

Chapter 24

Discrimination in Employment



Legal environments of business

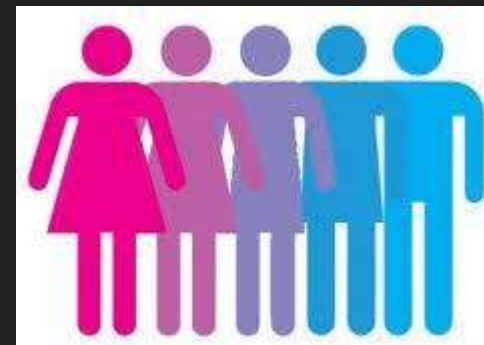
Employment discrimination

- Treating individuals differently in the various aspects of employment (hiring, firing, promotions, awarding of benefits, wages, etc.) based on race, color, gender, pregnancy, and pregnancy intentions, age (40 or older), religion, disability, and national origin.

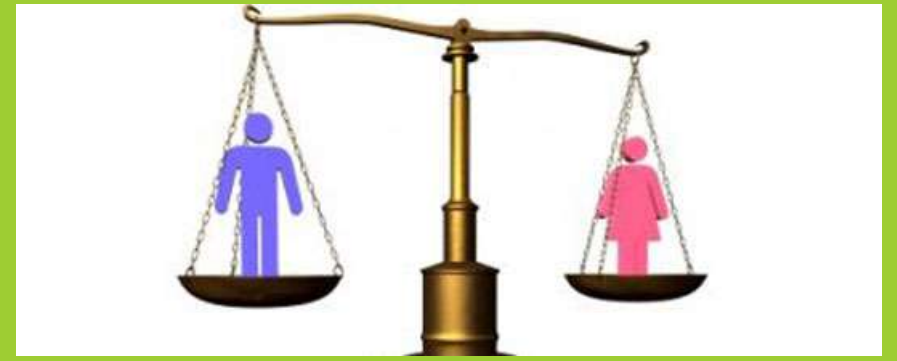


Protected Class

- Group characteristics that employers may not consider when making employment decisions. Title VII of the Civil Rights Act of 1964 labeled these groups protected class. Members are often but not always minorities. Included are:
 - Race and color
 - Gender
 - Pregnancy/Pregnancy Intentions
 - Age
 - Religion
 - Disability
 - National Origin



Scope of Protection



- Years ago, most obvious forms of discrimination arise out of hiring conditions. This country's employment advertisement often included such language as "men only", "no black people need apply", and "persons between the ages of 16 and 30 years only, please."
- Law make illegal not only discrimination against protect class in hiring but similar discrimination in any **"term, condition, or privilege of employment"**. This means it's illegal to discriminate in any aspect of the job e.g., pay, promotion, training, overtime, educational opportunities, travel requirements, firings, layoffs, etc.

Title VII of the Civil Rights Acts of 1964



- Act forbids employers, employment agencies, and unions from discriminating in hiring, paying, training, promoting, or discharging employees on the basis of race, color, religion, national origin, or sex.
- Employer may discriminate in selecting one worker over another if the job requirement creating the discrimination is necessary for proper performance of the job.
- Example: prospective airplane pilot may be required to understand radar and navigation equipment; must be free of potentially fatal heart disease and be able to react quickly to emergency situations.

Equal Employment Opportunity Commission (EEOC)



- Created under **Title VII of the Civil Rights Act** giving authority to investigate and settle complaints of job discrimination. If necessary, it can also prosecute offenders..
- If an employer has discriminated in the past, the courts may mandate an **affirmative action plan** to remedy the past discriminations.
- Plan must include positive steps aimed at offsetting past discrimination by bringing the percentages of minorities and women in the workforce up to the their corresponding percentages in the pool of qualified applicants.

Equal Pay Act of 1963

- Prohibits wage discrimination on basis of sex. Women who do the same work or equal a men must be paid the same rate.
- Differences in pay are allowed if based on: merit system, seniority system, system basing pay on quantity or quality of production; and system based on any factor other than gender.



Age Discrimination in Employment Act of 1967



- Forbids discrimination against workers 40 years of age and older in any employment practice (hiring, discharging, retiring, promoting, and compensating).
- Exceptions are made when age is a necessary consideration for job performance (bus drivers, fire fighters, and police officers).

Americans with Disabilities Act (ADA)



- Requires that employers not engage in unjustified discrimination against disabled persons on the basis of their disability.
- Act attempts to prevent employers from automatically assuming that disabled persons cannot perform work.
- A **disability** as defined by ADA is a physical or mental impairment that substantially limits one or more of life's major activities. (Seeing, hearing, speaking, breathing, walking, learning, and performing manual tasks)



- In 2009, ADA amended significantly to include the list of “**Major life activities**” to include major bodily functions such as cell growth, immune system functions, bowel functions, learning functions, concentrating, bending, and others.
- ADA requires that employers make **reasonable accommodations** for the qualified disabled worker. It may not be required if it causes the employer undue hardship (cost of accommodation and financial resources of employer)

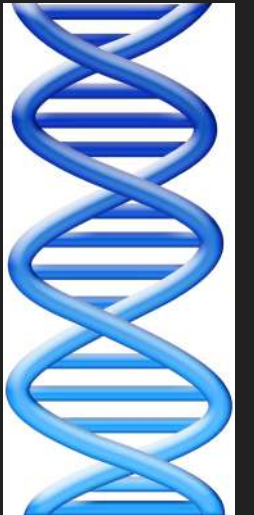
Pregnancy Discrimination Act of 1978



- A statute that makes it illegal to discriminate because of pregnancy, childbirth, or related medical conditions.
- Employers may not fire, refuse to hire, refuse to promote, or demote a woman because she is pregnant.
- Act also makes it illegal to discriminate in the providing of fringe benefits on these basis.

Genetic Information Nondiscrimination Act of 2008 (GINA)

- Prohibits employment discrimination based on genetic information about an applicant, employee or former employee.
- Act is intended to protect individuals from being adversely affected when it comes to personalized medical treatment, health insurance, and other aspects of employment.



Disparate Treatment

- Exists when an employer intentionally treats members of a protected class differently from other employees, it is legally termed **disparate treatment**.

Evidence of Disparate Treatment (Direct Evidence)

- In the past, it was *intentional and open*. Newspapers carried want ads that listed jobs as “men only”; some firms would refuse to hire African Americans, Mexicans, mulattos, Puerto Ricans, or women. Flyers would say “no Irish” or “no Jews need to apply”.
- To win a case where the discrimination is admitted, the employee need only prove that he or she was denied employment because of membership in a protected class.

Case based on Indirect Evidence (Disparate Treatment)

- Today most employers denies any intention to illegally discriminate. To establish a case against such an employer, employees must show:
 - The person was a member of a protected class.
 - The person applied for the job and was qualified
 - The person was rejected
 - The employer held the job open and sought other persons with similar qualifications.

Business Necessity Defense (Employer's Defenses)

- Defenses attempted to show that the disparate treatment was legally justifiable.
- In an indirect proof case, the employer's most common defense is termed the **business necessity defense** and means that the employee did not have the necessary skills or work history needed for hiring.
- This general defense is proven by showing that the qualification standard in question is job related and that required performance cannot be accomplished by reasonable accommodations made for the benefit of the employee.

Bona Fide Occupational Qualification Defense (BFOQ)



- A **bona fide occupational qualification** is a job requirement that compels discrimination against a protected class.
- If an employer hired actors to play parts in a stage show, some of the parts would be for men and the employer could justifiably decide to hire only men for these parts; or they could require only male or female models for a fashion show.

Bona Fide Seniority System Defense



- **Bona fide seniority system defense** is based on the contention that employment decisions consider only length of employment rather than merit, and is not intended to discriminate on any other grounds.
- Employer can use this defense when charged with disparate treatment.
- Ex: an employer pays union members, promotes, or lays off on the basis of seniority, disparate treatment of protected class will be tolerated.
- Supreme Court will permit seniority to be used even when it perpetuates past discrimination.

Pretext



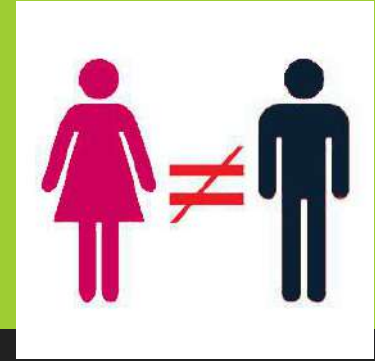
- Employers sometimes assert business necessity or BFOQ as a **pretext**, or a cover for discriminating.
- Ex. Company hires a male instead of a female (Julie) for a job. Company says reason is the job involves a lot of travel. Because Julie is a mother of three children, company says that would make travel harder for her schedule.

Disparate Impact Cases



- **Neutral on its face** – policy makes no reference to a protected class; it may, however, have a discriminatory impact on one.
- Ex. More male job applicants for jobs can satisfy a lifting requirement than female applicants; the policy therefore would have a discriminatory, impact on a protected class.
- **Disparate impact** – indicates that the policy improperly eliminates more members of a protected class than members of the majority. (*agility* test, height test, weight, test, educational requirements).

By Statistical Proof



- **To establish case in disparate impact**, an employee must first establish that fewer members of a protected class qualified for the job when the challenged employment practice is used than when it's not: Involves examining two groups:
- **Applicant pool** – those qualified for the job when the challenged qualifications practice is not considered.
- **Workforce pool** – persons actually in the employer's workforce.

Employer's Defenses



- Employers can avoid liability even after the employee has shown disparate impact. If challenged practice is justified by business necessity, there is no liability.
 - Ex. If weight lifting is required on the job, it does not legally matter that the requirement excludes a larger part of a protected class from the job.
- Also, an employer can utilize the defenses of bona fide occupational qualification and seniority.

Quid Pro Quo



- **Quid pro quo** means one thing is exchanged for another.
- Most vivid form is sexual harassment when a boss threatens to fire a subordinate unless the subordinate provides sexual favors for continued employment, etc.

Hostile Environment



- A **hostile environment** arises when unwelcome sexual comments, gestures, or contact interfere with an employee's ability to work.
- If the sexual harassment is the result of the conduct of a supervisor, the employer is strictly liable.
- If it's nonsupervisory employees causes the problem, the employer is liable only when the harassment is either known or should have been known to supervisors and they failed to act effectively to prevent further occurrences.