Chapter 2

Title VII of the Civil Rights Act of 1964

Learning Objectives

When you finish this chapter you should be able to:

- **LO1** Explain the history leading up to passage of the Civil Rights Act of 1964.
- **LO2** Give examples of the ways that certain groups of people were treated differently before passage of the Civil Rights Act.
- **LO3** Discuss what is prohibited by Title VII.
- **LO4** Recognize who is covered by Title VII and who is not.
- **LO5** State how a Title VII claim is filed and proceeds through the administrative process.
- **LO6** Define disparate treatment and an employer's defenses to such a claim.
- **LO7** Define disparate impact and how it works, including the four-fifths rule and employer defenses to disparate impact claims.
- **LO8** Discuss what management can do to comply with Title VII.

Opening Scenarios

SCENARIO 1

1 Scenario

Jack feels he has been discriminated against by his employer, based on national origin. After a particularly tense incident one day, Jack leaves work and goes to his attorney and asks the attorney to file suit against the employer for violation of Title VII of the Civil Rights Act of 1964. Will the attorney do so?

SCENARIO 2

2 Scenario

Demetria, 5 foot 2, 120 pounds, applies for a position with her local police department. When the department sees that she is applying for a position as a police officer, it refuses to take her application, saying that she doesn't meet the department's requirement of being at least 5 feet 4 inches tall and at least 130 pounds. Is the department's policy legal?

SCENARIO 3

3 Scenario

Jill, an interviewer for a large business firm, receives a letter from a consulting firm inviting her to attend a seminar on Title VII issues. Jill feels she doesn't need to go since all she does is interview applicants, who are then hired by someone else in the firm. Is Jill correct?

Statutory Basis

Title VII of the Civil Rights Act of 1964

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. sec. 2000e et seq., sec. 703 (a).

A Historic Rights Act

LO1

"A strong and prosperous nation secured through a fair and inclusive workplace."[1]

LO2

Such a simple statement. Who could disagree with such a vision? It is the vision of the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing laws that were created to make that statement a reality. However, not everyone agrees with that vision, so though we have come a long way in the 40+ years since the law was passed creating the agency, there is still much work to be done.

Title VII of the Civil Rights Act of 1964 is the single most important piece of legislation that has helped to shape and define employment law rights in this country. It was an ambitious piece of social legislation, the likes of which had never been attempted here, so passage of the law was not an easy task.

The Civil Rights Act of 1964 prohibits discrimination in education, employment, public accommodations, and the receipt of federal funds on the basis of race, color, gender, national origin, and religion. Although several categories of discrimination are included in the law, it was racial discrimination that was truly the moving force for its enactment. Africans had been brought to America from Africa to be slaves, period. No other role was envisioned for them. It was thus not surprising that when slavery ended 246 years later, the country struggled mightily with the idea of forging a new relationship with African Americans with whom they had no legal or social relationship other than ownership or African Americans serving their needs in the most menial ways. Ninety-nine years later, when the civil rights legislation was debated in Congress and eventually passed in 1964, the country was deeply divided in trying to move away from its post–Civil War history of its treatment of African Americans—a history that included everything from benign neglect to lynchings to legally sanctioned discrimination, called "Jim Crow" laws. There were laws regulating the separation of blacks and whites in every facet of life from birth to death. Laws prohibited blacks and whites from marrying, going to school together, and working together. Every facility imaginable was segregated, including movies, restaurants, hospitals, cemeteries, libraries, funeral homes, doctors' waiting rooms, swimming pools, taxicabs, churches, housing developments, parks, water fountains, colleges, public transportation, recreational facilities, toilets, social organizations, and stores. Blacks could not vote, sue whites, testify against them, raise their voice to them, or even look them in the eye or stay on the sidewalk if they passed by. If an African American wanted to buy shoes, he or she had to bring a paper cutout of the foot, rather than try the shoe on in the store. Of course it was unthinkable to allow an item purchased by an African American customer to be returned once purchased, even if it did not fit. If they wanted food from a restaurant, they had to go to the back door and order it to be taken away. Separation of the races was complete under Jim Crow and Jim Crow was only outlawed in 1964, the year the Beatles descended upon America from Britain and rocked the music world. (See Exhibit 2.1, "June 1961 Newspaper Want Ad.")

The doctrine of separate but equal educational facilities had fallen 10 years before passage of the Civil Rights Act, in 1954, with the U.S. Supreme Court's decision in *Brown v. Topeka Board of Education*.[2] Citizens were challenging infringements upon the right of blacks to vote. There were boycotts, "freedom rides," and sit-in demonstrations for the right to nonsegregated public accommodations, transportation, municipal parks, swimming pools, libraries, and lunch counters. There was racial unrest, strife, marches, and civil disobedience on as close to a mass scale as this country has ever experienced. Something had to give.

In an impressive show of how important societal considerations can be in shaping law, the 1964 Civil Rights Act was passed the year after the historic August 28, 1963, March on Washington. It was at this march that the late Rev. Dr. Martin Luther King Jr. gave his famous "I Have a Dream" speech (see Exhibit 2.2, "Dr. Martin Luther King Jr.'s 'I Have a Dream Speech'") on the steps of the Lincoln Memorial. In the largest march of its kind ever held in this country until

Exhibit 2.1 *June 1961 (Pre–Title VII) Newspaper Want Ad**

Index to Want Ads

Announcements

1—Funeral Notices
2—Funeral Notices, Colored

Male Employment

14—Male Help Wanted
15—Male Employment Agencies
16—Situations Wanted, Male
17—Male, Female Help Wanted

Female Employment

22—Female Help Wanted
23—Female Employment Agencies
24—Situations Wanted, Female

Colored Employment

26—Help Wanted Male, Colored
27—Employment Agency Male, Colored
28—Situations Wanted Male, Colored
29—Help Wanted Female, Colored
30—Employment Agency Female, Colored
31—Situations Wanted Female, Colored

*** This exhibit, taken from an actual newspaper, is typical of the index to want ads from the classified section found in newspapers in the United States before Title VII was passed in 1964. Note the separate categories based on race and gender. This is no longer legal under Title VII.**

then, hundreds of thousands of people of all races, creeds, colors, and walks of life traveled from around the world to show legislators that legalized racism was no longer tolerable in a society that considered itself to be civilized. Just two weeks later, four little black girls were killed and 20 others injured by a bomb tossed into the Sixteenth Street Baptist Church by whites in Birmingham, as the girls donned their robes and prepared to sing in the choir at Sunday's church service. These and other factors demonstrated in stark terms that it was time to change the status quo and move from the racially segregated Jim Crow system the country had employed for the 99 years since the end of the Civil War, to something more akin to the equality the Constitution promised to all.

Title VII of the Civil Rights Act of 1964 is the employment section of the act, but it is only one title of a much larger piece of legislation. The Civil Rights Act of 1964 also created the legal basis for nondiscrimination in education, public accommodations, and federally assisted programs. Since employment in large measure defines the availability of the other matters, the case law in Title VII of the Civil Rights Act quickly became the most important arbiter of rights under the new law. In President John F. Kennedy's original message to Congress upon introducing the bill in 1963, he stated: "There is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job."

The face of the workplace has changed dramatically since the passage of the act. Because of the law, more women and minorities than ever before are engaged in meaningful employment. While Title VII applies equally to everyone, because

Exhibit 2.2 *Dr. Martin Luther King Jr.'s "I Have A Dream" Speech*

Dr. King did an excellent job of capturing the state of discrimination in the year before the Civil Rights Act of 1964 was enacted. The year after this speech, the Civil Rights Act of 1964 was passed by Congress and Dr. King won the Nobel Peace Prize. The speech became a rallying cry for people all over the world who suffered oppression at the hands of their governments and/or societies.

I am happy to join with you today in what will go down in history as the greatest demonstration for freedom in the history of our nation.

Five score years ago, a great American, in whose symbolic shadow we stand today, signed the Emancipation Proclamation. This momentous decree came as a great beacon light of hope to millions of Negro slaves who had been seared in the flames of withering injustice. It came as a joyous daybreak to end the long night of their captivity.

But one hundred years later, the Negro still is not free. One hundred years later, the life of the Negro is still sadly crippled by the manacles of segregation and the chains of discrimination. One hundred years later, the Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity. One hundred years later, the Negro is still languishing in the corners of American society and finds himself an exile in his own land. So we have come here today to dramatize a shameful condition.

In a sense we have come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.

It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked "insufficient funds." But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. So we have come to cash this check—a check that will give us upon demand the riches of freedom and the security of justice. We have also come to this hallowed spot to remind America of the fierce urgency of now. This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism. Now is the time to make real the promises of democracy. Now is the time to rise from the dark and desolate valley of segregation to the sunlit path of racial justice. Now is the time to lift our nation from the quick sands of racial injustice to the solid rock of brotherhood. Now is the time to make justice a reality for all of God's children.

It would be fatal for the nation to overlook the urgency of the moment. This sweltering summer of the Negro's legitimate discontent will not pass until there is an invigorating autumn of freedom and equality. Nineteen sixty-three is not an end, but a beginning. Those who hope that the Negro needed to blow off steam and will now be content will have a rude awakening if the nation returns to business as usual. There will be neither rest nor tranquility in America until the Negro is granted his citizenship rights. The whirlwinds of revolt will continue to shake the foundations of our nation until the bright day of justice emerges.

But there is something that I must say to my people who stand on the warm threshold which leads into the palace of justice. In the process of gaining our rightful place we must not be guilty of wrongful deeds. Let us not seek to satisfy our thirst for freedom by drinking from the cup of bitterness and hatred.

We must forever conduct our struggle on the high plane of dignity and discipline. We must not allow our creative protest to degenerate into physical violence. Again and again we must rise to the majestic heights of meeting physical force with

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soul force. The marvelous new militancy which has engulfed the Negro community must not lead us to distrust of all white people, for many of our white brothers, as evidenced by their presence here today, have come to realize that their destiny is tied up with our destiny and their freedom is inextricably bound to our freedom. We cannot walk alone.

As we walk, we must make the pledge that we shall march ahead. We cannot turn back. There are those who are asking the devotees of civil rights, "When will you be satisfied?" We can never be satisfied as long as the Negro is the victim of the unspeakable horrors of police brutality. We can never be satisfied, as long as our bodies, heavy with the fatigue of travel, cannot gain lodging in the motels of the highways and the hotels of the cities. We can never be satisfied as long as a Negro in Mississippi cannot vote and a Negro in New York believes he has nothing for which to vote. No, no, we are not satisfied, and we will not be satisfied until justice rolls down like waters and righteousness like a mighty stream.

I am not unmindful that some of you have come here out of great trials and tribulations. Some of you have come fresh from narrow jail cells. Some of you have come from areas where your quest for freedom left you battered by the storms of persecution and staggered by the winds of police brutality. You have been the veterans of creative suffering. Continue to work with the faith that unearned suffering is redemptive.

Go back to Mississippi, go back to Alabama, go back to South Carolina, go back to Georgia, go back to Louisiana, go back to the slums and ghettos of our northern cities, knowing that somehow this situation can and will be changed. Let us not wallow in the valley of despair.

I say to you today, my friends, so even though we face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream.

I have a dream that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident: that all men are created equal."

I have a dream that one day on the red hills of Georgia the sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood.

I have a dream that one day even the state of Mississippi, a state sweltering with the heat of injustice, sweltering with the heat of oppression, will be transformed into an oasis of freedom and justice.

I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.

I have a dream today.

I have a dream that one day, down in Alabama, with its vicious racists, with its governor having his lips dripping with the words of interposition and nullification; one day right there in Alabama, little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers.

I have a dream today.

I have a dream that one day every valley shall be exalted, every hill and mountain shall be made low, the rough places will be made plain, and the crooked places will be made straight, and the glory of the Lord shall be revealed, and all flesh shall see it together.

This is our hope. This is the faith that I go back to the South with. With this faith we will be able to hew out of the mountain of despair a stone of hope. With this faith we will be able to transform the jangling discords of our nation into a beautiful symphony of brotherhood. With this faith we will be able to work together, to pray together, to struggle together, to go to jail together, to stand up for freedom together, knowing that we will be free one day.

This will be the day when all of God's children will be able to sing with a new meaning, "My country, 'tis of thee, sweet land of liberty, of thee I sing. Land where my fathers died, land of the pilgrim's pride, from every mountainside, let freedom ring."

And if America is to be a great nation this must become true. So let freedom ring from the

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Exhibit 2.2 *continued*

prodigious hilltops of New Hampshire. Let freedom ring from the mighty mountains of New York. Let freedom ring from the heightening Alleghenies of Pennsylvania!

Let freedom ring from the snowcapped Rockies of Colorado!

Let freedom ring from the curvaceous slopes of California!

But not only that; let freedom ring from Stone Mountain of Georgia!

Let freedom ring from Lookout Mountain of Tennessee!

Let freedom ring from every hill and molehill of Mississippi. From every mountainside, let freedom ring.

And when this happens, When we allow freedom to ring, when we let it ring from every village and every hamlet, from every state and every city, we will be able to speed up that day when all of God's children, black men and white men, Jews and Gentiles, Protestants and Catholics, will be able to join hands and sing in the words of the old Negro spiritual, "Free at last! free at last! thank God Almighty, we are free at last!"

Source: www.usconstitution.net/dream.html, accessed July 27, 2007.

of the particular history behind the law it gave new rights to women and minorities, who had only limited legal recourse available for job discrimination before the act. With the passage of Title VII, the door was opened to prohibiting job discrimination and creating expectations of fairness in employment. It was not long before additional federal legislation followed providing similar protection from discrimination in the workplace based on age, Vietnam veteran status, and disabilities. Like a ripple effect, not only did the law usher in the expectations that you now have that you will be treated equally because you live in the United States and we have such laws, but antidiscrimination laws were enacted all over the world in the wake of the Civil Rights Act. The courage exhibited by African Americans and their supporters standing up to the government and challenging long-held beliefs relegating them to second-class citizenship embolden other groups around the world to challenge their treatment as well.

State and local governments passed laws paralleling Title VII and the other protective legislation. Some laws added categories such as marital status, political affiliation, affinity orientation, receipt of public benefits, or others as prohibited categories of discrimination. For instance, California prohibits discrimination on the basis of being a victim of domestic violence and imposed personal liability on co-workers regardless of whether the employer knew or should have known of the conduct and failed to take immediate corrective action. Washington, D.C., added personal appearance to its list of prohibited categories. The new expectations did not stop there. As we saw in the chapter on employment-at-will, others not included in the coverage of the statutes came to have heightened expectations about the workplace and their role within it and were willing to pressure legislators and sue employers in pursuit of these expected rights. The exceptions created in the

take-no-prisoners employment-at-will doctrine largely owe their existence to the expectations caused by Title VII. Once Title VII protection from unjust dismissal was provided on the basis of discrimination, it made it easier for judges and legislatures to take the step of extending it to other terminations that came to be considered as not in keeping with this new approach to employment.

For employers, Title VII meant that the workplace was no longer a place in which decisions regarding hiring, promotion, and the like could go unchallenged. Now there were prohibitions on some of the factors that had previously been a part of many employers' considerations (see, e.g., Exhibit 2.1 showing an actual newspaper classified ad categorized by race and gender). Employers had been feeling the effects of federal regulation in the workplace for some time. Among others, there were wage and hour and child labor laws regulating minimum ages, wages, and permissible work hours that employers could impose, and there were labor laws protecting collective bargaining. Now came Title VII, regulating to some extent the bases an employer could use to hire or promote employees.

After enactment, Title VII was amended several times to further strengthen it. There were amendments in 1972 and 1978, with the passage of the Equal Employment Opportunity Act of 1972 and the Pregnancy Discrimination Act of 1978. The 1972 amendment expanded Title VII's coverage to include government employees and to strengthen the enforcement powers of the enforcing agency created by the law, the Equal Employment Opportunity Commission (EEOC). The 1978 amendment added discrimination on the basis of pregnancy as a type of gender discrimination. In addition, Title VII and other workplace protection were extended to congressional employees in the Congressional Accountability Act of 1995.

In its most far-reaching overhaul since its passage, the act also was amended by the Civil Rights Act of 1991. This amendment added jury trials, compensatory and punitive damages (where appropriate), and several other provisions, further strengthening the law. (See Exhibit 2.3, "The Civil Rights Act of 1991.")

The EEOC is now the lead agency for handling issues of job discrimination and deals with most matters of employment discrimination arising under federal laws, including age and disability. The U.S. Department of Justice handles cases involving most government agencies such as police and fire departments. The Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order 11246 concerning affirmative action in government contracting. The EEOC has implemented regulations that govern agency procedures and requirements under the law, and it provides guidelines to employers for dealing with employment discrimination laws. The EEOC's regulations can be found in the Code of Federal Regulations (e.g., 29 C.F.R. §§ 1604.1–9, Guidelines on Discrimination Because of Sex; 29 C.F.R. § 1604.10, Guidelines on Discrimination Because of Sex, Pregnancy and Childbirth; 29 C.F.R. part 1606, Guidelines on Discrimination Because of National Origin; 29 C.F.R. part 1607, Employee Selection Procedures; 29 C.F.R. § 1613.701–707, Guidelines on Discrimination Because of Disability; 45 C.F.R. part 90, Guidelines on Discrimination Because of Age).

Most employers have come to accept the reality of Title VII. Some have gone beyond acceptance and grown to appreciate the diversity and breadth of the

Exhibit 2.3 *The Civil Rights Act of 1991*

When the Civil Rights Act of 1991 was signed into law by President George Bush on November 21, 1991, it was the end of a fierce battle that had raged for several years over the increasingly conservative decisions of the U.S. Supreme Court in civil rights cases. The new law was a major overhaul for Title VII. The law's nearly 30-year history was closely scrutinized. It is significant for employers that, when presented the opportunity, Congress chose to strengthen the law in many ways, rather than lessen its effectiveness. Among other things, the new law for the first time in Title VII cases:

- Permitted:
  - —Jury trials where compensatory or punitive damages are sought.
  - —Compensatory damages in religious, gender, and disability cases (such damages were already allowed for race and national origin under related legislation).
  - —Punitive damages for the same (except against governmental agencies).
  - —Unlimited medical expenses.
- Limited the extent to which "reverse discrimination" suits could be brought.
- Authorized expert witness fees to successful plaintiffs.
- Codified the disparate impact theory.
- Broadened protections against private race discrimination in 42 U.S.C. § 1981 cases.
- Expanded the right to bring actions challenging discriminatory seniority systems.
- Extended extraterritorial coverage of Title VII to U.S. citizens working for U.S. companies outside the United States, except where it would violate the laws of the country.
- Extended coverage and established procedures for Senate employees.
- Established the Glass Ceiling Commission.
- Established the National Award for Diversity and Excellence in American Executive Management (known as the Frances Perkins–Elizabeth Hanford Dole National Award for Diversity and Excellence in American Executive Management) for businesses who "have made substantial efforts to promote the opportunities and development experiences of women and minorities and foster advancement to management and decision-making positions within the business."

workplace that the law engenders. The EEOC has changed also. Forty-plus years after the effective date of the 1964 Civil Rights Act, it is clear that the agency has maintained its mission to eradicate workplace discrimination but changed some of its tactics as it has gained experience. While its mission has always been conciliation based, it did not always seem that way. In carving out its new, untrod territory, it aggressively went after employers in order to establish its presence and place in the law (which, along with being "the feds," caused more than a little employer resentment). Once that place was firmly established, the EEOC began living up to its conciliation mission. It now prefers to be proactive and have employers avoid litigation by thoroughly understanding the law and its requirements. The EEOC has sponsored thousands of outreach programs to teach employers and employees, alike, about the law; has initiated extensive mediation programs to try to handle discrimination claims quickly, efficiently, and without litigation; and maintains an informative Web site that makes help readily accessible for employers and employees alike. (See Exhibit 2.4, "EEOC on Call.")

Exhibit 2.4 *EEOC on Call*

The EEOC's National Contact Center may be reached 24 hours a day at 1-800-669-4000, 1-800-669-6820 TTY, or via e-mail at info@ask.eeoc.gov. Constituents can now communicate with the agency in more than 150 languages by telephone, e-mail, and Web inquiries to obtain quick, accurate information. Additionally, through Frequently Asked Questions posted on the EEOC's Web page and an Interactive Voice Response telephone system available 24 hours a day, customers are getting their questions answered through the use of the NCC's technology.

Source: http://eeoc.gov/abouteeoc/plan/par/2006/management_discussion.html#highlights.

As the demographics and the workplace change, the EEOC has incorporated these changes into its mission, for instance, by forming the TIGAAR (The Information Group for Asian-American Rights) initiative to promote voluntary compliance with employment laws by Asian-American employers and to educate Asian-American employees about their workplace rights; through programs with Sikh and Muslim communities in response to post-9/11 religious and national origin discrimination; or by working with Native Americans through the Council of Tribal Employment Rights (CTER) to eliminate workplace discrimination on or near Native American reservations, secure Native American preference agreements with employers operating on or near reservations, and process employment discrimination complaints. The EEOC also has re-invigorated its efforts in the area of race and color discrimination with its new E-RACE initiative discussed in a later chapter. In addition, it has put renewed emphasis on discriminatory recruitment and hiring practices and discrimination against youth with its Youth@Work initative.

Much work, however, remains. The EEOC still receives a large number of discrimination charges. In fiscal year 2006, charges increased for the first time since 2002. Charges of race discrimination have increased every decade since the inception of Title VII. Retaliation charges and "egregious discrimination" charges are increasing. While it prefers conciliation, the EEOC will still aggressively pursue employers when conciliation does not work to its satisfaction. There are other changes as well. As the EEOC Chair, Naomi C. Earp said in presenting the EEOC's Performance and Accountability Report for FY 2006,

> Employment discrimination has changed fairly dramatically over the past 40 years. In the years before and immediately after Title VII was passed, discrimination was blatant and pervasive. Newspapers published sex-segregated job ads, and employers implemented or continued policies of segregating employment facilities by race, paying female employees less than male employees, restricting employment and promotion opportunities for women and minorities, and enforcing mandatory retirement policies to force older workers out. Today, discrimination has become more subtle and thus more difficult to prove. . . [C]urrent demographic changes, such as the graying of the workforce and the increased gender and ethnic diversity of the workforce, also present new challenges and opportunities for employees, employers, and the Commission.[3]

The best way to avoid violations of employment discrimination laws is to know and understand their requirements. That is what the following sections and chapters will help you do.

Keep Exhibit 2.5, "Cages," in mind as you go through this section of the text. Most of us look at things microscopically. That is, we tend to see only the situation in front of us, and don't give much thought to the larger picture into which it fits. But it is this larger picture within which we actually operate. It is the one the law considers when enacting legislation, the courts consider in interpreting the law and deciding cases, and thus the one an employer should consider when developing workplace policies or responding to workplace situations. Often, a situation, in and of itself, may seem to us to have little or no significance. "Why are they whining about this?" we say; "Why can't they just go along?" "Why are they being so sensitive?" But we are often missing the larger picture and how this situation may fit into it. Like the birdcage in Exhibit 2.5, each thing, in and of itself, may not be a big deal, but put each of these things together, and a picture is revealed of a very different reality for those who must deal with the "wires."

Many of the situations you see in the following chapters are "wires" that Title VII and other protective legislation try to eradicate in an effort to break down the seemingly impenetrable invisible barriers we have erected around issues of race, gender, disabilities, ethnicity, religion, age, and affinity orientation for generations. As you go through the cases and information, think not only about the micro picture of what is going on in front of you but also about the larger macro picture that it fits into. Sometimes what makes little sense in one setting, makes perfect sense in the other.

Another way to look at it is as if it is one of those repeating-pattern "Magic Eye" pictures so popular a few years ago. If you stare at one the correct way, you get to see the detailed 3-D picture you'd never see by just glancing at the surface picture. The picture hasn't changed, but you've looked at it in a way that now lets you see another, richly detailed picture you didn't even know was there. Learning about employment discrimination will not change the reality you already know (the repeating-pattern picture you see at a glance), but will instead help you to see another, richer, more detailed picture inside this one—one that will greatly assist you in being an effective manager who is less likely to be responsible for workplace discrimination claims.

What does this all mean? Let's look at an example. A female who works in a garage comes in one day and there are photos of nude females all around the shop. She complains to the supervisor and he tells her that the men like the photos and if she doesn't like it, just don't look at them. The guys she works with begin to rib her about complaining. They tell her she's a "wuss," "can't cut the mustard," and "can't hang with the big boys." "What's the big deal?" you say. "Why didn't she just shut up and ignore the photos?"

Well, in and of itself the photos may not seem like much. But when you look at the issue in its larger context, it looks quite different. Research shows that in workplaces in which nude photos, adult language, sexual teasing, jokes, and so on, are present, women tend to be paid less and receive fewer and less-significant

Exhibit 2.5 *Cages*

Cages. Consider a birdcage. If you look very closely at just one wire in the cage, you cannot see the other wires. If your conception of what is before you is determined by this myopic focus, you could look at that one wire, up and down the length of it, and be unable to see why a bird would not just fly around the wire any time it wanted to go somewhere. Furthermore, even if, one day at a time, you myopically inspected each wire, you still could not see why a bird would have trouble going past the wires to get anywhere. There is no physical property of any one wire, nothing that the closest scrutiny could discover, that will reveal how a bird could be inhibited or harmed by it except in the most accidental way. It is only when you step back, stop looking at the wires one by one, microscopically, and take a macroscopic view of the whole cage, that you can see why the bird does not go anywhere; and then you will see it in a moment. It will require no great subtlety of mental powers. It is perfectly obvious that the bird is surrounded by a network of systematically related barriers, no one of which would be the least hindrance to its flight, but which, by their relations to each other, are as confining as the solid walls of a dungeon.

Source: From "Oppression," by Marilyn Frye, *The Politics of Reality,* reprinted in *Race, Class and Gender: An Anthology,* Margaret L. Anderson and Patricia Hill Collins, 1992, Wadsworth Press. Used by permission.

raises, promotions, and training. It is not unlikely that the environment that supports such photos doesn't clearly draw lines between the people in the photos and females at work. Case after case bears it out. So the photos themselves aren't really the whole issue. It's the micro picture, the repeating-pattern picture you see at a glance. But the macro picture, the 3-D picture, is the objectification of women and what contributes to women being viewed as less than and not as capable in a workplace in which they may well be just as capable as anyone else. What might have seemed like harmless joking or photos in the micro view takes on much more significance in the macro view and has much more of a potential negative impact on the work experience of the female employee who is less likely to be trained, promoted, or given a raise for which she is qualified.

Again, as you go through the following chapters, try to look at the micro as well as the macro picture—the repeating-pattern surface picture as well as the 3-D picture inside. You will also benefit from the case questions, which help you view what you have read in a larger context. Again, it is this context that will be under scrutiny when the policies of a workplace form the basis of a lawsuit. Thinking about that context beforehand and making policies consistent with it will give the employer a much greater chance of avoiding embarrassing and costly litigation.

The Structure of Title VII

LO3

What Is Prohibited under Title VII

Title VII prohibits discrimination in hiring, firing, training, promotion, discipline, or other workplace decisions on the basis of an employee or applicant's race, color, gender, national origin, or religion. Included in the prohibitions are discrimination

Exhibit 2.6 *Title VII Provisions*

An employer cannot discriminate on the basis of:

- Race
- Color
- Gender
- Religion
- National origin

in making decisions regarding:

- Hiring
- Firing
- Training
- Discipline
- Compensation
- Benefits
- Classification
- Or other terms or conditions of employment

in pay, terms and conditions of employment, training, layoffs, and benefits. Virtually any workplace decision can be challenged by an applicant or employee who falls within the Title VII categories. (See Exhibit 2.6, "Title VII Provisions.")

LO4

Who Must Comply

Title VII applies to employers, unions, and joint labor and management committees making admission, referral, training, and other decisions, and to employment agencies and other similar hiring entities making referrals for employment. It applies to all private employers employing 15 or more employees, and to federal, state, and local governments. (See Exhibit 2.7, "Who Must Comply.")

Who Is Covered

Title VII applies to public (governmental) and private (nongovernmental) employees alike. Unlike labor laws that do not apply to managerial employees or wage and hour laws that exempt certain types of employees, Title VII covers all levels and types of employees. The Civil Rights Act of 1991 further extended Title VII's coverage to U.S. citizens employed by American employers outside the United States. Non-U.S. citizens are protected in the United States but not outside the United States.

Undocumented workers also are covered by the law, but after the U.S. Supreme Court's 2002 ruling in *Hoffman Plastic Compounds, Inc. v. NLRB,*[4] the EEOC reexamined its position on remedies for undocumented workers. In *Hoffman,* the Court said that U.S. immigration laws outweighed the employer's labor violations; therefore, the employee could not recover back pay for violations of the labor law. The EEOC had been treating undocumented worker claims of employment discrimination under Title VII like violations against any other worker. After *Hoffman,* the EEOC said that employment discrimination against undocumented workers is still illegal, and they will not ask their status in handling their discrimination claims, but *Hoffman* affected the availability of some forms of relief, such as reinstatement and back pay for periods after discharge or failure to hire.

Exhibit 2.7 *Who Must Comply*

- Employers engaged in interstate commerce if they have:
  - Fifteen or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.
- Labor organizations of any kind that exist to deal with employers concerning labor issues, engaged in an industry affecting commerce.
- Employment agencies that, with or without compensation, procure employees for employers or opportunities to work for employees.

Who Is Not Covered

Exemptions under Title VII are limited. Title VII permits businesses operated on or around Native American reservations to give preferential treatment to Native Americans. The act specifically states that it does not apply to actions taken with respect to someone who is a member of the Communist Party or other organization required to register as a Communist-action or Communist-front organization. The law permits religious institutions and associations to discriminate when performing their activities. For instance, a Catholic priest could not successfully sue under Title VII alleging religious discrimination for not being hired to lead a Jewish synagogue. (See Exhibit 2.8, "Employees Who Are Not Covered by Title VII.") In the case of *Petruska v. Gannon University,* included at the end of the chapter, the employee was not able to effectively bring her claim for gender discrimination because of this limitation on religious claims.

Case 1

LO5

Filing Claims under Title VII

claimant or charging party
The person who brings an action alleging violation of Title VII.

Nonfederal employees who believe they have experienced employment discrimination may file a charge or claim with the EEOC. An employee filing such a claim is called a **claimant** or a **charging party**. Employers should be aware that it costs an employee only time and energy to go to the nearest EEOC office and file a claim. By law, the EEOC must in some way handle every claim it receives. To discourage claims and ensure the best defense when they arise, employers should ensure that their policies and procedures are legal, fair, and consistently applied.

Regarding the ease of bringing EEO claims, there is good news and bad news for employers. The good news is that the vast majority of charges are sifted out of the system for one reason or another. For instance, in fiscal year 2007, of the 82,792 charges filed with the EEOC, 12.2 percent were settled, 17.8 percent had administrative closures (failure of the claimant to pursue the claim, loss of contact with the claimant, etc.), 59.3 percent resulted in findings of no reasonable cause, and reasonable cause was found in only 5.0 percent of the charges.[5]

The bad news is that the EEOC's success rate in litigation was 91.5 percent with a total monetary recovery of over $345.5 million. For years the EEOC's

Exhibit 2.8 *Employees Who Are Not Covered by Title VII*

- Employees of employers having less than 15 employees.
- Employees whose employers are not engaged in interstate commerce.
- Non-U.S. citizens employed outside the United States.
- Employees of religious institutions, associations, or corporations hired to perform work connected with carrying on religious activities.
- Members of Communist organizations.
- Employers employing Native Americans living in or around Native American reservations.
- Employers who are engaged in interstate commerce but do not employ 15 or more employees for each of 20 or more calendar weeks in the current or preceding calendar year.

success rate has been at least 90 percent. Those are not good numbers for employers tangling with the EEOC. The best defense is a good offense. Avoiding trouble in the first place lessens the chances of having to deal with the EEOC and therefore the chances of probably losing.

Nonfederal government employee claims must be filed within 180 days of the discriminatory event, except as noted in the next section involving 706 agencies. For federal employees, claims must be filed with their employing agency within 45 days of the event. In a significant U.S. Supreme Court case, *National Railroad Passenger Corp. (Amtrak) v. Morgan,*[6] these deadlines were made a bit more flexible by the Court for harassment cases. In the *Morgan* case, the Supreme Court said that since on-the-job harassment is part of a pattern of behavior, if a charge is filed with the EEOC within the statutory period, a jury can consider actions that occurred outside the statutory period. That is, the violation is considered to be a continuing one, so the claimant is not limited to only evidence relating to the specific event resulting in the lawsuit. Note, however, that in May 2007, the U.S. Supreme Court held that it was not a continuing violation each time an employer issued a paycheck based on gender-based wage discrimination. In *Ledbetter v. Goodyear Tire and Rubber Co., Inc.,*[7] discussed in more detail in the gender chapter, the Court rejected the paycheck accrual rule that would have allowed the employee to restart the statute of limitations each time she was paid. The Court distinguished *Morgan* by saying the act of wage discrimination was a discrete act rather than a pattern, and, thus, did not merit the same treatment as the harassment in the *Morgan* case.

record keeping and reporting requirements
Title VII requires that certain documents must be maintained and periodically reported to the EEOC.

The reason for the fairly short statute of limitations is an attempt to ensure that the necessary parties and witnesses are still available and that events are not too remote to recollect accurately. Violations of Title VII may also be brought to the EEOC's attention because of its own investigation or by information provided by employers meeting their **record keeping and reporting requirements** under the law.

You should be aware that the filing process is different for federal employees, although the EEOC is seeking to make it conform more closely to the nonfederal

employee regulations. Federal employees are protected by Title VII, but the procedures for handling their claims simply follow a different path.

State Law Interface in the Filing Process

Since most states have their own fair employment practice laws, they also have their own state and local enforcement agencies for employment discrimination claims. Most of these agencies contract with the EEOC to be what is called a **"706" agency** (named for section 706 of the act). On the basis of a work-sharing agreement with the EEOC, these agencies receive and process claims of discrimination for the EEOC in addition to carrying on their own state business.

706 agency
State agency that handles EEOC claims under a work-sharing agreement with the EEOC.

Title VII's intent is that claims be **conciliated** if possible. Local agencies serve as a type of screening process for the more serious cases. If the complaint is not satisfactorily disposed at this level, it may eventually be taken by the EEOC and, if necessary, litigated. State and local agencies have their own procedures, which are similar to those of the EEOC.

conciliation
Attempting to reach agreement on a claim through discussion, without resort to litigation.

If there is a 706 agency in the employee's jurisdiction, the employee has 300 days rather than 180 days within which to file. If an employee files his or her claim with the EEOC when there is a 706 agency in the jurisdiction, the EEOC defers the complaint to the 706 agency for 60 days before investigating. The employee can file the complaint with the EEOC, but the EEOC sends it to the 706 agency, and the EEOC will not move on the claim for 60 days.

In further explaining the process, reference will only be made to the EEOC as the enforcing agency involved.

Proceeding through the EEOC

Within 10 days of the employee filing a claim with the EEOC, the EEOC serves notice of the charge to the employer (called **respondent** or **responding party**). Title VII also includes **antiretaliation provisions**. It is a separate offense for an employer to retaliate against an employee for pursuing rights under Title VII. Noting that retaliation claims had doubled since 1991, in 1998 the EEOC issued retaliation guidelines to make clear its view on what constitutes retaliation for pursuing Title VII rights and how seriously it views such claims by employees. In fiscal year 2007, retaliation claims were, by far, the third largest percentage of claims filed under Title VII, with race at 37.0 percent, gender at 30.1 percent, and retaliation at 28.3 percent.[8]

respondent or responding party
Person alleged to have violated Title VII, usually the employer.

antiretaliation provisions
Provisions making it illegal to treat an employee adversely because the employee pursued his or her rights under Title VII.

Mediation

Hot. That is the best way to describe the EEOC's approach to mediation. In response to complaints of a tremendous backlog of cases and claims that went on for years, in recent years the EEOC has adopted several important steps to try to streamline its case-handling process and make it more efficient, effective, and less time-consuming for employees filing claims. Primary among the steps is its adoption of mediation as an alternative to a full-blown EEOC investigation. In furtherance of this, the EEOC has begun several different programs involving mediation. In 1999 it launched the expanded mediation program discussed in the next paragraph. In 2003, in recognition that many private sector employers

already have extensive mediation programs set up to handle workplace issues, the EEOC began a "referral-back" program. Private sector employment discrimination claims are referred back to participating employers for mediation by the employer's own mediation program to see if they can be resolved without going any further. The same year, the EEOC ushered in a pilot program to have local fair employment practice offices mediate claims on the EEOC's behalf. In response to the EEOC's finding that there were more employees willing to mediate than there were employers willing to do so, the EEOC instituted "universal mediation agreements," under which employers agree to have their claims mediated by the EEOC when discrimination charges are filed. As of the end of fiscal year 2007, the EEOC had signed universal agreements to mediate with 154 national/regional corporations and 1,115 local employers. National universal mediation agreements have been signed with such employers as Ford Motor Company; Huddle House, Inc.; Ryan's Restaurant Group, Inc.; and Southern Company. This was a 15 percent increase in agreements over just the previous year.[9]

Generally, the way mediation works is that after a discrimination charge is filed by the employee and notice of the charge is given to the employer, the EEOC screens the charge to see if it is one that is appropriate for mediation. If it is appropriate for mediation, the EEOC will offer that option to the parties. Complex and weak cases are not offered mediation. The agency estimates that it offers mediation to 60 to 70 percent of its incoming workload of 80,000 cases per year. Of those, about 15 percent are actually mediated. Both parties are sent letters offering mediation, and the decision to participate is voluntary for both parties. Each side has 10 days to respond to the offer to mediate. If both parties elect mediation, the charge must be mediated within 60 days for in-house mediation or 45 days for external mediation. The EEOC has expanded its mediation program to allow a request for mediation at any stage of the administrative process, even after a finding of discrimination has been issued.

If the parties choose to mediate, then during mediation they will have the opportunity to present their positions, express their opinions, provide information, and express their request for relief. Any information disclosed during this process is not to be revealed to anyone, including EEOC employees. If the parties reach agreement, that agreement is as binding as any other settlement agreement. From 1999, when it's mediation program was fully implemented, to 2007, the EEOC conducted over 98,000 mediations, with 69 percent, over 68,000 charges, being successfully resolved, with a satisfaction rate of over 90 percent.[10]

EEOC Investigation

If the parties choose not to mediate the charge or if the mediation is not successful, the charge is referred back to the EEOC for handling. The EEOC investigates the complaint by talking with the employer and employee and any other necessary witnesses as well as viewing any documents or even visiting the workplace. The average time for an investigation is about 182 days.[11]

reasonable cause
EEOC finding that Title VII was violated.

no reasonable cause
EEOC finding that evidence indicates no reasonable basis to believe Title VII was violated.

right-to-sue letter
Letter given by the EEOC to claimants, notifying them of the EEOC's no-cause finding and informing them of their right to pursue their claim in court.

exhaustion of administrative remedies
Going through the EEOC administrative procedure before being permitted to seek judicial review of an agency decision.

EEO investigator
Employee of EEOC who reviews Title VII complaints for merit.

1 Scenario

judicial review
Court review of an agency's decision.

***de novo* review**
Complete new look at administrative case by the reviewing court.

EEOC's Determination

After appropriate investigation, the EEOC makes a determination as to whether there is **reasonable cause** or no reasonable cause for the employee to charge the employer with violating Title VII. Once there has been an investigation and a cause or no-cause finding, either party can ask for reconsideration of the EEOC's decision.

No-Reasonable-Cause Finding

After investigation, if the EEOC finds there is **no reasonable cause** for the employee's discrimination complaint, the employee is given a dismissal and notice of rights, often known as a **right-to-sue letter**. If the employee wants to pursue the matter further despite the EEOC's conclusion that Title VII has not been violated, the employee is now free to do so, having **exhausted the administrative remedies**. The employee can then bring suit against the employer in federal court within 90 days of receiving the notice. (See Exhibit 2.9, "The Procedure for Bringing a Claim within the EEOC.")

Reasonable-Cause Finding

If the EEOC finds there is reasonable cause for the employee to charge the employer with discrimination, it will attempt to have the parties meet together and conciliate the matter. That is, the EEOC will bring the parties together in a fairly informal setting with an **EEO investigator**.

The EEO investigator sets forth what has been found during the investigation and discusses with the parties the ways the matter can be resolved. Often the employee is satisfied if the employer simply agrees to provide a favorable letter of recommendation. The majority of claims filed with the EEOC are adequately disposed of at this stage of the proceedings. If the claim is not adequately disposed of, the EEOC can take the matter further and eventually file suit against the employer in federal district court.

Judicial Review

If no conciliation is reached, the EEOC may eventually file a civil action in federal district court. As we have seen, if the EEOC originally found no cause and issued the complaining party a right-to-sue letter, the employee can take the case to court, seeking **judicial review**. Title VII requires that courts give EEOC decisions ***de novo* review.** A court can only take a Title VII discrimination case for judicial review after the EEOC has first disposed of the claim. Thus, in opening scenario 1, Jack cannot immediately file a discrimination lawsuit against his employer because Jack has not yet gone through the EEOC's administrative process and exhausted his administrative remedies.

Upon going to court, the case is handled entirely new, as if there had not already been a finding by the EEOC. Employees proceeding with a no-reasonable-cause letter are also free to develop the case however they wish without being

Exhibit 2.9 *The Procedure for Bringing a Claim within the EEOC*

- Employee goes to the EEOC office and files the EEOC complaint.
- Agency sends notice to employer responding party accused of discrimination.
- Parties receive referral to mediation (if appropriate).
- If both parties elect mediation, the charge is mediated.
- If the parties agree in mediation, the negotiated settlement is binding. Complaint is resolved and closed.
- If mediation is not successful or parties choose not to mediate, the EEOC investigates the claim.
- If the EEOC's investigation shows reasonable cause to believe discrimination has occurred, the parties meet and try to conciliate.
- If agreement is reached during conciliation, the claim is resolved and closed.
- If no agreement is reached during conciliation, the EEOC makes determination of reasonable cause, or no reasonable cause to believe discrimination occurred.
- If reasonable cause is found, the EEOC notifies the employer of the proposed remedy.
- If no reasonable cause is found, parties are notified and the charging party is issued a dismissal and the notice of rights letter.
- If the employer disagrees, he or she appeals the decision to next agency level.

bound by the EEOC's prior determination. If a party is not satisfied with the court's decision and has a basis upon which to appeal, the case can be appealed up to, and including, the U.S. Supreme Court, if it agrees to hear the case.

Before we leave the area of judicial review, we need to discuss a matter that has become important in the area of employees' pursuing their rights under Title VII and having the right to judicial review of the EEOC's decisions.

mandatory arbitration agreement
Agreement an employee signs as a condition of employment, requiring that workplace disputes be arbitrated rather than litigated.

In recent years, **mandatory arbitration agreements** have gained tremendously in popularity. Previously confined almost exclusively to unions and the securities industry, these agreements are entered into by employees with their employers when they are hired and stipulate that any workplace disputes will be disposed of by submitting them to arbitration rather than to the EEOC or the courts.

The appeal of mandatory arbitration clauses is that they greatly decrease the time and resources parties would spend by fighting workplace legal battles in court. There are at least two major drawbacks for employees: (1) When they are trying to obtain employment, potential employees generally feel they have little choice about signing away their rights to go to court and (2) once a case goes to arbitration, the arbitrator's decision is not subject to judicial review by the courts unless the decision can be shown to be the result of fraud or collusion, is unconstitutional, or suffers some similar malady. This means that the vast majority of arbitration awards, many rendered by arbitrators with no legal background or grounding in Title VII issues, remain intact, free from review by the courts. It also means that while employers gain the advantage of having fewer cases in court, employees have the disadvantage of essentially having the courts closed to them

in Title VII cases, even though Title VII provides for both an administrative process and judicial review.

With few downsides for employers, mandatory arbitration agreements have become so popular with employers that they are now fairly routine. Employees who come to the EEOC intending to file claims of employment discrimination are told that they cannot do so because they have entered into a mandatory arbitration agreement with their employer, which requires them to seek redress through arbitration, *not* the EEOC or the courts.

Two recent U.S. Supreme Court cases have decided important issues in this area. In *Circuit City v. Adams,*[12] the Supreme Court held that mandatory arbitration clauses requiring arbitration of workplace claims, including those under Title VII, are enforceable under the Federal Arbitration Act. In *EEOC v. Waffle House, Inc.,*[13] the Court held that even though an employee is subject to a mandatory arbitration agreement, since the EEOC is not a party to the agreement, the agreement does not prevent the EEOC from pursuing victim-specific relief such as back pay, reinstatement, and damages as part of an enforcement action.

So, the EEOC claims clearly can be the subject of mandatory arbitration, but this does not prevent the EEOC from bringing its own enforcement action against the employer and even asking for victim-specific relief for the employee. An employer can avoid a Title VII court case by requiring mandatory arbitration of workplace claims, but still may have to contend with the EEOC bringing suit on its own.

Legislation to overturn *Circuit City* and only permit voluntary arbitration agreements was introduced in both the House and Senate shortly after the decision, but did not pass. Perhaps this was, at least in part, because the Supreme Court gave further indication of how it will view mandatory arbitration agreements in a later *Circuit City* case. In its initial decision, the Supreme Court required the *Circuit City* case to be remanded to the lower court for actions not inconsistent with its ruling. On remand, the court of appeals applied the Federal Arbitration Act and ruled that the employer's mandatory arbitration agreement was unconscionable and unenforceable because it was offered on a take-it-or-leave-it basis, did not require the company to arbitrate claims, limited the relief available to employees, and required employees to pay half of the arbitration costs. When the court of appeals' decision came back to the Supreme Court for review, the Court declined to hear it, leaving the court of appeals' refusal to enforce the mandatory arbitration agreement intact.[14]

Perhaps also, at least in part in response to mandatory arbitration agreements, the EEOC stepped up its mediation programs in order to provide employers with an alternative between litigation and mandatory arbitration. Since 1991 the EEOC had been moving in the direction of mediation, but the issue heated up after the Supreme Court decisions on mandatory arbitration. The EEOC's subsequent litigation alternatives heavily favoring mediation included plans aimed squarely at employers, with its adoption of the national uniform mediation agreements (NUMAs) and referral-back programs. As discussed earlier, the NUMAs specifically commit employers to mediation of Title VII claims, while the referral-back

back pay
Money awarded for time employee was not working (usually due to termination) because of illegal discrimination.

front pay
Equitable remedy of money awarded to claimant when reinstatement is not possible or feasible.

retroactive seniority
Seniority that dates back to the time the claimant was treated illegally.

make-whole relief
Attempts to put the claimant in position he or she would have been in had there been no discrimination.

compensatory damages
Money awarded to compensate the injured party for direct losses.

punitive damages
Money over and above compensatory damages, imposed by court to punish defendant for willful acts and to act as a deterrent.

disparate/adverse impact
Effect of facially neutral policy is deleterious for Title VII group.

programs allow employers to use their own in-house ADR programs to attempt to settle such claims.

Remedies

If the employee wins the case, the employer may be liable for **back pay** of up to two years before the filing of the charge with the EEOC; for **front pay** for situations when reinstatement is not possible or feasible for claimant, for reinstatement of the employee to his or her position; for **retroactive seniority**; for injunctive relief, if applicable; and for attorney fees. Until passage of the Civil Rights Act of 1991, remedies for discrimination under Title VII were limited to **make-whole relief** and injunctive relief.

The Civil Rights Act of 1991 added **compensatory damages** and **punitive damages** as available remedies. Punitive damages are permitted when it is shown that the employer's action was malicious or was done with reckless indifference to federally protected rights of the employee. They are not allowed under the **disparate/adverse impact** or unintentional theory of discrimination (to be discussed shortly) and may not be recovered from governmental employers. Compensatory damages may include future pecuniary loss, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. (See Exhibit 2.10, "Title VII Remedies.")

There are certain limitations on the damages under the law. Gender discrimination (including sexual harassment) and religious discrimination have a $300,000 cap total on nonpecuniary (pain and suffering) compensatory and punitive damages. There is no limitation on medical compensatory damages. The cap depends on the number of employees the employer has (see Exhibit 2.11, "Compensatory and Punitive Damages Caps"). Juries may not be told of the caps on liability. Since race and national origin discrimination cases also can be brought under 42 U.S.C. § 1981, which permits unlimited compensatory damages, the caps do not apply to these categories. In 2001, the U.S. Supreme Court ruled that though compensatory damages are capped by the law, the limitations do not apply to front pay.[15] Also, as previously discussed, the U.S. Supreme Court's *Hoffman* decision[16] foreclosed the ability of undocumented workers to receive post-discharge back pay, and the EEOC rescinded its policy guidance suggesting otherwise.

With the addition of compensatory and punitive damages possible in Title VII cases, litigation increased dramatically. It is now more worthwhile for employees to sue and for lawyers to take the cases. The possibility of money damages also makes it more likely that employers will settle more suits rather than risk large damage awards. Again, the best defense to costly litigation and liability is solid, consistently applied workplace policies.

Jury Trials

The Civil Rights Act of 1991 also added jury trials to Title VII. From the creation of Title VII in 1964 until passage of the 1991 Civil Rights Act 27 years later, jury trials were not permitted under Title VII. Jury trials are now permitted under

Exhibit 2.10 *Title VII Remedies*

- Back pay
- Front pay
- Reinstatement
- Seniority
- Retroactive seniority
- Injunctive relief
- Compensatory damages
- Punitive damages
- Attorney fees
- Medical costs

Title VII at the request of either party when compensatory and punitive damages are sought.

There is always less predictability about case outcomes when juries are involved. Arguing one's cause to a judge who is a trained member of the legal profession is quite different from arguing to a jury of 6 to 12 jurors, all of whom come with their own backgrounds, prejudices, predilections, and little knowledge of the law. Employers now have even more incentive to ensure that their policies and actions are well reasoned, business-related, and justifiable—especially since employees have even more incentive to sue.

Theoretical Bases for Title VII Lawsuits

plaintiff
One who brings a civil action in court.

defendant
One against whom a case is brought.

OK, so we exhaust our administrative remedies and decide to file a claim in court for our discrimination claim. Since cases will be our vehicle for viewing Title VII, we will speak of the parties as **plaintiff** and **defendant**. In alleging discrimination, an employee plaintiff may use either of two theories to bring suit under Title VII: disparate treatment or disparate impact. The suit must fit into one theory or the other to be recognized under Title VII. A thorough understanding of each will help employers to make sounder policies that avoid litigation in the first place and enhance the workplace in the process.

Disparate Treatment

LO6

disparate treatment
Treating similarly situated employee differently because of prohibited Title VII factors.

Disparate treatment is the Title VII theory used in cases of individual and obvious discrimination. The plaintiff employee (or applicant) bringing suit alleges that the defendant employer treats the employee differently than other similarly situated employees. Further, the employee alleges that the reason for the difference is the employees' race, religion, gender, color, or national origin. Disparate treatment is considered intentional discrimination, but the plaintiff need not actually know that unlawful discrimination is the reason for the difference. That is, the employee need not prove that the employer actually said that race, gender, and so on was the reason for the decision. In disparate treatment cases, the employer's policy is discriminatory on its face.

Case 2

As you will see in *McDonnell Douglas Corp. v. Green,* included at the end of the chapter, the U.S. Supreme Court has come up with a set of indicators that

Exhibit 2.11 *Compensatory and Punitive Damages Caps*

For employers with:

- 15 to 100 employees, there is a cap of $50,000.
- 101 to 200 employees, there is a cap of $100,000.
- 201 to 500 employees, there is a cap of $200,000.
- More than 500 employees, there is a cap of $300,000.

prima facie case
Presenting evidence that fits each requirement of a cause of action.

leaves discrimination as the only plausible explanation when all other possibilities are eliminated. (See Exhibit 2.12, "Disparate Treatment.") That is, in order to make out a **prima facie case** of disparate treatment discrimination, the employee must show that (1) the employee belongs to a class protected under Title VII; (2) he or she applied for and was qualified for a job for which the employer was seeking applicants; (3) despite his or her qualifications, the applicant was rejected and, after the rejection, the position remained open; and (4) the employer continued to seek applicants with the rejected applicant's qualifications.

The effect of the *McDonnell Douglas* inquiries is to set up a legal test of all relevant factors that are generally taken into consideration in making employment decisions. Once those considerations have been ruled out as the reason for failure to hire the applicant, the only factor left to consider is the applicant's membership in one of Title VII's prohibited categories (i.e., race, color, gender, religion, or national origin).

The *McDonnell Douglas* Court recognized that there would be scenarios under Title VII other than failure to rehire involved in that case (i.e., failure to promote or train, discriminatory discipline, and so on) and its test would not be directly transferrable to them, but it could be modified accordingly. For instance, the issue may not be a refusal to rehire; it may, instead, be a dismissal. In such a case, the employee would show the factors as they relate to dismissal.

If an employer makes decisions in accordance with these requirements, it is less likely that the decisions will later be successfully challenged by the employee in court. Disparate treatment cases involve an employer's variance from the normal scheme of things, to which the employee can point to show he or she was treated differently. Employers should therefore consistently treat similarly situated employees similarly. If there are differences, ensure that they are justifiable.

Think carefully before deciding to single out an employee for a workplace action. Is the reason for the action clear? Can it be articulated? Based on the information the employer used to make the decision, is it reasonable? Rational? Is the information serving as the basis for the decision reliable? Balanced? Is the justification job related? If the employer is satisfied with the answers to these questions, the decision is probably defensible. If not, reexamine the considerations for the decision, find its weakness, and determine what can be done to address the weakness. The employer will then be in a much better position to defend the decision and show it is supported by legitimate, nondiscriminatory reasons.

Exhibit 2.12 *Disparate Treatment*

EMPLOYEE'S PRIMA FACIE CASE REQUIREMENTS

- Employee belongs to a group protected by Title VII.
- Employee applied and was qualified for a job for which the employer was seeking applicants.
- Despite his or her qualifications, employee was rejected for the job.
- After employee's rejection, the position remained open and employer continued to seek applicants with employee's qualifications.

This is modified to conform to the situation forming the basis of the suit, as appropriate. For instance, if it was termination rather than hiring, or discipline rather than hiring, the requirements would be adjusted accordingly.

Employer's Defense: Employer can defend by showing that the action was taken for a legitimate, nondiscriminatory reason.

Employee's Counter: Employee can counter with evidence that the employer's legitimate, nondiscriminatory reason was actually a mere pretext for the employer to discriminate.

Legitimate, Nondiscriminatory Reason Defense

Even if the employee establishes all four of the elements of the prima facie case of disparate treatment, it is only a rebuttable presumption. That is, that alone does not establish that the employer discriminated against the employee. There may be some other explanation for what the employer did. As the Court stated in *McDonnell Douglas,* the employer may defend against the prima facie case of disparate treatment by showing that there was a legitimate, nondiscriminatory reason for the decision involving the employee. That reason may be virtually anything that makes sense and is not related to Title VII criteria. It is only discrimination on the basis of Title VII that is protected. For instance, Title VII does not protect the category of jerks. If it can legitimately be shown that the action was taken because the employee was acting like a jerk, then regardless of Title VII, there is no protection. However, if it turns out that the only jerks terminated are those of a particular race, gender, ethnicity, and the like, then the employer is still violating Title VII.

But even if the employer can show a legitimate, nondiscriminatory reason for the action toward the employee, the analysis does not end there. The employee can then counter the employer's defense by showing that the legitimate, nondiscriminatory reason being shown by the employer is a mere pretext for discrimination. That is, that while on its face the employer's reason may appear legitimate, there is actually something discriminatory going on. For instance, in *McDonnell Douglas,* the employer said it would not rehire Green because he engaged in unlawful activity. This is a perfectly reasonable, legitimate, nondiscriminatory reason. However, if Green could show that the employer had rehired white employees who had engaged in similar unlawful activities, then McDonnell Douglas's legitimate, nondiscriminatory reason for the treatment of Green would appear to be a mere pretext for discrimination since white employees who engaged in similar activities had been rehired despite their activity, but Green, black, had not.

The BFOQ Defense

bona fide occupational qualification (BFOQ)
Permissible discrimination if legally necessary for employer's particular business.

Employers also may defend against disparate treatment cases by showing that the basis for the employer's intentional discrimination is a **bona fide occupational qualification (BFOQ)** reasonably necessary for the employer's particular business. This is available only for disparate treatment cases involving gender, religion, and national origin and is not available for race or color. BFOQ is legalized discrimination and, therefore, very narrowly construed by the courts.

To have a successful BFOQ defense, the employer must be able to show that the basis for preferring one group over another goes to the essence of what the employer is in business to do and that predominant attributes of the group discriminated against are at odds with that business. (See Exhibit 2.13, "BFOQ Test.") For instance, it has been held that, because bus companies and airlines are in the business of safely transporting passengers from one place to another, and driving and piloting skills begin to deteriorate at a certain age, a maximum age requirement for hiring is an appropriate BFOQ for bus drivers and pilots. The evidence supporting the qualification must be credible, and not just the employer's opinion. The employer also must be able to show it would be impractical to determine if each individual member of the group who is discriminated against could qualify for the position.

As you can see from *Wilson v. Southwest Airlines Company,* included at the end of the chapter, not every attempt to show a BFOQ is successful. Southwest argued that allowing only females to be flight attendants was a BFOQ. However, the court held that the essence of the job of flight attendants is to be able to assist passengers if there is an emergency, and being female was not necessary for this role. Weigh the business considerations in the case against the dictates of Title VII, and think about how you would decide the issue.

Make sure that you understand the distinction the court made in *Southwest Airlines* between the essence of *what* an employer is in business to do and *how* the employer chooses to do it. People often neglect this distinction and cannot understand why business owners cannot simply hire whomever they want (or not, as the case may be) if it has a marketing scheme it wants to pursue. Marketing schemes go to the "how" of the employer's business, as in how an employer chooses to conduct his or her business or attract people to it, rather than the "what" of the business, which is what the actual business itself is in business to do. Getting passengers safely from one point to another is the "what" in *Southwest.* How the airline chose to market that business of safely transporting customers is another matter and has little to do with the actual conduct of the business itself. Perhaps the Playboy Club bunnies will make it clearer.

After the success of *Playboy* magazine, Playboy opened several Playboy clubs in which the servers were dressed as Playboy bunnies. The purpose of the clubs was not to serve drinks as much as it was to extend *Playboy* magazine and its theme of beautiful women dressed in bunny costumes into another form for public consumption. *Playboy* magazine and its concept were purely for the purpose of adult male entertainment. The bunnies serving drinks were not so much drink servers as they were Playboy bunnies in the flesh rather than on a magazine page.

Exhibit 2.13 *BFOQ Test*

As you saw in *Southwest,* in order for an employer to establish a successful bona fide occupational qualification reasonably necessary for the employer's particular business that will protect the employer from liability for discrimination, the courts use a *two-part test.* The employer has the burden of proving that he had reasonable factual cause to believe that all or substantially all members of a particular group would be unable to perform safely and efficiently the duties of the job involved. This is most effective if the employer has consulted with an expert in the area who provides a scientific basis for the belief, for example, a doctor who can attest to factors that applicants over 35 years of age for professional driving positions would begin to lose physical attributes needed for safe driving. The attributes must occur so frequently within the group being screened out that it would be safe to say the group as a whole could be kept out. The two-part test must answer the following questions affirmatively. Keep in mind that since a BFOQ is legalized discrimination, the bar to obtaining it is set very high.

1. ***Does the job require that the employee be of one gender only?*** This requirement is designed to test whether gender is so essential to job performance that a member of the opposite gender simply could not do the same job. In our bunny case, being a Playboy bunny requires being female and a male could not be the bunny envisioned by *Playboy* magazine.
2. ***If the answer to question 1 is yes, is that requirement reasonably necessary to the "essence" of the employer's business?*** This requirement is designed to assure that the qualification being scrutinized is so important to the operation of the business that the business would be undermined if employees of the "wrong" gender were hired. Keep in mind that the BFOQ must be necessary, not just convenient. Here, having bunnies that look like the *Playboy* magazine bunnies is the essence of the employer's business.

That is what the business of the clubs was all about. Though it later chose to open up its policies to include male bunnies, being female was a defensible BFOQ for being a bunny server in a Playboy club because having female bunnies was what the club was in business to do.

Contrast this with Hooters restaurants, where Hooters asserted that its business is serving spicy chicken wings. Since males can serve chicken wings just as well as females, being female is not a BFOQ for being a Hooters server. However, if Hooters had said the purpose of its business is to provide males with scantily clad female servers for entertainment purposes, as it was with the Playboy clubs, then being female would be a BFOQ.

Disparate Impact

LO7

facially neutral policy Workplace policy applies equally to all appropriate employees.

While disparate treatment is based on an employee's allegations that she or he is treated differently as an individual based on a policy that is discriminatory on its face, disparate impact cases are generally statistically based group cases alleging that the employer's policy, while neutral on its face (**facially neutral**), has a disparate or adverse impact on a protected Title VII group. If such a policy impacts protected groups more harshly than majority groups, illegal discrimination may

be found if the employer cannot show that the requirement is a legitimate business necessity. This is why the police department's policy fails in opening scenario 2. The 5-foot-4, 130-pound policy would screen out many more females than males and would therefore have to be shown to be job-related in order to stand. Statistically speaking, females, as a group, are slighter and shorter than males, so the policy has a disparate impact on females and could be gender discrimination in violation of Title VII. Actually, this has been found to be true of males in certain ethnic groups, too, such as some Hispanics and Asians, who statistically tend to be lighter and shorter than the requirement.

The disparate impact theory was established by the Supreme Court in 1971 in the *Griggs v. Duke Power Co.* case, included at the end of the chapter. *Griggs* is generally recognized as the first important case under Title VII, setting forth how Title VII was to be interpreted by courts. Even though the law became effective in 1965, it was not until *Griggs* in 1971 that it was taken seriously by most employers. *Griggs* has since been codified into law by the Civil Rights Act of 1991. In *Griggs,* the employer had kept a segregated workforce before Title VII, with African-American employees being consigned to the coal handling department, where the highest-paid coal handler made less than the lowest-paid white employee in any other department. The day after Title VII became effective, the company imposed a high school diploma requirement and passing scores on two general intelligence tests in order for employees to be able to move from coal handling to any other department. White employees working in the other departments of the company were grandfathered in and did not have to meet these new requirements. While the policy looked neutral on its face, the impact was to effectively keep the status quo and continue to keep blacks in coal handling and whites in the other, higher-paying, departments. The Supreme Court struck down Duke Power Company's new requirements as a violation of Title VII due to its disparate impact on African Americans. Notice the difference between the theories in the *Griggs* case involving disparate impact and the *McDonnell Douglas* case involving disparate treatment.

Griggs stood as good law until 1989 when the U.S. Supreme Court decided *Wards Cove Packing Co. v. Atonio.*[17] In that case, the Court held that the burden was on the employee to show that the employer's policy was *not* job related. In *Griggs* the burden was on the *employer* to show that the policy *was* job related. This increase in the employee's burden was taken as a setback in what was considered to be settled civil rights law. It moved Congress to immediately call for *Griggs* and its 18-year progeny to be enacted into law so it would no longer be subject to the vagaries of whoever was sitting on the U.S. Supreme Court. The Civil Rights Act of 1991 did this.

screening device
Factor used to weed out applicants from the pool of candidates.

Disparate impact cases can be an employer's nightmare. No matter how careful an employer tries to be, a policy, procedure, or **screening device** may serve as the basis of a disparate impact claim if the employer is not vigilant in watching for its indefensible disparate impact. Even the most seemingly innocuous policies can turn up unexpected cases of disparate impact. (See Exhibit 2.14, "Disparate Impact Screening Devices.") Employers must guard against analyzing policies or actions for signs of intentional discrimination, yet missing those with a

Exhibit 2.14 *Disparate Impact Screening Devices*

Court cases have determined that the following screening devices have a disparate impact:

- Credit status—gender, race.
- Arrest record—race.
- Unwed pregnancy—gender, race.
- Height and weight requirements—gender, national origin.
- Educational requirements—race.
- Marital status—gender.
- Conviction of crime unrelated to job performance—race.

Keep in mind that finding that a screening device has a disparate impact does not mean that it will automatically be struck down as discriminatory. The employer can always show that the screening device is based on a legitimate business necessity.

disparate impact. Ensure that any screening device is explainable and justifiable as a legitimate business necessity if it has a disparate impact on Title VII groups. This is even more important now that EEOC has adopted it's new E-RACE initiative. The purpose of the initiative is to put a renewed emphasis on employers' hiring and promotion practices in order to eliminate even the more subtle ways in which employers can discriminate, for instance on the basis of names, arrest or conviction records, credit scores, or employment and personality tests, all of which may have a disparate impact on people of color.

What Constitutes a Disparate Impact?

We have talked about disparate impact in general, but we have not yet discussed what actually constitutes a disparate impact. Any time an employer uses a factor as a screening device to decide who receives the benefit of any type of employment decision—from hiring to termination, from promotion to training, from raises to employee benefit packages—it can be the basis for disparate impact analysis.

Recall that Title VII does not mention disparate impact. On August 25, 1978, several federal agencies, including the EEOC and the Departments of Justice and Labor, adopted a set of uniform guidelines to provide standards for ruling on the legality of employee selection procedures. The Uniform Guidelines on Employee Selection Procedures takes the position that there is a 20 percent margin permissible between the outcome of the majority and the minority under a given screening device. This is known as the **four-fifths rule**. Disparate impact is statistically demonstrated when the selection rate for groups protected by Title VII is less than 80 percent or four-fifths that of the higher-scoring majority group.

four-fifths rule
Minority must do at least 80 percent or four-fifths as well as majority on screening device or presumption of disparate impact arises, and device must then be shown to be a legitimate business necessity.

For example, 100 women and 100 men take a promotion examination. One hundred percent of the women and 50 percent of the men pass the exam. The men have only performed 50 percent as well as the women. Since the men did not pass at a rate of at least 80 percent of the women's passage rate, the exam has a disparate impact on the men. The employer would now be required to show that the exam is a legitimate business necessity. If this can be shown to the satisfaction of the court, then the job requirement will be permitted even though it has a

disparate impact. Even then the policy may still be struck down if the men can show there is a way to accomplish the employer's legitimate goal in using the exam without it having such a harsh impact on them.

For example, suppose a store like Sears has a 75-pound lifting requirement for applicants who apply to work as mechanics in their car repair facilities. A woman sues for gender discrimination, saying the lifting requirement has a disparate impact on women because they generally cannot lift that much weight. The store is able to show that employees who work in the car repair facilities move heavy tools from place to place in the garage. The lifting requirement is therefore a legitimate business necessity. Though the lifting policy screens out women applying for jobs as mechanics at a higher rate than it does men, and, for argument's sake, let's say women only do 20 percent as well as men on the lifting requirement, thus not meeting the four-fifths rule, the employer has provided a legitimate, nondiscriminatory reason for the lifting policy. But suppose the applicant can counter that if the employer used a rolling tool cart (which is actually sold by Sears), then the policy would not have such a harmful impact on women and would still allow Sears what it needs. Even though Sears has given a legitimate, nondiscriminatory reason for its policy, it has been demonstrated that the policy can be made less harsh by using the cart.

The four-fifths rule guideline is only a rule of thumb. The U.S. Supreme Court stated in *Watson v. Ft. Worth Bank and Trust*[18] that it has never used mathematical precision to determine disparate impact. What is clear is that the employee is required to show that the statistical evidence is significant and has the effect of selecting applicants for hiring and promotion in ways adversely affecting groups protected by Title VII.

The terminology regarding scoring is intentionally imprecise because the "outcome" depends on the nature of the screening device. The screening device can be anything that distinguishes one employee from another for workplace decision purposes. It may be a policy of hiring only ex-football players as barroom bouncers (most females would be precluded from consideration since most of them have not played football); requiring a minimum passing score on a written or other examination; physical attributes such as height and weight requirements; or another type of differentiating factor. Disparate impact's coverage is very broad and virtually any policy may be challenged.

If the device is a written examination, then the outcomes compared will be test scores of one group (usually whites) versus another (usually African Americans, or, more recently, Hispanics). If the screening device is a no-beard policy, then the outcome will be the percentage of black males affected by the medical condition, which is exacerbated if they shave, versus the percentage of white males so affected. If it is a height and weight requirement, it will be the percentage of females or members of traditionally shorter and slighter ethnic groups who can meet that requirement versus the percentage of males or majority members who can do so. The hallmark of these devices is that they appear neutral on their face. That is, they apply equally to everyone yet upon closer examination, there is a harsher impact on a group with Title VII protection.

Disparate Impact and Subjective Criteria

When addressing the issue of the disparate impact of screening devices, subjective and objective criteria are a concern. *Objective criteria* are factors that are able to be quantified by anyone, such as whether the employee made a certain score on a written exam. *Subjective criteria* are, instead, factors based on someone's personal thoughts or ideas (i.e., a supervisor's opinion as to whether the employee being considered for promotion is "compatible" with the workplace).

Initially it was suspected that subjective criteria could not be the basis for disparate impact claims since the Supreme Court cases had involved only objective factors such as height and weight, educational requirements, test scores, and the like. In *Watson v. Fort Worth Bank,* mentioned above, the Supreme Court, for the first time, determined that subjective criteria also could be the basis for a disparate impact claim.

In *Watson,* a black employee had worked for the bank for years and was constantly passed over for promotion in favor of white employees. She eventually brought suit, alleging racial discrimination in that the bank's subjective promotion policy had a disparate impact upon black employees. The bank's policy was to promote employees based on the recommendation of the supervisor (all of whom were white). The Supreme Court held that the disparate impact analysis could indeed be used in determining illegal discrimination in subjective criteria cases.

Disparate Impact of Preemployment Interviews and Employment Applications

Quite often questions asked during idle conversational chat during preemployment interviews or included on job applications may unwittingly be the basis for Title VII claims. Such questions or discussions should therefore be scrutinized for their potential impact, and interviewers should be trained in potential trouble areas to be avoided. If the premise is that the purpose of questions is to elicit information to be used in the evaluation process, then it makes sense to the applicant that if the question is asked, the employer will use the information. It may seem like innocent conversation to the interviewer, but if the applicant is rejected, then whether or not the information was gathered for discriminatory purposes, the applicant has the foundation for alleging that it illegally impacted the decision-making process. (See Exhibit 2.14.) Only questions relevant to legal considerations for evaluating the applicant should be asked. There is virtually always a way to elicit legal, necessary information without violating the law or exposing the employer to potential liability. A chatty, untrained interviewer can innocently do an employer a world of harm.

For example, idle, friendly conversation has included questions by interviewers such as "What a beautiful head of gray hair! Is it real?" (age); "What an interesting last name. What sort of name is it?" (national origin); "Oh, just the one child? Are you planning to have more?" (gender); "Oh, I see by your engagement ring that you're getting married! Congratulations! What does your fiancée do?" (gender). These questions may seem, or even be, innocent, but they can come

back to haunt an employer later. Training employees who interview is an important way to avoid liability for unnecessary discrimination claims.

Conversation is not the only culprit. Sometimes it is job applications. Applications often ask the marital status of the applicant. Since there is often discrimination against married women holding certain jobs, this question has a potential disparate impact on married female applicants (but not married male applicants for whom this is generally not considered an issue). If the married female applicant is not hired, she can allege that it was because she was a married female. This may have nothing whatsoever to do with the actual reason for her rejection, but since the employer asked the question, the argument can be made that it did. In truth, employers often ask this question because they want to know whom to contact in case of an emergency should the applicant be hired and suffer an on-the-job emergency. Simply asking who should be contacted in case of emergency, or not soliciting such information until after the applicant is hired, gives the employer exactly what the employer needs without risking potential liability by asking questions about gender or marital status that pose a risk. That is why in opening scenario 3, Jill, as one who interviews applicants, is in need of training, just like those who actually hire applicants.

The Business Necessity Defense

business necessity
Defense to a disparate impact case based on the employer's need for the policy as a legitimate requirement for the job.

In a disparate impact claim, the employer can use the defense that the challenged policy, neutral on its face, that has a disparate impact on a group protected by Title VII is actually job related and consistent with **business necessity**. For instance, an employee challenges the employer's policy of requesting credit information and demonstrates that, because of shorter credit histories, fewer women are hired than men. The employer can show that it needs the policy because it is in the business of handling large sums of money and that hiring only those people with good and stable credit histories is a business necessity. Business necessity may not be used as a defense to a disparate treatment claim.

In a disparate impact case, once the employer provides evidence rebutting the employee's prima facie case by showing business necessity or other means of rebuttal, the employee can show that there is a means of addressing the issue that has less of an adverse impact than the challenged policy. If this is shown to the court's satisfaction, then the employee will prevail and the policy will be struck down.

Knowing these requirements provides the employer with valuable insight into what is necessary to protect itself from liability. Even though disparate impact claims can be difficult to detect beforehand, once they are brought to the employer's attention by the employee, they can be used as an opportunity to revisit the policy. With flexible, creative, and innovative approaches, the employer is able to avoid many problems in this area.

Other Defenses to Title VII Claims

Once an employee provides prima facie evidence that the employer has discriminated, in addition to the BFOQ and business necessity defenses discussed, the employer may perhaps present evidence of other defenses:

- That the employee's evidence is not true—that is, this is not the employer's policy as alleged or that it was not applied as the employee alleges, employee's statistics regarding the policy's disparate impact are incorrect and there is no disparate impact, or the treatment employee says she or he received did not occur.
- That the employer's "bottom line" comes out correctly. We initially said that disparate impact is a statistical theory. Employers have tried to avoid litigation under this theory by taking measures to ensure that the relevant statistics will not exhibit a disparate impact. In an area in which they feel they may be vulnerable, such as in minorities' passing scores on a written examination, they may make decisions to use criteria that make it appear as if minorities do at least 80 percent as well as the majority so the prima facie elements for a disparate impact case are not met. This attempt at an end run around Title VII was soundly rejected by the U.S. Supreme Court in *Connecticut v. Teal,* included at the end of the chapter. Note that this is also very often the reason you hear someone say there are "quotas" in a workplace. They are there *not* because the law requires them—it doesn't—but rather because the employer has self-imposed them to try to avoid liability. *Not* a good idea. The best policy is to have an open, fair employment process. Manipulating statistics to reach a "suitable" bottom-line outcome is *not* permitted, as shown in *Teal,* where the employer imposed such a scheme to try to counteract the fact that black employees did not pass a pen and paper test at sufficient rates and were therefore barred from further consideration for promotion even though they had been performing in the positions for two years. When the employees not allowed to be considered because of their test scores sued for discrimination based on disparate impact, the employer tried to defend by saying the bottom-line figures (resulting from whatever manipulation the employer did to the actual passage rates to take away the disparate impact) did not indicate a disparate impact; therefore, the employees could not sue. The Supreme Court rejected this argument and said it is the process of providing equal opportunity that the law protects, not equal employment, and that if a non-job-related screening device has a disparate impact on a protected group, it cannot be used, regardless of how the employer tries to neutralize its negative impact.

Teal demonstrates that Title VII requires equal employment *opportunity,* not simply equal *employment.* This is *extremely* important to keep in mind. It is *not* purely a "numbers game" as many employers, including the state of Connecticut, have interpreted the law. Under the Civil Rights Act of 1991, it is an unfair employment practice for an employer to adjust the scores of, or to use different cutoff scores for, or to otherwise alter the results of, an employment-related test on the basis of a prohibited category as was done in *Teal.*

Employers' policies should ensure that everyone has an equal chance at the job, based on qualifications. The *Teal* employees had been in their positions on a provisional basis for nearly two years before taking the examination. The employer therefore had nearly two years of actual job performance that it could consider

Management Tips

LO8

Since potentially all employees can bind the employer by their discriminatory actions, it is important for all employees to understand the law. This not only will greatly aid them in avoiding acts that may cause the employer liability, but it will also go far in creating a work environment in which discrimination is less likely to occur. Through training, make sure that all employees understand

- What Title VII is.
- What Title VII requires.
- Who Title VII applies to.
- How the employees' actions can bring about liability for the employer.
- What kinds of actions will be looked at in a Title VII proceeding.
- That the employer will not allow Title VII to be violated.
- That all employees have a right to a workplace free of illegal discrimination.

to determine the applicant's promotability. Instead, an exam was administered, requiring a certain score, which exam the employer could not show to be related to the job. Of course, the logical question is, "Then why give it?" Make sure you ask yourself that question before using screening devices that may operate to exclude certain groups on a disproportional basis. If you cannot justify the device, you take an unnecessary risk by using it.

An Important Note

One of the prevalent misconceptions about Title VII is that all an employee must do is file a claim and the employer is automatically deemed to be liable for discrimination. This is not true. Discrimination claims under Title VII and other employment discrimination legislation must be proved just as any other lawsuits. It is not enough for an employee to allege he or she is being discriminated against. The employee must offer evidence to support the claim. As shown, at the conclusion of the chapter, in *Ali v. Mount Sinai Hospital,* not doing so has predictable results.

Many times managers do not discipline or even terminate employees with Title VII protection for fear of being sued. This should not be the approach. Rather, simply treat them and their actions as you would those of any other similarly situated employee and be consistent. There is no need to walk on eggshells. If an employee is not performing as he or she should, Title VII affords them no protection whatsoever just because they are in a protected class based on race, gender, national origin, and so forth. Title VII is not a job guarantee for women and minorities. Instead, it requires employers to provide them with equal employment opportunity, including termination if it is called for. No one can stop the employee from suing. The best an employer can do is engage in consistency and even-handedness that makes for a less desirable target, and to have justifiable decisions to defend once sued.

In *Ali v. Mt. Sinai Hospital,* an African-American employee sued her employer for race discrimination after being disciplined for violating the hospital's detailed three-page dress code requiring that dress be "conservative and in keeping with the professional image of nursing," in deference to working in the post–open heart surgery unit. Ali said enforcement of the dress code against her was discriminatory, but did not show proof of this, and her case was therefore dismissed. As you read *Ali,* take note of the inadvisability of the questionable parts of the encounter between the employer and the employee.

Chapter Summary

- Title VII prohibits employers, unions, joint labor–management committees, and employment agencies from discriminating in any aspect of employment on the basis of race, color, religion, gender, or national origin.
- Title VII addresses subtle as well as overt discrimination; disparate treatment as well as disparate impact; and discrimination that is intentional as well as unintentional.
- The law allows for compensatory and punitive damages, where appropriate, as well as jury trials.
- The employer's best defense is a good offense. A strong, top-down policy of nondiscrimination can be effective in setting the right tone and getting the message to managers and employees alike that discrimination in employment will not be tolerated.
- Strong policies, consistently and appropriately enforced, as well as periodic training and updating as issues emerge, and even as a means of review, are most helpful.
- To the extent that an employer complies with Title VII, it can safely be said that workplace productivity will benefit, as will the employer's coffers, because unlawful employment discrimination can be costly to the employer in more ways than one.

Chapter-End Questions

1. While reviewing preemployment reports as part of her job, the claimant read a report in which an applicant admitted commenting to an employee at a prior job that "making love to you is like making love to the Grand Canyon." Later, at a meeting convened by her supervisor, the supervisor read the quote and said he didn't understand it. A male subordinate said he would explain it to him later, and both chuckled. The claimant interpreted the exchange as sexual harassment and reported it internally. The claimant alleges that nearly every action after the incident constituted retaliation for her complaint, including a lateral transfer. Will the court agree? [*Clark County School District v. Breeden,* 121 S. Ct. 1508 (2001).]
2. How long does a private employee have to file a claim with the EEOC or be barred from doing so?
3. Lin Teung files a complaint with the EEOC for national origin discrimination. His jurisdiction has a 706 agency. When Teung calls up the EEOC after 45 days to see how his case is progressing, he learns that the EEOC has not yet moved on it. Teung feels the EEOC is violating its own rules. Is it?
4. Althea, black, has been a deejay for a local Christian music station for several years. The station gets a new general manager and within a month he terminates Althea.

The reason he gave was that it was inappropriate for a black deejay to play music on a white Christian music station. Althea sues the station. What is her best theory for proceeding?

5. Melinda wants to file a sexual harassment claim against her employer but feels she cannot do so because he would retaliate against her by firing her. She also has no money to sue him. Any advice for Melinda?
6. Saeid, a Muslim, alleges that his supervisor made numerous remarks belittling his Muslim religion, Arabs generally, and him specifically. The comments were not made in the context of a specific employment decision affecting Saeid. Is this sufficient for the court to find discriminatory ill will? [*Maarouf v. Walker Manufacturing Co.,* 210 F.3d 750 (7th Cir. 2000).]
7. A construction company was sued for harassment when it failed to take seriously the complaints about offensive graffiti scrawled on rented portable toilets. The employer defended by saying (1) employees should be used to such rude and crude behavior; (2) the employer did not own or maintain the equipment, which came with graffiti already on it; (3) it took action after a formal employee complaint; and (4) the graffiti insulted everyone. Will the defenses be successful? [*Malone v. Foster-Wheeler Constructors,* 21 Fed. Appx. 470 (Westlaw) (7th Cir. 2001) (unpub. opinion).]
8. An employee files a race discrimination claim against the employer under Title VII. The employee alleges that after filing a claim with the EEOC, her ratings went from outstanding to satisfactory and she was excluded from meetings and important work-place communications, which made it impossible for her to satisfactorily perform her job. The court denied the race discrimination claim. Must it also deny the retaliation claim? [*Lafate v. Chase Manhattan Bank,* 123 F. Supp. 2d 773 (D. Del. 2000).]
9. Day Care Center has a policy stating that no employee can be over 5 feet 4 inches because the employer thinks children feel more comfortable with people who are closer to them in size. Does Tiffany, who is 5 feet 7 inches, have a claim? If so, under what theory could she proceed?
10. During the interview Gale had with Leslie Accounting Firm, Gale was asked whether she had any children, whether she planned to have any more children, to what church she belonged, and what her husband did for a living. Are these questions illegal? Explain.

End Notes

1. http://eeoc.gov/abouteeoc/plan/par/2006/index.html.
2. 347 U.S. 483 (1954).
3. http://eeoc.gov/abouteeoc/plan/par/2006/chair_message.html.
4. 535 U.S. 137 (2002).
5. http://eeoc.gov/stats/all.html, accessed June 25, 2008.
6. 536 U.S. 101 (2002).
7. 550 U.S._, 127 S. Ct. 2162, 167 L. Ed. 2d 982, 2007 U.S. LEXIS 6295 (2007).
8. http://eeoc.gov/stats/charges.html, accessed June 25, 2008.
9. http://eeoc.gov/abouteeoc/plan/par/2007/strategic_plan.html#mediation, accesse June 25, 2008.
10. http://eeoc.gov/mediate/history.html, accessed June 25, 2008.
11. http://eeoc.gov/employers/investigations.html, accessed February 6, 2008.
12. 532 U.S. 105 (2001).

13. 534 U.S. 279 (2002).
14. *Circuit City Stores, Inc. v. Adams,* 535 U.S. 1112 (2002).
15. *Pollard v. E.I. duPont de Nemours & Co.,* 532 U.S. 843 (2001).
16. *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002).
17. 490 U.S. 642 (1989).
18. 487 U.S. 997 (1988).

Cases

Petruska v. Gannon University *350 F. Supp. 2d 666 (W.D. Pa. 2004)*

Employee, the chaplain of a Catholic university, sued for gender-based employment discrimination in violation of, among other things, Title VII. The court dismissed the action, saying that the university, as a religious institution, was not subject to Title VII.

McLaughlin, J.

Memorandum Opinion

Gannon University is a private, Catholic, diocesan college established under the laws of the Commonwealth of Pennsylvania. Plaintiff employee was initially hired by Gannon as Director for the University's Center for Social Concerns and in considering and accepting this position, relied upon Gannon's self-representation as an equal opportunity employer that does not discriminate on the basis of, among other things, gender.

Following [Gannon's President] Rubino's resignation [after allegations of a sexual affair with a subordinate], Gannon engaged in a campaign to cover up Rubino's sexual misconduct. Employee was vocal in opposing this and other of the Administration's policies and procedures, which she viewed as discriminatory toward females. One such policy was [Bishop of the Roman Catholic Diocese of Erie] Trautman's willingness to allow allegedly abusive clergy to remain on campus, including at least one former Gannon priest who had been removed because of sexual misconduct directed at students.

Employee also strongly opposed the University's efforts, during the time that Rubino was coming under investigation for alleged sexual harassment of females, to limit the time frame within which victims of sexual harassment could file grievances. As Chair of the University's Institutional Integrity Committee, employee was instrumental in submitting a Middle States accreditation report which raised issues of gender-based inequality in the pay of Gannon's female employees and which was critical of the University's policies and procedures for addressing complaints of sexual harassment and other

forms of discrimination. Despite pressure from the University's administration, employee refused to change those portions of the report which were critical of the University.

Employee contends that, in retaliation for the foregoing conduct and because of her gender, she was discriminated against in the terms and conditions of her employment. Believing that she was about to be fired, employee served Gannon with two weeks notice of her resignation. Employee was advised the following day that her resignation was accepted effective immediately and that she was to pack her belongings and leave the campus. Her access to the campus and to students was strictly limited thereafter. Following employee's departure, her supervisor stated on several occasions to both students and staff that a female would not be considered to replace employee as Chaplain.

The University has moved to dismiss all claims on the ground that they are barred by the so-called "ministerial exception," which is frequently applied in employment discrimination cases involving religious institutions. The ministerial exception is rooted in the First Amendment which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Among the prerogatives protected by the Free Exercise Clause is the right of religious institutions to manage their internal affairs.

The Establishment Clause prohibits laws "respecting an establishment of religion." The Supreme Court held that a statute comports with the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an "excessive government entanglement with religion." Unconstitutional entanglement with religion may arise in situations "where a 'protracted legal process pit(s) church and state as adversaries,' and where the Government is placed in a position of choosing among 'competing religious visions.'"

It is only in the rarest of occasions—e.g., where there is a need to prevent the "gravest abuses, endangering paramount [state] interest"—that government-imposed limitations on the free exercise of religion can be upheld. The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection.

Application of Title VII to [the] case would necessarily involve an investigation and review of these practices which, in turn, would result in state interference in matters of church administration and government—"matters of a singular ecclesiastical concern"—and threaten the separation of church and state contemplated by the Establishment Clause. The ministerial exception "does not apply solely to the hiring and firing of ministers, but also relates to the broader relationship between an organized religious institution and its clergy." In fact, *any matters* "touching this relationship" are necessarily considered "as of prime ecclesiastical concern."

[It is not] significant that Gannon has not asserted a religious basis for the challenged employment actions, for "the focus under the ministerial exception is on the action taken [by the employer], not possible motives." Indeed, "the exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision." "The church need not, for example, proffer any religious justification for its decision, for the Free Exercise Clause 'protects the act of a decision rather than a motivation behind it.'"

We acknowledge employee's concerns that discrimination, in any form, should not be tolerated in civilized society. Employee passionately argues that tolerance of gender-based discrimination in the workplace has led to sexual exploitation and harassment, which turns women into objects. To allow these behaviors to go unregulated simply because they [sic] employer is a religious entity and the employee is claimed to be a minister is unjustified and perpetuates the very evils Congress sought to eliminate. It is hard to argue that certain conduct is even wrong when churches freely engage in it. This has a tremendous impact on establishing social norms. This Court is "mindful of the potential for abuse" which application of the ministerial exception can invite, "namely, the use of the First Amendment as a pretextual shield to protect otherwise prohibited employment decisions." But it bears reiterating that the ministerial exception is not without limits and therefore "does not insulate wholesale the religious employer from the operation of federal anti-discrimination statutes." For one, the exception does not apply to employment decisions concerning individuals with purely custodial or administrative functions. It has also been found inapplicable in the context of Title VII sexual harassment claims. The "saving grace lies in the recognition that courts consistently have subjected the personnel decisions of various religious organizations to statutory scrutiny where the duties of the employees were not of a religious nature." Moreover, the existence of the

ministerial exception does not derogate the profound state interest in "assuring equal employment opportunities for all, regardless of race, sex, or national origin." The exception simply recognizes that the "introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state." Application of the exception thus manifests no more than the reality that a constitutional command cannot yield to even the noblest and most exigent of statutory mandates.

Based upon the foregoing reasons, the Defendants' motions to dismiss is GRANTED.

Case Questions

1. Do you agree with the court's decision? Explain.
2. As a manager in this situation, how do you think you would have handled the chaplain's complaints?
3. Given the power that religious organizations have under Title VII, how do you think employment discrimination concerns can be addressed in the religious workplace?

McDonnell Douglas Corp. v. Green *411 U.S. 792 (1973)*

Green, an employee of McDonnell Douglas and a black civil rights activist, engaged with others in "disruptive and illegal activity" against his employer in the form of a traffic stall-in. The activity was done as part of Green's protest that his discharge from McDonnell Douglas was racially motivated, as were the firm's general hiring practices. McDonnell Douglas later rejected Green's reemployment application on the ground of the illegal conduct. Green sued, alleging race discrimination. The case is important because it is the first time the U.S. Supreme Court set forth how to prove a disparate treatment case under Title VII. In such cases the employee can use an inference of discrimination drawn from a set of inquiries the Court set forth.

Powell, J.

The critical issue before us concerns the order and allocation of proof in a private, nonclass action challenging employment discrimination. The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. The facts necessarily will vary in Title VII cases, and the specification of the prima facie proof required from Green is not necessarily applicable in every respect to differing factual situations.

In the instant case, Green proved a prima facie case. McDonnell Douglas sought mechanics, Green's trade, and continued to do so after Green's rejection. McDonnell Douglas, moreover, does not dispute Green's qualifications and acknowledges that his past work performance in McDonnell Douglas' employ was "satisfactory."

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here McDonnell Douglas has assigned Green's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge McDonnell Douglas' burden of proof at this stage and to meet Green's prima facie case of discrimination.

But the inquiry must not end here. While Title VII does not, without more, compel the rehiring of Green, neither does it permit McDonnell Douglas to use Green's conduct as a pretext for the sort of discrimination prohibited

by Title VII. On remand, Green must be afforded a fair opportunity to show that McDonnell Douglas' stated reason for Green's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against McDonnell Douglas of comparable seriousness to the "stall-in" were nevertheless retained or rehired.

McDonnell Douglas may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races. Other evidence that may be relevant to any showing of pretext includes facts as to McDonnell Douglas' treatment of Green during his prior term of employment; McDonnell Douglas' reaction, if any, to Green's legitimate civil rights activities; and McDonnell Douglas' general policy and practice with respect to minority employment.

On the latter point, statistics as to McDonnell Douglas' employment policy and practice may be helpful to a determination of whether McDonnell Douglas' refusal to rehire Green in this case conformed to a general pattern of discrimination against blacks. The District Court may, for example, determine after reasonable discovery that "the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices." We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire. In short, on the retrial Green must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover up for a racially discriminatory decision. VACATED and REMANDED.

Case Questions

1. Do you think the Court should require actual evidence of discrimination in disparate treatment cases rather than permitting an inference? What are the advantages? Disadvantages?
2. Practically speaking, is an employer's burden really met after the employer "articulates" a legitimate nondiscriminatory reason for rejecting the employee? Explain.
3. Does the Court say that Green must be kept on in spite of his illegal activities? Discuss.

Wilson v. Southwest Airlines Company

517 F. Supp. 292 (N.D. Tex. Dallas Div. 1981)

A male sued Southwest Airlines after he was not hired as a flight attendant because he was male. The airline argued that being female was a BFOQ for being a flight attendant. The court disagreed.

Higginbotham, J.

Memorandum Opinion

Southwest conceded that its refusal to hire males was intentional. The airline also conceded that its height–weight restrictions would have an adverse impact on male applicants, if actually applied. Southwest contends, however, that the BFOQ exception to Title VII's ban on gender discrimination justifies its hiring only females for the public contact positions of flight attendant and ticket agent. The BFOQ window through which Southwest attempts to fly permits gender discrimination in situations where the employer can prove that gender is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Southwest reasons it may discriminate against males because its attractive female flight attendants and ticket agents personify the airline's sexy image and fulfill its public promise to take passengers skyward with "love." The airline claims maintenance of its females-only hiring policy is crucial to its continued financial success.

Since it has been admitted that Southwest discriminates on the basis of gender, the only issue to decide is whether Southwest has proved that being female is a BFOQ reasonably necessary to the normal operation of its particular business.

As an integral part of its youthful, feminine image, Southwest has employed only females in the high customer contact positions of ticket agent and flight attendant. From the start, Southwest's attractive personnel, dressed in high boots and hot-pants, generated public

interest and "free ink." Their sex appeal has been used to attract male customers to the airline. Southwest's flight attendants, and to a lesser degree its ticket agents, have been featured in newspaper, magazine, billboard, and television advertisements during the past 10 years. According to Southwest, its female flight attendants have come to "personify" Southwest's public image.

Southwest has enjoyed enormous success in recent years. From 1979 to 1980, the company's earnings rose from $17 million to $28 million when most other airlines suffered heavy losses.

The broad scope of Title VII's coverage is qualified by Section 703(e), the BFOQ exception. Section 703(e) states:

(e) Notwithstanding any other provision of this subchapter,

(1) It shall not be an unlawful employment practice for an employer to hire . . . on the basis of his religion, gender, or national origin in those certain instances where religion, gender, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

The BFOQ defense is not to be confused with the doctrine of "business necessity" which operates only in cases involving unintentional discrimination, when job criteria which are "fair in form, but discriminatory in operation" are shown to be "related to" job performance.

This Circuit's decisions have given rise to a two step BFOQ test: (1) does the particular job under consideration require that the worker be of one gender only; and if so, (2) is that requirement reasonably necessary to the "essence" of the employer's business. The first level of inquiry is designed to test whether gender is so essential to job performance that a member of the opposite gender simply could not do the same job.

To rely on the bona fide occupational qualification exception, an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved. The second level is designed to assure that the qualification being scrutinized is one so important to the operation of the business that the business would be undermined if employees of the "wrong" gender were hired. . . . The use of the word "necessary" in section 703(e) requires that we apply a business necessity test, not a business convenience test. That is to say, discrimination based on gender is valid only when the essence of the business operation would be undermined by not hiring members of one gender exclusively.

Applying the first level test for a BFOQ to Southwest's particular operations results in the conclusion that being female is not a qualification required to perform successfully the jobs of flight attendant and ticket agent with Southwest. Like any other airline, Southwest's primary function is to transport passengers safely and quickly from one point to another. To do this, Southwest employs ticket agents whose primary job duties are to ticket passengers and check baggage, and flight attendants, whose primary duties are to assist passengers during boarding and deboarding, to instruct passengers in the location and use of aircraft safety equipment, and to serve passengers cocktails and snacks during the airline's short commuter flights. Mechanical, nongender-linked duties dominate both these occupations. Indeed, on Southwest's short-haul commuter flights there is time for little else. That Southwest's female personnel may perform their mechanical duties "with love" does not change the result. "Love" is the manner of job performance, not the job performed.

Southwest's argument that its primary function is "to make a profit," not to transport passengers, must be rejected. Without doubt the goal of every business is to make a profit. For purposes of BFOQ analysis, however, the business "essence" inquiry focuses on the particular service provided and the job tasks and functions involved, not the business goal. If an employer could justify employment discrimination merely on the grounds that it is necessary to make a profit, Title VII would be nullified in short order.

In order not to undermine Congress' purpose to prevent employers from "refusing to hire an individual based on stereotyped characterizations of the genders," a BFOQ for gender must be denied where gender is merely useful for attracting customers of the opposite gender, but where hiring both genders will not alter or undermine the essential function of the employer's business. Rejecting a wider BFOQ for gender does not eliminate the commercial exploitation of sex appeal. It only requires, consistent with the purposes of Title VII, that employers exploit the attractiveness and allure of a gender-integrated workforce. Neither Southwest, nor the traveling public, will suffer from such a rule. More to the point, it is my judgment that this is what Congress intended.

Case Questions

1. What should be done if, as here, the public likes the employer's marketing scheme?

2. Do you think the standards for BFOQs are too strict? Explain.
3. Should a commercial success argument be given more weight by the courts? How should that be balanced with concern for Congress's position on discrimination?

Griggs v. Duke Power Co. *401 U.S. 424 (1971)*

Until the day Title VII became effective, it was the policy of Duke Power Co. that blacks be employed in only one of its five departments: the Labor Department. The highest paid black employee in the Labor Department made less than the lowest paid white employee in any other department. Blacks could not transfer out of the Labor Department into any other department. The day Title VII became effective, Duke instituted a policy requiring new hires to have a high school diploma and passing scores on two general intelligence tests in order to be placed in any department other than Labor and a high school diploma to transfer to other departments from Labor. Two months later, Duke required that transferees from the Labor or Coal Handling Departments who had no high school diploma pass two general intelligence tests. White employees already in other departments were grandfathered in under the new policy and the high school diploma and intelligence test requirements did not apply to them. Black employees brought this action under Title VII of the Civil Rights Act of 1964, challenging the employer's requirement of a high school diploma and the passing of intelligence tests as a condition of employment in or transfer to jobs at the power plant. They alleged the requirements are not job related and have the effect of disqualifying blacks from employment or transfer at a higher rate than whites. The U.S. Supreme Court held that the act dictated that job requirements which have a disproportionate impact on groups protected by Title VII be shown to be job related.

Burger, J.

We granted the writ in this case to resolve the question of whether an employer is prohibited by Title VII of the Civil Rights Act of 1964 from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when *(a)* neither standard is shown to be significantly related to successful job performance, *(b)* both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and *(c)* the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.

What is required by Congress [under Title VII] is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.

The act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted without meaningful study of their relationship to job performance ability.

The evidence shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used.

Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in head winds" for minority groups and are unrelated to measuring job capability.

The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as general measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

Nothing in the act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be measured or preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract. REVERSED.

Case Questions

1. Does this case make sense to you? Why? Why not?
2. The Court said the employer's intent does not matter here. Should it? Explain.
3. What would be your biggest concern as an employer who read this decision?

Connecticut v. Teal *457 U.S. 440 (1982)*

Unsuccessful black promotion candidates sued the employer for race discrimination. The employees alleged that even though the employer's final promotion figures showed no disparate impact, the employer's process of arriving at the bottom-line figures should be subject to scrutiny for disparate impact. The Supreme Court agreed.

Brennan, J.

Black employees of a Connecticut state agency were promoted provisionally to supervisors. To attain permanent status as supervisors, they were first required to receive a passing score on a written examination. There was a disparate impact, in that blacks passed at a rate of approximately 68 percent of the passing rate for whites. The black employees who failed the examination were thus excluded from further consideration for permanent supervisory positions. They then brought an action against the state of Connecticut and certain state agencies and officials, alleging violation of Title VII of the Civil Rights Act of 1964 by requiring, as an absolute condition for consideration for promotion, that applicants pass a written test that disproportionately excluded blacks and was not job related. Before trial, Connecticut made promotions from the eligibility list, with an overall result that 22.9 percent of the black candidates were promoted but only 13.5 percent of the white candidates—thus no disparate impact resulted from the final promotions.

We consider here whether an employer sued for violation of Title VII of the Civil Rights Act of 1964 may assert a "bottom-line" theory of defense. Under that theory, as asserted in this case, an employer's acts of racial discrimination in promotions effected by an examination having disparate impact would not render the employer liable for the racial discrimination suffered by employees barred from promotion if the "bottom-line" result of the promotional process was an appropriate racial balance. We hold that the "bottom line" does not preclude employees from establishing a prima facie case, nor does it provide the employer with a defense to such a case.

A nonjob-related test that has a disparate racial impact, and is used to "limit" or "classify" employees,

is "used to discriminate" within the meaning of Title VII, whether or not it was "designed or intended" to have this effect and despite an employer's efforts to compensate for its discriminatory effect.

Employee's claim of disparate impact from the examination, a pass-fail barrier to employment opportunity, states a prima facie case of employment discrimination under Title VII despite their employer's nondiscriminatory "bottom line," and that "bottom line" is no defense to this prima facie case.

Having determined that employees' claim comes within the terms of Title VII, we must address the suggestion of the employer and some *amici curiae* ["friends of the court"—nonparties who wish to have their positions considered by the Supreme Court in its deliberation of an issue] that we recognize an exception, either in the nature of an additional burden on employees seeking to establish a prima facie case or in the nature of an affirmative defense, for cases in which an employer has compensated for a discriminatory pass-fail barrier by hiring or promoting a sufficient number of black employees to reach a nondiscriminatory "bottom line." We reject this suggestion, which is in essence nothing more than a request that we redefine the protections guaranteed by Title VII.

Section 703(a)(2) prohibits practices that would deprive or tend to deprive "any individual of employment opportunities." The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole.

The Court has stated that a nondiscriminatory "bottom line" and an employer's good-faith efforts to achieve a nondiscriminatory workforce might in some cases assist an employer in rebutting the inference that particular action had been intentionally discriminatory: Proof that a workforce was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided. But resolution of the factual question of intent is not what is at issue in this case. Rather, employer seeks simply to justify discrimination against the employees on the basis of their favorable treatment of other members of the employees' racial group. Under Title VII, a racially balanced workforce cannot immunize an employer from liability for specific acts of discrimination.

It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce.

Congress never intended to give an employer license to discriminate against some employees on the basis of race or gender merely because he favorably treats other members of the employees' group. In sum, the employer's nondiscriminatory "bottom line" is no answer, under the terms of Title VII, to the employees' prima facie claim of employment discrimination. AFFIRMED and REMANDED.

Case Questions

1. After being sued but before trial, why do you think that the agency promoted a larger percentage of blacks than whites when a larger percentage of whites actually passed the exam?
2. Should the employees have been allowed to sue if the bottom line showed no discrimination?
3. How could the employer here have avoided liability?

Ali v. Mount Sinai Hospital *68 Empl. Prac. Dec. (CCH) ¶ 44,188, 1996 U.S. Dist. LEXIS 8079 (S.D.N.Y. 1996)*

An employee sued the employer for racial discrimination in violation of Title VII, for discriminatory enforcement of the employer's dress code. She alleged she was disciplined for violating the code but whites were not. The court found that the employee had offered no evidence of discriminatory enforcement, so the court had no choice but to find in favor of the employer.

Gershon, J.

It is undisputed that, at all relevant times, the Hospital had a detailed three-page dress code for all of its nursing department staff, including unit clerks. It expressly provided that "the style chosen be conservative and in keeping with the professional image in nursing" and that the "Unit clerks wear the blue smock provided by the Hospital with conservative street clothes." The wearing of boots, among other items of dress, was expressly prohibited. With regard to hair, the dress code provided that "it should be clean and neatly groomed to prevent interference with patient care" and only "plain" hair barrettes and hairpins should be worn. As plaintiff acknowledges, "The hallmark of said code was that the staff had to dress and groom themselves in a conservative manner."

It is also undisputed that Ms. Ali violated the dress code. Ms. Ali reported to work at the CSICU wearing a red, three-quarter length, cowl-necked dress and red boots made of lycra fabric which went over her knees. Over her dress, Ms. Ali wore the regulation smock provided by the Hospital. She wore her hair in what she says she then called a "punk" style. She now calls it a "fade" style, which she describes as an "Afro hairstyle." It was shorter on the sides than on the top and was in its natural color, black. According to Dr. Shields, Ms. Ali's hair was not conservative because it "was so high" and "you noticed it right away because it was high and back behind the ears and down. It certainly caused you to look at her. It caused attention." Deposition of Dr. Elizabeth Shields: Her hair "had to be at least three to five inches high down behind her ears." This description by Dr. Shields has not been disputed.

According to the employee, Dr. Shields approached her and asked her to look in the mirror and see what looks back at her. Ali responded that she looked beautiful. Ms. Ali testified that Dr. Shields told her that "I belong in a zoo, and then the last thing she said was I look like I [am] . . . going to a disco or belong in a disco or something to that effect." Dr. Shields testified: "I told her about the whole outfit. She had red boots, red dress, in the unit. This is the post open heart unit. People come out of here after just having cracked their chest. We were expected to be conservative."

Title VII makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." Defendants seek summary judgment dismissing the complaint on the ground that plaintiff cannot make a prima facie showing that they engaged in discriminatory conduct.

To establish a prima facie case of individualized disparate treatment from an alleged discriminatory enforcement of the dress code, plaintiff must show that she is a member of a protected class and that, at the time of the alleged discriminatory treatment, she was satisfactorily performing the duties of her position. This she has done. However, her prima facie showing must also include a showing that Mount Sinai Hospital had a dress code and that it was applied to her under circumstances giving rise to an inference of discrimination.

Reviewing all of the evidence submitted on the motion, employee does not raise an issue of fact as to whether the enforcement of the code against her was discriminatory. There is no dispute that employee was in violation of the dress code. Her claim is that the dress code was enforced against her but not against others, who also violated its requirements, but were not black. The problem is the utter lack of evidence supporting this position.

Employee offers no evidence that the dress code was not enforced against other Hospital employees as it was against her. Dr. Shields' testimony that the dress code had been enforced against other nurses was not disputed. Although Ms. Ali identified certain caucasian women whom she believed were in violation of the code, she failed to set forth any evidence to show a lack of enforcement.

All that employee's testimony establishes is that she was unaware of the enforcement of the dress code against others. Following a full opportunity for discovery, employee has not proffered any additional evidence to support her claim of disparate treatment. On this record, there is no reason to believe that she will be able to offer at trial evidence from which a jury could reasonably

conclude that there was racially discriminatory enforcement of the dress code.

It is not enough that Ms. Ali sincerely believes that she was the subject of discrimination; "[a] plaintiff is not entitled to a trial based on pure speculation, no matter how earnestly held." Summary judgment is appropriate here because employee has failed to raise an issue of fact as to whether the dress code was enforced against her under circumstances giving rise to an inference of discrimination. Motion to dismiss GRANTED.

Case Questions

1. What do you think of the way in which Ali was approached by Dr. Shields about her violation of the dress code? Does this seem advisable to you?
2. How much of a role do you think different cultural values played in this situation? Explain.
3. What can the employer do to avoid even the appearance of unfair enforcement of its dress policy in the future?