Chapter 16 - Discrimination in Employment

INTRODUCTION

Only in recent decades have federal and state judicial decisions, administrative agency actions, and legislation restricted the ability of employers, as well as unions, to discriminate against workers on the basis of race, color, religion, national origin, gender, age, or handicap.

A class of persons defined by one or more of these criteria is known as a protected class. Several federal statutes prohibit employment discrimination against members of protected classes. The most important is Title VII of the Civil Rights Act of 1964 and its amendments. Title VII prohibits employment discrimination on the basis of race, color, religion, national origin, or gender. Discrimination on the basis of age and disability are prohibited by the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990, respectively.

The focus of this chapter is on the kinds of discrimination prohibited by these federal statutes. Discrimination against employees on the basis of any of the above-mentioned criteria may also violate state human rights statutes or other state laws prohibiting discrimination, as discussed at the end of this chapter.

CHAPTER OUTLINE

I. Title VII of the Civil Rights Act of 1964
Title VII of the Civil Rights Act of 1964 and its amendments prohibit job discrimination against employees, applicants, and union members on the basis of race, color, national origin, religion, and gender at any stage of employment. Nearly any employer with fifteen or more employees is covered. The basic outlines of this statute are sketched in the text.

A. PROCEDURES UNDER TITLE VII
The Equal Employment Opportunity Commission (EEOC) issues guidelines interpreting the law. Also, complaints about violations are registered first with the EEOC. If it is unable to resolve a situation and chooses not to sue to enforce the law, the victim may sue. The text points out that the EEOC has established a priority as to which cases it will pursue.

B. INTENTIONAL V. UNINTENTIONAL DISCRIMINATION
In a disparate-treatment employment discrimination case, a plaintiff must initially show only that (1) he or she is a member of a protected class, (2) he or she applied and was qualified for the job in question, (3) he or she was rejected by the employer, and (4) the employer continued to seek applicants for the position or filled the position with a person not in a protected class. Once this prima facie case is shown, an employer who cannot offer a legitimate defense loses. If the employer offers a legitimate defense, however, the plaintiff, to succeed, must show that the defense is a pretext and that discriminatory intent was the real motivation.

If a plaintiff challenging an employment practice having a discriminatory impact can show a connection between the practice and the impact, he or she makes out a prima facie case, and no evidence of discriminatory intent is necessary.

C. DISCRIMINATION BASED ON RACE, COLOR, AND NATIONAL ORIGIN
If a company's standards or policies for selecting or promoting employees have the effect of discriminating against employees or job applicants on the basis of race, color, or national origin and do not have a substantial, demonstrable relationship to realistic qualifications for the job in question, they are illegal. Discrimination against these protected classes in regard to employment conditions and benefits is also illegal.
McCullough v. Real Foods, Inc.

In 1992, Cynthia McCullough, an African American woman with a college degree in urban affairs, began work at a deli in Chubb's Finer Foods (Real Foods, Inc.), a grocery store owned and managed by Ron Meredith. More than a year later, Meredith hired Kathy Craven, a white woman, to work at the deli. Craven had no prior deli experience, only a sixth-grade education, and poor reading and math skills. For example, Craven could not calculate prices or read recipes. McCullough and Craven were the only deli employees. Three months after Craven's arrival, Meredith appointed her "deli manager." Meredith later said that he did not promote McCullough because he "understood" that she would not work past 3:00 P.M., she felt she was overeducated for the position, she spoke of quitting, and she would not accept a managerial job for the salary he was willing to pay. Denying all of what Meredith "understood," McCullough filed a suit in a federal district court against Real Foods, alleging discrimination on the basis of race. The court granted a summary judgment in favor of Real Foods, and McCullough appealed.

The U.S. Court of Appeals for the Eighth Circuit reversed and remanded. McCullough made out a prima facie case and Real Foods offered a legitimate nondiscriminatory reason for not promoting her. McCullough successfully raised an inference that "Meredith promoted a substantially less qualified white woman over a substantially better qualified black woman" on the basis of "an impermissible consideration"—race. "[I]t is common business practice to pick the best qualified candidate for promotion." Critical to the court's reasoning was the subjective nature of Meredith's decision. Meredith's asserted reasons for not promoting McCullough "are essentially checked by McCullough's denials."

When an appellate court overrules the grant of a summary judgment, does that mean that a party "wins"? No. In this case, the court concluded that "McCullough presented evidence sufficient to support a reasonable inference that Real Foods' failure to promote her to the position of deli manager was motivated by racial animus." The court explained, however, that "[t]hat inference is enough to prevent summary judgment for the employer. Whether or not the trier of fact will draw such an inference after hearing all of the evidence offered by both sides at trial and judging the opposing witnesses' credibility is an entirely different question. We hold only that summary judgment was improvidently granted to the employer."

D. DISCRIMINATION BASED ON RELIGION
Title VII prohibits government employers, private employers, and unions from discriminating against persons because of their religion. The text also points out that employers must "reasonably accommodate" the religious practices of their employees.

E. DISCRIMINATION BASED ON GENDER
Employers may not discriminate against employees on the basis of gender. The text gives specific examples. In a gender discrimination suit, a plaintiff must show that gender was a determining factor in an employer's decision to hire, fire, or promote.

. Carey v. Mount Desert Island Hospital

Michael Carey was vice-president in charge of the finance department for Mount Desert Island Hospital (MDI). When the position of chief executive officer (CEO) opened up, Carey applied and was endorsed by Dan Hobbs, the acting CEO. At the time, an audit of the finance department revealed some deficiencies but concluded that the department was "already attacking the problem." MDI's board offered the CEO post to Leslie Hawkins, a woman, who accepted. Less than a year later, Hawkins terminated Carey, giving as reasons the problems cited in the audit and "lack of confidence" in Carey. Carey filed a suit in a federal district court against MDI for gender discrimination in violation of Title VII and other laws. Among the evidence revealed during the trial were statements by one female executive that "we have different standards for men and women," with regard to discipline and termination, and by another female executive that "it's about time that we get a woman for this [CEO] position." The court awarded Carey more than $300,000 in damages. MDI appealed.

"The U.S. Court of Appeals for the First Circuit affirmed. This case "involv[ed] the always difficult question of probing the wellsprings of human motivation." The court acknowledged that it expected the evidence would consist of "bits and pieces" and that "occasional stray remarks" by employees would not be enough. Statements that suggest a "discriminatory atmosphere" at MDI could support a jury's finding, however. The court pointed to the statements by female executives at MDI and concluded that there was enough evidence "to support a finding that deficiencies in Carey's handling of financial controls were not the real reason for his discharge."
F. PREGNANCY DISCRIMINATION
The Pregnancy Discrimination Act of 1978 expanded Title VII's definition of gender discrimination to include discrimination based on pregnancy. An employer must treat an employee temporarily unable to perform her job owing to a pregnancy-related condition the same as the employer would treat other temporarily disabled employees. Policies concerning a return to work, accrual of seniority, pay increases, and so on must result in equal treatment.

G. SEXUAL HARASSMENT
Sexual harassment can take two forms: quid pro quo harassment and hostile-environment harassment. The former occurs when job opportunities, promotions, and the like are doled out on the basis of sexual favors. The latter occurs when an employee is subjected to sexual comments, jokes, or physical contact perceived to be offensive. The text delineates types of conduct that the EEOC defines as hostile-environment harassment.

ADDITIONAL BACKGROUND—

“Hostile or Offensive Environment”

In 1974, Mechelle Vinson began working at Meritor Savings Bank. Vinson later sued the bank, claiming that she had “constantly been subjected to sexual harassment.” She claimed that Sidney Taylor, a vice president and branch manager, made sexual advances toward her, to which she acquiesced out of fear of losing her job. She testified that Taylor fondled her in front of other employees and forcibly raped her. Taylor denied the charges. The trial court concluded that any sexual relationship between Vinson and Taylor had no relationship to Vinson's continued employment and ruled in favor of the bank. Vinson appealed, and the appellate court ruled in her favor, finding that she had made out a case of harassing-environment discrimination. The bank appealed to the United States Supreme Court.

In one of the early and often-cited cases involving charges of sexual harassment—Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)—the United States Supreme Court affirmed the appellate court's decision. The Supreme Court rejected the bank's argument that in prohibiting discrimination under Title VII, Congress was concerned with "tangible loss" of "an economic character" and not "purely psychological aspects of the workplace environment." The Court pointed out that courts have uniformly held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."

* * * "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." Requiring an individual to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest racial epithets." Holding that the bank's liability for the actions of its supervisory employees should be determined according to common law principles of agency, the Court remanded the case to the district court for further proceedings.

1. Harassment by Supervisors and Co-Workers
In a quid-pro-quo case involving a supervisor, the employer is strictly liable. In a hostile-environment case involving a supervisor and in any case involving a nonsupervisory employee, the employer may be liable only if it knew or should have known and failed to act. (Supervisors have been held personally liable in some cases.)

2. Harassment by Nonemployees
In a case involving a nonemployee, an employer may be liable if it knew, or should have known, about the harassment, could exert control over the nonemployee, and failed to act.

ADDITIONAL BACKGROUND—

Perceiving Conduct as Harassment

Sexual harassment is a major problem in the workplace. Over 40 percent of female federal employees, for example, reported incidents of sexual harassment in 1980 and roughly the same number
reported incidents in 1987. Sexual harassment cost the federal government $267 million between May 1985 and May 1987 for losses in productivity, sick leave costs, and employee replacement costs. According to the United States Merit System Protection Board, victims of sexual harassment "pay all the intangible emotional costs inflicted by anger, humiliation, frustration, withdrawal, dysfunction in family life, as well as medical expenses, litigation expenses, job search expenses, and the loss of valuable sick leave and annual leave."

Sometimes, a person questions whether conduct he or she perceives as offensive should instead be viewed only as bad taste, poor manners, a lack of social grace, or an off-color sense of humor. It has been suggested that if a person feels belittled by an actor's conduct, it is harassment. If the person feels that the actor treated the person as an equal, it is not harassment.

Because women are disproportionately victims of rape and sexual assault, many women who are victims of mild forms of sexual harassment may worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

H. REMEDIES UNDER TITLE VII
A plaintiff may obtain reinstatement, back pay, retroactive promotions, and damages. Compensatory damages are available only in cases of intentional discrimination. Punitive damages may be recovered in some cases, but the sum of compensatory and punitive damages is limited to specific amounts against specific employers (stated in the text).

ADDITIONAL BACKGROUND—

Paramour Liability

When, because of a romantic relationship, an employer hires, promotes, or otherwise favors someone (a "paramour"), an applicant or employee who is better qualified may believe that the employer should be held liable under Title VII on the ground of sex discrimination.

In King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985), a nurse filed a discrimination claim against her employer because her supervisor had promoted another nurse allegedly on the basis of their romantic relationship. The plaintiff proved that kissing, embracing, and other "amorous behavior" played a part in the promotion decision. The court stated that Title VII is violated if a romantic relationship is a substantial factor in an employment decision. The court ordered the employer to promote the nurse who had been overlooked.

The Equal Employment Opportunity Commission (EEOC) has rejected claims of discrimination based on consensual romantic relationships. According to the EEOC, "[a]n isolated instance of favoritism toward a 'paramour' (or a spouse, or a friend) may be unfair, but it does not constitute discrimination on the basis of sex. The reason is that when preferential treatment is based on a romantic relationship, other employees—both men and women—are equally disadvantaged for reasons other than their gender.

For example, Jane promotes Wallace, her fiancé, over Dora, who believes she is better qualified for the promotion. Dora was not denied the promotion because she is a woman, nor would she have received the promotion if she were a man. Thus, under the EEOC's guidelines, there would be no liability.

Most courts agree with the EEOC. For example, in DeCintio v. Westchester County Medical Center, 807 F.2d 304 (2d Cir. 1986), the court held that voluntary, romantic relationships cannot form the basis of a sex discrimination suit under Title VII. In that case, in April 1982, the Westchester County Medical Center (WCMC) opened a neonatal intensive care unit for the treatment of critically-ill newborn children. The WCMC decided to add to the staff of the new unit a respiratory therapist with supervisory responsibilities at a salary higher than those of other staff respiratory therapists. One of
the requirements for the position was certification by the National Board of Respiratory Therapists (NBRT). This had not previously been a requirement for members of the staff, none of whom had NBRT certification. On April 22, Jean Guagenti, a respiratory therapist with NBRT certification, was hired for the new position on the recommendation of James Ryan, the program administrator of the respiratory therapy department. In May, Anthony DeCintio, a staff respiratory therapist, filed a complaint with the Equal Employment Opportunity Commission (EEOC), charging the WCMC with sex discrimination in violation of Title VII arising from the hiring of Guagenti. He alleged that the certification requirement was created to exclude him from consideration for the new position and that the new position was created specifically for Guagenti. Six other male staff respiratory therapists also filed complaints. Eventually, the EEOC dismissed the complaints, and the therapists took their case to court. Finding, among other things, that Ryan and Guagenti had been in a consensual-romantic relationship at the time Guagenti was hired and that the certification requirement was a pretext on Ryan's part to obtain the position for Guagenti, the court ruled in favor of DeCintio and the others. The WCMC appealed.

The appellate court reversed the decision of the trial court. The court acknowledged that in the context of Title VII, "sex" refers to "membership in a protected class delineated by gender." The court could find no reason for extending Title VII's reference to "sex" so broadly as to include an ongoing, voluntary, romantic engagement. Under the circumstances, "appellees were not prejudiced because of their status as males; rather, they were discriminated against because Ryan preferred his paramour." Appellees faced exactly the same predicament as that faced by any woman applicant for the promotion.

II. Equal Pay Act of 1963
The Equal Pay Act of 1963 prohibits gender-based discrimination in wages paid for equal work when a job requires equal skill, effort, and responsibility under similar conditions. It is the primary duties of jobs that are compared.

III. Discrimination Based on Age
The Age Discrimination in Employment Act (ADEA) of 1967 prohibits employment discrimination on the basis of age against individuals forty years of age or older. The text states to whom the ADEA applies. A prima facie age-discrimination case and its burden-shifting is similar to Title VII’s procedures. One of the central issues and defenses in age-discrimination cases—that termination of an older employee was for cost-cutting, not discriminatory, reasons.

Rhodes v. Guiberson Oil Tools
Calvin Rhodes sold oil field equipment for Guiberson Oil Tools. When he was discharged at age fifty-six, he was told that it was part of a reduction in the work force (RIF). Within six weeks, Guiberson hired a forty-two-year-old person to do the same job. Rhodes filed a suit in a federal district court against Guiberson under the ADEA. Guiberson officials testified that they had not told Rhodes the truth: that they had intended to replace him. Guiberson offered as a defense Rhodes’s “poor work performance” but did not provide any proof. Rhodes countered with customers’ testimony about his expertise and diligence. The jury found that Rhodes was discharged because of his age. Guiberson appealed.

The U.S. Court of Appeals for the Fifth Circuit affirmed. “[T]he jury was entitled to find that the reasons given for Rhodes’ discharge were pretexts for age discrimination. The jury was entitled to find that Guiberson’s stated reason for discharging Rhodes—RIF—was false. Additionally, the reason for discharge that Guiberson Oil proffered in court ** was countered with evidence from which the jury could have found that Rhodes was an excellent salesman who met Guiberson Oil’s legitimate productivity expectations. ** [A] reasonable jury could have found that Guiberson Oil discriminated against Rhodes on the basis of his age.”

IV. Discrimination Based on Disability
The text discusses the Americans with Disabilities Act (ADA) of 1990 in some detail. The ADA was designed to eliminate discriminatory hiring and firing practices that prevent otherwise qualified disabled workers from fully participating in the national labor force. Essentially, an employer must reasonably accommodate disabled persons unless to do so would constitute an undue hardship.

A. PROCEDURES AND REMEDIES UNDER THE ADA
The text lists the elements and steps of an ADA case (similar to the elements and steps of other employment-discrimination cases). Remedies, which are similar to those under Title VII, are also listed in the text.

B. WHAT IS A DISABILITY?
The text gives the ADA’s definition (an impairment that “substantially limits” major life activities). A plaintiff must prove that he or she has a disability. The text provides examples of conditions that have been considered disabilities. Some conditions are specifically excluded.
Sutton v. United Airlines, Inc.

Karen and Kimberly Sutton have severe myopia. Without corrective lenses, neither can see well enough to do such things as driving a vehicle, but with corrective measures, each functions identically to individuals without a similar impairment. The Suttons applied to United Airlines, Inc. (UA), for employment as commercial airline pilots. They met UA's age, education, experience, and Federal Aviation Administration certification qualifications, and were invited to flight simulator tests and interviews. Because they did not meet UA's minimum vision requirement, however, neither pilot was offered a position. The Suttons filed a suit in a federal district court against UA, alleging discrimination under the ADA. The Suttons asserted in part that they have a substantially limiting impairment and are thus disabled. The court disagreed and dismissed the suit. The U.S. Court of Appeals for the Tenth Circuit affirmed. The Suttons appealed.

The United States Supreme Court affirmed. A person is not disabled under the ADA if he or she has a condition such as poor vision that can be corrected with corrective devices, such as glasses. "A 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken. . . . To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not 'substantially limit[t]' a major life activity."

C. REASONABLE ACCOMMODATION
An employer cannot refuse to hire a disabled person who is otherwise qualified for a particular position. That the employer may have to make some reasonable accommodation for a disabled applicant, such as installing ramps for a wheelchair, will not cause the applicant to be considered unqualified. The text provides other examples.

Employers who do not wish to make such accommodations must show that the accommodations will cause "undue hardship." This is subject to a case-by-case determination. The text mentions some of the cases.

1. Job Applications and Preemployment Physicals
   The job application process, including questions and medical exams, must not be discriminatory. There must also be reasonable accommodation for disabled applicants. The text expands on these points and provides examples.

2. Dangerous Workers
   Workers need not be hired or retained if they pose a "direct threat to the health or safety" of co-workers. This danger must be substantial and immediate; it cannot be speculative. What this means in the context of AIDS is discussed in the text. Generally AIDS has not been found to be so contagious as to disqualify employees in most jobs.

3. Health-Insurance Plans
   A group health-care plan that makes a disability-based distinction in its benefits violates the ADA unless (1) limiting coverage of certain ailments is required to keep the plan financially sound, (2) coverage of certain ailments would cause a significant increase in premium payments or their equivalent so that the plan would be unappealing to a significant number of workers, or (3) the disparate treatment is justified by the risks and costs associated with a particular disability.

4. The ADA and Substance Abusers
   The ADA protects recovering addicts and alcoholics (those who have completed, or are currently in, a drug-rehab program), not former or present casual users. Practicing alcoholics are protected to the extent that they may not be treated differently because of their condition. The text expands on these points.

V. Defenses to Claims of Employment Discrimination
Defenses to charges of employment discrimination include the following.

A. BUSINESS NECESSITY
   An employer may defend against a claim of disparate-impact discrimination by asserting that a practice that has a discriminatory effect is a business necessity. If there is a definite connection between the practice and business, the practice may stand. The text provides an example of a high-school diploma (the lack of which may effectively discriminate against some minorities).

B. BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ)
   A trait must be essential to a job to qualify as a BFOQ if discriminating against those who do not have the trait amounts to otherwise illegal employment discrimination.
C. Seniority Systems
   If no present intent to discriminate is shown, and promotions or other job benefits are distributed according to a fair seniority system, an employer has a good defense against some employment-discrimination suits.

D. After-Acquired Evidence Is No Defense
   After-acquired evidence of the plaintiff's wrongdoing cannot shield employers from liability for employment discrimination. Under EEOC guidelines, compensatory and punitive damages are available to plaintiffs in discrimination cases, notwithstanding after-acquired evidence of their misconduct. The text explains the background to this point.

VI. Affirmative Action
   Affirmative action programs have caused much controversy. The text discusses some affirmative-action cases, most notably Adarand Constructors, Inc. v. Peña, 515 U.S. 200 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), in which the United States Supreme Court applied a strict scrutiny analysis in an equal-protection challenge to an affirmative-action program in the granting of federal highway construction contracts. The Court held that such programs cannot make use of quotas or preferences for unqualified persons, and once a program has succeeded, it must be changed or dropped.

VII. State Laws Prohibiting Discrimination
   Generally, the kinds of discrimination prohibited under federal legislation are also prohibited by state laws. States also often provide protection for certain individuals, such as homosexuals, who are not protected under Title VII and may provide for additional damages. Some small business employers may not be covered by any statute, however.