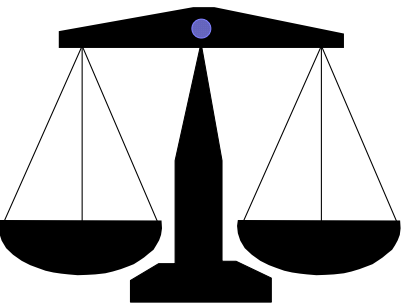




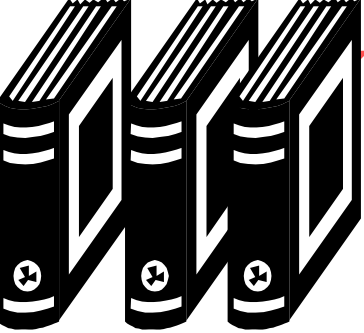
Employment Discrimination

Chapter 16



Historical Movement to the Present Laws

- **Historically, employers could discriminate on race, sex or other personal characteristics**
- **Jim Crow laws supported segregation & labor market discrimination**
- **National Civil Rights Movements in the 1960s began the change**
- **1963 Equal Pay Act (first employment discrimination legislation)**
- **Title VII of the Civil Rights Act of 1964**
- **1972 Equal Employment Opportunity Act (created the EEOC)**
- **1978 Pregnancy Discrimination Act**
- **1991 Civil Rights Act**
- **EEOC established to enforce all of them**



Title VII of 1964 Civil Rights Act

Amended by Equal Employment Opportunity Act of 1972

- **Employers/unions with 15 or more employees/members are subject to the law**
- **CANNOT discriminate based on (protected classes):**
 - **Race**
 - **Color**
 - **Religion (*reasonable accommodation* of religious practices *w/o undue hardship* on the employers)**
 - **Sex (does not apply to *sexual preference* or *identity*)**
 - **National origin**
- ***Reverse discrimination* (preferential treatment to members of a protected class) is also illegal**
 - ***McDonald v. Santa Fe Trail* African-American employee reprimanded, but kept job; the white employee was fired. Held: Illegal reverse discrimination under Title VII.**

Title VII Legal Theories

- 1. Disparate Treatment
 - Express Policy (No women in this department)
 - This is rarely seen now; employers too sophisticated
 - Isolated Incidents Members of protected classes with equal qualifications are not hired, while whites or men are hired
 - Issue of pretext firings.

Title VII Legal Theories (cont)

- 2. Disparate Impact (usually from a rule neutral on its face).
 - Height/weight restrictions; must test attribute.
 - Educational restrictions;
 - Police/Fire tests; must show relevance.
 - High school diploma; Pacemates.
 - Sponsored by a current member.
 - Chaney case: Drug tests/false +’s/Blacks

Defenses Under Title VII

1. BFOQ: Bona Fide Occupational Qualification

- Applies only to sex, religion, national origin, and race in very limited circumstance: actor, wet nurse.
- Jewish rabbi
- French chef in French restaurant
- Only female guards at women's prisons?
- Male models for female clothing?
- Dothard case – Yes.
- Johnson Control case – No.



B F O Q – Dothard case

- AL had a height and weight restriction for prison guards, and a policy of no women in contact positions.
- Female applies
- Height/Weight restrictions held unlawful.
- No contact upheld: Woman's ability to control prisoners impaired by womanhood.
 - More likely that men would attack women guards; this would put OTHER guards at risk.
- Usually up to woman to decide health risks; but not risks to other guards

BFOQ – Johnson Control Case

- Employer prohibited fertile women to work in areas with lead. No similar prohibitions for male workers, altho' similar danger.
- Those jobs paid better.
- Woman is denied job.
- Sex is not a BFOQ.
- Dangers to woman and fetus are for woman to decide. No danger to others.

Defenses Under Title VII

- **2. Bona Fide Seniority or Merit System**
 - **Cannot take away seniority or merit, even though applied discriminatorily in the past**
- **3. Merit**
 - **Piece work;**
 - **Professionally-Developed Ability Tests**
- **4. Other Factors**
 - **Shift differentials;**
 - **Regional cost-of-living differences.**

Sex Discrimination

- **Equal Pay Act**
 - Must Pay Women the same as men in similar jobs; cannot reduce men's pay to gain equal.
- **Pregnancy Discrimination Act**
 - Must treat pregnancy as any other ailment;
 - Cannot be fired simply for pregnancy.
- **Title VII**
 - Women as a protected class;
 - Sexual Harassment.



Sexual Harassment

Under Title VII

- **Unwelcome sexual advances**
 - **Requests for sexual favors**
 - **Verbal or physical conduct of a sexual nature**
 - **Purpose: to promote, change condition of employment, salary, place on project, etc.**
 - **Submission is the basis for the employment decision**
- ***Quid pro quo:* Promise of reward or threat of punishment in exchange for providing sexual favors**
 - ***Hostile environment:***
 - **discussing sexual activities**
 - **commenting on physical attributes**
 - **unnecessary touching or gestures**
 - **crude, demeaning, offensive language**
 - **displaying sexually suggestive pictures**
 - **jokes**

Sexual Harassment

- For quid pro quo harassment, must be denial of a “tangible job consequence”
- Suffering denial of tangible job consequence, Not Required for hostile work environment.

Harris v. Forklift Systems

- Harris is a rental manager; her boss, Hardy, insults her in front of others & she is a target of sexual suggestions
- “You’re a woman, what do you know?” Called her a “dumb-ass woman” “Go to the Holiday Inn to negotiate [her] raise”
- Hardy asks women to get coins from his front pants pocket.
- Hardy throws things on the ground; asks women to pick them up; makes sexual comments about clothing
- Harris quits & sues, claiming a “hostile work environment”
- **Lower courts: Say there is no sexual harassment**
- **US Supreme Court reverses: “Employee’s psychological well-being is relevant” to determine if the environment is abusive and has a discouraging effect on the employee’s staying on job; NEED NOT PROVE PSYCHOLOGICAL HARM. WOULD FORCE WOMEN TO STAY IN BAD SITUATIONS.**
- **Standard is both objective and subjective; reasonable woman and this particular woman.**
- **Free Speech limitation.**

Hostile Work Environment

- Meritor Savings Bank vs. Vinson – issue in not voluntariness, but unwelcomeness.
 - Woman worked in a bank; she engaged in sexual relations with boss out of fear of him; she did not report him because of this fear.
 - Boss defended that the sex was voluntary; that is, she was not raped.
 - Court said that was not issue; issue was whether the advances were welcomed by her. Not here. Caused an intimidating, hostile, or offensive work environment.

Sexual Stereotype Sexual Harass.

- Woman was turned down for partner in a big acc't firm twice, even tho' her performance was better than some men who received partnership. Another partner told her she needed to be more feminine.
 - Dress more fem; walk more fem; wear better make-up; better hair; don't swear like the men;
 - Puts women in dilemma: Act aggressive like men, too macho; act feminine, not tough.
 - Can't use a stereotype of how employer thinks women should act.

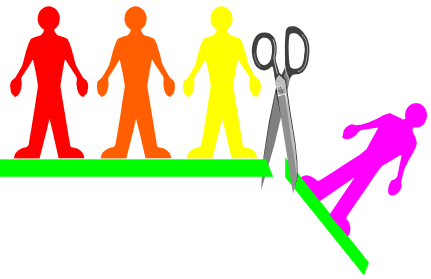


Reverse Sexual Discrimination and Same-Sex Discrimination

- *Oncale v. Sundowner Offshore Services, Inc.*
(in text; Supreme Court)
- Male-on-male sexual harassment
- Held: Same-sex harassment is prohibited
- Prohibition of sexual harassment is not based on asexuality or androgyny in the workplace
- Use common sense; look at whole situation
- Use sensitivity
- Courts use the “reasonable person” standard in cases

Employer Liability for Sex. Har.

- 1. Employers' are strictly liable for Quid Pro Quo sexual harassment by supervisors.
- 2. Liable for hostile working environment by both supervisors and co-workers, ONLY IF management knew or should have known of the harassment and failed to stop it.
 - Employers must have policy.
 - Must have a place to report high in corp.

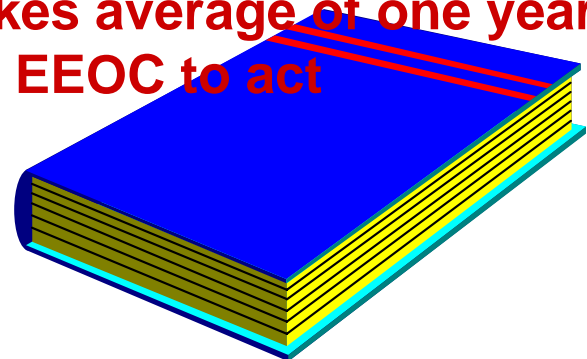


1967 Age Discrimination In Employment Act (ADEA)

- **Prohibits discrimination in persons over 40**
- **All employers with 20+ employees must comply**
- **Applies to hiring, promoting, terminating**
- **May not assign older workers duties that restrict their ability to compete**
- **May not force retirement**
- **May not indicate age preference in advertising**
- **May not require a physical exam as condition of continued employment (unless it is necessary for job performance)**
- **May not choose a younger worker because an older one will retire soon**
- **May not cut health-care benefits for workers over 65 because they are eligible for Medicare**

Procedure for filing under Title VII or ADEA

- **First Step**: Must file with a state or federal EEO Office
- Within 180 or 300 days of alleged discrimination
- Employee must present *prima facie* case
- EEOC then notifies the employer of the case & investigates the claim
- EEOC agent may hear both parties' sides
- If no settlement, the EEOC informs the parties of the result of the investigation
- If the EEOC finds merit with complaint, it issues a *right-to-sue* letter to the employee (which is not definitive but helps a lot)
- Sometimes the EEOC will sue the employer
- 100,000 complaints per year
- Takes average of one year for EEOC to act



Prima Facie Case

To bring a discrimination case, the Supreme Court established, in *McDonnell-Douglas v. Green*, that the plaintiff must show that she is:

1. A member of a protected class
2. Who met the relevant qualifications
3. Who suffered an adverse job action (not hired, fired, treated differently, etc.)
4. The employer hired others, treated other employees differently, etc.

Employer must then provide legitimate, non-discriminatory reasons for actions taken—not mere pretexts (excuses) for the actions in question

Affirmative Action Programs

- **Purpose? *To Remedy past discriminatory practices***
- ***Correct underrepresentation***
- **Adopted ONLY on race or sex (not color, religion, national origin or age)**
- **Pres. Johnson's Executive Order 11246 in 1965: gov't. contractors must adopt *affirmative action program***
- **Companies may voluntarily adopt a plan under Executive Order 11246**
- **Programs are monitored and enforced by the Office of Federal Contract Compliance Programs (OFCCP)**
- **Courts may require affirmative action as a remedy in **discrimination case****

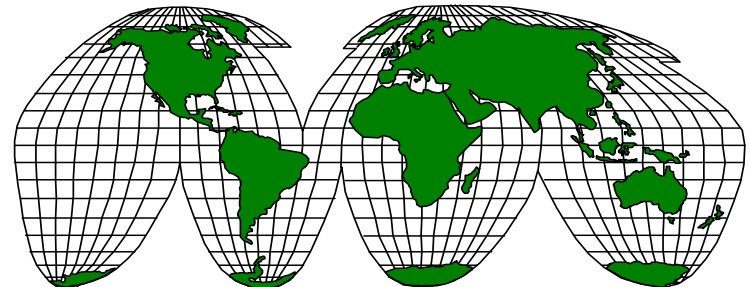


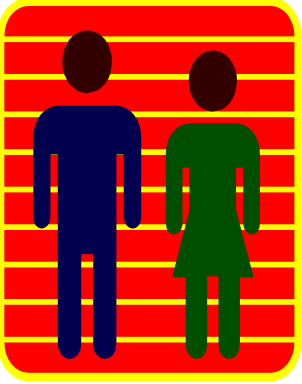
Affirmative Action (cont)

- Affirmative action has received much criticism recently, due to reverse discrimination; discriminating against whites.
- It is easier for private companies to maintain AA programs than for the govt.
- The govt. is limited by equal protection and due process clauses. Appears that rule is that a govt. cannot give preference unless there is a history of discrimination in that industry.

Intl. Perspective: Employment Discrimination in Europe and Japan

- These countries are often behind the US in treatment of women and minorities
- Europe: Employees can be forced to retire between the ages of 55 and 65
- Japan: First sexual harassment case in 1992-remedy was for only \$12,500, but considered a landmark case
- Europe & Japan: Immigrants often treated as 2nd-class citizens
- Japan: Women usually kept out of higher-level jobs and not always paid as much for equal work
- Both: Generous maternity benefits encourage employers not to hire women because of high costs of such benefits





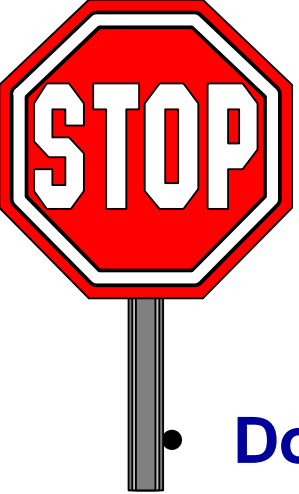
1990 Americans With Disabilities Act (ADA) and 1973 Rehabilitation Act

- **Applies to all employers with 15+ employees**
- **Cannot discriminate against a person with a disability that “*limits a major life activity,*” or has a record of or regarded to have “*an impairment*”**
 - **Manual tasks**
 - **Walking/seeing**
 - **Hearing/speaking**
 - **Breathing/learning**
 - **Working**
- **Examples of disabilities**
 - **History of alcohol or drug abuse**
 - **Disfigurements**
 - **Have had heart attacks**
 - **Must use a wheelchair**
 - **Are hearing- or vision-impaired**
 - **Fear of heights **NOT** covered**
 - **Being left-handed **NOT** covered**

Requirements Under ADA

- Employers must make “*reasonable accommodation*” BUT need not take on an “*undue hardship*”
- Special equipment & training for the disabled
- Modified work schedules? **Yes**
- Redesign the entire assembly line to accommodate wheelchair employees? **No**
- Readers for blind? **Yes**
- Completely revamp a computer system? **No**





Questions That Are Illegal During A Job Interview

- **Do you have AIDS?**
- **Have you been treated for mental health problems?**
- **Have you filed for workers' compensation benefits?**
- **Do you have a disability that would interfere with your ability to perform the job?**
- **How many sick days were you out last year?**
- **Have you ever been unable to handle work-related stress?**
- **Have you ever been treated for drug addiction or drug abuse?**

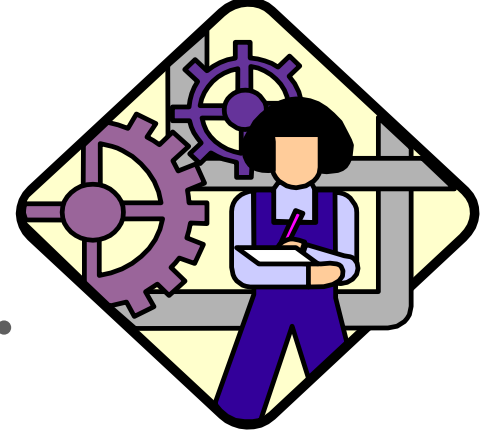


1995 ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations

- ADA prohibits employers asking disability-related questions or requiring medical exams before job is offered
- What you may and may not ask of applicants must relate to the job
- Once a job offer is made, an employer may ask 1) for documentation of a disability and 2) more questions about reasonable accommodations
- Can you ask?
 - Age? **No**
 - Computer skills if applicant won't use them? **No**
 - Married? Children? **No**
 - Sexual Preference? **No**
 - Been in therapy? **No**

Other Discrimination Rules

- National Origin Discrimination
- Religious Discrimination
- The End of Chapter 16



Toyota Motor Mfr. v. Williams.

- Williams worked on Toyota assembly line. Use of tools caused carpal tunnel syndrome and tendonitis, which restricted her lifting ability & some repetitive motions.
- For 2 years she was assigned to other jobs, then was assigned to inspecting paint jobs. After 2 more years, company said inspectors would do all parts of that process, requiring lifting and motions that caused her pain. She refused to do all inspection jobs, and was fired.
- She sued for disability discrimination and failure of Toyota to reasonably accommodate her disability.
- Trial court dismissed suit; reversed on appeals. Toyota appealed to Supreme Court.
- HELD: Reversed. Impairment must severely restrict activities *central* to one's life. Her impairments, while real, did not qualify as disabled under ADA.

Issue: Can Race Discrimination Be Justified to Help Minority Businesses?

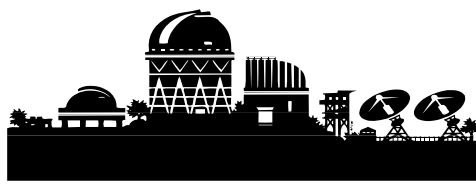
- **First Impressions sends white “front man” to white clients**
- **Judy Wiles, owner, says she has lost 20 jobs because of clients’ preconceived notions of African-Americans**
- **Mel Farr (African-American owner of fifteen car dealerships) uses a white stand-in for TV spots**
- **Others do such disguising**
- **Some disagree on ethical grounds**
- **Others say it’s just realistic, but unfortunate, business practices**





Burlington Indus. v. Ellerth

- Ellerth worked for 15 months in sales for Burlington. She claimed that Slovik, her manager, made sexually offensive remarks, asked for favors & made threats. She refused his advances. There was no retaliation against her. She never told anyone about the problem until lawsuit was filed.
- District Court granted summary judgment for Burlington; Appeals Court reversed. Burlington appealed
- **HELD:** Case remanded back to District Court.
- It does not matter if *quid pro quo* claims or hostile work environment is the essence of the matter; principles of agency law govern the employment relationship and vicarious liability that employer may incur.
- Employer may raise defense that includes 1) that it exercised reasonable care to prevent or correct harassing behavior and 2) employee unreasonably failed to take advantage of those opportunities or to avoid harm.



Griggs v. Duke Power Company

- Before 1964 Civil Rights Act, Duke was segregated
- African-Americans held only low-level jobs
- After Title VII was passed, Duke took applications by minorities, but required
 - High school diploma & certain scores on tests
- Requirements appeared neutral on their face
- 34% white men v. 12% African-American men had a H.S. diploma in N.C.
- 58% whites passed aptitude tests; only 6% African-Americans
- Plaintiffs claimed the seemingly neutral rules had a *disparate impact*
- Lower courts said no discriminatory motive
- **Held: The requirements, even if unintentionally discriminatory, have an *adverse impact***
- **Do not bear a relationship to successful performance of the jobs in question**

Remedies

(Courts Have Broad & Flexible Powers)



- Injunction
- Reinstatement/promotion
- Hiring employees, with or without back pay
- Equitable relief
- Intentional discrimination relief:
 - Back wages
 - Punitive damages
 - Payment for psychotherapy or medical treatment



Age Discrimination Defenses

- **Good cause**
- **Bona fide occupational qualification (BFOQ)**
- **Reasonable factors other than age (performance evaluations; employee's performance has deteriorated)**
- **Seniority (Younger worker has seniority over an older worker and the older worker is laid off first. "Last in-first out" rule)**
- **Bona fide employee benefit plans (which encourage voluntary early retirement)**

Types of Discrimination Cases

- **Imposing differential standards on employees**
- **Illegal compensation differentials**
- **Segregation in the workplace**
- **Constructive discharge due to harassment**
- **Disparate treatment (intentional discrimination)**
 - See *Burlington Industries, Inc. v. Ellerth*
- **Disparate impact (unintentional discrimination)**
 - See *Griggs v. Duke Power Company*

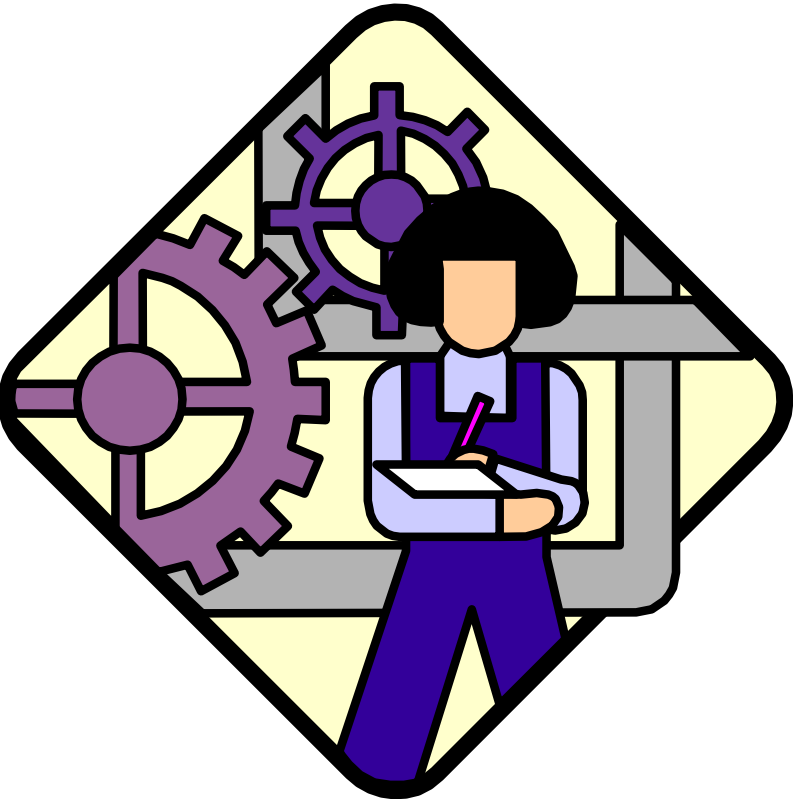




Reeves v. Sanderson Plumbing Products (2000)

- Reeves (57) & Oswalt (in 30s) were supervisors managed by Caldwell (45). Reeves helped record attendance. Chestnut, boss of all, ordered audit of record-keeping & found problems. He fired Reeves and Caldwell. Reeves sued for age discrimination
- Oswalt testified that there was an “obvious difference” between Chestnut’s treatment of Reeves and Oswalt.
- Chestnut made age-disparaging remarks to Reeves.
- Jury found for Reeves. Appeals court reversed. Reeves appealed to Supreme Court.
- **HELD**: Reversed for Reeves. There was a “prima facie case of discrimination”; a “falsity of the employer’s explanation” of the firing; and added evidence of age-based motivation for the firing that was for the jury to properly evaluate.

Johnson v. Transportation Agency, Santa Clara County, CA



- **Affirmative Action Program to hire & promote female employees in underrepresented jobs**
- **Johnson (man) & Joyce (woman) apply for a job; he scores 75% at interview; she 73% (70% required)**
- **Taking into account her sex, Joyce is hired over Johnson**
- **District Court said that the affirmative action plan was illegal with no clear goals; Court of Appeals reversed. Johnson appeals to Supreme Court.**
- **Held: Affirmed. Use of the plan assists in long-term goals; flexibility reasonable.**