

EQUAL EMPLOYMENT OPPORTUNITY LAW

Rarely is nearly everything you already "know" about a given area of law wrong. However, in this area of law, often everything you already "know" about the law is wrong.

The employer's legitimate business interest is in obtaining, retaining, and promoting objectively qualified employees.

One's objective intent can be objectively proven even in the absence of an underlying and identical subjective intent.

When does the legislature tend to react?

The equal employment opportunity laws outlaw the use of specific types of cheap information due to its inherent inaccuracy.

The employer is required to determine whether the individual applicant is objectively qualified, rather than being allowed to rely on stereotypical indicators which show that different groups are differentially objectively qualified.

The legislature has directed the courts to **presume** employer actions which are **disproportionate** to the employer's **legitimate business interests** when the employer makes "employment decisions" of who is objectively qualified based on specific types of cheap information.

These specific types of cheap information are called **PROTECTED CLASSES**.

Every one is a member of every protected class.

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PROTECTED CLASSES

Race
Color
Religion reasonably accommodate
National Origin
Sex
Age
Physical Handicap reasonably accommodate
 major life activity

The question is not whether you are "male" or "female".
 The question is whether "sex" was used to indicate "qualified".

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Protected Classes

Race can not change Civil Rights Act 1964
Color can not change Civil Rights Act 1964
Religion *should not* change Civil Rights Act 1964
 reasonably accommodate
National Origin can not change Civil Rights Act 1964
Sex can not change Civil Rights Act 1964
 Equal Pay Act 1963

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Protected Classes

Age (over 40) can not change Age Discrimination Employment Act 1967

Physical Handicap can not change reasonably accommodate (federal contracts) Vocational Rehabilitation Act 1973
major life activity Americans with Disabilities Act 1990 (15+ employees)

What is race? 1864 versus 1964 Civil Rights Acts ethnic?: Jewish, Arab

Title VII of the Civil Rights Act of 1964

employer's legitimate business interest to hire and promote objectively "qualified" persons

Three ways to objectively prove that the employer did not hire or promote objectively qualified persons.

- Disparate Treatment
- Disparate Impact
- Pattern or Practice

Employer's plausible, alternative, legitimate explanation.

Title VII of the Civil Rights Act of 1964

Disparate Treatment

individual intentional

inference from circumstantial evidence

- protected class
- qualified for job
- rejected
- job remained open
- continued seeking applicants

Title VII of the Civil Rights Act of 1964

Disparate Impact

group

facially neutral

e.g., six feet tall to be police officer

disproportionately affects
a particular protected class

job related

business necessity

Title VII of the Civil Rights Act of 1964

Pattern or Practice

group

general policy

which does not satisfy its objective

e.g., require high school diploma
to assure reading and math skills

statistical inference

relevant labor market

4 / 5 ths Rule

not conclusive

starts an investigation

high transaction cost

Title VII of the Civil Rights Act of 1964

Bona Fide Occupational Qualifications BFOQ

NEVER Race or Color

business necessity

"necessity"

equals reasonably necessary

narrow interpretation

perspective of the public policy

not perspective of business

Title VII of the Civil Rights Act of 1964

Seniority if bona fide

- collective bargaining agreements
- legitimate business interests of union and employer to agree seniority
- objectively measures increased qualification

may not use seniority to discriminate

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Title VII of the Civil Rights Act of 1964

Reverse Discrimination v. Affirmative Action

court ordered affirmative action

- recruitment and hiring and promotion
- corrects adjudicated past discrimination
- e.g., FTC's corrective advertising

voluntary affirmative action

- recruitment
- expand pool of qualified applicants
- correct self identified past discrimination
- clean hands?

BUT: have current employees personally benefited from past discrimination?

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SEX DISCRIMINATION

Sexual Harassment

- managers are personally liable
- unless take preventative steps

harassment is reasonably expected if not take preventative steps

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SEX DISCRIMINATION
Sexual Harassment

definition of sexual harassment

Defendant

reasonable person would
subjectively intend harassment

Plaintiff

reasonable person would
subjectively perceive harassment

reasonable interpretation
by the person harassed
not by the person "harassing"

SEX DISCRIMINATION
Sexual Harassment

to avoid personal liability
managers must

develop a policy

communicate the policy

enforce the policy

internal versus external resolution

quid pro quo harassment
equals soliciting prostitution?

SEX DISCRIMINATION

Sex - plus and Pregnancy

unpregnant persons

EQUAL PAY ACT

only applies to the sex protected class

equal pay for equal work

not comparable worth

AMERICANS WITH DISABILITIES ACT OF 1990

THOSE AFFECTED:

43 million

physical or mental disability
affecting a major life activity
not disabled if correctable condition

includes

AIDS

recovering drug (e.g., alcohol) addicts

AMERICANS WITH DISABILITIES ACT OF 1990

Does not cover every one in all contexts.

Scope of Commerce Clause.

Only covers some

jobs
buildings
transportation
telephones

AMERICANS WITH DISABILITIES ACT OF 1990

JOBS

employers 15+ employees
no discrimination against "qualified" applicants
alter workplace unless "undue hardship"

BUILDING ACCESS

restaurants, hotels, grocery, medical
alterations if "readily achievable"
new construction must conform

TRANSPORTATION

new buses, trains, subways must be accessible
special pickup if not usable
Amtrak: 1 car per train

AMERICANS WITH DISABILITIES ACT OF 1990

TELEPHONES

provided to hearing and speech impaired

ENFORCEMENT

EEOC in federal court
