

# EMPLOYMENT DISCRIMINATION

- **Equal Employment Opportunity Commission (EEOC):** The federal agency charged with enforcing Title VII of the Civil Rights Act of 1964 and other federal statutes and regulations prohibiting *employment discrimination*.
  
- **Employment Discrimination:** Treating employees or job applicants unequally on the basis of race, color, national origin, religion, gender, age, disability, or other characteristic prohibited by federal law.
  
- Title VII may also be enforced by **private civil actions** brought by employees and applicants who believe that an employer has discriminated against them.
  - **Exhaustion of Administrative Remedies:** Before an employee or applicant may file suit, she must first file a claim with the EEOC and await its disposition of her claim.
  
  - The applicant or employee may file suit only if the EEOC investigates the claim and decides not to file suit on the employee's behalf, or elects not to investigate the claim.

# INTENTIONAL DISCRIMINATION

- **Disparate Treatment:** Intentional discrimination against employees or applicants who are members of a *protected class* (e.g., African-Americans, females, disabled persons).
  - To state a *prima facie* disparate treatment claim, a plaintiff must prove that:
    - (1) she is a member of a protected class;
    - (2) she applied and was qualified for, or was employed in, the position in question;
    - (3) she was rejected, demoted, or terminated by the employer; and
    - (4) the employer subsequently filled the position with a person not in a protected class.
- A plaintiff who makes a prima facie disparate treatment case shifts to the employer the burden of articulating a **legally-permissible reason** for not hiring the plaintiff (e.g., the plaintiff lacked sufficient experience).
- If the employer states a legally-permissible reason, the plaintiff must plead and prove that the reason the employer gave was a *mere pretext* to disguise discriminatory intent.

# UNINTENTIONAL DISCRIMINATION

- **Disparate Impact:** Practices or procedures which, although not intentionally discriminatory, have the effect of discriminating against members of a protected class.
  
- **Pool of Applicants Test:** A plaintiff can establish disparate impact by proving that the percentage of protected-class employees in the employer's workforce does not reflect the percentage of qualified protected-class workers in the relevant labor market.
  
- **Selection Rate Test:** Alternatively a plaintiff can establish disparate impact by comparing the rates at which the employer hires, retains, and promotes protected class members compared to non-members.
  
- **"Four-Fifths Rule":** The EEOC deems a challenged practice or procedure to be discriminatory if it results in members of a protected class being hired, retained, or promoted at a rate less than four-fifths of the rate for the group with the highest corresponding rate.
  
- To make a prima facie case, the plaintiff must show a **causal link** between the employer's practices or policies and the observed effect. The burden then shifts to the employer to **justify** its practices or policies.

## RACE, COLOR, NATIONAL ORIGIN, AND RELIGION

- **Race:** Discriminating on the basis of race – *whether the discrimination appears designed to aid or hinder a protected class* – with regard to **hiring or promoting** employees, **employment conditions**, or **benefits** is illegal.
  
- **Color or National Origin**
  - Discriminating on the basis of color or national origin with regard to **hiring or promoting** employees is illegal unless the discriminatory policies or procedures have a *substantial, demonstrable relationship* to *realistic qualifications* for the job in question.
  
  - Discriminating against employees on the basis of color or national origin with regard to **employment conditions** or **benefits** is illegal.
  
- **Religion:** Employers must *reasonably accommodate* their employees' **religious beliefs**, unless doing so would cause the employer's business *undue hardship*.
  - An employee's religious belief need not be based on the tenets of a particular church, sect, or denomination, as long as the employee sincerely holds the belief.

# GENDER DISCRIMINATION

- Employers may not discriminate against applicants and employees on the basis of gender, including **classifying** jobs as “male” and “female” or **advertising** jobs in help-wanted columns designated “male” and “female,” unless the employer can prove that the gender of the applicant or employee is **essential to the job** in question.
- **Pregnancy:** Employers must treat women who are pregnant, have recently given birth, and/or have a medical condition related to pregnancy or childbirth the same as any other employee who is temporarily unable to perform some or all of his or her job functions.
- **Equal Pay Act:** Employers may not pay men and women different wages for jobs whose performance requires equal skill, effort, and responsibility under similar conditions.
- **Paycheck Fairness Act:** Employers may not use gender-based differentials in assessing an employee’s education, training, or experience.
- **Lilly Ledbetter Fair Pay Act:** Each time an employer pays an employee a discriminatory wage, the employee has a new cause of action against the employer. In other words, an employee does not waive her right to sue by keeping her job while trying to remedy the discrimination.

# CONSTRUCTIVE DISCHARGE

- **Constructive Discharge** occurs when an employer causes an employee's working conditions to be so intolerable that a reasonable person in the employee's position would feel compelled to quit.
  
- To establish a prima facie case of constructive discharge, a Title VII claimant must prove:
  - (1) **intolerable working conditions,**
  - (2) which the **employer knew or had reason to know** existed but **failed to correct** within a reasonable time, and
  - (3) in many cases, that the employer's discriminatory policies or practices caused the intolerable conditions or made the employee's resignation **reasonably foreseeable.**
  
- Constructive discharge is available to **any Title VII claimant** and entitles the aggrieved employee to seek to recover loss of income, including back pay, despite her "voluntary" resignation.

## TYPES OF SEXUAL HARASSMENT

- **Quid Pro Quo:** Granting employment, job promotions, or other benefits in return for **sexual favors**, or refusing (or threatening refusal) to hire, promote, or extend other employment benefits if sexual favors are refused.
- Language or conduct that is so sexually offensive that it creates a **hostile working environment**.
- **Retaliation:** An employer may not fire, demote, or otherwise change the terms, conditions, or benefits of an employee who has complained of sexual harassment.
- **Same-Gender:** Title VII's ban on sexual harassment extends to acts by employees of the same gender as the victim.
- **Online Harassment:** Sending sexually offensive e-mails and viewing sexually explicit or offensive Internet sites on workplace computers may create a hostile work environment.
- Employers seeking to prevent online harassment must delicately tread the line between, on the one hand, allowing workplace harassment to go unchecked and, on the other hand, invading employees' privacy rights in order to determine whether they are using their workplace computers to send or view sexually offensive material.

## SOURCES OF SEXUAL HARASSMENT

- **Supervisors:** Employers are generally liable for sexual harassment by supervisors regardless of whether (1) the **employer knew** of the harassment or (2) the employee suffered any **adverse job consequences**.
  - An employer can avoid liability for supervisory harassment by proving that it
    - (1) has taken “reasonable care to prevent and correct promptly any sexually harassing behavior” and
    - (2) the employee suing for harassment unreasonably failed to follow these policies and procedures.
- **Co-Workers:** Employers are generally liable for sexual harassment by co-workers only if the **employer knew** or should have known about the harassment and **failed to take remedial action**.
- **Nonemployees:** Employers may be liable for sexual harassment by nonemployees if they have the **ability to prevent** harassment and **fail to act**.



# AGE DISCRIMINATION

- **Age Discrimination in Employment Act (ADEA):** Federal law prohibiting
  - (1) employment **discrimination** on the basis of age against persons 40 years of age and older, and
  - (2) **mandatory retirement** for non-managerial employees.
  
- In order to prevail, an ADEA plaintiff must show that, at the time of the employment decision, he was:
  - (1) a member of the **protected age group**,
  - (2) **qualified for the position** from which he was discharged, for which he was denied employment, or to which he was denied promotion, and
  - (3) discharged, denied employment, or denied promotion under circumstances creating a **reasonable inference of discrimination** (*e.g.*, the position was filled by a person younger than 40).
  
- The ADEA does not generally protect employees of state or local government agencies, but the Supreme Court's decision in *Tennessee v. Lane* (2004) suggests that state and local governments no longer enjoy a blanket exemption.

# DISABILITY DISCRIMINATION

- **Americans with Disabilities Act (ADA):** Federal law prohibiting private employers from discrimination in hiring, promotion, and discharge against *persons with disabilities*.
- In order to prevail, an ADA plaintiff must show that, at the time of the employment decision, she:
  - (1) had a **disability** or her employer knew her *to have a relative or an associate with a disability*,
  - (2) was **otherwise qualified** for the position from which she was discharged or demoted, for which she was denied employment, or to which she was denied promotion, and
  - (3) was discharged, denied employment, or denied promotion **solely because of the disability**.
- Employers must provide disabled employees the same **health insurance benefits** as their non-disabled co-workers.
  - An employer who fails to do so must show that disparate benefits are justified in order to (1) keep the benefits plan financially sound, (2) keep benefits affordable for employees without the excluded condition, or (3) account for the risks and costs associated with a particular condition.

# DISABILITIES

- The ADA defines a “disability” as
  - (1) a mental or physical **impairment** that **substantially limits** one or more major life activities (*e.g.*, breathing, speaking, seeing),
    - Courts have held that **correctable conditions**, such as myopia, diabetes, or epilepsy, are not disabilities under the ADA.
    - The Supreme Court has also held that **repetitive-stress injuries**, such as carpal tunnel syndrome, are not disabilities.
  - (2) a **record** of such impairment, or
  - (3) **being regarded** as having such an impairment.
- The ADA does not require employers to hire or retain applicants or employees whose disabilities constitute a ***direct threat*** to the health and safety of co-workers or customers.
- Employers need not hire or retain applicants or employees who **currently abuse drugs or alcohol**. However, an employer may not refuse to hire or retain an applicant or employee based on her history of abuse or addiction.

# REASONABLE ACCOMMODATION

- If an otherwise qualified disabled job applicant or employee can, with *reasonable accommodation*, perform essential job functions, the employer must make accommodations, such as
  - installing **wheelchair ramps**,
  - establishing **flexible working hours**,
  - modifying **job assignments**,
  - reassigning **nonessential functions**, and
  - creating and improving **training materials and methods**,

unless doing so would create an *undue hardship* for the employer.

- **Undue Hardship:** An employer may not be required to accommodate a particular employee's or applicant's disability if doing so would cause the employer "significant difficulty or expense."
- Accommodation is only required if it would enable the applicant or employee to perform the essential functions of the job **now or in the immediate future.**

# DISCRIMINATION DEFENSES

- Once a plaintiff establishes that discrimination has occurred, the burden shifts to the employer to justify the discriminatory policy or practice. Common defenses include:
  - **Business Necessity:** The discriminatory policy or practice is related to job performance (*e.g.*, a law degree is a prerequisite to acting as a lawyer, notwithstanding that minorities are less likely to hold law degrees).
  - **Bona Fide Occupational Qualification (“BOFQ”):** Identifiable characteristics – such as gender, national origin, or religious belief – are reasonably necessary to the normal operation of a business (*e.g.*, a men’s swimwear company may hire only male models).
  - **Seniority:** The employer has in place a system in which those who have worked longest for the company are first in line for promotions, raises, and other benefits, and those with the least seniority are the first to be laid off if the work force must be reduced.
  - **After-Acquired Evidence:** Employers may limit their liability for discriminatory acts by presenting evidence of misconduct by the employee alleging discrimination.

# AFFIRMATIVE ACTION

- **Affirmative Action:** Hiring and promotion policies that give special consideration to members of protected classes in an effort to overcome present effects of past discrimination.
  
- Private employers that do not do business with the government or receive federal funds are not required to implement affirmative action programs. However, they may do so, and are able to defend against subsequent claims of “reverse discrimination” by showing that
  - (1) women and minorities have been historically underrepresented, and
  - (2) the plan does not unnecessarily restrict the rights of employees and applicants who are not eligible for the program.
  
- Affirmative action programs enacted by public sector employers, public universities, and other public entities are subject to strict scrutiny. At issue is the extent to which favoring historically disfavored groups violates the Equal Protection Clause of the Fourteenth Amendment.