

## Employment Discrimination

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## Employment Discrimination

- Important Employment Laws:
  - Title VII of the Civil Rights Act of 1964
  - The Age Discrimination in Employment Act
  - The Equal Pay Act
  - The Americans with Disabilities Act

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## Title VII

- Prohibits employment discrimination on the basis of race, gender, color, religion, and national origin
  - policies that discriminate are illegal, unless (except for race) have substantial demonstrable relationship to realistic job qualifications
    - “gender” now includes pregnancy
    - Further, employers must reasonably accommodate an employee’s “sincerely held” religious practices
      - unless doing so would cause undue hardship to employer’s business
- Enforced EEOC

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## Discrimination: Two Types

- Intentional: “Disparate-Treatment”
  - Applicant must prove
    - membership in a protected class
    - applied, qualified for job, but rejected; and
    - employer continued to seek applicants
- Negligent: “Disparate Impact”
  - Non-protected applicant sues employer who tries to integrate members of protected classes into workplace

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## Sex or Gender Discrimination

- Employers are prohibited from
  - classifying jobs as male or female or from advertising such
    - unless employer can prove gender is essential to the job
- Plaintiff must show gender was determining factor in hiring, firing or lack of promotion

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## Sex Discrimination: Two Types

- Differential treatment
- Sexual harassment
  - Hostile Work Environment
    - workplace “permeated” with discriminatory intimidation, ridicule, insult so severe to alter the conditions of the victim’s employment
    - conduct must be offensive to reasonable person, as well as to victim, and it must be severe and pervasive
  - Quid Pro Quo
    - (this for that) job opportunities in exchange for sexual favors
  - Supreme Court has interpreted Title VII to include sexual harassment

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## Liability for Sexual Harassment

- Employer can be liable for supervisor's harassment
  - even though the employer is unaware it,
  - especially if harassment policies and procedures have not been distributed to employees
- Company can be liable for harassment even though the employee suffered no adverse job consequences

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## Harassment by Co-workers

- Employer generally liable only if knew or should have known and failed to act
  - employee notice to supervisor is notice to employer under agency law
- Employers may also be liable for harassment by non-employees
- Same-sex harassment also violates Title VII.
- Employees can create hostile work environment using chat, email to spread racial and sexual jokes and slurs. Employer should have policy.

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## Remedies under Title VII

- Liability may be extensive. Plaintiff may receive
  - Reinstatement
  - Back Pay
  - Retroactive Promotions
  - Damages

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## Supreme Court Guidelines

- Employer has defense if
  - Took “reasonable care to prevent and correct promptly any sexually harassing behavior”
    - by establishing and distributing effective harassment policies and procedures
  - Employee suing for harassment failed to follow these policies and procedures

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## Equal Pay Act of 1963

- EPA amends Fair Labor Standards Act
  - to prohibit gender-based discrimination in wages paid for similar jobs performed under similar conditions
- Pay differentials for similar jobs can be justified on the basis of seniority, merit, a piece-work system, or any factor other than gender

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## Age Discrimination

- The Age Discrimination in Employment Act (ADEA) protects individuals over the age of 40 from workplace discrimination that favors younger workers
- States are immune from private lawsuits brought in federal court under 11<sup>th</sup> Amendment

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## Discrimination based on Disability

- Americans with Disabilities Act (ADA)
  - requires employers to offer reasonable accommodation
    - e.g., wheelchair ramps, flexible working hours, improved training materials
  - to employees or applicants with a “disability” who are otherwise qualified for the job they hold or seek
  - unless accommodation creates undue hardship
- Job applications, pre-employment physicals must be required for all, not just disabled
  - Some courts have allowed hostile environment suits under ADA, although ADA does not expressly allow suits for this

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## What is a Disability?

- ADA defines disability as:
  - Physical or mental impairment that “substantially limits one or more of major life activities; or
  - A record of such impairment; or
  - Being regarded as having such an impairment
- Determination on case-by-case basis

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## ADA: Claims

- To prevail on a claim under ADA, plaintiff must show she:
  - has a “disability”
  - is otherwise qualified for the job in question; and
  - was excluded from employment solely because of the disability
- Plaintiff must first exhaust administrative relief with EEOC

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## Discrimination: Basic Defenses

- Four basic defenses to claims of employment discrimination
  - Business necessity
  - Bona fide occupational qualification
  - Seniority systems
  - After-acquired evidence of employee misconduct

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## Business Necessity

- Business necessity defense requires employer to demonstrate that
  - imposition of a job qualification is reasonably necessary to the legitimate conduct of the employer's business
- Business necessity is a defense to disparate impact discrimination

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## Bona Fide Occupational Qualification

- Bona fide occupational qualification (BFOQ) defense requires employer to show that
  - a particular skill is necessary for the performance of a particular job
- The BFOQ defense is used in cases of disparate treatment discrimination

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## Seniority System

- Seniority system
  - conditions distribution of job benefits on length of time one has worked for employer
  - can be defense only if it is a bona fide system, not designed to evade the effects of the anti-discrimination laws

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## After-Acquired Evidence

- After-acquired evidence
  - evidence of misconduct by employee who is suing employer for employment discrimination,
  - uncovered during discovery process conducted in preparation for defense against suit
- May limit employee's recovery, but not absolute defense for the employer

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## Affirmative Action

- Programs go one step beyond non-discrimination
  - designed to “make up” for past patterns of discrimination by giving preferential treatment to protected classes
- Has led to “reverse discrimination” cases

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