24 EMPLOYMENT LAW

KEY TERMS

Title VII statute in the federal Civil Rights Act of 1964 that prohibits discrimination in the hiring, firing, promotion, compensation, or any other aspect of employment because of a person's race, color, religion, sex, or national origin

workers' compensation a law, found in all states, requiring employees to relinquish their right to sue their employers for accidental death, injury, or disease arising from or during the course of their employment; in exchange, the employees gain the right to receive financial benefits (according to a statutory schedule of benefits) regardless of fault

The states and the federal government have many statutes concerning employment (employment law). For example, all states have workers' compensation statutes, and many states have minimum wage and maximum hour laws that mirror or approximate federal statutes (e.g., the Fair Labor Standards Act) and cover employees not protected by federal laws. In addition, sometimes state laws cause analogous federal laws to be developed: e.g., following much state legislation prohibiting the use of lie-detector tests (polygraphs), Congress enacted the Employee Polygraph Protection Act of 1998 (EPPA) prohibiting most private employers from using polygraphs, but not proscribing paper and pencil honesty questionnaires—civil penalties, injunctions, and private lawsuits are all authorized remedies for EPPA violations. Employers are exempt from EPPA if engaged in security services, the handling of controlled substances, or the ongoing investigation of an economic loss to the business (e.g., from theft, industrial espionage, or sabotage).

The purpose of employment legislation is to protect workers' health and safety, provide workers with a minimum level of economic support, and—overall—foster a workplace free from both discrimination and disruptive labor/management "wars."

HEALTH AND SAFETY LEGISLATION

WORKERS' COMPENSATION

Historically, the common law tort system imposed huge barriers on employees seeking redress against their employers for work-related injuries. A torts approach required the employee to prove that his employer's negligence caused the injury. Employers typically used three defenses to absolve themselves of responsibility. The first, the fellow-servant doctrine, absolved the employer's responsibility when a fellow employee negligently contributed to the injury. A second defense, assumption of risk, released the employer when an injured employee had voluntarily accepted the job's risks. Finally, the third defense, contributory negligence, barred an employee's suit if the employee had, in any way, contributed to the cause of his own injury.

In the early decades of the 20th century, workers' compensation statutes were enacted to overturn a system that had provided workers with little effective remedy. Thus, each state has a *workers' compensation statute* mandating that employees relinquish the right to sue their employers for accidental death, injury, disease, or illness arising out of or during the course of their employment. In return, the employer must pay an employee financial benefits when such incidents occur, regardless of who—if anyone—was at fault. Common law tort defenses are eliminated, and the employer is strictly liable to the employee. The amount of compensation is defined in, and limited by, a statutory schedule of benefits.

Workers' compensation statutes do not cover actions by or against parties other than the employer and employee. (Such actions are brought in tort law.) Also, employers must assume financial responsibility for potential claims by obtaining insurance, paying into a state fund, or having sufficient assets to qualify as self-insured. Administrative agencies and appellate courts increasingly have allowed workers' compensation for illnesses if they truly are "occupational diseases": related to specific job hazards, with a scientifically supported causal link between hazard and injury. Agencies and courts also are recognizing the need to provide benefits for mental injuries caused by job-related stress. However, most such awards only are granted when some physical impact accompanies the mental injury.

OSHA

Many states also have legislation on health and safety in the workplace. The primary statute in this area, however, is the federal **Occupational Safety and Health Act** (1970). This act, which applies to all employers

engaged in businesses affecting interstate commerce, states that workplaces are to be "free from recognized hazards" which could cause death or serious injury. The act establishes a federal agency, the Occupational Safety and Health Administration (OSHA), to ensure that both employers and employees comply with health and safety standards. OSHA conducts inspections and investigations: employers must keep comprehensive records on their research, job hazards generally, OSHA enforcement, and—most important—employees' illnesses and accidental deaths or injuries. OSHA rules further maintain that all affected employers must document and report to OSHA not just fatal and harmful occurrences, but any unsafe incidents, accidents, lost workdays, job transfers and terminations, medical treatments, and restrictions on work.

Besides OSHA, the act created the National Institute for Occupational Safety and Health (NIOSH), and the Occupational Safety and Health Review Commission (OSHRC). The NIOSH is charged with conducting research into health and safety standards and recommending new rules or regulations to OSHA. It also conducts training seminars that educate employers and employees on new ways to make the workplace safer. The OSHRC is an independent organization that reviews appeals from OSHA's decisions.

Three trends are apparent: (1) as with most other federal administrative agencies, OSHA cannot make new rules or policies until it has studied and verified that these new regulatory proposals, if enacted, would provide societal benefits exceeding their costs; (2) OSHA has been promulgating regulations, which set forth performance standards focusing on a level of protection rather than a particular device to achieve that protection; (3) OSHA has gone beyond just concentrating on immediate, overt dangers to life and limb, and it instead increasingly emphasizes the "hidden" hazards from relatively low-level exposure to toxic workplace chemicals sometimes linked to "delayed manifestation diseases," such as cancer and asbestosis.

THE FAMILY AND MEDICAL LEAVE ACT OF 1993 (FMLA)

The FMLA requires governmental employers and the private employers of 50 or more workers to provide their employees up to 12 weeks of unpaid leave for their own serious illness, the birth or adoption of a child, or the care of a seriously ill child, spouse, or parent. Eligible employees are those who give reasonable notice and have worked for the employer at least one year—a minimum of 1250 hours annually. The leave can be taken all at once or in increments of as little as an hour at a time. Workers who take such leaves must be allowed to return to the same or equivalent jobs, with the same pay and benefits. (Employers can exempt the highest-

paid 10% of their work force, who thus are not guaranteed to get their jobs back.) When state laws or employment contracts are more generous than the federal act, employers must abide by the state law or the contract.

FAIR LABOR STANDARDS ACT

Congress enacted the Fair Labor Standards Act (FLSA) in 1938. The FLSA:

1. Establishes a minimum wage. The minimum wage may be reduced by equivalent rewards in the form of food or lodging. An employer of a tipped employee is required to pay only $2.13 an hour in direct wages if that amount plus the tips received equals at least the federal minimum wage, the employee retains all tips, and the employee customarily and regularly receives more than $30 a month in tips. If the tips and wages together are less than the minimum wage, the employer must make up the difference. State wage laws may also concern tip income and, more generally, minimum wages, with employees entitled to whichever provisions—federal or state—provide greater benefits.
2. Mandates payment of "time and a half" (150% of the normal wage rate) for overtime work, with a regular work week being 40 hours. Travel time to and from work generally is not compensable time unless it is part of preliminary or postliminary activities (e.g., employer transportation of workers to or from the work site). Compensable activities include preparatory actions, such as readying tools and equipment at the beginning of the work day, and post-work actions, such as winding down operations and cleaning up the work site.
3. Exempts from coverage professionals, executives, and administrative or outside sales personnel, as well as workers at very small and/or seasonal businesses, such as agriculture and fishing. Many states, though, have their own state version of the FLSA that applies to some employees not protected under the federal laws.
4. Generally forbids any employment of children under 14 years old.
5. Prohibits employment of persons under age 18 in hazardous occupations (e.g., logging or mining), and further restricts the employment of 14- and 15-year-olds to nonschool hours in nonhazardous, nonmanufacturing jobs, such as at retail stores, food service establishments, and gas stations.

The Secretary of Labor can sue for back wages, an equal amount as a civil penalty, and injunctions. Private parties also can seek back pay, the civil penalty, and attorney's fees. Willful FLSA violations can lead to fines and imprisonment.

INCOME PROTECTION

FOR WORKERS DISCHARGED WITHOUT CAUSE

Unemployment compensation is a state insurance system intended to supplement unemployed workers' incomes. An unemployed worker's total payable benefits are a percentage of his average earnings when he was employed. All private, for-profit employers that have at least one employee working one or more days a week for 20 or more weeks per year, or that have a payroll of at least $1,500 per quarter, are required to participate.

Under a joint federal-state program (both governments making contributions, along with employers), a tax on the participating employers is paid into unemployment insurance plans. The tax is based on the employer's number of employees, the wages they are paid, and the employer's record in laying off or retaining workers. Workers in the covered (taxed) businesses, if discharged "without cause" (through no fault of their own), can collect unemployment compensation. The amount of and time period for this compensation varies from state to state, but there are federally prescribed minimums and the federal government often furnishes supplemental unemployment compensation.

To qualify for unemployment compensation, discharged workers must have worked for at least a minimum time period or have earned at least a minimum amount of wages, with eligibility varying from state to state. At all times the unemployed worker must be seeking a job for which he is qualified. The discharged worker may be disqualified from receiving benefits if he rejects a job offer, or is not ready and available for work, or fails to follow proper procedures in filing claims for compensation.

Another protection is the federal WARN (Worker Adjustment and Retraining Notification) Act that took effect in 1989. This act requires large businesses (those with over 4,000 total work hours per week) to give workers at least 60 days' notice before a plant closing or mass layoff. A shorter notice period is allowed only if due to *unforeseeable* business circumstances. Employees and unions may obtain monetary damages if an employer violates WARN.

FOR DISABLED OR RETIRED WORKERS

The two most important federal statutes on retirement benefits are the Social Security Act of 1935 (SSA) and the Employment Retirement Income Security Act of 1974 (ERISA). Both have been frequently amended.

• *SOCIAL SECURITY*

SSA provides money when incomes from employment are reduced or cease because of death, disability, or retirement. The Federal Insurance

Contributions Act (FICA) mandates that, for all of an employee's earnings up to a statutory maximum amount (approaching $100,000 per annum, as annual cost-of-living increases take effect), the employer must withhold a specified percentage of the employee's wages and also contribute a matching amount. This pool of money derived from employee contributions and matching employer contributions goes directly into the Social Security Trust Fund. This fund provides compensation when job incomes decline or cease because of death, disability, or retirement.

Employers must keep detailed records, file quarterly reports, and (usually) make monthly payments of the amounts withheld and matched. Violations can lead to severe civil and criminal penalties.

• *ERISA*

When private pension plans were originally introduced, they were usually gratuitous rewards that could be revoked or reduced at the employer's will. The unpredictability and arbitrariness of these early plans helped lead Congress to pass ERISA. The act was designed to regulate private retirement plans. It does not require that employers establish a pension, but ERISA does contain complex vesting requirements that determine when an employee's right to receive pension benefits is irrevocable.

ERISA sets standards for the funding of private pensions. It governs eligibility for and the taxation of pension plan earnings and benefit payments. In order to be an ERISA qualified pension plan, a plan must be administered by an individual who is charged with the responsibility to handle the pension funds. This administrator has a fiduciary duty to the plan's beneficiaries. He must carefully invest the funds and protect the beneficiaries. In addition, the administrator must disclose to the Labor Department the terms of the plan, annual financial reports, and annual summaries of each beneficiary's interest.

ERISA establishes a Pension Benefit Guaranty Corporation, and both the Department of Labor and the Internal Revenue Service promulgate ERISA regulations. Statutory or regulatory violations are a basis for criminal prosecutions and also for governmental or private civil actions (lawsuits by or for pension holders) alleging pension mismanagement or fraud.

PROTECTION AGAINST DISCRIMINATION

THE DOCTRINE OF ABUSIVE (WRONGFUL) DISCHARGE

At common law, a worker without an employment contract was called an "at-will" employee: the employee could quit at any time, for any reason, and

the employer could fire him at any time for any reason. However, federal and state statutes have now limited the scope of the at-will doctrine. For example, under antidiscrimination laws, most at-will employees cannot lawfully be fired because of their race, sex, or religion. Also, most state courts have ruled that certain reasons for firing any person are so pernicious as to be disallowed (i.e., the fired worker can sue for damages).

Examples: Unacceptable Reasons for Firing (thus constituting an Abusive Discharge)

1. A worker asks his superiors to obey securities or environmental laws.
2. An employee is about to become entitled to a bonus.
3. A worker exercises a statutory right (e.g., files a workers' compensation claim).
4. An employee refuses to participate in antitrust violations.
5. A worker seeks to have his/her employer comply with consumer protection laws.
6. An employee reports criminal activity by his/her employer (the whistleblower exception to at-will employment).

Thus, while many employment relationships remain at-will, with the employee always free to quit and the employer usually free to fire, there are now some exceptions to the employer's freedom: broad statutory schemes and case-law requirements that employers obey the law and common notions of public policy. (Apart from this tort doctrine, at-will employment has also been restricted by finding implied contracts of good faith and fair dealing—e.g., implied or even express contracts based on statements in a company's Employee Handbook.)

FEDERAL STATUTES

Although cases on abusive (wrongful) discharge have risen in importance, federal statutes still dominate the law concerning employment disputes. The most important statute on discriminatory employment practices is Title VII of the Civil Rights Act of 1964. Under the Equal Employment Opportunity Act (1972) and subsequent amendments, the Equal Employment Opportunity Commission (EEOC) enforces Title VII and other federal statutes such as the Equal Pay Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. The EEOC may investigate, conciliate, and litigate grievances filed by existing and prospective employees. It is also authorized to issue rules implementing the antidiscrimination laws.

Complaints may be filed by individuals, state human rights (fair employment) commissions, or the EEOC itself. Of course, as with other administrative proceedings, appeals may be taken to the courts. (Also, under

federal statutes predating Title VII, if a claim includes constitutional rights allegedly deprived "under color of a state law or custom," i.e., with the state's explicit or implicit approval or condonement, a plaintiff can bypass the EEOC and proceed directly to federal court.)

Title VII applies to any employment agency (including unions that operate hiring halls) and any business or labor organization that affects interstate commerce and has at least 15 workers/members. Court remedies for winning plaintiffs include back pay, attorney's fees, reinstatement orders, retroactive seniority and pension benefits, injunctions, and consent decrees.

Title VII outlaws discrimination in hiring, firing, promotion, compensation, or any other aspect of employment, because of an individual's race, color, religion, sex, or national origin. Title VII also prohibits any employment discrimination against someone because he/she opposed a Title VII violation or participated in a Title VII investigation or proceeding (e.g., making a charge, testifying or otherwise assisting at a proceeding).* Thus, discriminatory employment practices are illegal if based on a person's membership in a protected class (by race, sex, color, national origin, or religion); the discrimination involves treating other employees or job applicants better than members of the protected class. Employment practices also are unlawful if they help perpetuate previous discrimination.

Certain exemptions or defenses are permitted. Courts recognize a lawful reason to discriminate (a *bona fide occupational qualification/BFOQ*) when religion, sex, or national origin is, in effect, a job requirement.

To establish a BFOQ defense, the employer must do the following:

1. Show that the BFOQ is necessary to the business;
2. Demonstrate that its necessity is established by a verifiable, rational basis;
3. Prove that the rational basis is rooted in a substantial belief that all, or nearly all, employees who are not members of the suspect class do not have the qualifications for the position, and;

*Many federal statutes, such as Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Acts (both discussed later), provide for lawsuit claims if an employer retaliates against someone exercising statutory rights or pursuing statutory remedies. And what is unlawful *retaliation* is broadly construed. In *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the Supreme Court found that illegal *retaliation* can take place on or off the job and that it applies to situations in which the employer's actions are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."

4. Demonstrate that this belief can either be proven, through appropriate tests if necessary, or that it would be impossible or impracticable to "deal with all of the excluded class," as validated by expert testimony or generally accepted research and data.

BFOQ defenses are generally construed very narrowly and unfavorably.

Examples: A Baptist church may interview only Baptist ministers for the job of parish pastor; a seminary may consider the religion of its teaching applicants; a theater company may interview only women to play the role of a woman. A BFOQ cannot lawfully be based on assumptions about the comparative employment characteristics of a group (e.g., that women have a higher turnover rate). A BFOQ also cannot be based on stereotyped characterizations of groups (e.g., that men are less capable of assembling intricate equipment than are women). Finally, it may not be affected by the supposed preferences of customers, employers, or coworkers for one group (e.g., women) over another. Gender *may be* a BFOQ if physical attributes are needed for a position (e.g., a wet nurse) or to protect others' right to privacy (e.g., sauna room attendants). Although employers are required to try to accommodate an employee's religious beliefs, that accommodation need only be reasonable; the employer can fire an employee rather than significantly disrupt workplace productivity.

An employer can lawfully apply different compensation standards or terms or condition of employment pursuant to a bona fide *seniority* or *merit system*. However, there must be no intentional discrimination in establishing or continuing that system.

Since required procedures before the EEOC or comparable state agencies often are very complicated, it is important that all covered employers, unions, and employment agencies—even those not currently involved in a dispute—maintain accurate records, file any mandated reports, and keep abreast of all employment law requirements. Although the Supreme Court, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), ruled that mandatory arbitration of employment claims, including claims for discrimination violative of federal statutes, is permissible, the employer may still face tough legal challenges for trying to circumvent the administrative and court processes. The leading challenges are typically that the arbitration clause was invalid under contract law principles, such as adhesion or, more gen-

erally, unconscionability. (Indeed, on remand, 279 F.3d 889 (9th Circuit 2002), the lower federal appeals court in the *Circuit City* case applied California contract to throw out the arbitration clause and permit the employee to litigate his claim in court.)

Laws prohibiting discrimination in employment do not prohibit all employment decisions that an applicant or employee may deem unfair. For example, Title VII does not prohibit an employer from "discriminating" against (treating differently) an individual on the basis of merit, initiative, or performance.

To demonstrate unlawful discrimination, an individual must establish a connection between the employment condition or decision, and the prohibited basis, e.g., race, sex, or religion. These connections may be established in the following manner:

- Individual instances of different or disparate treatment based on prohibited criteria, or
- Neutral policies or practices that have a much harsher or adverse impact upon a protected class to which an employee or applicant belongs, such as females or African-Americans.

Either direct evidence or indirect circumstantial evidence can prove such discrimination. Therefore, Title VII not only bans expressly discriminatory practices and actions (cases where discriminatory motives are clear), but also prohibits discrimination under the judicially created doctrines of **disparate treatment** or **adverse (disparate) impact**.

• *DISPARATE TREATMENT*

To win under disparate treatment, the plaintiff must demonstrate what appears to be discrimination on its face (e.g., she interviewed for a job, she was qualified for that job, she was not hired, and the employer continued to search for a new employee). To make such a prima facie case of intentional discrimination, the employee must prove that (1) he/she is a member of a class of persons that title VII protects and (2) he/she was denied a position or benefit that he/she sought and was qualified for and that was available (e.g. the plaintiff interviewed for and so on). The burden then shifts to the defendant employer to present evidence (but need not prove) that there were genuine, legitimate, nondiscriminatory reasons for its challenged employment decision (e.g. that the employee was fired for excessive tardiness and poor work performance). Finally, if the defendant puts forth such reasons, the plaintiff has the burden to prove that he/she was unlawfully discriminated against and that the grounds the employer offered for its actions were only a pretext or pretense (that the

defendant, in fact, practiced discrimination). Such pretext would be shown, for example, if the defendant's alleged hiring criteria were only applied to women, not similarly situated men. As the U.S. Supreme Court noted in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), proof that the employer's explanation for its practices was false may by itself suffice as proof of intentional discrimination.

• *ADVERSE (DISPARATE) IMPACT*

Under this theory, intentional discrimination need not be proven. Plaintiffs must show that the allegedly discriminatory employment practice (tests, educational degree requirements, height and weight limits, etc.), while neutral on its face, has an unequal (disproportionate), negative (adverse) impact on one or more classes of individuals covered by Title VII. The defendant employer must then establish that the practice is a "business necessity," and therefore legitimate (e.g., a test is job-related because it predicts how well a potential employee would perform tasks essential to the job that he seeks). Then, the plaintiff may still succeed if he/she demonstrates that other criteria or methods would achieve the employer's purposes with less impact on (less harm to) the protected group(s). Although the adverse impact doctrine originally arose from cases involving objective criteria (e.g., test and degree requirements), it may also apply to subjective bases for decisions (e.g., interviews and supervisor evaluations).

Reverse Discrimination Versus Adverse Impact

Employers sometimes face the dilemma of trying not to engage in practices which may have an impermissible adverse impact on minority or female employees or job applicants, but—at the same time—avoid "reverse discrimination" against others.

In *Ricci v. DeStefano* (2009), the results of a written firefighters' examination meant that 17 whites and two Latinos, but no African-Americans, were slated for promotion to lieutenant or captain at the New Haven, Connecticut fire department. However, New Haven decided to scrap the test results and not promote anyone. In a 5–4 decision, the U.S. Supreme Court held that an employer could not choose to refrain from promoting white employees for fear of an adverse impact lawsuit by minority employees unless there was a "strong basis in evidence" to establish either that the promotion standards were not job-related or that there was a less discriminatory alternative. In effect, when employees meet the established criteria and are thereby due a promotion, they can win a claim for Title VII discrimination if the employer, without a strong basis to believe it would lose an adverse-impact case, fails to promote the employees on account of the resulting numbers (e.g., of promoted white and minority employees).

• *PATTERN OR PRACTICE*

If there is a much greater percentage of protected group members in the local labor market as compared to that group's representation in the defendant employer's work force, that fact may indicate a Title VII violation through a **pervasive pattern or practice of discrimination**. However, a defendant employer is permitted to rebut any inference of discrimination by introducing its own evidence that the challenged practice or policy is job related and justified by business necessity. Inconvenience, annoyance, or expense to the employer does not suffice as a defense. As with disparate treatment cases, the ultimate burden of proof rests with the plaintiff.

SEXUAL HARASSMENT

There are two types of sexual harassment, both of which violate Title VII: (1) **quid pro quo**—requiring an employee to engage in sexual activity in order to keep his/her job, get an increase in salary, obtain a promotion, or the like (e.g., sex with the boss in return for retaining one's job); (2) **hostile work environment**—unwelcome sexual behavior (e.g., sexual advances) and/or an atmosphere so severe or pervasive as to alter the victim's employment conditions and create an abusive (intimidating, hostile, offensive) work environment, such as a barrage of unwelcome sex-related jokes, comments and/or touchings from co-workers. Even if the employee-victim does not lose a tangible job benefit, a hostile work environment can exist. The EEOC has issued guidelines on sexual harassment, which include not only unwelcome sexual advances, but also requests for sexual favors and other unwelcome verbal or physical conduct of a sexual nature.

Employers tend to be strictly liable for quid pro quo harassment by supervisors and also liable for work environment harassment if higher-level managers knew or should have known about the harassment and did not take appropriate corrective action. (Also, employees unfairly treated in comparison to an employee who received a promotion or other benefits because of a sexual relationship (e.g., with a supervisor) have a claim for sexual harassment.)

If no adverse action was taken against an alleged sexual harassment victim (e.g., discharge, demotion, or undesirable reassignment), the employer has an affirmative defense against liability for a supervisor's hostile work environment harassment when the following two conditions are met. (1) The employer used reasonable care to prevent and promptly correct any sexually harassing behavior. (2) The employee unreasonably failed to take advantage of any preventive or corrective opportunities that the employer had provided. Employers, therefore, should inform all employees about the employer's antiharassment policy, which should have an effective complaint procedure specifying persons other than the employee's direct supervisor to whom complaints can be made.

Employers need not immediately discipline the accused harasser. But employers must thoroughly investigate complaints. Employers can be liable for inaction either way: insufficiently investigating, and thus retaining, what proves to have been a harassing worker; or inadequately investigating, and thus firing, a worker who turns out not to have been harassing others. In either case, the employer may be held liable for damages—to the Title VII harassment victim, or to the innocent fired employee for his/her wrongful dismissal (grounds might be abusive discharge, breach of contract, reverse discrimination, or perhaps even defamation).

Both men and women can sue for sexual harassment. Also, Title VII applies to same-sex harassment regardless of whether the conduct is motivated by sexual desire. (See *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998).) Still, Title VII is not meant to be "a general civility code for the American workplace." The court held:

> "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at discrimination because of sex. The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

So *Oncale* extends the law to cover not just cases of alleged harassment involving homosexuals, but also, perhaps, sexually tinged jokes and horseplay among heterosexuals of the same sex. Nonetheless, it is often difficult for employees to prove the same-sex harassment covered under *Oncale*. Suing for battery, filing a union grievance, or other actions may be more suitable.

In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the U.S. Supreme Court unanimously decided that sexual harassment plaintiffs need not show a workplace environment so hostile as to cause "severe psychological injury" (e.g., a nervous breakdown). The proper standard is that, for any variety of reasons, "the environment would reasonably be perceived, and is perceived, as hostile or abusive" (a "reasonableness" standard). No single factor is required to show sexual harassment; besides psychological harm, possible circumstances include "the frequency of the discriminating conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." As two concurring opinions noted, the test is not whether job performance was impaired but whether the harassment altered the working conditions in a discriminatory way. (Several Supreme Court decisions since *Harris* have affirmed and refined the law of sexual harassment, and the number of claims has risen rapidly.)

The employer can be held liable for an employee's harassment by customers or other people who are not supervisors or coworkers. For example, the U.S. Circuit Court of Appeals for the Tenth Circuit held in *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (1998), that a Pizza Hut franchisee was *vicariously liable* under Title VII for the hostile work environment that one of its waitresses had experienced. Male customers, about whom the waitress had previously complained, were again directing crude, sexual remarks at her and even grabbing her. But the restaurant manager ignored the waitress's complaint and insisted she keep waiting on them. The harassment escalated, the waitress quit, and she sued. The employer ended up liable for its manager's failure to protect the employee.

QUOTAS AND AFFIRMATIVE ACTION

Quotas are policies mandating that certain numbers or percentages of minorities or women be hired or promoted, even if that means better qualified persons are turned away. By only hiring or promoting from within certain groups regardless of the qualifications of others, employers subject themselves to "reverse discrimination" liability: Passed over persons (e.g., white males) successfully argue that a quota is illegal race or sex discrimination that violates Title VII.

Affirmative action programs are concerted efforts—plans—designed by the employer to hire and promote larger numbers of women and minorities that have been under-represented in its work force. The law has been that government contractors or others receiving federal funds or licenses must have affirmative action programs. However, Supreme Court holdings and numerous lower court opinions have subjected state (*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)) and federal (*Adarand Constructors, Inc. v. Pena* 515 U.S. 200 (1995)) affirmative action programs to strict scrutiny tests, thereby dramatically increasing the probability of success for reverse discrimination claims. A growing body of case law has started to overturn much of the last 30 years of affirmative action law.

Affirmative action is more likely to survive in the purely private sector, where employers opting to have such programs are not generally subject to constitutional challenge (no "state action"), but only statutory interpretation. So a private, voluntary plan intended to correct a manifest imbalance between one class (e.g., African-Americans, women) and other classes (e.g., whites, men) may still be permitted if it is only temporary and does not "unnecessarily trammel" the rights of individuals in the (nonpreferred) class (e.g., whites, males) or create an absolute bar to their advancement. *Case law*, though, indicates profound skepticism

about the public policy arguments underlying many affirmative action programs, whether public or private.

Affirmative Action and Higher Education: In *Gratz v. Bollinger* (2003), the U.S. Supreme Court ruled that automatically granting points to every "underrepresented minority" university applicant solely because of the applicant's race is not "narrowly tailored" to achieve the goal of educational diversity and fails to provide the necessary individualized consideration of applicants. Thus, University of Michigan's undergraduate admissions point-system (with 150 maximum points, 100 points guaranteeing admission, and 20 points given for being African-American, Native American, or Latino) violated the 14th Amendment's Equal Protection clause. Moreover, in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), the Supreme Court ruled that using a student's race to govern the availability of a place at a desired public school, even to prevent resegregation, is likewise unconstitutional.

However, in *Grutter v. Bollinger* (2003), the U.S. Supreme Court held that campus diversity is a compelling purpose for which the use of race as only a "plus factor" in evaluating applicants is permitted. Therefore, the high court upheld University of Michigan's law school affirmative action admissions program because it was a narrowly tailored approach, with a race-based "plus" just part of an individualized review of each applicant no matter his/her race (including consideration of every applicant's potential contribution to a diverse educational environment). *Grutter's* emphasis on campus diversity distinguishes it from other cases (e.g., on employment or contracting) barring any racial preferences meant to correct societal injustice, foster diversity, or further some other goal besides countering actual discrimination in that specific industry or by that particular employer or contractor.

Besides Title VII, several other statutes prohibit discrimination in specific areas of employment:

1. *The Equal Pay Act* (1963), an amendment to FLSA, outlaws differences in pay between the sexes for employees performing essentially the same ("equal") work. The "equal" jobs must involve substantially the same skill, effort, responsibility, and working conditions. Pay differentials are permitted if based on seniority, merit, quality or quantity of production, training bonuses, shift differentials (e.g., paying more to the night shift), or any factor other than sex. Violations can lead to fines of up to $10,000, imprisonment for as long as six months, or both. In pri-

vate lawsuits, plaintiffs can seek double damages for up to three years of wages, reinstatement, promotion, and liquidated damages.

What if the jobs are different but, arguably, worth essentially the same? The wage differential between two employees working for the same employer, one performing a predominantly male job (e.g., construction work) and the other performing a predominantly female job (e.g., doing secretarial work), does not violate the Equal Pay Act (or Title VII) since the jobs are not substantially "equal" (same abilities, effort, responsibility, and working conditions). The jobs involve, at the very least, distinct skills and working conditions. Thus a proposed "comparable worth" standard has been rejected in federal law, but continues to be considered by state or local governments. Comparable worth now is most notably a discretionary, policy matter for large corporate or government employers worried about their own pay-scale fairness.

2. *The Age Discrimination in Employment Act of 1967* (ADEA) prohibits job discrimination against people age 40 and older. The business entities covered by the ADEA are somewhat fewer than for Title VII: here the employers must have at least 20 employees, and the labor organizations without hiring halls must have at least 25 members. Sometimes, age can be a bona fide occupational qualification, just as there are such exemptions under Title VII. (For example, safety officers, such as police, firefighters, and airline pilots, are not protected under the ADEA.) Furthermore, in some instances an employer may provide a lower level of fringe benefits (e.g., life insurance) for its older workers if such treatment is justified by the costs involved (i.e., older workers' benefits cost much more to provide). ADEA, though, outlaws almost all mandatory retirement. It can be proven via the same adverse impact theory as for Title VII, and provides for EEOC enforcement, awards *double unpaid wages* for willful violations, and grants a broad set of private lawsuit remedies comparable to those for Title VII violations. In *Meacham v. Knolls Atomic Power Lab.* (2008), the Supreme Court ruled that the employer, not the employee, must bear the burden of proof (both in producing evidence and in persuading the judge or jury) concerning its supposedly using "reasonable factors other than age" in the decision to terminate employment.[1] Lastly, employers seeking the waiver of potential ADEA claims by a terminated worker age 40 or older must meet an elaborate set of criteria.

---

[1]Unlike Title VII discrimination cases, though, the employer need not show business necessity, and burdens of proof remain comparatively high for the plaintiff. The Supreme Court's decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005), holds that ADEA plaintiffs alleging an adverse impact on workers age 40 or older must identify the specific test, requirement, or practice responsible for the disparity.

3. *The Americans with Disabilities Act* (ADA) was passed in 1990, and applies to virtually the same number of employers as does Title VII, with the minimal number of employees for a covered employer being 15. The ADA forbids employment discrimination[2] against *qualified* individuals with (1) mental or physical impairments (e.g., blindness, cancer, AIDS, learning disabilities, or any number of other illnesses or conditions) substantially limiting a major life activity or (2) a record of such an impairment; or (3) being regarded as having such an impairment. As amended in 2008, the ADA includes a nonexhaustive, illustrative list of *major life activities*, which include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. These major life activities also include the operation of significant bodily functions, including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Even an impairment that is episodic or in remission is a disability if it would, when active, substantially limit a major life activity. The EEOC, U.S. Attorney General, and U.S. Secretary of Transportation all have authority to issue regulations implementing the definition of "disability" and, in doing so, further delineating what a disability is.[3]

   A court's decision about whether an impairment substantially limits a major life activity must, under the amended ADA, not consider "the ameliorative effects of mitigating measures" such as medication, artificial aids (e.g., prostheses or hearing aids), assisting technology, reasonable accommodations, and learned behavioral or adaptive neurological modifications. The amended ADA accepts a limited part of the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999)—that the ameliorative effects of ordinary eyeglasses or contact lenses must be considered in determining whether an impairment substantially limits a major life activity. However, the amended ADA removes an approach, sanctioned in court holdings, that put an employee in an untenable position: his/her corrected vision leaving the employee no longer "disabled" for purposes of the ADA, yet the employer still using the employee's uncorrected vision as the standard when deciding whether he/she was qualified for the job for which they had applied. With the 2008 amendments,

[2]And also discrimination by the operators of public facilities (e.g., buses, trains, hotels, restaurants, stores, and theaters).

[3]Many situations or conditions are not covered disabilities, such as illegal drug use, workplace alcohol use, various sexual behaviors (including homosexuality), compulsive gambling, kleptomania, and pyromania. Also, most testing for drug or alcohol abuse has been upheld in court as lawful under the ADA.

that approach may still exist in some jobs (including the commercial airline pilot position at stake in *Sutton*), but the ADA now places the burden on the employer to justify its "uncorrected vision" policy as being job related and consistent with business necessity. For example, an employer would have to demonstrate that it is reasonable and necessary for it to judge a job applicant who takes medication to prevent epileptic seizures as if that applicant were leaving his/her epilepsy untreated. In most situations, presumably, the employer could not justify that approach.

As for the "regarded as" basis for an ADA-defined disability, the amended ADA is meant to combat, as the EEOC has put it, the "myths, fears, and stereotypes" about a disability. The 2008 amended law thus adopts a definition nearly identical to an earlier law, the Vocational Rehabilitation Act of 1973, in which Congress recognized that misconceptions may be as handicapping as any physical or mental limitations that flow from the actual impairment. The amended ADA, therefore, looks at one or more actual or perceived impairments and considers the plaintiff to have a disability when

(1) a plaintiff *actually has* a physical or mental impairment that motivated the defendant's adverse action against the plaintiff (e.g., terminating the plaintiff), regardless of how limiting the impairment in fact is [the impairment may not have risen to the level of an ADA disability, but the defendant's reaction to that impairment makes it so]; or

(2) the defendant is motivated to act adversely against the plaintiff because the defendant, rightly or wrongly, *perceives* the plaintiff as having an impairment, regardless of how limiting the defendant believes the impairment to be [the defendant's acts based on its belief that there is an impairment brings the plaintiff under the ADA's protection, regardless of whether or not the impairment is solely in the defendant's imagination].

However, an actual or perceived impairment is not covered under the "regarded as" benchmark if the impairment is transitory and minor. "Transitory" is defined as "an actual or expected duration of six months or less." The ADA, though, fails to explain what qualifies as a "minor" impairment.

Employers may not discriminate against a qualified, disabled person if he/she could perform the job with "reasonable accommodation" by the employer (e.g., modified work schedules; wheelchair-accessible facilities; acquiring better equipment; changing examinations, manuals, or policies; providing readers/interpreters; job restructuring; or worker retraining). Employers, though, are *not* required to accommodate—and thus hire—disabled individuals when that would result in an **undue hardship** for the employer (e.g., significant difficulty or

expense).[4] Furthermore, as with Title VII, if an employer can show that its hiring practice is justified as a "business necessity," then its refusal to hire disabled individuals will not constitute a violation of ADA. That is so even if, for example, certain job-related tests or standards reduce or eliminate opportunities for some groups of persons ordinarily protected under ADA.

4. *The Pregnancy Discrimination Act* (1978) amended Title VII to command that employers treat pregnancy and childbirth just as they treat any other medical condition similarly affecting an employee's ability to work. If a pregnant woman can still perform her job's duties, her employer cannot lawfully fire her or force her to take a leave of absence. Pregnancy leaves may not be treated differently from other leaves for temporary disability. Employers have also been prohibited from firing or refusing to hire women of childbearing age because of fear of exposure to workplace hazards or toxins. *International Union v. Johnson Controls,* 499 U.S. 187 (U.S. Supreme Court, 1991). Employers must monitor the workplace for toxins and dangers and then take measures to protect their employees.
5. *Section 1981 of the Civil Rights Act of 1866* prohibits discrimination on the basis of race, color, and sometimes national origin in the creation and execution of employment contracts, as well as in all other private contract areas. As such, Section 1981 can cover areas of discrimination *beyond simply employment contracts.* Unlike Title VII, there are no small employer exemptions. Compared to Title VII, the Section 1981 time periods to sue generally are longer, the procedures simpler, a jury trial always available, and types of possible damages sometimes more expansive.
6. *Civil Rights Law amendments,* enacted in 1991, provide that Title VII or ADA plaintiffs claiming discrimination based on disability, religion, or sex (including sexual harassment) can receive punitive damages if the employer acted "with malice or with reckless indifference." Such damages in combination with non-pay compensatory damages (e.g., emotional distress or damage to reputation), are capped (between $50,000 and $300,000), depending on the employer's size; under 15 employees—no Title VII; 15–100 employees—$50,000; 101–200 employees—$100,000; 201–500 employees—$200,000; over 500 employees—$300,000). Back pay, front pay, reinstatement, and attorney's fees always have been available under Title VII and are *not* capped, but the amendments provide for other compensation (e.g., for medical treatment) if the discrimination was intentional. While still

[4]The amended ADA provides that employers and others bound by the act need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures if an individual simply meets the "regarded as" definition of a disability.

not as broad as Section 1981, the amendments reduce some of the discrepancies between the treatment of racial discrimination under Section 1981 and the treatment of other forms of discrimination under Title VII.

7. Almost all states have laws similar to Title VII and ADEA, and many have ADA-like statutes. Some states impose higher standards on employers than do the federal laws; and some states or cities go beyond federal law and, for instance, prohibit employment discrimination based on marital status, sexual orientation,[5] political affiliation, and—with a specificity not found in the ADA—having or testing positive for the AIDS virus or HIV. Also, state and local laws apply to governmental bodies and small businesses often exempted by federal employment laws.

KNOW THE CONCEPTS

DO YOU KNOW THE BASICS?

1. Workers' compensation programs are applicable to injuries in the scope of employment, are no-fault programs, generally eliminate the employee's right to sue his employer for negligence, and provide for compensation according to a general schedule of benefits. *True* or *False?*
2. Each state has its own workers' compensation program, with the pertinent law, administration, and funding at the state, not the federal, level of government. *True* or *False?*
3. Name three functions of the Occupational Safety and Health Administration.
4. No one under age 16 is permitted to work, except either for a business owned and operated by relatives or as an unpaid volunteer. *True* or *False?*
5. Name two statutes intended to protect or assist people who are, or likely will be, unemployed.
6. Name two statutes intended to furnish financial protection for people's retirement.
7. Does Title VII apply to all businesses?

[5]Many states and more than 100 municipalities (cities and counties) in the remaining states have laws barring employment discrimination based on sexual orientation. Also, many employers (particularly large employers) have voluntarily adopted policies prohibiting discrimination based on sexual orientation.