OVERVIEW OF EMPLOYMENT LAW

by

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Yellow HIGHLIGHTED areas are new for 2020

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I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Coverage

Title VII is the primary federal law that prohibits discrimination in employment practices. Title VII applies to any employer engaged in an industry affecting commerce who has **15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.**

Under Title VII, it is unlawful to fail or refuse to hire or to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.

Under Title VII it is also unlawful to limit, segregate, or classify employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect one's status as an employee because of race, color, religion, sex, or national origin.

Note: These materials will refer to various federal circuit courts as authority for the status of the law. However, each federal circuit could reach another finding for its jurisdiction. That is why these materials will refer to the majority status of the law across the country and, of course, U.S. supreme Court decisions which rump all of the federal circuits. For a map showing the areas covered by each federal circuit court, see the end of these materials.

B. Types of Discrimination: Disparate Treatment, Disparate Impact and "Systemic" Disparate Treatment

Basically, the three major theories of discrimination used by plaintiffs in Title VII cases are disparate treatment and disparate impact.

1. Disparate Treatment

Intentional discrimination. At a minimum, when faced with a disparate treatment claim, an employer must articulate a legitimate, non-discriminatory reason for the employment decision it made.

2. Disparate Impact

On its face, the practice or policy appears to be neutral and non-discriminatory, but the end result of the practice or policy is discriminatory. ("Facially neutral") In such cases, a facially neutral employment practice or policy that has "disparate impact" ("bad affect") on members of a protected class is illegal. (i.e., Hiring only college graduates for menial labor jobs has an adverse impact on minorities.)

Plaintiffs need ***not*** show that the employer ***intended*** to discriminate, only that unlawful discrimination has in fact occurred. That is why Disparate Impact is also referred to as "unintentional discrimination."

The employer must then demonstrate that the practice is job-related and based on business necessity.

3. "Systemic" Disparate Treatment

Systemic Disparate Treatment is very similar to Disparate Impact. However, when a plaintiff can show that an employer has a practice or policy that appears to be neutral and non-discriminatory, but the end result of the practice or policy has such a ***clear*** and ***significant*** statistical impact against a group of protected class individuals that the resulting discrimination must have been intentional.

II. EMPLOYMENT-AT-WILL DOCTRINE

A. Employment-At-Will And The Common Law

Under the common law, it was believed that since employees could quit their jobs whenever they wanted to for no reason, then employers should be able to fire their employees whenever they wanted regardless of whether or not they had "just cause" to do so. This philosophy was referred to as the "employment-at-will

doctrine" and it was widely recognized as being the current status of the law regarding employment law for many years.

Additionally, in those states where the employment-at-will doctrine is still alive and well, there is often a strong presumption under the law that *all* employment relationships are terminable at will unless the terms of the employee's contract or other facts or circumstances clearly manifest the parties' intent to bind each other to the relationship or to change this relationship in some way. (i.e., Henkel v. Educ. Research Council (1976), 45 Ohio St.2d 249). Therefore, in many employment-at-will states, the law begins with the presumption that every employment relationship is at-will.

However, over the years, the employment-at-will doctrine has eroded to the point that it is now not nearly the "all-protecting" doctrine that it once was for employers. In fact, in some states, the employment-at-will doctrine does not exist at all anymore. In such states, employers may be required to have "just cause" for terminating an employee, which is commonly documented by using a progressive discipline procedure (i.e., verbal warning, written warning, termination).

In states where the employment-at-will doctrine still exists, it has been greatly weakened by legislation and various court decisions. Therefore, the best way to think of the employment-at-will doctrine is to envision a medieval wooden shield protecting the employer from wrongful discharge suits by employees.

However, today, this shield is riddled with holes. If an arrow hits the shield, the employer will be protected by the doctrine. However, if the arrow goes through one of these "holes" (exceptions to the Employment At Will doctrine) the arrow will strike the employer dead.

B. Statutory Rights Exception

Today, many statutes exist that protect the rights of employees based upon their protected class status or based upon certain activities in which employees choose to engage. The employment-at-will doctrine will not protect an employer who has violated the statutory rights of an employee. Examples of such statutes include:

- Title VII of the Civil Rights Act of 1964,
- Age Discrimination in Employment Act of 1967,
- Americans With Disabilities Act of 1990 and The Rehabilitation Act of 1973,
- Employee Polygraph Protection Act of 1988,
- Equal Pay Act of 1963,
- Family and Medical Leave Act of 1993,

- Occupational Safety and Health Act of 1970,
- National Labor Relations Act of 1935,
- Pregnancy Discrimination Act of 1978,
- Uniformed Services Employment and Reemployment Rights Act of 1994,
- Employee Retirement Income Security Act of 1974,
- The Opposition and Participation Clauses of these Acts and
- Various state discrimination laws, as well as various whistleblower laws, state laws which prohibit employers from taking any retaliatory acts against employees for filing Workers' Compensation claims, and so on.

III. U.S. SUPREME COURT: PLEADING REQUIREMENTS IN EMPLOYMENT DISCRIMINATION CASES

A. No Facts Are Needed To Plead Employment Law Cases

In Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002), Akos Swierkiewicz sued his employer for illegal discrimination under Title VII based upon national origin. When Swierkiewicz filed his lawsuit, he failed to state any supporting facts, but only made a short statement claiming that his rights had been violated and was entitled to relief. His employer, Sorema, filed to have the case dismissed, claiming that Swierkiewicz failed to properly state a claim. Sorema contended that Swierkiewicz should be required to express some facts that support his claim before being allowed to file a lawsuit.

The U.S. Supreme Court disagreed.

The U.S. Supreme Court ruled that in order to file an employment discrimination lawsuit based upon Title VII, the plaintiff need only make a …

"short and plain statement of the claim showing that the pleader is entitled to relief."

Therefore, in order to file an employment lawsuit, plaintiffs need not declare **ANY FACTS** in their filing with the court. They need only state that their rights have been violated and they want some money.

IV. INTENTIONAL DISCRIMINATION: DISPARATE TREATMENT

A. Discriminatory Intent: Direct Evidence

Under the first theory of discrimination, disparate treatment, the plaintiff must prove that he was intentionally discriminated against due to his protected class status by either his employer or prospective employer, such as when an employer refuses to hire an individual solely because he is Catholic, for instance. As a result, the focus in a disparate treatment case is on the employer's motive for taking the adverse action against the plaintiff.

Therefore, the proper question to ask at this point is how does a plaintiff go about proving that his employer intended to discriminate against him based on his protected class status?

In Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975), Ray Pohasky was a white male supervisor who ordered four cleaning women, one of whom was white and three of whom were black, to perform heavy cleanup work, which included scraping hardened resin from the floor, even though they were hired to perform light cleaning duties. When the women protested and reiterated to Pohasky that they were hired to only do light cleaning and that such heavy work was not part of their jobs, the white cleaning lady was excused from the assignment and another black employee was assigned to perform the task in her place.

Pohasky was then heard making such comments as, "Colored folks are hired to clean because they clean better" and something to the effect that "colored people should stay in their places." The four black female employees, one of whom was Isabel Slack, were fired for refusing to perform these "heavy cleaning" tasks. As a result, they sued under Title VII claiming race discrimination for their terminations.

In considering whether or not Title VII had been violated by Pohasky's actions, the Ninth Circuit held that an employer's intent to discriminate can be inferred by its actions. In reaching its decision, the court considered Pohasky's statements and his conduct, and then held that it is reasonable to infer that the employer did indeed intend to discriminate against these black employees due to their race. Therefore, today it is clear that such direct evidence as a decision maker's acts or comments, like those made by Pohasky, can be used to prove an employer's discriminatory intent or its motive in taking certain actions.

Additionally, circumstantial evidence can be used to support the claim that the employer was motivated by discriminatory intent. Such evidence would include whether the employer hires, fires, disciplines or denies more promotions to black individuals than to white people without a legitimate business reason, for example.

Typical inquiries would be to ask if the plaintiff's replacement was someone who belongs to the same protected class as the plaintiff? What were the work records of the parties involved? Who made the adverse decision regarding the plaintiff? Was the decision maker a member of the same protected class as the plaintiff? How have employees who are not members of the plaintiff's protected class been treated in similar situations in the past? Were there good reasons for treating those who are not members of the plaintiff's protected class differently?

All of these questions are legitimate inquiries that can be used to prove or infer an employer's true motive. Therefore, even though no single piece of circumstantial evidence is dispositive ("will alone determine the outcome of the case") in proving a disparate impact case, collectively, such evidence may indeed be used to show an employer's discriminatory intent.

It is also important to note from Slack that the black cleaning women did not have to be fired by their employer in order for them to have a Title VII claim based on race. Delegating work assignments to employees based on their protected class status also violates Title VII since such decisions are employment-related.

Also, the incriminating fact for the employer in Slack was that the decisions made by Pohasky were based on the race of these black cleaning women. If Pohasky had not made these racial comments, and if he had assigned this work to both black and white cleaning women alike, then fired all of these cleaning women for refusing to perform these heavy cleaning tasks, no Title VII violation would have existed. Therefore, the employer in Slack violated Title VII by basing its decision as to whom this work would be assigned to on the employees' race, a protected class, and not for assigning work that was clearly beyond their job descriptions.

B. Direct Evidence Of Discrimination And Mixed Motive Cases

A "mixed motive" case occurs when an employer admits, or when it can be proven with direct evidence of discrimination, that it did indeed commit an illegal discriminatory act against the plaintiff. However, in a mixed motive case, the employer contends that a legitimate nondiscriminatory reason **also** exists to explain why it took the actions it did against the plaintiff in addition to the discriminatory reason, such as the fact that the plaintiff demonstrated bad work habits. The seminal case in this area of the law is Price Waterhouse v. Hopkins, 490 U.S. 288 (1989).

In Price Waterhouse, Ann Hopkins was a "superstar" female associate who was passed over for partnership. Her supporters told her that she needed to act more feminine, talk more like a lady, and so on. Hopkins sued, claiming sex discrimination.

At trial, Hopkins was able to demonstrate to the court by a preponderance of the evidence that her sex did indeed play a role in her being denied an offer of partnership with Price Waterhouse, thus substantiating her sex discrimination claim. However, Price Waterhouse was also able to demonstrate that Hopkins' abrasive nature played a role in this decision as well. Therefore, the two factors considered by the employer in making the decision not to promote Hopkins were "mixed" .... one was based on her sex, which was an illegal motive, and one was based on her abrasive nature, which was a legal motive.

The U.S. Supreme Court held that once a plaintiff in a Title VII action shows that gender, or any protected class status, was indeed a motivating factor in making the decision against the plaintiff, the employer may still avoid liability entirely if it can show by a preponderance of the evidence that it would have made the same decision even if the plaintiff's protected class had not played a part in the decision.

Therefore, in order to prevail in a mixed motive case, the plaintiff was required to show that her protected class status was **the** motivating factor, not just a motivating factor in making the decision. The Court also noted that since a mixed motive defense is an affirmative defense being asserted by the employer, since at this point it has been demonstrated that at least **some** illegal conduct by the employer has been committed, the employer retains both the burden of production and persuasion in defending itself on this issue.

However, in the Civil Rights Act of 1991, Congress overturned the holding in Price Waterhouse. Today, plaintiffs only need to prove that their protected class status played *a* factor in the employer's decision in order to prevail in a Title VII action, *not* that his protected class status was *the* motivating factor. However, Congress greatly limited the remedies employees who win mixed motive cases may receive to only declaratory and injunctive relief, which basically consists of a court order to "cease and desist" the illegal discriminatory practice, attorney's fees, and court costs. Plaintiffs who win mixed motive cases are therefore not entitled to receive reinstatement, instatement, promotions, or damages, either compensatory or punitive.

Of course, if the plaintiff can demonstrate to the court that *the* motivating factor for taking the adverse action against the plaintiff was the plaintiff's protected class status, which would constitute illegal discrimination, then a mixed motive case does not really exist. Instead, the situation is more along the lines of a traditional disparate treatment and pretext case.

C. The Disparate Treatment Prima Facie Case And Circumstantial Evidence Of Discrimination In Forming A Prima Facie Case of Discrimination

In order to establish "an inference" that an individual has been the victim of disparate treatment, or intentional discrimination under the Title VII, this individual must first establish what is called a "prima facie case."

("Prima facie" is a Latin term meaning "at first sight." The term "prima facie case" in the law refers to evidence that the plaintiff must first present in a case that, unless it is rebutted by the defendant, would be sufficient to prove a particular proposition or fact. In most legal proceedings, the courts require the plaintiff to present a "prima facie case" before the case is allowed to begin.)

In McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), the U.S. Supreme Court clearly outlined what the plaintiff must prove in order to establish this prima facie case of discrimination under Title VII, which includes:

1. That the plaintiff is a member of a protected class,

2. The plaintiff was qualified for the position the employer was filling (Are the minimum qualifications of the job met?),

3. The plaintiff was not chosen despite his qualifications (adverse action), and

4. After the plaintiff's rejection, the position remained open and the employer continued to look for another candidate, or the employer treated those who do not belong to the plaintiff's protected class differently.

Of course, these prima facie case factors may vary from case to case a bit depending on the alleged violation involved. Still, these inquiries form the basic framework that is used in establishing an inference of belief that an act of illegal discrimination has intentionally occurred under a disparate treatment theory.

Previously, it was widely believed that in order to prevail in a McDonnell Douglas type of case and show that the employer's legitimate business reason offered to the court was pretextual, the plaintiff must **prove** that:

- The employer's alleged reason for taking the adverse action against the employee was false and

- That the illegal discrimination alleged by the plaintiff was the real reason the employer acted the way it did.

However, in Reeves v. Sanderson Plumbing Products, Inc., No. 99-536 (2000), Roger Reeves, 57, had worked for Sanderson Plumbing Products, Inc. for 40 years…most recently as a supervisor. Reeves was then terminated by the company for allegedly making timekeeping errors. Reeves, on the other hand, claimed he was terminated due to his age and sued the company.

At trial, Reeves offered evidence that he had properly maintained the company's timekeeping records and that any errors that were made were not his fault, which included showing that the time clock was not working properly.

Reeves also cast doubt on the reasonableness of the employer's legitimate

business reason offered to the court for terminating his employment (poor timekeeping records) by introducing circumstantial evidence of derogatory, age-based comments directed at Reeves ("You're too old to do this job."). Reeves was also able to demonstrate to the court that he was treated more harshly than younger employees for the same types of alleged offenses.

The jury then returned a verdict for Reeves. Reeves was awarded $70,000 in damages.

However, on appeal, the 5th Circuit Court of Appeals overturned the trial court's verdict for Reeves and found for the employer. Specifically, the 5th Circuit found that Reeves had failed to carry his burden of proof required under Hicks.

The 5th Circuit Court of Appeals discounted this evidence presented by Reeves since only one decision-maker allegedly made the derogatory comments, and even then these comments were not made related to Reeves' termination but occurred in another context. No evidence was presented that indicated the other decision-makers were motivated by a prejudice against age.

Further, the 5th Circuit found that when Reeves was terminated, many of the employer's management positions were filled were by individuals over the age of 50. Also, two of the managers who decided to terminate Reeves were also over the age of 50.

As a result, the 5th Circuit found that even though Reeves had cast doubt on the credibility of the employer's legitimate business reason offered to the court (pretext), as well as cast doubt on whether the employer's true motivation for terminating him was based upon his and not poor timekeeping records, Reeves had not **proven** that these reasons offered by the employer were pretextual, or not true. The 5th Circuit Court reasoned that since it was Reeves' burden to prove these points, and since he failed to carry this burden of proof, Reeves must lose this case.

The U.S. Supreme Court disagreed.

The Court reasoned that the 5th Circuit misconstrued Mr. Reeves' burden, and thus the plaintiff's burden, in such disparate treatment cases. The U.S. Supreme Court held that plaintiff's are not required to present **explicit evidence** to prove their cases to the jury, which includes proving that the employer's legitimate business reason offered to the court is unworthy of credence and that the employer was motivated by an illegal reason in making its decision adverse to the plaintiff.

Instead, the Court reasoned that many times, illegal discrimination is subtle and difficult to prove…so plaintiffs are not required to present to the court a "smoking gun." Many times, such direct evidence as a "smoking gun" will simply not exist. Therefore, plaintiffs are only required to present evidence that the jury could **infer** that the employer's legitimate business reason offered to the court is pretextual

and that the true motivating factor behind the employer's decision was based on the plaintiff's protected class.

In this case, the Court found that Reeves had established a prima facie case under McDonnell Douglas, he had presented enough evidence that a reasonable jury could reject the employer's legitimate business reason offered to the court, and he had presented evidence that indicated that at least one of the decision–makers may have been motivated by an animus towards Reeves' age. Having presented this evidence, circumstantial or not, the ultimate questions of whether the employer terminated Reeves on account of his age should be a question left to the jury to decide.

The Reeves case is an important decision to employers and employees alike. Plaintiffs are now only required to present enough credible circumstantial evidence for the jury to **infer** that employer committed illegal discrimination. No direct evidence will be required from the plaintiff.

The problem for employers is that juries are inherently pro-employee.

Employers must therefore document their actions taken against employees now more than ever before. In reality, even though the ultimate burden of proof always remains with the plaintiff in disparate treatment cases, after Reeves, employers truly must be able to prove that they did not illegally discriminate against the employee.

This is done through documentation.

D. "Systemic" Disparate Treatment

Another way a plaintiff can prove illegal discrimination under a disparate treatment theory is by pointing to a formal policy used by the employer that is facially discriminatory.

For instance, in Trans World Airlines v. Thurston, 469 U.S. 111 (1985), after Harold Thurston, and other pilots as well, were forced to retire at the age of 60 pursuant to company policy, Thurston was denied the opportunity to transfer to a flight engineer's position. TWA argued that there was no vacancy for Thurston in any of these positions.

However, those pilots who left their positions for reasons **other** than being **forced to retire due to age were allowed to "bump" those with less seniority and obtain flight engineer positions, per TWA's policy**. The Court noted that TWA's policy of requiring its pilots to retire at age 60 was indeed a "bona fide occupational qualification," or "BFOQ," and was therefore legal, but *only* for its pilot positions.

The BFOQ that was granted for these pilot positions. However**,** the BFOQ **did not apply to the flight engineer jobs,** since no true detrimental link could be

shown to exist between one's age and one's ability to perform the duties of the flight engineer position.

Consequently, Thurston and all of TWA's other pilots who were forced to retire at age 60 were indeed **treated differently from those pilots who had not yet reached age 60 and were forced to retire**: Thurston and anyone else who reached the age of 60 were **not allowed** to "bump" into a flight engineer position. On the other hand, **those individuals who were not pilots and reached the age of 60 were allowed to "bump" into a flight engineer position.** Such a policy that treats individuals differently due to their age violates the Age Discrimination in Employment Act, or the "ADEA."

TWA contended that Thurston failed to establish a prima facie case of disparate treatment as required under McDonnell Douglas. However, the Court held that this was a systemic disparate treatment case, not a disparate treatment case, **so the plaintiff was not required to present a prima facie case as outlined under McDonnell Douglas**. Instead, when a **facially discriminatory policy** exists, as was used by TWA, it is **direct evidence of illegal discrimination**, so **no prima facie case is required**.

Therefore, in order to establish a case of illegal discrimination under a systemic disparate treatment theory, the plaintiff need only to point to a facially discriminatory policy.

It is important to note that if Thurston had been required to present a McDonnell Douglas prima facie case under a simple disparate treatment claim, Thurston would have been required to show that:

1. A flight engineer position was available when he was forced to retire and

2. That he was denied this opportunity due to his age.

Because a systemic disparate treatment claim was made by Thurston, all he had to show was that the employer's formal policy was discriminatory on its face. Thurston was therefore not required to show that any such positions were available. Instead, Thurston only had to show that he was being treated **differently** due to his age.

Also, plaintiffs can present a systemic disparate treatment claim if they are able to demonstrate that the employer has established a "pattern and practice" of illegal discrimination. Meeting this burden often relies largely on statistical evidence. Of course, the stronger the statistical evidence against the employer, the greater the chances are that the employer has indeed intentionally discriminated against a protected class of persons.

V. WHY WAS I FIRED? PICK A REASON!!!

In Chichewicz v. UNOVA Industrial Automotive Systems, Inc., No. 02-1831 (6th Cir. Feb. 12, 2004) Daniel Chichewicz was a sales engineer for UNOVA. In January 2000, Chichewicz, who was 53 years old, was told his position was being eliminated. UNOVA claimed his termination was the result of a reduction in force caused by slumping sales.

Chichewicz first filed a complaint with the Equal Employment Opportunity Commission (EEOC) claiming age discrimination. UNOVA then told the EEOC the reason it terminated Chichewicz was due to his poor performance, which differed from what Chichewicz has been originally told.

Chichewicz then sued for age discrimination in the U.S. District Court for the Eastern District of Michigan. In responding to the lawsuit, UNOVA again claimed that Chichewicz was terminated because of a reduction in force. The district court threw the case out, holding that Chichewicz failed to show he was replaced by or treated differently than a younger person. Chichewicz appealed to the Sixth Circuit.

The Sixth Circuit reversed the district court's decision, noting that in the case of a reduction in force, Chichewicz did not have to show that he was replaced by or treated differently than a younger employee in order to establish a case of age discrimination.

Instead, the Sixth Circuit said Chichewicz had to show only that there was some evidence he was "singled out" for discharge based on "impermissible reasons."

The court was particularly bothered by the fact that "UNOVA gave differing reasons at different times for [Chichewicz's] termination."

First, UNOVA claimed that Chichewicz was terminated because "the business climate was deteriorating, forcing it to do more with fewer people." However, Chichewicz provided a sworn statement from his supervisor that said the company had used "reorganization" as a tool to remove a number of employees in their 50s but not younger employees.

However, UNOVA told the EEOC Chichewicz was terminated due to poor performance.

As a result, the Sixth Circuit ordered that the case be sent back to the trial level for further consideration since a jury would be needed to determine the reason for separation.

WHAT DOES THIS MEAN TO EMPLOYERS?

DISCLOSE YOUR REASONS FOR TERMINATION!!! If an employee is discharged for multiple reasons…**ALL OF THESE REASONS MUST BE DISCLOSED.** Otherwise, it looks as if the company is rationalizing its decision later.

VI. WORKPLACE INVESTIGATIONS AND HONEST BELIEF RULE

In Hitt v. Harsco Corp., 356 F.3d 920 (8th Cir. 2004), William Hitt was a 65-year old employee with Harsco. Hitt also worked with his son-in-law, Mark Odom, age 34. However, Hitt filed to gain legal custody of Odom's son, which was also Hitt's grandson. Since then, Odom denied Hitt any access to his grandson. As a result, there was a great deal of tension between Odon and Hitt.

On the morning of August 23, 2000, Hitt allegedly sought out Odom in the company's lunchroom. The discussion, which centered on Odom's son, became quite heated. (No, it is probably not the best idea to criticize someone's parenting skills.)

Witnesses reported that Hitt told Odom that he was going to kick Odom's "ass." Odom then said they should "take it outside."

The two left then left lunchroom.

Witnesses reported that after the two left the lunchroom to "take it outside," Hitt then took a swing at Odom and Odom kicked Hitt, which is, of course, workplace violence.

HR investigated the incident and tried to get written statements from the witnesses. However, most people did not want to "get involved," but a few of the witnesses did give written statements. Based on these eye witness accounts, both Hill and Odom were terminated.

Hitt then filed suit against the company, claiming that he was fired in violation of the ADEA, or age discrimination.

Later, it was discovered that the witnesses that gave the employer written statements had in fact lied. There was no fight. They made the whole incident of workplace violence up.

Still, the employer refused to reinstate either Hill or Odom.

So, Hill proceeded with his lawsuit for age discrimination.

In the end, the court held for the employer, Harsco.

The court reasoned that the key question is not whether the plaintiff actually participated in the fight, but instead whether the employer **HONESTLY BELIEVED** that the employee had been a participant. Even though terminating an employee based on faulty information might be unfair, it is not illegal age discrimination.

WHAT DOES THIS MEAN TO EMPLOYERS?

Employees should be instructed to tell the truth in all investigations. Lying in an investigation subjects the company and the employee who made the false statement to

liability for defamation. Lying in an investigation should result in the employee's termination. Human resource people should include in their policies that refusing to give full and honest responses in an investigation may result in immediate termination.

However, in order to protect themselves, employers should document such statements. This documentation is vital since it can later be used to show exactly what information the employer relied upon that in making its employment decisions.

VII. STUPID COMMENTS DEFEAT HONEST BELIEF RULE

In Stewart v. Kettering Health Network, 576 Fed. Appx. 518 (6th Cir., Aug. 13, 2014), 59-year-old Doug Stewart was the oldest security officer working at Grandview Hospital.

On February 22, 2011, Grandview Hospital had a patient in a padded room that was becoming very upset and was cursing loudly. Dr. Robert Hunter asked Stewart and another officer, Officer Mardy White, to undress the patient and put him into a hospital gown. After blows were exchanged, Stewart was forced to use his stun gun to subdue the patient.

The patient appeared unaffected by the Taser, but shortly afterwards Stewart and White were able to tackle the patient to the floor and handcuff him with his hands in front of his body.

The door to the exam room was open during the incident. Stewart did not see anyone in the hall but medical staff came rushing in all of a sudden. Stewart recalls Dr. Hunter and Sergeant Jones ("Jones"), among others, coming into the room.

At this point, what happened to the patient is disputed.

Jones, Dr. Hunter and Dr. Fish testified that Stewart kicked the restrained patient in the head. Jones described the event in his report to Miller. Officer D. Stewart then took what appeared to be his right foot and moved it to the patients face in a quick motion. It appeared that his foot had struck the patient in the area of his forehead and nose...."

Jones also reported that Doctors Hunter and Fish confirmed that they saw Stewart kick the patient's head.

Stewart testifies to a different story. According to Stewart, the patient was spitting blood on everybody and everything. Dr. Hunter, in an effort to redirect the patient's head to avoid possible disease from the patient's blood, pushed his foot on the patient's head. Stewart told Dr. Hunter that "we" had the situation under control and he needed to remove his foot from the patient's head.

Dr. Hunter refused.

Stewart then placed his foot on the patient's head but he says he had no pressure on the patient's head.

When the patient calmed down, Stewart removed his foot and Stewart also removed Dr. Hunter's foot.

During the follow-up investigation, Stewart denied kicking the patient.

White's incident report mentions nothing of Stewart kicking the patient's head.

Dr. Fish's handwritten statement made shortly after the incident says nothing about Stewart kicking the patient's head.

Dr. Hunter's handwritten statement made shortly after the incident says nothing about Stewart kicking the patient's head.

During an interview following the incident, the patient said nothing about Stewart kicking him.

Finally, according to Stewart, the only injury that the patient had was a bloody nose and the bloody nose was from being punched by White, the other security officer.

Following an investigation headed by its chief of security, David Miller, Grandview fired him for using excessive force.

Stewart sued Grandview for age discrimination.

In support of his claims, he pointed to a number of incidents in which Miller allegedly made remarks about his age. Grandview didn't dispute that Miller had remarked that he generally wanted to hire younger officers.

According to Stewart, Miller told him he wanted "young bulls" instead of "old guys."

Further, another officer testified that Miller had asked him to "keep an eye on" Stewart and that he felt Stewart's "days were numbered."

The trial court dismissed Stewart's lawsuit, finding that he failed to present sufficient evidence to refute Grandview's position that it appropriately terminated him based on its "honest belief" of the truthfulness of the witnesses' accounts of the patient altercation.

Stewart appealed that decision to the Sixth Circuit.

The Sixth Circuit reversed the trial court's ruling and found that Stewart came forward with enough evidence to warrant a trial. The heart of the issue was the honest belief rule.

Under that rule, an employer's termination or other disciplinary decision isn't unlawful if it was based on its "honest belief" of the facts, even if the employer makes a mistake about the facts.

According to the court, the "employer must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." Therefore, Grandview argued, even if Stewart did not actually kick the patient in the head, it was reasonable for it to determine that he did based on the doctors' statements.

However, the Sixth Circuit found that in this case, a jury, rather than a judge, should have the opportunity to determine whether Grandview could rely on the honest belief rule.

The court was particularly bothered by three things in this case.

First, Stewart was able to point to several comments by his supervisor that suggested a prejudice against his age.

Second, "the fact that neither doctor present at the time of the incident giving rise to [the] termination saw fit to mention [the alleged misconduct] in his contemporaneous notes undercuts the credibility" of their subsequent testimony.

Third, Miller, who was the primary person heading up the investigation, was the same person who allegedly made comments that suggested he was prejudice against older employees.

Taking all of that into consideration, the court found that there were plenty of reasons that reasonable minds could differ on the employer's true motives. Therefore, Stewart should be allowed to present his claims to a jury.

WHAT DOES THIS MEAN FOR EMPLOYERS?

Under the Circuit Court's interpretation of the honest belief rule, an employer is not required to show that its decision-making process was "optimal or that it left no stone unturned."

However, the courts will not "blindly assume that an employer's description of its reasons [for an adverse action] is honest." The decision must be based on "particularized facts" rather than on "ignorance and mythology."

Grandview should have made sure that its physicians did a better job of documenting this incident. When their notes and their statements did not match, much doubt was cast on the truthfulness of their testimony.

Also, Miller's previous discriminatory comments are simply absurd. His credibility was destroyed.

As a result, the credibility of this entire process was tainted.

In the end, a lack of supervisor and physician training cost the employer.

VIII. U.S. SUPREME COURT: CAT'S PAW THEORY

In Staub v. Proctor Hospital, 131 S. Ct. 1186 (2011), Vincent Staub worked as an angiography technician for Proctor Hospital until 2004, when he was fired. While employed by Proctor, Staub was a member of the United States Army Reserve, which required him to attend drill one weekend per month and to train full time for two to three weeks a year. Both Janice Mulally, Staub's immediate supervisor, and Michael Korenchuk, Mulally's supervisor, were angry with Staub due to his military obligations.

Mulally scheduled Staub for additional shifts without any prior notice because he needed to "'pa[y] back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves.'" Mulally also informed Staub's co-worker, Leslie Sweborg, that Staub's "'military duty had been a strain on th[e] department,'" and asked Sweborg to help her "'get rid of him.'"

Korenchuk referred to Staub's military obligations as "'a b[u]nch of smoking and joking and [a] waste of taxpayers[‘] money.'" He was also aware that Mulally was "'out to get'" Staub.

In January 2004, Mulally issued Staub a written warning for purportedly violating a hospital rule that required him to stay in his work area whenever he was not working with a patient. The warning required Staub to report to Mulally or Korenchuk "'when [he] ha[d] no patients and [the angio] cases [we]re complete[d].'"

According to Staub, Mulally's justification for the warning as false for two reasons: First, the company rule invoked by Mulally did not exist; and second, even if it did, Staub did not violate it.

On April 2, 2004, Angie Day, Staub's co-worker, complained to Linda Buck, Proctor's vice president of human resources, and Garrett McGowan, Proctor's chief operating officer, about Staub's frequent unavailability and abruptness. McGowan directed Korenchuk and Buck to create a plan that would solve Staub's "'availability' problems."

In late April, Korenchuk informed Buck that Staub had left his desk without informing a supervisor in violation of the January Corrective Action. Staub claimed this accusation was false. Staub claimed that he left Korenchuk a voice-mail notifying him that he was leaving his desk. Buck relied on Korenchuk's accusation and after reviewing Staub's personnel file, she decided to fire him. The termination notice stated that Staub had ignored the directive issued in the January 2004 Corrective Action.

Staub challenged his firing through Proctor's grievance process, claiming that Mulally had fabricated the allegation underlying the warning out of hostility toward his military obligations. Buck did not follow up with Mulally about this claim. After discussing the matter with another personnel officer, Buck did not change her decision.

Staub sued Proctor under the Uniformed Services Employment and Reemployment Rights

Act (USERRA) of 1994, claiming that his discharge was motivated by hostility to his obligations as a military reservist. Staub did not claim that Buck had any such hostility towards him, but instead that Mulally and Korenchuk discriminated against him because of his military service. Staub claimed that their actions and their desire to discriminate against him influenced Buck's ultimate employment decision. A jury found that Staub's "military status was a motivating factor in [Proctor's] decision to discharge him," and awarded $57,640 in damages.

The Seventh Circuit reversed, holding that the employer was entitled to judgment as a matter of law. The court observed that Staub had brought a "'cat's paw' case," meaning that he sought to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision. It explained that under Seventh Circuit precedent, a "cat's paw" case could not succeed unless the non-decision maker exercised such "'singular influence'" over the decision maker that the decision to terminate was the product of "blind reliance." It then noted that "Buck looked beyond what Mulally and Korenchuk said," relying in part on her conversation with Day and her review of Staub's personnel file. The court "admit[ted] that Buck's investigation could have been more robust," since it "failed to pursue Staub's theory that Mulally fabricated the write-up." But the court said that the "'singular influence'" rule "does not require the decision maker to be a paragon of independence":

> "It is enough that the decision maker is not wholly dependent on a single source of information and conducts her own investigation into the facts relevant to the decision."

Because the undisputed evidence established that Buck was not wholly dependent on the advice of Korenchuk and Mulally, the court held that Proctor was entitled to judgment.

(The term "cat's paw" comes from an Aesop fable, which was put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by Posner in 1990. In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing.)

The Supreme Court reversed and held for Staub.

The Court reasoned that the USERRA, which forbids an employer to deny "employment, reemployment, retention in employment, promotion, or any benefit of employment" based on a person's "membership" in or "obligation to perform service in a uniformed service" ... and provides that liability is established "if the person's membership ... is a motivating factor in the employer's action."

The Court agreed that there was no evidence that the human resources executive, Buck, harbored any anti-military bias towards Staub. However, Buck's failure to follow up on Staub's claim that his supervisors were discriminating against him was enough to create liability under the cat's paw theory. Simply put, Buck failed to take any action to sever the causal link between the discriminatory acts of the non-decision makers, which included the prejudicial corrective action and tainted recommendation that Staub be terminated, which

led to the company's ultimate decision to terminate Staub. Under a cat's paw theory of liability, that inaction proved fatal to Proctor's defense.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Staub reminds employers that whenever an employee claims that he/she is being treated in an illegal manner by managers and supervisors, these allegations should be independently investigated, regardless where in the disciplinary process these allegations are raised. If Buck, Proctor's vice president of human resources, had independently investigated Staub's claim of anti-military bias, she might have verified the accuracy of his claims and rescinded the discipline, or she might have independently determined that Staub's termination was justified by the portion of his disciplinary file that was not tainted by the biased corrective action. Either way, she would have created a record that was much better suited to withstanding a cat's paw discrimination challenge.

Also …

In Hickle v. American Multi-Cinema, No. 18-4131 (6th Cir. 2019), Jared Hickle began his career at the theater in 2004 while he was still in high school. Two years later, he received a promotion to operations coordinator at the theater.

In 2008, Hickle joined the National Guard. Before he left for training, Hickle interviewed with Tim Kalman, the theater's general manager, for a management position. When Hickle mentioned that he would need a six-month leave of absence for military training, Kalman immediately ended the interview.

Hickle did not receive the promotion, but the person who did thanked him "for joining the military. I just got promoted."

Hickle received a promotion into management following his training and became kitchen manager in April of 2013. During that time, Hickle continued to serve, including a one-year tour in Afghanistan.

Senior Manager Jacqueline Adler, Hickle's immediate supervisor, made several comments over the years about how frustrating his time off was to her and that maybe he should be moved to the front of the house where there are more managers to cover for him when he is gone "and it wouldn't be such a [headache] to her."

In June 2014, Hickle was supposed to close on the Thursday night before his military obligation on Friday. However, the theater's closing occurred well after midnight which was when his orders could commence. Thus, Hickle informed Adler he could not close on Thursday. Adler responded by saying that he needed to find another job because he no longer met the defendant's minimum qualifications. Hickle told Kalman about Adler's comment. Kalman said he would take care of it.

After returning from military duty, Hickle asked to meet with Kalman and Adler. During the meeting, Hickle provided Kalman with a pamphlet that provided a detailed explanation of an employer's obligations under USERRA. After the meeting, Adler

continued to make comments suggesting that Hickle could, or should, be fired for taking time off for military service, including in February 2015 when Hickle asked for time off for military duty, and she suggested that they needed to replace him.

In April 2015, the theater defendant was expecting huge crowds for "Avengers weekend." Hickle reminded Adler that he would be gone that weekend for military service. Adler told him that he would be fired if he missed work that weekend. When Hickle reminded her that terminating him for military service would be illegal, she said "that's okay. We will find something else to terminate you on."

The defendant would later argue that Adler was just joking.

However, Hickle was fired in April, not long after she made that comment.

Hickle was fired because of the "chicken finger incident." Apparently, one of the employees told Hickle that Quinton Branham, an employee at the theater, had asked her to make extra food, so he could take it home at the end of the shift. She refused, but a "to go" box was found with 10 chicken fingers in it. This exceeded the amount an employee could take home for a shift meal.

Branham admitted that they were his but that they had been abandoned and would have been tossed out. Hickle told the employees that they could not take food home that night but would be permitted to eat their meal at the theater.

Another employee then began cursing at Hickle and acting disrespectful. Hickle wrote a statement concerning the incident and denied losing his temper or otherwise acting unprofessional in return.

The next day, an employee told Hickle that Adler was plotting to get rid of him. According to the employee, Adler was asking an employee to get into an argument with Hickle in front of other employees so they could then write statements against him. While Hickle gathered employee statements about Adler's plot, Adler was already investigating Hickle about the chicken finger incident.

Hickle's actions were viewed as impeding the investigation. Hickle was fired by Keana Bradley, a "corporate adjudicator" after reviewing findings by the defendant's corporate compliance office, which conducted the investigation with input from Kalman.

Under USERRA, employees who perform military service are protected from termination because of their military service. A plaintiff has to show by a preponderance of the evidence, which is a "more than not" standard, that his protected status was a "substantial or motivating factor in the adverse employment action." If the employee can prove that standard, then the employer needs to show by a preponderance of the evidence that it would have taken the same action without considering the military service and for a lawful reason.

The trial court found for the theater and dismissed the charges against it.

Hickle then appealed to the Sixth Circuit Court of Appeals, where the court reversed the lower court.

The Sixth Circuit found that the district court was wrong when it held that Hickle had not offered any direct evidence of the violation. The decision maker was well aware of Adler's persistent, discriminatory comments and threats and that Hickle was gathering evidence of Adler's plot to frame him.

The court, relying on the Supreme Court's decision in Staub v Proctor Hosp, 562 US 422 (2011), applied the "cat's paw" theory:

> "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."

Hickle presented evidence of Adler's comments, including that Adler stated she would find another reason to fire him, and of her plotting to get him fired. Therefore, an issue of fact existed that needed to be resolved by a jury to determine whether Adler may have influenced the decision.

The defendant tried to rely on a case where the investigator was not aware of the plaintiff's complaints about military leave and conducted a thorough investigation, terminating the employee solely for lawful reasons. However, the appellate court found the instant case to be distinguishable, stating:

> "[t]his was not a case in which the decisionmaker was acting on a clean record and in ignorance of lurking discriminatory motives. The decisionmaker was fully aware of the facts suggesting that the 'impeding the investigation' charge was pretextual."

However, Hickle was able to present evidence that ties some people involved in the termination decision to Adler's discriminatory comments.

Hickle offered evidence that Adler persistently made anti-military comments, up to and including threatening to get him fired for 'something else' when Hickle had to miss the Avengers weekend for military duty. He offered evidence that Adler was, in fact, plotting to get him fired. This evidence is more than sufficient for a reasonable jury to infer that Adler intended to cause Hickle's termination.

Also, the decisionmaker, Bradley, and those with direct input, including Kalman, all knew about Adler's persistent, discriminatory comments. Hickle repeatedly complained to Kalman, who had direct input into the termination decision, about Adler's behavior.

Further, the actual decisionmaker, Bradley, knew that Hickle had heard that Adler was conspiring to get him fired, and knew that Adler told Hickle to gather employees' statements.

Therefore, the decisionmaker knew that Hickle was told to commit a fireable offense, gathering statements and thereby impeding an investigation, by someone Hickle had repeatedly said had made discriminatory comments threatening his job. Still, the decisionmaker chose to fire Hickle.

The defendant also argued that it had never denied Hickle's request for time off, which the district court found to be persuasive evidence of a lack of anti-military animus. However, the appellate court said this was not "determinative, as there could be numerous situations in which an employer would grant requests for military leave, albeit grudgingly, for years and still wrongfully terminates an employee for taking such leave." While granting leave helps the defendant's case, it does not insulate it from liability.

WHAT DOES THIS MEAN FOR HR?

So, in the end, a jury will decide whether the defendant relied solely on the "chicken finger incident" in deciding to fire Hickle and whether it would have reached the same result absent the allegations that he had impeded the defendant's investigation.

This case clearly shows how vital it is to train and educate all supervisors in employment and labor law. Supervisors often incriminate their employers without realizing it, and some do not really understand the repercussions of making such comments. Being irritated with an employee is one thing. Making incriminating comments and engaging in illegal acts are another.

Also, beware of the "cat's paw theory." Supervisors who engage in such conduct as Kilman and Adler can doom your investigation if any of their "tainted" input becomes a factor in any employment decision.

Employers must choose their investigators carefully and keep the investigator far away from the opinions and taint of the supervisor who will be accused of committing the discriminatory actions or comments. Such strategy decisions may best be made with the assistance of legal counsel who specializes in these areas.

IX. STUPID COMMENTS ARE "DIRECT EVIDENCE" OF DISCRIMINATION

In Sciaretta v. Refractory Specialties, 2018-Ohio-1141, Refractory Specialties, Inc. (RSI), was a manufacturer of vacuum-formed products located in Sebring, Ohio. In 2006, RSI hired Domenico Sciaretta as a product manager. Sciaretta was 63 at the time he was hired.

In 2011, Unifrax acquired RSI as a wholly owned subsidiary. The day before the sale was announced, RSI's owner, Richard Wilk, told Sciaretta about the sale. He also told Sciaretta that the new owner had asked him how old he and Sciaretta were and how long they both planned to work for the company. Wilk told Unifrax that he and Sciaretta were the same age, which was approximately 68 years old at that point, and they both planned to continue working as long as they enjoyed their work.

In July 2013, Unifrax general manager James Olchawski prepared a succession planning document estimating Sciaretta's retirement date as July 2017. **Olchawski wrote in the memorandum that there was a need for "immediate succession planning" for Sciaretta and others and that Unifrax needed to identify "the next generation of leadership" and "to get the next generation in place."**

In December 2013, Wilk told Sciaretta that Unifrax was again asking about their ages and retirement plans. Sciaretta replied that it was none of Unifrax's business, **noting that other companies he had worked for had engaged in succession planning without using ages or retirement plans because the information was not necessary and employees could leave for various reasons**.

However, about a week later, Sciaretta felt compelled to estimate his retirement date to appease Unifrax. He told Wilk that he planned to work until he was 75, which would be April 2018.

In January 2014, Sciaretta and Olchawski went to a convention in New York. **Over dinner, Olchawski asked Sciaretta about his age, why he was still working, and how much longer he was going to work**.

The dinner became confrontational.

In March 2014, Unifrax posted a notice for a market manager position, which would be located at corporate headquarters in Tonawanda, New York, and would require domestic and international travel. **Unifrax sought a candidate with a degree in mechanical engineering or an equivalent degree, seven to 10 years of experience in the steel and refractory industry, including three to five years of sales experience, good communication skills, and complete knowledge of the company's products.**

Sciaretta, who was 71 at the time, applied for the position. He has a degree in chemical engineering and had worked in the steel and refractory industry for 43 years, and he claimed to have sales experience, including direct and international sales.

A vice president at Unifrax, Stephen Juda, was tasked with hiring someone to fill the new position. **Sciaretta was the only one of the five applicants not selected for an interview. When an HR representative asked Juda why he did not interview Sciaretta, he replied that Sciaretta fell asleep at a regional sales meeting they both attended a few years before**.

He also commented that Sciaretta was close to retirement.

During his initial review of the candidates, Juda asked Olchawski for his opinion of Sciaretta. Olchawski told Juda that Sciaretta was not a star performer, his quantity of work "wasn't that good," and his quality of work was average. Juda didn't ask Wilk for his opinion of Sciaretta's qualifications for the new position.

Juda ultimately selected a 29-year-old to fill the position. However, because the person who was chosen did not have the desired years of sales and marketing experience, **he was given a different title and assigned a salary grade a step lower than what was posted in the job opening**.

In October 2014, Sciaretta filed a lawsuit in the Mahoning County Court of Common Pleas alleging claims of age discrimination against RSI and Unifrax. The company ultimately filed motions for summary judgment, which the trial court granted. The court ruled that Sciaretta failed to present direct evidence that the promotion decision was tainted by age discrimination.

The court also ruled that although Sciaretta presented sufficient indirect evidence to establish a *prima facie,* or minimally sufficient, case of age discrimination, he did not have enough evidence to warrant a trial. The court concluded that he could not provide sufficient evidence to rebut the employers' nondiscriminatory reasons for not selecting him for the market manager position:

The fact that he fell asleep at a sales meeting he and Juda attended, Juda's impression that he didn't have frontline sales experience, and Olchawski's opinion that he was merely an adequate performer.

Sciaretta appealed the trial court's dismissal of his case to the Court of Appeals for the 7th District of Ohio. On March 16, 2018, the court of appeals overruled the trial court's dismissal.

The court of appeals disagreed with the trial court's ruling that Sciaretta failed to present **direct evidence of age discrimination**. The court of appeals concluded that Juda's statement to the HR representative that he did not want to interview Sciaretta because he was "**close to retirement age**" constituted **direct evidence** of age discrimination. According to the court, "**The comment dealt with age and was said to be made in the context of explaining why the decision-maker was not willing to interview" Sciaretta**.

The court of appeals also overruled the trial court's finding that Sciaretta failed to meet his burden of establishing that the employers' stated reasons for not promoting him were pretextual, or an excuse for discrimination. The court noted that the trial court's ruling was the equivalent of concluding that no rational fact finder could reasonably doubt that the employers' explanation of the decision to promote someone other than Sciaretta was not age-related.

The court then pointed to the following evidence that might lead a jury to find that Sciaretta had been discriminated against because of his age:

- ✓ His work history at RSI and before he came to RSI;
- ✓ Unifrax's inquiries about his age and retirement plans;
- ✓ Wilk's opinion that he was very qualified for the posted position;

- ✓ His qualifications compared to the person who was hired;
- ✓ The fact that he was the only one of the five applicants who wasn't interviewed; and
- ✓ The employers' deviation from the March 2014 job posting in hiring the 29-year-old applicant.

Accordingly, the court of appeals sent the case back to the trial court so the case can proceed to trial.

WHAT DOES THIS MEAN FOR HR?

To be successful in the present and into the future, employers must continuously be mindful of succession planning. This case is a reminder of how even well-intended missteps as you navigate the legal minefield can hamper your succession planning. It's also a real-life reminder that you cannot lawfully exclude anyone who is otherwise qualified from consideration for a job or a promotion just because he happens to be in his 60s or, like Sciaretta, who was in his 70s.

X. STATUTE OF LIMITATIONS FOR FILING AN EEOC CHARGE

In Ledbetter v. Goodyear Tire & Rubber Co., (No. 05-1074), salaried employees at the Goodyear plant where Rita Ledbetter worked were given or denied raises based on their performance evaluations. Since Ledbetter was a salaried employee, her raises were also based upon her performance appraisals. Rita Ledbetter had worked under this system at Goodyear for 19 years.

However, in March 1998, Ledbetter filed an intake questionnaire with the EEOC regarding a potential sex discrimination charge. In July 1998, Ledbetter filed a formal EEOC charge against Goodyear claiming sex discrimination based upon the performance appraisals she had received while working at Goodyear. After she retired in November 1998, she filed suit against Goodyear, asserting, among other things, a sex discrimination claim under Title VII of the Civil Rights Act of 1964.

At trial, Ledbetter claimed that several supervisors had in the past given her poor evaluations because of her sex. As a result, her pay had not increased as much as it would have if she had been evaluated fairly. Ledbetter claimed that as a result of those past performance appraisals and their subsequent influence on her raises, her pay was reduced throughout her employment because of her sex. By the end of her employment, Ledbetter was earning significantly less than her male colleagues.

Goodyear argued that Ledbetter's evaluations had been nondiscriminatory. Still the jury found for Ledbetter, awarding her back pay and damages.

On appeal, Goodyear contended that Ledbetter's pay discrimination claim was time barred. Goodyear argued that Title VII requires an aggrieved individual to file an administrative charge of discrimination with the Equal Employment Opportunity Commission within 180 days, or 300 days in a "deferral" state where the investigation is

deferred by the EEOC to the appropriate state agency. In this case, the proper statute of limitations was 180 days from the alleged illegal event.

Goodyear therefore contended that the statute of limitations for Ledbetter to file her claim under Title VII began to run when the discriminatory decision was originally made, which in this case were Ledbetter's performance appraisals and their subsequent pay increases. Goodyear argued that the statute of limitations does not, as Ledbetter argued, continue to run years later merely because the effects of that decision may still be felt in future paychecks.

The 11th Circuit Court of Appeals agreed with Goodyear and overturned the trial court's holding for Ledbetter. Ledbetter then appealed to the United State Supreme Court. Unfortunately for Ms. Ledbetter, the U.S. Supreme Court held for Goodyear.

The Court reasoned that anyone wishing to bring a Title VII lawsuit must first file an EEOC charge within 180 days, as was the situation in this case, "after the alleged unlawful employment practice occurred."

Ledbetter contended that Title VII's statute of limitations period (180 or 300 days) began to run when "each allegedly discriminatory pay decision was made and communicated to her." The Court rejected Ledbetter's argument that each subsequent paycheck was a separate act of discrimination. Instead, in addressing when a charge is filed in a timely manner with the EEOC, the Court stated that a new violation does not occur, and a new charging period does not commence, simply because the victim suffers the natural consequences of a discriminatory act.

On the other hand, if an employer engages in a series of **separately actionable** and **intentionally discriminatory acts**, then a **fresh violation** does indeed take place when each illegal act is committed.

However, Ledbetter did not argue that any **separately actionable** and **intentionally discriminatory acts** were committed by Goodyear other than the original performance appraisals upon which her raises were based. Instead, Ledbetter simply argued that that Goodyear's on-going discriminatory pay practices gave her a renewed statute of limitations period with each occurrence, which in this case was with every paycheck. Unfortunately for Ledbetter, the current effects of past illegal discrimination alone cannot breathe life back into a previous act of illegal discrimination wherein no timely filing had been made.

In short, Ledbetter should have filed an EEOC charge within 180 days after each discriminatory employment decision was made and communicated to her. Therefore, the Court held that because the later effects of past discrimination do not restart the clock for filing an EEOC charge, Ledbetter's claim is untimely.

XI. EMPLOYER DEFENSES TO DISPARATE TREATMENT CLAIMS

A. Bona Fide Occupational Qualification ("BFOQ")

Title VII permits employers to treat individuals differently based upon their protected class status (i.e.: sex, religion, national origin, etc.) if such criteria constitute a **"bona fide occupational qualification" ("BFOQ") reasonably necessary to the normal operations of that particular business...".**

Basically, the requirements of a BFOQ are that:

1. The particular job in question requires that the members of a certain protected class be excluded.

2. In order to support this defense, employers must present proof that everyone in a particular protected class would be unable to perform the job, or unable to perform it safely, or they must demonstrate that it would be impossible to make such a determination on a case-by-case basis, and

3. That excluding the members of a certain protected class is **reasonably necessary** since such a requirement relates directly to the **essence of the employer's business**, and thatThe BFOQ used by the employer is **narrowly tailored** (not any broader than it has to be) **to meet the essential needs of the business and it is a legitimate solution** to the employer's dilemma.

First, a vital question to ask in any BFOQ analysis is "what is the 'essence' of an employer's business?" In Playboy Clubs International, Inc., v. Hotel and Restaurant Employees and B.I.U., 321 F.Supp. 704 (1971), the court upheld the use of sex as a BFOQ for the female waitresses of Playboy's clubs since the court believed the essence of Playboy's business was sex appeal, as opposed to "restauranting." As a result, hiring a man to fill a Playboy "bunny" waitress position would contradict the essence of Playboy's business. Therefore, Playboy was permitted to discriminate on the basis of sex.

However, in Wilson v. Southwest Airlines Company, 517 F.Supp. 292 (N.D. Tex. 1981), Southwest Airlines advertised itself as the "Love Airline." It hired only female flight attendants and female ticket agents, claiming that its image was to present the personification of feminine youth and vitality to its customers. As a result of its "love" campaign, the airline was saved from the brink of economic extinction. In fact, as a result of this campaign, the company's business flourished. However, Gregory Wilson, and a class of over 100 male job applicants, brought suit under Title VII claiming sex discrimination.

The court in Southwest Airlines held that an employer must show more than just economic harm or customer preference in order to substantiate a BFOQ

defense. In this case, the court said that the true essence of Southwest Airlines' business was transportation, not love. Therefore, the BFOQ defense was denied.

In reality, the difference between the Playboy Clubs and Southwest Airlines cases was that the essence of Playboy's business is a type of "erotica" entertainment, whereas the essence of Southwest Airlines' business was not; Southwest Airlines' business was transportation. However, had Southwest Airlines' business been more lurid or sexually erotic in its approach, then perhaps a BFOQ exemption would have been granted. Consequently, at some point, the essence of one's business stops being regarded as transportation or food service and it becomes something else, such as sexual entertainment.

BFOQs generally do not exist for the protected classes of race and color.

B. Rebutting The Inference Of Discriminatory Intent

Since both a charge of disparate treatment and a charge of systemic disparate treatment allege that the employer has intentionally discriminated against a protected class of persons, an employer can defend itself by rebutting this inference that it intended to discriminate.

In the EEOC v. Sears, Roebuck and Company, 839 F.2d 302 (7th Cir. 1988), the employer, Sears, was also able to rebut the inference of intentional discrimination. In Sears, the EEOC presented statistics showing that the vast majority of Sears' commissioned sales positions, which were very high-paying jobs, were filled entirely by men. The EEOC therefore claimed that Sears was intentionally discriminating against women based on these statistics.

However, Sears refuted the inference of discriminatory intent suggested by these statistics. First, Sears explained that many women were simply not qualified to perform these jobs. (i.e., weak technical background) Sears also explained that many women were not interested in these jobs due to the late hours that were involved and the risk of receiving "no pay" if they failed to make any sales, since such jobs were paid on a commission-only basis.

Sears presented surveys completed by its female employees and its managers supporting this theory.

Sears also brought in experts to testify regarding some of the **real** differences that exist between men and women, as opposed to mere stereotypes, which also supported the theories Sears presented to the court.

The EEOC, on the other hand, failed to present any direct evidence to support its statistical case or to refute Sears' contentions, so Sears prevailed.

Perhaps most obvious, employers can use their own statistics to refute the plaintiff's case. Employers can also point out flaws in the statistics used by the plaintiff, such as whether the plaintiff used the most relevant labor market in

tabulating its statistics, or if all the relevant factors have been considered in the plaintiff's statistics, such as the requirements of the job.

Therefore, attacking the plaintiff's statistical case, and then introducing a more favorable set of statistics to refute the plaintiff's case, can be quite effective in establishing a defense.

C. Legitimate Business Reason and Business Judgment

In Jacklyn v. Schering-Plough Healthcare Products Sales Corp., 176 F.3d 921 (6th Cir. 1999), Carol Jacklyn was employed by Schering as a key account manager (KAM). At the time, KAMs marketed and sold Schering's products to major retail accounts such as Meijer's, F&M Distributors and Arbor Drugs. In this role, Jacklyn had consistently received high performance ratings.

However, due to reorganization, the role of the KAMs changed. Instead of acting independently, the company instituted a "team concept in selling." This new approach primarily involved sharing expertise with others and training less experienced KAMs.

The new management of Schering made it clear that these new expectations were "not optional." In fact, management stated and documented that these requirements were "required to build our business, develop our personnel and allow our company to meet the changing demands of the business environment."

Jacklyn was perceived as resisting these new requirements, which management expressed as "disappointing." Her supervisors claimed that she was not involved in "pitching" new products with them. Consequently, Jacklyn's performance ratings dropped to "needs improvement."

Jacklyn claimed that these low performance ratings she received were based upon the fact that she was a woman and because of her age. Jacklyn claimed that management was overly critical of her because of her sex. Specifically, she stated that she heard her manager state that he did not want any "skirts" working for him.

However, the court held for the employer. Specifically, the court reasoned that Jacklyn was unable to show that she was treated differently than any male employee. The court therefore found that Jacklyn was unable to form a prima facie case of illegal discrimination.

The court further reasoned that the employer's right to "raise the performance bar" on its employees is a matter of business judgment and will not be second-guessed by the courts. In fact, even if Jacklyn had been able to show that the "bar" had been raised on her and her alone, that would be insufficient to form a prima facie case of illegal discrimination.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Simply put, companies have the right to exercise their business judgment and adjust the performance expectations of their employees. However, they should always document what they are doing and why.

In other words:

"If it isn't written down … it didn't happen."

D. "Same Actor" Defense

Another defense to a charge of disparate treatment that has been recognized by the majority of the courts is the "same actor" defense. Under this defense, the employer argues that it is not logical to conclude that it committed illegal discrimination against the plaintiff **when the same manager, or actor, who made the decision to hire the plaintiff, for instance, was also the same manager who made the decision to take the adverse action against the plaintiff**.

The logic of using this defense lies in the argument that if the manager was going to discriminate against the plaintiff, the plaintiff would not have been hired in the first place.

Further, if the manager who made the decision to take the adverse action against the plaintiff **also belongs to the same protected class as the plaintiff,** then even more credence is added to this defense.

Therefore, in short, the employer uses this defense to strengthen its argument that it took the adverse action against the plaintiff based upon a legitimate non-discriminatory reason and not the plaintiff's protected class status.

For instance, in Brown and Davis v. CSC Logic, Inc., 82 F.3d 651 (5th Cir. 1996), Robert Davis, an executive with CSC, was laid off from his job at the age of 58 as part of a company-wide reorganization. Davis claimed that he had been the victim of age discrimination under the Age Discrimination in Employment Act of 1967, or the "ADEA."

However, the court agreed with the ""same actor" defense raised by CSC. The court noted that **Davis was 54 years old** when he was hired by the CEO of CSC, **56-year-old Winston Kimzey**. **Four years later, when Davis was 58 years old, he was terminated.**

The court reasoned that it was **"irrational" to believe that an employer would not discriminate in its hiring practices based on age but it would discriminate against this same protected class person four years later due to his age in its**

termination practices.

Specifically, the court gave weight to the fact that the "actor" involved in both the decision to hire Davis and then to terminate his employment was Kimzey, who was also a member of the ADEA's protected class. The court reasoned that since Kimzey was 56 years old when he hired Davis and he was 60 years old when he decided to terminate Davis' employment, the probability that CSC based its decision to terminate Davis' employment due to his age was further diminished.

XII. CIRCUIT COURT RE-EXAMINES "SIMILARLY SITUATED" EMPLOYEES IN DISCRIMINATION CLAIMS

Human resource and legal professionals have long evaluated the potential of a discrimination claim using the following paradigm:

(1) Whether the employer is able to articulate a lawful reason (preferably objective) for the adverse employment decision;

(2) Whether there is documentation that supports the existence of the lawful reason for the adverse employment decision;

(3) Whether there are comparables or comparators;

(4) Whether the decision-maker (including any personnel who influenced the decision-maker under the "cat's paw" theory of liability) is above reproach; and

(5) Whether the decision was fair (for example, whether the employee was provided with the opportunity to tell his or her "side of the story"; whether the employee was placed on notice the conduct that led to the adverse employment decision was improper).

While all these factors are important, discrimination claims typically involve an attack on the decision-maker's alleged bias and the identification of similarly situated employees who were treated differently, which are referred to as "comparables." Traditionally, a comparable involves the identification of a similarly situated individual, supervised by the same decision-maker as the plaintiff, who was treated the same as the plaintiff for engaging in the same or similar conduct.

However, this narrow view of "comparables" has just expanded in the 6th Circuit.

In Bobo v. United Parcel Service, Inc. (No. 09-6348, January 9, 2012), Walleon Bobo, an African-American Army Reservist, was employed by United Parcel Service (UPS) as a feeder supervisor. His job duties included training his direct reports by conducting yearly safety rides and evaluating the performance of his direct reports. The evaluation required the completion of a specific form.

A department-wide investigation revealed that Bobo asked a number of the drivers he supervised to sign blank forms and did not actually spend the amount of time training as indicated on the forms. Bobo was discharged for falsifying records in violation of the company's written policies. Thus, the first two prongs of the paradigm were satisfied: an objective reason supported by written documentation.

Bobo sued UPS alleging discrimination and retaliation under the Uniformed Services Employment and Reemployment Rights Act (USERRA), Title VII of the Civil Rights Act, 42 U.S.C. § 1981, and the Tennessee Human Rights Act. According to Bobo, his discharge was a pretext for discrimination and retaliation because other non-African-American and non-military employees engaged in this widespread practice of falsification of forms and were not ultimately terminated from employment. In seeking summary judgment, UPS maintained the only comparable, a non-military, Caucasian feeder supervisor who admitted to falsifying yearly safety ride forms, was also terminated for the same conduct.

During discovery, Bobo moved to expand the scope of discovery to seek information about several Caucasian, non-military supervisors to whom Bobo attempted to compare himself, even though these individuals reported to a different supervisor. UPS had only provided discovery about a single employee, who was the only Caucasian, non-military feeder supervisor who reported to Bobo's supervisor. The trial court agreed with UPS on the permissible scope of discovery and denied Bobo's request to expand the search for comparables.

However, the Sixth Circuit was critical of the trial court's limitation on the definition of comparables and held that "[c]ontrary to the holding below, Bobo was not required to demonstrate an **exact correlation** between himself and others similarly situated; rather, he had to show only that he and his **proposed comparators were similar in all relevant respects, and that he and his proposed comparators engaged in acts of comparable seriousness**."

The court further explained that the similarly situated employees did not have to deal with the same supervisor in every case and that this criterion was never "an inflexible requirement."

The Sixth Circuit held that the trial court's reliance on the standard that only included **similarly situated employees that reported to the plaintiff's supervisor** was too narrow and the inquiry on who constituted a comparable depended on the facts of the case and, given the facts of this case, the search should have been expanded by the trial court.

A reading of the court's decision also indicates UPS may have failed the fourth prong of the paradigm, *i.e.*, the decision-maker was not above reproach. Even though Bobo's immediate supervisor did not make the termination decision, the court found that Bobo's immediate supervisor may have "influenced" the termination decision due to discriminatory animus. The immediate supervisor made disparaging remarks concerning Bobo's military service and had been the subject of a prior complaint by Bobo. There is little doubt the court's decision to expand the definition of comparables was tied to the

evidence of discriminatory animus by an individual who may have "influenced" the adverse employment decision of an otherwise unbiased decision-maker.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Bobo underscores the importance of critically evaluating the definition of "comparables" and the reputation and conduct of all of those individuals who had the ability to influence the ultimate decision-maker. In expanding the definition of comparables, the Sixth Circuit in Bobo significantly increased the potential burden on employers to justify the adverse employment decision, to evaluate comparables and to carefully analyze all those who may have "influenced" the decision-maker based upon an improper motive.

XIII. CIRCUIT COURT FURTHER DEFINES "SIMILARLY SITUATED"

In Petzel v. Redflex Traffic Sys., No. 15-3671 (6th Cir., Ohio 2016), Redflex hired Catherine Petzel to work as a regional sales manager in early 2009. In that position, she sold electronic traffic monitoring devices that allow cities to ticket vehicles without police officers being present. During her time at Redflex, she was either the lone woman or one of just two women on its sales force.

Because Petzel had not made any sales in 2011 and failed to satisfy a sales quota set for all salespeople, Redflex put Petzel on a performance improvement plan (PIP). The company fired her when she didn't attain the PIP's goals.

Petzel filed suit, alleging she was discriminated against based on her gender.

She admitted that she didn't satisfy either the sales quota given to all Redflex salespeople or her PIP. However, she claimed her termination was discriminatory because Redflex did not fire a similarly situated male employee, Darren Kolack, who also failed to satisfy the sales quota and was on a PIP.

The district court granted summary judgment in favor of Redflex, and Petzel appealed the dismissal of her case without a trial to the Sixth Circuit Court of Appeals.

On appeal, Redflex argued that Kolack wasn't similarly situated to Petzel.

First, Kolack had a better sales history than she did over the course of their careers at Redflex, despite not making his current sales goals.

Second, Redflex had stopped selling to two of the three states he covered because of operational and political challenges in those states.

Finally, during the PIP period, Redflex had given Kolack development responsibilities for a new product, while Petzel had no similar responsibilities.

The court agreed with Redflex, holding that even though Kolack didn't meet his sales goals and was also on a PIP, he was not **similarly situated** to Petzel in "all relevant respects."

The court reasoned that even though an employee is not required to show an "exact correlation" with another employee who receives more favorable treatment in order to establish a "similarly situated" argument, the courts are entitled to make independent determinations about the relevancy of a particular aspect of her employment status.

In order to be deemed similarly situated, the coworker must have been subjected to the **same standards** and **must have engaged in the same conduct** "without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it."

The court found that Kolack worked under "differentiating or mitigating circumstances that . . . distinguish [his] conduct" and therefore explained Redflex's treatment of him compared to Petzel. His overall history of better sales, limited sales territory, and responsibility for another project explained why he wasn't terminated and she was.

WHAT DOES THIS MEAN TO HR?

This case is important for employers to understand because it outlines an important lesson about how to differentiate between different employees when it comes to "equal treatment."

Employers must remember that it is not always enough to just evaluate whether an employee who is having problems at work is meeting the performance standards or violated a policy. Employers must consider how they treated other employees in similar situations previously.

XIV. REVIEW SINKS EMPLOYER BETWEEN COMPARABLES

In Redlin v. Grosse Pointe Public School System, 6th Cir., No. 18-1641 (April 16, 2019), Debra Redlin began her employment as an assistant principal with the Grosse Pointe South High School in 2012. In this role, Redlin shared responsibilities with a male assistant principal, Terry Flint.

In 2014, Flint tipped off a social worker at the school that she was going to be "spot-checked" with a sobriety test to see if she had been drinking. While he initially denied notifying the employee, Flint ultimately acknowledged his misconduct, and a letter of concern was placed in his personnel file.

In December 2014, Flint was preparing to conduct a performance evaluation of a school employee. Prior to the evaluation, he made certain comments to the Redlin that caused her to believe that he intended to be particularly harsh on the employee during the review. Subsequently, Redlin advised the employee about the discussion and warned her to "keep an eye on her evaluation." When the principal of the high school learned that the Redlin provided the employee with this information regarding the upcoming review, Redlin was informed that she would be disciplined for making a disclosure regarding an ongoing staff evaluation. Following this incident, Redlin filed a complaint of gender discrimination against the principal, which was ultimately resolved informally.

In 2015, the Redlin and Flint became aware of a rumor regarding an alleged relationship between the school's principal, Moussa Kamka, and a staff member. Following an investigation, both assistant principals were advised that they acted inappropriately by not reporting the rumor. However, neither was disciplined at that time.

At the conclusion of the 2014-15 school year, Redlin received a rating of "minimally effective" on her performance review. She was informed that the negative evaluation was because she had warned an employee about the performance review, as well as her failure to report the rumor regarding the principal and staff member. As a result of her rating, Redlin received a one-year contract instead of a two-year rolling contract and became ineligible for any merit pay or step increases. She was also placed on an individual development plan for the next school year.

In the summer of 2015, Redlin was allegedly asked to resign and was also transferred to a middle school, where she was paid at a lower rate for two years. In contrast, Flint received an "effective" rating on his 2014-15 review and did not receive the same discipline and treatment.

In December 2015, Redlin filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission. After receiving her right-to-sue letter, she filed an action against the school district in federal district court alleging, among other claims, gender discrimination. The school system filed a motion for summary judgment seeking dismissal of the Redlin's case before trial. The district court dismissed her case in its entirety, and the Redlin appealed the dismissal to the 6th Circuit.

In reversing the district court's dismissal of Redlin's gender-discrimination claim, the court focused its analysis on the different treatment the Redlin and Flint received for similar workplace infractions. The court observed that the Redlin received a "minimally effective" review rating for advising a co-worker about a negative evaluation and not reporting a workplace rumor, while the male assistant principal, who allegedly told an employee about an impending sobriety check and also did not report the rumor, received an "effective" review rating. Further, while Redlin was transferred and asked to resign as a result of her misconduct, Flint was not. The court concluded that a reasonable fact-finder could determine that the actions taken against Redlin were based on a discriminatory motive.

WHAT DOES THIS MEAN FOR HR?

When employers are deciding appropriate disciplinary action for workplace misconduct or performance issues, it is vital that they are consistent between similarly situated employees. Employers must be able to articulate why an employee in a protected category was treated differently from an employee outside such category who made similar infractions. If not, it is easy to presume that retaliation or discrimination was the real underlying motivation.

HR professionals should discuss with managers how prior instances of similar workplace issues were addressed, which should be taken into consideration in determining appropriate discipline in the case at hand.

XV. UNINTENTIONAL DISCRIMINATION: DISPARATE IMPACT

A. Disparate Impact: 80% Rule

As a general rule of thumb, a disproportionate impact against a protected group constituting a disparate impact claim may be shown to exist if the "80 Percent Rule," or "4/5ths Rule," is met.

The 80 Percent Rule says that if an employer's selection rate for any protected class is less than 80 percent, or 4/5ths, of the group with the highest selection rate, then an inference of disparate impact will be shown to exist.

The following illustration shows how to perform such calculations:

80 PERCENT RULE CALCULATIONS

STEP 1

Calculate the employer's selection rates for each group:

	HIRED		QUALIFIED JOB APPLICANTS		
Males	150	divided by	300	=	50%
Females	50	divided by	200	=	25%

STEP 2

Identify the group with the highest selection rate:

Males, with a 50% selection rate.

STEP 3

Calculate the percentage difference between the selection rates of these two groups:

$$\frac{25\%}{50\%} = 50\%$$

If the ratio between the two groups is less than 80 percent, then an inference of disparate impact exists. In this example, 50 percent is less than 80 percent, so an **inference** that the employer has unintentionally discriminated against females is established under a disparate impact theory.

Although the 80 Percent Rule has not been defined or adopted by Congress, it is a guideline used by the EEOC. Consequently, it is now a very widely accepted indicator of whether or not a disparate impact case has been presented.

Of course, the reason the statistical requirements of establishing a disparate impact case are not nearly as stringent as those required under a systemic disparate treatment case is because the plaintiff is trying to prove **intentional discrimination** under a systemic disparate treatment theory. In other words, in a disparate treatment case, the plaintiff is trying to prove that the employer **intended** to discriminate by using only statistics.

B. Business Necessity and Job Relatedness And Adverse Impact

Section 703(k)(1)(A) of Title VII states that once a disparate impact case has been shown to exist, the employer may defend itself by demonstrating that the challenged policy is **"job related"** for the position in question and it is consistent with **"business necessity."**

In Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993), the Atlanta Fire Department enforced a policy that required all male firefighters to be completely clean-shaven. **The reason for adopting such a policy was because firefighters must wear self-contained breathing apparatuses (SCBAs) that require a secure seal to the face.**

Unfortunately, twelve black firefighters in the department suffered from **pseudo folliculitis barbae ("PFB"),** a bacterial disorder that causes men's faces to become infected when shaven. Since PFB afflicts black men disproportionately, a Title VII suit against the city was filed claiming race discrimination under a disparate impact theory.

The plaintiffs claimed that the rule was unnecessary since the city previously allowed those afflicted with PFB to wear very short "shadow" beards. Under the "shadow" beard policy, no adverse incidents involving SCBAs had occurred. The plaintiffs therefore contended that a less discriminatory alternative to the "clean shaven" rule existed, so the city of Atlanta had discriminated against these black firefighters by refusing to implement this viable alternative.

The city of Atlanta contended that the "clean shaven" rule was a business necessity and no less discriminatory alternatives existed, in spite of its previous policy. **The city then presented evidence that detailed the safety risks of using SCBAs by men with facial hair, which included the standards set by OSHA and NIOSH**.

The Eleventh Circuit found for the city of Atlanta, **relying on the fact that the city had presented convincing expert testimony claiming that the existence of a shadow beard created a safety hazard to the firefighters when using an SCBA, thus meeting its burden of production and persuasion on this issue.**

The plaintiffs, on the other hand, failed to refute this evidence. In fact, the only evidence presented by the plaintiffs was the fact that the city had previously adopted a shadow beard policy, which did not refute the opinions of OSHA and NIOSH experts presented by the city of Atlanta.

Therefore, the court found that the city had in fact demonstrated that the safety of its firefighters was an important business goal… that the clean-shaven rule was job-related to these positions and was therefore a business necessity.

C. Professionally Developed Tests: **Statutory Exception To Claims Of Disparate Impact**

Section 703(h) of Title VII specifically states that it **"shall not be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such a test, its administration, or any action taken based upon its results are not designed, intended or used to discriminate because of race, color, religion, sex or national origin."**

Therefore, even if an employer's testing program is found to have a disparate impact against a protected class of persons, the test will be permissible if the employer can demonstrate the **job-relatedness** of the test and that **it was not developed with the intent to discriminate**.

In reality, there are three separate ways to validate the tests employers use, with some being easier to prove as being valid than others.

1. Construct Validity

"Construct validity" is the most difficult type of validation to prove since the employer is in essence trying to measure some theoretical trait of an applicant, or a construct, such as **"intelligence."** The employer must prove that the test it is using **accurately measures this trait and that a correlation between a positive score on this test and good performance on the job exists.** In other words**, the employer must prove that this test is predictive of good performance on the job, which is a difficult goal to reach in trying to measure a construct**.

In Albemarle Paper Company v. Moody, 422 U.S. 405 (1975), a class of present and former black employees challenged Albemarle Paper's policy of requiring its applicants for promotions within the company to pass **two general ability tests**. One of these tests was intended to measure the applicants' **nonverbal intelligence** and the other purported to measure the **general verbal abilities** of the applicant.

In defense of its practice, Albemarle Paper presented the testimony of **an industrial psychologist who had studied the job-relatedness of these two tests**.

This psychologist testified that a **significant statistical correlation existed between the scores these individuals received from their supervisors based upon their performance in these positions and the scores these individuals previously received on these two tests**.

The U.S. Supreme Court held that discriminatory employment tests are permissible under Title VII **if they can accurately predict the employee's performance in the available position**. The Court then looked to the EEOC's guidelines to determine whether these tests were truly job-related. Measured against the EEOC's guidelines, the Court found Albemarle's validation study to be **defective because it considered all of the various managers' performance evaluations of their employees together instead of considering only those evaluations relating to the position in question**.

Specifically:

a. Albemarle compared the scores the applicants received on these tests against the subjective opinions of the supervisors, so the criterion used for evaluation purposes was extremely vague,

b. It only focused on those jobs near the **"top of the ladder,"** which left doubt as to whether the tests were a good measure of qualifications of new workers entering lower-level jobs, and

c. The **study dealt only with experienced white workers**, in contrast to the applicants themselves, who were young and black.

Consequently, the Court found that Albemarle Paper failed to prove the job-relatedness of its discriminatory testing program.

Before the passage of the Civil Rights Act of 1991, employers "corrected" their discriminatory tests by awarding additional points to the scores of those minorities against whom the test was allegedly prejudicial or discriminatory. Such a practice was referred to as "norming." However, the Civil Rights Act of 1991 made such "norming" practices illegal.

Today, employers are required to show that such tests are nondiscriminatory without norming any individual's score.

2. Criterion Validity

Criterion validity is not as difficult for an employer to prove as construct validity since no abstract theoretical trait is involved. Instead, **a specific ability that will be needed on the job, or criterion, is tested**, such as when **mathematical skills** are needed in a certain job and the employer administers a math test to its applicants. A statistical comparison is then made between the score received by the applicant and the score that has

been shown to predict the applicant's success in this job.

3. Content Validity

Of the three ways to validate a test, content validity is the easiest. Whenever an employer tests an applicant on an actual duty that will be performed on the job, such as when an applicant for a human resource specialist position is required to write a job description, then no formal statistical analysis is necessary. Merely verifying that an applicant can perform some of the actual duties or a content portion of the job will suffice as proper validation.

D. Bona Fide Seniority Systems

Section 703(h) also states that if disparate impact against a protected class of persons exists due to a **bona fide seniority system**, then the fact that the disparate impact is caused by a bona fide seniority system may act as a **complete defense** for the employer.

For example, assume that a company follows a strict seniority system when promoting or transferring employees to open positions within the company. Unfortunately, since the company used to discriminate in its hiring practices, the white employees have more seniority at the company and get all the best positions when they become available.

In most jurisdictions, the use of a bona fide seniority will be a defense for the employer. The adverse impact will be allowed to continue.

The logic used by most courts is that it is not legal to discriminate against the current employees for the past bad acts of others. Eventually, the adverse impact of the past bad practices will no longer be an issue.

E. Bona Fide Merit Systems

Section 703(h) of Title VII allows employers to use their **bona fide merit systems** to act as a defense to disparate impact claims. However, if the court suspects that the merit system is being used to circumvent a claim of disparate impact rather than using the system used to evaluate employees fairly, the defense will not be permitted.

XVI. EEOC: ANTI-DISCRIMINATION LAWS MAY APPLY TO VICTIMS OF VIOLENCE

The U.S. Equal Employment Opportunity Commission (EEOC) has issued a fact sheet discussing how Title VII and the Americans with Disabilities Act (ADA) may apply in employment situations involving applicants and employees who experience domestic or dating violence, sexual assault or stalking.

Title VII, which outlaws discrimination based on race, color, sex, religion or national origin, and the ADA, which bans discrimination against individuals with disabilities, do not explicitly prohibit discrimination against applicants or employees who are victims of domestic or dating violence, sexual assault or stalking. However, according to the EEOC, these laws do protect such victims from discriminatory employer practices. The EEOC's fact sheet provides examples, a sampling of which are set out below.

Under Title VII, the following scenarios illustrate prohibited disparate treatment based on sex, sexual or sex-based harassment, and retaliation for protected activity, respectively:

- A manager terminates an employee after learning she has been subjected to domestic violence, saying he fears the potential "**drama battered women bring to the workplace.**"

The ADA prohibits different treatment or harassment at work based on an actual or perceived impairment, including impairments resulting from domestic or dating violence, sexual assault or stalking. The EEOC fact sheet offers the following examples to illustrate this type of prohibited employer behavior:

- An employer searches an applicant's name online and learns that she was a complaining witness in a rape prosecution and received counseling for depression. The employer decides not to hire her out of concern that she may require future time off for continuing symptoms or further treatment.

- An employee has facial scarring from skin grafts, which were necessary after she was badly burned in an attack by a former domestic partner. When she returns to work after a lengthy hospitalization, co-workers subject her to frequent abusive comments about the scars, and her manager fails to take any action to stop the harassment.

The EEOC fact sheet also contains the following examples to illustrate that an employer may violate the ADA if it does not provide reasonable accommodation requested for a disability caused by domestic or dating violence, sexual assault or stalking:

- An employee who has no accrued sick leave and whose employer is not covered by the Family and Medical Leave Act (FMLA) requests a schedule change or unpaid leave to get treatment for depression and anxiety following a sexual assault by a home intruder. The employer denies the request because it "applies leave and attendance policies the same way to all employees."

- In the aftermath of stalking by an ex-boyfriend who works in the same building, an employee develops major depression that her doctor states is exacerbated by continuing to work in that location. As a reasonable accommodation for her disability, the employee requests reassignment to an available vacant position for which she is qualified at a different location. The employer denies the request, citing its "no transfer" policy.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

When designing anti-harassment training, employers also should consider including examples involving domestic or dating violence, sexual assault or stalking under this new guidance.

XVII. EQUAL PAY ACT OF 1963

A. Coverage

In 1963, Congress amended the Fair Labor Standards Act, or the "FLSA," to prohibit employers with two or more employees from paying individuals less than those of the opposite **sex based on their gender** when both sexes are **performing duties that are substantially similar**, or even identical, in the **level of skill, effort and responsibility** required when such duties are performed under similar working conditions within the same geographic locations (29 U.S.C. § 206(d)(1)). This amendment was the Equal Pay Act (EPA) of 1963.

Of course, differences in the level of experience between the parties is also a factor of to consider.

If an employer is found guilty of violating the EPA, it will be required to raise the wages of the gender being discriminated against rather than being allowed to lower the wages of the other sex.

Additionally, even though the EPA is enforced by the EEOC, it is still an amendment to the FLSA. As a result, the standard administrative requirements that apply to Title VII cases do not apply to EPA violations. Therefore, plaintiffs in EPA cases may sue their employers directly and are not required to file a charge with the EEOC first.

B. Prima Facie Case Under The EPA

In order to establish a prima facie case under the EPA, plaintiffs must establish that:

1. Employees of the opposite sex,

2. Receive unequal pay and

3. For work that is substantially similar in skill, effort and responsibility, which are performed under similar working conditions within the same geographic locations.

Like Title VII cases, the focus of the prima facie case for an EPA claim is whether the employer used gender as a factor of consideration in its decision to

pay members of the opposite sex different wages for equal work. However, unlike Title VII disparate treatment cases, once a prima facie case is established in an EPA disparate treatment case, the burden of persuasion shifts to the employer. (Remember, in disparate treatment cases, the ultimate burden of persuasion (proof) *always* remains with the plaintiff.)

Currently, however, it is a split of authority whether plaintiffs are permitted to use the theory of disparate impact in establishing an EPA claim.

C. Employer Defenses

If the plaintiff is able to establish a prima facie case under the EPA, the burden of persuasion then shifts to the employer, unlike Title VII cases. However, § 206(d)(1) of the EPA provides employers with four statutory defenses against such a claim, which are that the difference in pay between the men and women at its facility is based on:

- A bona fide seniority system,
- A bona fide merit system.
- A system that measures the quality or quantity of an employee's work, or
- A differential based on any factor other than sex.

If the employer can demonstrate to the court that any one of these four defenses is the true reason causing this discrepancy in pay between its male and female employees, thus proving that this difference is not "on the basis of sex," then the employer will be viewed as not violating the EPA.

- **Employers Must Have A True Program In Place**

  In using either a seniority, merit, or an incentive system based on quality or quantity of work to explain this difference in pay and therefore defend against an EPA claim, the employer must be able to demonstrate that the system used is a true system and not simply a policy that is used in a sporadic fashion (Morgado v. Birmingham-Jefferson County Defense Corps, 706 F.2d 1184 (11th Cir. 1983)). The regulations governing the EPA do not require employers to formalize or reduce such systems to writing, although in order to be classified as a bona fide system, these plans must be well established and the essentials of these plans must be communicated to employees in writing.

- **Merit Systems Are More Strictly Construed Due To Their Subjectivity**

  While seniority systems and incentive pay systems tend to be more objective by their very nature, merit evaluation systems are inherently

subjective. Still, most courts allow employers to use merit evaluation systems to defend against EPA claims, although such systems are strictly construed against employers (Maxwell v. City of Tucson, 803 F.2d 444 (9th Cir. 1986)).

- **"Any Factor Other Than Sex" Defense Must Be Supported By A Legitimate Business Reason**

  In some jurisdictions, however, the courts require employers to prove that their "any factor other than sex" defense is also justified by a "legitimate business reason," thus placing an additional burden on employers in defending against EPA claims (EEOC v. J.C. Penney Company, 843 F.2d 249 (6th Cir. 1988)).

  A typical defense used here would be years of applicable experience of the higher paid employee.

- **Market Rates: Split Of Authority (Difference of opinion among the courts.)**

  Historically, the market has dictated the wage rates paid to many jobs. However, in Corning Glass Workers v. Brennan, 417 U.S. 188 (1974), the U.S. Supreme Court held that paying male employees more than females simply because the supply and demand factors of the market forced women's wages down was exactly the type of discrimination the EPA was designed to eliminate.

- **Negotiation Skill As A Factor**

  Another factor that should be considered in determining why a discrepancy exists between the wages of a man and a woman in substantially similar positions is how well each one negotiated his or her salary. If the man happened to be a better negotiator than the woman, then this would constitute a factor other than sex. Additionally, the respective credentials and experience of each person should also be considered in determining why such a difference exists.

- **"Head Of The Household" Defense**

  And finally, another controversial area of the EPA is whether it is a violation of the Act to pay the "head of a household" higher wages due to their increased personal obligations. The EEOC allows employers to use such criteria as a "factor other than sex," but it also clearly states that such policies must be closely scrutinized by the courts (29 C.F.R. § 1620.21). If such a policy is defined and applied in a neutral manner, it may be upheld by the courts (EEOC v. J.C. Penney, supra).

D. Geographic Location

The EPA recognizes that the amount of wages paid for each particular position may vary from geographic area to geographic area. As a result, one of the requirements of forming an EPA claim is that the positions being compared to one another must be located at the same facility. Therefore, if the prison guard positions in the Boston, Massachusetts area are filled by males and are paid more than the prison matron positions, filled by women, in Columbus, Ohio, no EPA claim can be formed since the discrepancy exists between different locations.

The rationale for having such a requirement is based largely on the fact that wages may differ from region to region since the cost of living may vary from region to region. Additionally, the circumstances of an employer's business may vary from facility to facility. Either way, the difference between the wages paid to the men and women in similar positions but in different locations could easily be due to a factor other than sex.

E. Unequal Pay And Equal Work

1. Wage Calculations Must Not Vary Between Substantially Similar Positions

The EPA defines wages to include any type of remuneration paid to employees, which includes vacation pay, holiday pay, and so on. The courts have also tended to hold that the basis upon which employees' wages are calculated must not vary between men and women based upon their gender.

In Bence v. Detroit Health Corporation, 712 F.2d 1024 (6th Cir. 1983), the Detroit Health Corporation placed its female salespersons on a lower commission scale than its male salespersons. The employer argued that because its female salespersons sold more memberships than its male salespersons, due to the fact that more women joined the health spa than men, the total compensation amounts paid to its male and female salespersons were equal and therefore did not violate the EPA.

However, the Sixth Circuit did not agree with the employer's logic. The Sixth Circuit held that the EPA requires employers to pay an equal wage rate for equal work, regardless of the total remuneration paid to each party. In this case, the common denominator between the sexes was the amount of work required to earn the same rate of pay. Due to the discriminatory commission scales used by the employer, female salespersons were required to work harder than their male counterparts in order to receive the same final sum of earnings. The EPA prohibits such practices.

2. Comparative Jobs Must Be "Substantially Similar" … Not Identical

Congress made it clear under the EPA that only those jobs that are "equal" may be compared to one another in order to demonstrate that the employer is discriminating against employees' wages based on their gender. Therefore, dissimilar jobs cannot be compared to one another and used to substantiate an EPA claim.

Still, in Corning Glass, supra, the U.S. Supreme Court held that in order to establish an EPA claim, the jobs being compared do not have to be *identical* to one another. Instead, the jobs need only be "substantially similar." Therefore, if the difference between the two jobs being compared is only de minimus, or minimal, then such differences will not bar the formation of the EPA claim.

Where the differences between the jobs being compared are more than de minimus, an EPA claim cannot be established. The Court reasoned that Congress specifically stated in drafting the EPA that only jobs which are equal in skill, effort and responsibility may be used to form an EPA claim. As a result, the Court stated that comparing "comparable" differences and the relative worth of *dissimilar* jobs is not permitted under the EPA, which is the basis of the "comparable worth" theory (i.e., Comparable worth of a secretarial position as compared to a maintenance position).

3. Comparisons Between Job Classes And/Or Individual Jobs

When comparing jobs, a plaintiff may compare either individual jobs to one another or the plaintiff may compare an entire classification of jobs to each other. In either instance, the major focus of the comparison must be on the actual core elements of the jobs being compared, which is referred to as a "factual job analysis." Merely comparing job titles will not suffice. Instead, the **actual duties** of these positions must be examined.

In Hein v. Oregon College of Education, 718 F.2d 910 (9th Cir. 1983), three female instructors in the Physical Education Department at Oregon College, Dr. Wilma Hein, Dr. Lenore Campbell, and Ms. Jacquelyn Rice, claimed that they were being discriminated against in their wages based on their sex. These plaintiffs compared their job duties and wages to Mr. James Boutin, the men's basketball coach.

The Ninth Circuit held that in order to establish a prima facie case under the EPA, the plaintiffs must demonstrate to the court that the wages they received were less than the average of wages paid to all of the employees of the opposite sex who are performing substantially equal work.

As for the first plaintiff, Hein, the court found that even though she held

superior academic credentials to Boutin, she was not a coach. Therefore, Boutin's job and Hein's job were not substantially similar, so no EPA claim could be formulated.

As for the other two plaintiffs, Campbell and Rice, their jobs were found to be substantially similar to Boutin's. However, the court reasoned that there may have been other male coaches who also had jobs that were similar in duties and in pay to the jobs held by these two plaintiffs.

The plaintiffs, however, failed to provide the court with this information, and the court held that without such data, no true comparison could be made between the plaintiffs' wages and those received by the average male in similar positions.

In Schultz v. Wheaton Glass Company, 421 F.2d 259 (3rd Cir. 1969), a shortage of male workers forced Wheaton Glass Company to hire women to visually inspect and package its bottles. Traditionally, Wheaton Glass had given this position the job title of "selector-packer." However, because women would fill these new positions, Wheaton created a new job classification for this position, calling it "female selector-packer." The selector-packer positions, which were filled by males, were paid $2.355 per hour, while the female selector-packers were paid only $2.14 per hour.

Wheaton defended itself against the EPA charge by claiming that the male selector-packers performed substantially different work than the female selector-packers.

Specifically, Wheaton claimed that the males were required to perform additional duties, which included lifting bulky cartons, moving wooden pallets, collecting dump trays and tubs of rejected glassware, and approximately a dozen other manual tasks that female employees were forbidden to perform.

However, the Third Circuit held that artificially creating a job classification that does not substantially differ from the original job cannot be used as a ploy to circumvent the EPA. In this case, even though these male employees were technically required to perform these additional duties, Wheaton presented no proof that the male selector-packers actually performed these tasks.

Instead, it appeared as if another job classification, called "snap up boys," actually did this extra work. Therefore, it appeared to the court that Wheaton's motive in creating the female selector-packer position was to keep women in a subordinate role, which is prohibited by the EPA.

It is important to note that while the Hein court compared the individual jobs in question to one another, the Wheaton court used a "class" analysis approach to evaluate the female jobs against the male jobs. The class

analysis approach tends to be used more often in analyzing blue-collar positions, but using either one may be acceptable.

F. Can Title VII Be Used To Attack Gender-Based Wage Discrimination?

- **Sex Discrimination Under Title VII Disparate Treatment Claims Requires "Intent" To Discrimination … EPA Has No Such Requirement**

  In Kouba v. Allstate Insurance Company, 691 F.2d 873 (9th Cir. 1992), where the employer had market wage data to show what its employees should be earning in their respective positions, but then intentionally suppressed the wages of certain jobs since they were filled by women, the Ninth Circuit found that the employer had indeed committed sex discrimination under Title VII (disparate treatment).

  Therefore, the courts tend to allow plaintiffs to make claims of sex discrimination under Title VII when their wages are intentionally suppressed based on their gender, as opposed to requiring plaintiffs to base their claims on the EPA.

  Using Title VII as an avenue of redress can be vital to a plaintiff's case since plaintiffs are not required to show that their jobs are "substantially similar" to any other job occupied by the opposite sex in order to establish a comparison in a Title VII case based on sex.

  However, in a Title VII action, plaintiffs must show that their wages were **intentionally** suppressed due to their sex, so plaintiffs are required to prove intent (disparate treatment), which is not a requirement under the EPA.

  Interestingly, in Kouba, even though the Ninth Circuit was hearing a Title VII action based on sex, the court shifted the burden of persuasion to the employer once the plaintiff had established her prima facie case, which occurs in EPA claims, **not** in Title VII disparate treatment cases.

  However, because this was a wage discrimination case based on sex, even though it was a Title VII action, the court found it proper to apply the EPA's rule regarding the shifting of the burden of persuasion. The courts are split over whether using an EPA or a Title VII burden of proof (persuasion and production) shifting is appropriate in such instances.

XVIII. SEX-PLUS DISCRIMINATION

A. Definition

Section 703(a) and (b) of Title VII states that it is illegal for a covered employer to discriminate against an individual **"on the basis of sex"** or **"because of sex."** More often than not, sex discrimination is referred to as "sex-plus" discrimination, since this provision is most frequently violated due to the fact that employers place additional requirements on the members of one sex and not on the other. For instance, if an employer refused to hire married women, yet it hired married males, then an additional requirement would be placed on females that did not apply to males. This would be an example of sex-plus discrimination.

Also, in proving sex-plus discrimination claims, plaintiffs may use a disparate treatment theory, a systemic disparate treatment theory, a disparate impact theory, or all three in proving that they have been discriminated against.

B. Grooming And Dress Codes: Sexual Stereotyping

In Smith v. City of Salem, No. 03-3399 (6th Cir. 06/01/2004), Jimmie Smith was employed by the City of Salem, Ohio, (the "City") as a lieutenant in the Salem Fire Department. Smith had worked for the Fire Department for seven years without any negative incidents.

However, Smith, who was born biologically a male, had been diagnosed with Gender Identity Disorder ("GID"), which the American Psychiatric Association characterizes as a disjunction between an individual's sexual organs and sexual identity. In short, Smith was a transsexual.

After being diagnosed with GID, Smith began "expressing a more feminine appearance on a full-time basis," including while he was at work, as part of his treatment for GID.

Soon thereafter, Smith's co-workers began questioning him about his appearance and commenting that his appearance and mannerisms were not "masculine enough." As a result, Smith notified his immediate supervisor, Defendant Thomas Eastek, about his GID diagnosis and treatment.

He also informed Eastek of the likelihood that his treatment would eventually include complete physical transformation from male to female. Smith specifically asked Eastek, and Eastek promised, not to divulge the substance of their conversation to any of his superiors, particularly to Defendant Walter Greenamyer, Chief of the Fire Department. However, Eastek almost immediately told Greenamyer about Smith's behavior and his GID.

Greenamyer then met with City of Salem officials in order to terminate Smith because of his transsexualism. On April 18, 2001, the City's executive body met to discuss Smith and devise a plan for terminating his employment. (NOTE: Every living member on the City's executive body was also named in this lawsuit.)

The City then decided to require Smith to undergo three separate psychological evaluations with physicians of the City's choosing. They hoped that Smith would either resign or refuse to comply. If he refused to comply, the City officials reasoned, they could terminate Smith's employment on the grounds of insubordination.

However, one of the City officials telephoned Smith after the meeting to inform him of the plan, calling the City's scheme a "witch hunt."

Two days after the meeting, on April 20, 2001, Smith's attorney telephoned City officials and advised them of the potential legal ramifications for the City if it followed through on the plan devised during the April 18 meeting. On April 22, 2001, Smith received his "right to sue" letter from the U.S. Equal Employment Opportunity Commission ("EEOC"). Four days after that, on April 26, 2001, the City suspended Smith for one twenty-four-hour shift.

Smith then filed suit in the federal district court, claiming sex discrimination and retaliation by the City in violation of Title VII of the 1964 Civil Rights Act. Smith contended that he was the victim of "sexual stereotyping," claiming that the City had discriminated against Smith because he was not acting "manly" enough.

The Sixth Circuit examined whether Smith was in fact the victim of sex stereotyping in violation of the Supreme Court's pronouncements in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . 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." 42 U.S.C. § 2000e-2(a).

In Price Waterhouse, the plaintiff, Ann Hopkins, a female senior manager in an accounting firm, was denied partnership in the firm, in part, because she was considered "macho." She was advised that she could improve her chances for partnership if she were to take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." The U.S. Supreme Court held that such comments constituted gender discrimination against Ms. Hopkins, holding that Title VII barred not just discrimination because Hopkins was a woman, but also sex stereotyping - that is, discrimination because she failed to act like a woman.

The Supreme Court in Price Waterhouse therefore made it clear that Title VII prohibits discrimination because of "sex," which includes gender discrimination:

> "In the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."

The Court emphasized that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."

After Price Waterhouse, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. Therefore, it follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.

The Sixth Circuit then held that Smith had stated a bona fide claim based upon sex stereotyping by the City of Salem due to his non-conforming behavior and appearance. Due to his feminine appearance and mannerisms, Smith's new look as a female did not conform with his employers' and co-workers' gender stereotypes of how a man should look and behave. In short, Smith claims that the discrimination he experienced was based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance.

Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind the City's actions, Smith had successfully plead claims of gender stereotyping and gender discrimination.

In Philecia Barnes, formerly known as Phillip W. Barnes v. City of Cincinnati, Case No. 00-CV-780 (U.S. District Court for the Southern District of Ohio February 26, 2003) Phillip Barnes had been an officer with the Cincinnati Police Department since July 1981. Barnes had always received good evaluations and earned both a B.S. and a Master of Social Work degrees. In January 1999, Barnes was promoted to the rank of sergeant and began a six-month probationary period. Within a month of his promotion, his direct supervisor reported that Barnes was having difficulties fulfilling his sergeant duties.

The police department developed a more intensive training and evaluation program exclusively for Barnes, which included daily written evaluations and a requirement that he not go into the field unless accompanied by another

sergeant. After six months as a sergeant, the City decided he had failed his probationary period and demoted him to a police officer.

However, Barnes was also in the process of a gender transformation before he received his promotion to sergeant. Throughout his probationary period, he was recognized as a male in public and while on duty and adhered to the male dress code of the Cincinnati Police Division. As an expression of his transsexuality, however, he would at times dress as a woman during his off-hours. After he was demoted to the rank of police officer, he changed his first name from Phillip to Philecia and assumed a female identity in public and while on duty, adhering to the female dress code of the Cincinnati Police Division.

In his lawsuit, Barnes claimed that the city had discriminated against him because of his sex in violation of federal and state law. The City argued that the laws against sex discrimination did not protect Barnes against discrimination on the basis of his sexual orientation or transsexuality and asked the court to dismiss the case.

The federal district court judge hearing Barnes' case denied the City's request, noting that the sex discrimination laws prohibit discrimination against a man because he fails to conform to the stereotypes associated with being male. The judge found that Barnes had produced enough evidence to raise a jury issue about whether he was treated differently because the city thought he wasn't masculine enough to be a police sergeant.

The judge noted that Barnes had been told before his promotion that wearing makeup did not present a sufficiently masculine image. He also was repeatedly criticized during his probationary period for failing to establish an adequate "command presence," a term that the judge viewed as possible code for the City's perception that Barnes was not masculine enough to be a police sergeant.

At trial, Barnes presented evidence that no other Cincinnati police sergeant had ever been demoted during the six-month probationary period and that various police command officers had made negative remarks about his lack of masculinity.

The jury unanimously agreed that Barnes had proven that his failure to conform to sex stereotypes was a motivating factor in the City's decision to demote him from sergeant to back to police officer. It further found that the City failed to prove that it would have demoted Barnes even if his failure to conform to sexual stereotypes had played no role in the employment decision. Barnes was awarded $150,000.00 in compensatory damages and $140,000.00 in front pay, which, combined with his agreed-on back pay award, totaled $320,000.00.

This is an example of the potential reach of discrimination laws. The lesson to be learned is an old one, however. Evaluate your employees on their ability to meet

your legitimate job requirements, not on stereotypes or irrelevant personal characteristics.

WHAT DOES THIS MEAN FOR HUMAN RESOURCES?

These decisions will have **vast** far reaching affects. If there was ever any question that the age of Diversity/Tolerance for others was here … this is it! How would your employees treat a cross-dresser? A masculine female? A male who wears eye shadow? If your employees are not prepared to accept people in the workplace for who they are…you can expect to find yourself explaining why your organization allowed such harassment to occur, which will cost you **MANY** zeros.

ADOPT A TOLERANCE PROGRAM…AND ENFORCE IT!

This decision will also affect your Dress Code Policies. The days of requiring "men to dress like men" and "women to dress like women" are gone. If a man wants to wear a dress to work one day, it will most likely be a situation you will have to allow if you allow women to wear dresses. In short, if you allow one gender to dress in a certain way, you will have to allow the other gender to do the same.

THE BOTTOM LINE: Evaluate employees on their abilities and legitimate requirements of the job…not on their appearance.

C. U.S. Supreme Court Overturns State Bans On Same Sex Marriage

Obergefell, et al. v. Hodges, Director, Ohio Dept. of Health, 576 U.S. ___ (2015), is a landmark United States Supreme Court case in which the Court held in a 5–4 decision that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Decided on June 26, 2015, Obergefell requires all states to issue marriage licenses to same-sex couples and to recognize same-sex marriages validly performed in other jurisdictions.

In June 2013, following the U.S. Supreme Court's decision in United States v. Windsor, James Obergefell and John Arthur, a same-sex couple, decided to get married. They traveled to Maryland, got married, then tried to get their marriage recognized by the state of Ohio, their state of residence. When they learned that Ohio would not recognize their marriage license, they filed a lawsuit, Obergefell v. Kasich on July 19, 2013, alleging that the state discriminated against same-sex couples who married lawfully outside of the state.

Because one partner, John Arthur, was terminally ill, suffering from amyotrophic lateral sclerosis, (ALS), they wanted the Ohio Registrar to identify the other partner, James Obergefell, as his surviving spouse on his death certificate based on their marriage in Maryland on July 11, 2013.

The local Ohio Registrar agreed that discriminating against the same-sex married couple was unconstitutional, but the state attorney general's office announced plans to defend Ohio's same-sex marriage ban.

On November 6, 2014, the Sixth Circuit ruled 2–1 that Ohio's ban on same-sex marriage **did not** violate the U.S. Constitution. It said it was bound by the U.S. Supreme Court's 1972 action in a similar case, Baker v. Nelson, which dismissed a same-sex couple's marriage claim "for want of a substantial federal question."

Writing for the majority, Judge Jeffrey Sutton also dismissed the arguments made on behalf of same-sex couples in this case:

> "Not one of the plaintiffs' theories, however, makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: **in the hands of state voters**."

Dissenting, Judge Martha Craig Daughtrey wrote:

> **"Because the correct result is so obvious, one is tempted to speculate that the majority has purposefully taken the contrary position to create the circuit split regarding the legality of same-sex marriage that could prompt a grant of certiorari by the Supreme Court and an end to the uncertainty of status and the interstate chaos that the current discrepancy in state laws threatens."**

On November 14, 2014, the same-sex couples filed an appeal to the U.S. Supreme Court.

They asked the court to consider whether Ohio's refusal to recognize marriage from other jurisdictions violated the Fourteenth Amendment's guarantees of Due Process and Equal Protection and whether the state's refusal to recognize the marriage of another state violated the U.S. Constitution's Full Faith and Credit clause.

On June 26, 2015, the U.S. Supreme Court held in a 5–4 decision that the Fourteenth Amendment requires **all states** to grant same-sex marriages and recognize same-sex marriages granted in other states. The Court overturned its prior decision in Baker v. Nelson, which the Sixth Circuit had invoked as precedent.

The Obergefell v. Hodges decision came on the second anniversary of the United States v. Winsor ruling that struck down Section 3 of the Defense of Marriage Act (DOMA), which denied federal recognition of same-sex marriages. It also came on the twelfth anniversary of Lawrence v. Texas which struck down sodomy laws in 13 states. Each justice's opinion on Obergefell was consistent with their opinion in Windsor.

In both cases, Justice Anthony Kennedy, who authored the majority opinion, was considered the "swing vote" in both cases. Justice Kennedy opinion was joined by Justices Ruth Bader Ginsberg, Stephen Breyer, Sonia Sotomayer and Elena Kagan. The majority opinion found that state same-sex marriage bans were a violation of both the Fourteenth Amendment's Due Process Clause and Equal Protection Clause.

The Court first affirmed Griswold v. Connecticut and found that the Fourteenth Amendment's Due Process Clause "extends to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs."

As the Supreme Court has found in cases such as Loving v. Virginia, Zablocki v. Redhail, and Turner v. Safley, this extension includes a fundamental right to marry.

The Court then listed **four distinct reasons** why the fundamental right to marry applies to same-sex couples.

First, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."

Second, same-sex couples have a right to intimately associate (see Lawrence v. Texas). Intimate association also applies to marriage, not merely sexual activity.

Third, the fundamental right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." As same-sex couples have children and families, they are deserving of this safeguard.

Lastly, as "marriage is a keystone of the Nation's social order," and because "there is no difference between same- and opposite-sex couples with respect to this principle," preventing same-sex couples from marrying puts them at odds

with society, denies them countless benefits of marriage, and introduces instability into their relationships for no justifiable reason.

Finding that the **liberty of same-sex couples was significantly burdened**, the Court struck down same-sex marriage bans for violating the **Due Process Clause** and determined that same-sex couples may exercise the fundamental right to marry in all 50 states.

Noting the relationship between the liberty of the Due Process Clause and the equality of the Equal Protection Clause, the Court also found that same-sex marriage bans violated the latter.

Addressing some of the dissent, the Court rejected the "wait and see approach" of the Sixth Circuit and others on the Court. The majority opinion emphasized that democracy may be an appropriate place to decide issues such as same-sex marriage, but no individual has to rely solely on the democratic process to exercise a fundamental right;

"Thus, when the rights of persons are violated, the Constitution requires redress by the courts, notwithstanding the more general value of democratic decision making."

In addition, "there has been far more deliberation than this argument acknowledges."

Lastly, the Court rejected notions that allowing same-sex couples to marry harms opposite-sex marriage or that procreation is a requirement for marriage.

The majority opinion stressed the First Amendment protects those who disagree with same-sex marriage, though to what extent is unclear.

In closing, Kennedy wrote:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The majority opinion did not declare that discrimination on the basis of sexual orientation is subject to any form of judicial scrutiny (such as strict or intermediate), or that homosexuals are a protected class.

WHAT DOES THIS MEAN FOR HUMAN RESOURCES?

As noted above, group health insurance plans should be reviewed so that same-sex spouses are treated equally with opposite sex spouses. Other benefit plans, including 401(k) and other retirement plans, life insurance, and any other benefit with beneficiary designations, should be reviewed as well. In some cases, employees will need to review their beneficiary designations.

For example, many employers in Ohio previously provided domestic partner benefits to same-sex couples as a way of circumventing the state-law ban on same-sex marriage. Now that the ban no longer exists, you should consider eliminating domestic partner benefits if you provided them only for same-sex couples. If you don't, you run the risk of discrimination claims by opposite-sex domestic partners.

XIX. U.S. SUPREME COURT GRANTS PROTECTED CLASS COVERAGE TO SEXUAL ORIENTATION AND GENDER IDENTITY

On October 8, 2019, the United States Supreme Court heard arguments on all three of the following cases:

- Altitude Express, Inc. v. Zarda, 590 U.S. ___ (2020)
- Bostock v. Clayton County, 590 U.S. ___ (2020)
- R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, 590 U.S. ___ (2020)

Although the facts in each case differ, the primary legal issues did not. All of these cases dealt with question as to whether Title VII protects sexual orientation and gender identity.

On June 15, 2020, the Court ruled in a 6-3 decision under Bostock, but its decision covered all three of these cases, that Title VII protection does extend to sexual orientation and gender identity.

Facts
Bostock v. Clayton County

In Bostock v. Clayton County, 590 U.S. ___ (2020), Gerald Bostock worked for Clayton County, which is located in the Atlanta, Georgia metropolitan area, as a child welfare advocate. Under his leadership, the county won national awards for its work and all of his performance records were good.

In early 2013, Bostock joined a gay softball league and promoted the league at work to try and get volunteers. Not long after that, influential members of the community allegedly made disparaging comments about Mr. Bostock's sexual orientation and his participation in the league. Soon after that, he was fired for conduct "unbecoming" a county employee. Georgia did not have any state laws that protected LGBTQ people from employment discrimination.

Bostock filed in 2016 in the U.S. District Court for the Northern District of Georgia. The county filed a request to dismiss Bostock's claim on the basis that the Eleventh Circuit Court of Appeals ruled in 2017 in Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017) that the Civil Rights Act's Title VII does not include protection against discrimination towards sexual orientation.

The district court agreed with the county and dismissed Bostock's claim.

Bostock then appealed to the Eleventh Circuit Court of Appeals, where the three-judge panel affirmed the district court's dismissal.

Bostock then appealed to the United States Supreme Court to determine if sexual orientation is covered by Title VII of the Civil Rights Act. The Supreme Court agreed to hear Bostock's case in April 2019.

Facts:
Altitude Express, Inc. v. Zardas

Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, he was fired.

Facts
R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission

In R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, Aimee Stephens was a funeral home employee who had presented herself as male up until 2013. However, Stephens considered herself a to be a transgender woman for most of her adult life. She had always presented herself as a male, which she claimed caused her constant emotional stress. In 2013, she decided to "come out" to family and friends. She then decided to undergo reassignment within the next year.

At that time, Stephens had been employed by R.G. &. G.R. Harris Funeral Homes for six years and had an excellent work record. In 2014, she wrote to her supervisor and explained that considered herself to be female and what she was planning to do about it. She also explained that she planned on taking vacation time from work to have the surgery, and as part of her transition, she would return to work dressed in attire appropriate for female employees, as was outlined in the employee handbook.

Two weeks later, Stephens was notified by mail that she had been terminated by the funeral home's owner, Thomas Rost.

Stephens filed a complaint with the Equal Employment Opportunity Commission (EEOC) claiming that she had been discriminated against because she was transgender.

EEOC agreed and found for Stephens. The EEOC then took the case against the Rost's funeral homes to the United States District Court for the Eastern District of Michigan.

The District Court ruled for the Harris Funeral Homes group, stating Title VII did not cover transgender people and that as a religious organization under the Religious Freedom Restoration Act, the company had a right to dismiss Stephens for non-conformity.

However, the Sixth Circuit Court of Appeals reversed the District Court's decision and held that Title VII did cover transgender people. The court also ruled that requiring the funeral home to honor Stephens rights did not deny Rost from exercising his religious beliefs.

NOTE: During the course of the proceedings in these long-running disputes, both Mr. Zarda and Ms. Stephens have passed away. But their estates continue to press their causes for the benefit of their heirs. The Court agreed to hear these cases to resolve once and for all the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons.

OPINION

Justice Neil Gorsuch wrote the majority opinion for the Court. It was released to the public on June 15, 2020. In a 6-3 decision, the Court held that protections of Title VII do include sexual orientation and gender identity.

In reaching this decision, Gorsuch wrote:

> "An employer who fired an individual for being homosexual or transgender fires that person for traits or actions **it would not have questioned in members of a different** sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids. Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. But the limits of the drafters' imagination supply no reason to ignore the law's demands. Only the written word is the law, and all persons are entitled to its benefit."

Gorsuch then stated that there was one word primarily at issue in all three of these cases: "sex."

All of the employers in these cases say that the term "sex" in 1964 referred to "status as either male or female [as] determined by reproductive biology." The employees disagreed, claiming that even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation.

Gorsuch then reasoned that it was key to the Court's decision to determine what Congress meant by using the word "sex" in 1964 when Title VII was passed.

Gorsuch also posed the question: What did "discriminate" mean in 1964?

As it turns out, it meant then roughly what it means today:

To "discriminate against" a person, then, would seem to mean treating that individual worse than others who are similarly situated.

In so-called "disparate treatment" cases like today's, Gorsuch reasoned that this Court has also held that the difference in treatment based on sex must be intentional.

So, taken together, an employer who intentionally treats a person worse because of sex, such as by firing the person for actions or attributes **it would tolerate in an individual of another sex**, discriminates against that person in violation of Title VII.

Gorsuch noted that Title VII clearly states three times, including immediately after the words "discriminate against," that the Court's focus should be on "individuals," not "groups":

> Employers may not "fail or refuse to hire or . . . discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." §2000e–2(a)(1) (emphasis added).

From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges:

> An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff 's sex contributed to the decision. And it doesn't matter if the employer treated **women as a group** the same when compared to **men as a group**. If the employer intentionally relies **in part** on an individual employee's sex when deciding to discharge the employee, or put differently, **if changing the employee's sex would have yielded a different choice by the employer**, a statutory violation has occurred.

The Court then held that an individual's homosexuality or transgender status is not relevant to employment decisions. That is because it is impossible to discriminate against a person for being homosexual or transgender without also discriminating against that individual based on the basis of that person's sex.

For example, consider an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, **except that one is a man and the other a woman**. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions **it tolerates in his female colleague**.

Put differently, the employer intentionally singled out an employee to fire based in part on the employee's sex. Consequently, the terminated employee's sex is a but-for cause of his discharge.

Gorsuch also cites to an example where an employer fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.

Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Gorsuch's decision also alluded to concerns that the judgment may set a sweeping precedent that would force gender equality on traditional practices. However, Gorsuch wrote:

> "They say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today but none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today."

WHAT DOES THIS MEAN TO HR?

The impact of this case is obvious:

Sexual Orientation and Gender Identity are now protected classes under Title VII.

In other words, using sexual oriented or gender identity slurs are as illegal as using racial slurs, religious slurs, gender slurs and so on. .

Likewise, basing employment decisions on either of these sexual oriented or gender identity factors is as illegal as basing such decisions on someone's race, religion and so on.

Clearly, employers need to re-write their policies to include these new protected classes. Further, and perhaps more importantly, employers must be training their employees that sexual orientation and gender identity are indeed protected classes and any harassment or discrimination based on either of these two classifications will not be tolerated in any way. Unfortunately, this will indeed be a huge cultural shift for many employers.

IMPORTANT NOTE:
Religious Freedom Restoration Act (RFRA)

It is also important to note that Rost was a devout Christian who does not accept that anyone can change their gender. So, he ran his funeral homes according to his religious beliefs, the Religious Freedom Restoration Act (RFRA) gave him the ability to fire Stephens if she would not conform to these beliefs. In other words, since Stephens'

decision to surgically alter his gender violated Rost's Christian beliefs, Rost claimed he could terminate Stephens regardless of whether Stephens actions were protected by Title VII or not. The district court agreed with Rost.

The EEOC appealed to the Sixth Circuit Court of Appeals.

The Sixth Circuit therefore had to consider if Rost and his funeral homes had shown that retaining Stephens as an employee under Title VII would have burdened Rost from expressing his religious freedom. The court decided that he did not, so he was required to comply with Title VII.

Judge Moore reasoned for the RFRA to serve as a shield that allows for illegal for discriminatory conduct, RFRA requires a showing that there has been a "**substantial burden**" on "**religious exercise**," that is not "**in furtherance of a compelling government interest**" and/or "**the least restrictive means of furthering**" that interest. In this case, the funeral home claimed that the presence of a transgender employee would

(1) "often create distractions for the deceased's loved ones" and

(2) force Rost to leave the industry, because working with a transgender person was an infringement on his religious beliefs.

Judge Moore concluded that neither of these constituted substantial burdens on Rost or the funeral home. Regarding the first claimed burden, Judge Moore stated that employers cannot escape the requirements of Title VII simply by assuming the "**presumed biases**" of their customers.

With regard to the second claimed burden, Judge Moore wrote that, "**tolerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it**."

Judge Moore asserted that Stephens did not ask Rost in any way to endorse or to aid her transition. Instead, she only sought to remain on staff at the funeral home. According to Judge Moore, allowing her to remain employed does not "**substantially burden his religious practice**."

In conclusion, Judge Moore asserted that even if Title VII was to impose a "substantial burden" on Rost's religious beliefs in this case, it would still survive scrutiny under the RFRA because eliminating or preventing employment discrimination because of sex is clearly a "compelling interest," and no less "restrictive means" of preventing such discrimination exists. Otherwise, according to Judge Moore, all modern civil rights law would be called into question.

Since Rost did not appeal this part of the Sixth Circuit's decision to the United States Supreme Court, the Court did not need to rule on it.

XX. RELIGIOUS DISCRIMINATION

A. Definition

When Title VII was passed into law, it became illegal for covered employers to discriminate against individuals due to their religious beliefs. However, Congress failed to define what it meant by the term "religion." As a result, the courts were faced with defining when one's religious beliefs were covered by this portion of Title VII and when they were not.

In United States v. Seeger, 380 U.S. 163 (1965), the U.S. Supreme Court defined a **"religious belief" as being any "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God of those admittedly qualifying for the exemption."**

Later, this definition was expanded in Welsh v. United States, 398 U.S. 333 (1970) to include **the moral and ethical beliefs of a person that assume the same function as a traditional religion in the person's life**. The Court then stated that only if a belief "rests solely upon considerations of policy, pragmatism, or expediency" would it fail to qualify. The courts also tend to hold, based on these definitions, that atheists are covered by the Act.

In establishing a prima facie case for disparate treatment for religious discrimination, the plaintiff must demonstrate that:

1. The plaintiff has a sincerely held belief,

2. The plaintiff was subjected to some adverse employment action,

3. At the time the adverse action was taken, the employee's job performance was satisfactory, and

4. The plaintiff presents some additional evidence to support the inference that the adverse employment action was taken due to a discriminatory motive based on the employee's religious beliefs.

B. Duty To Reasonably Accommodate

Section 701(j) states that a covered employer is required to reasonably accommodate its employees unless it would place an undue hardship on the employer to do so. **However, the proper question to ask at this point is what does it mean to "reasonably accommodate?"**

In Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986), Ronald Philbrook was a teacher in Ansonia who observed six holy days each year. Under Ansonia's policy, Philbrook was allowed to take three days of paid leave off from

work each year for observing religious holidays and three days of paid leave for "necessary personal business."

Philbrook wanted to use all six of these paid days off for each of the six holy days he took off each year, but Ansonia refused. Ansonia informed Philbrook that he would have to take three of these holy days off without pay and it refused to let Philbrook use his personal business days for this purpose.

Philbrook sued under Title VII, claiming religious discrimination, contending that Ansonia was required to accommodate his religious beliefs in the manner he proposed as long as it did not cause Ansonia "undue hardship."

The U.S. Supreme Court disagreed.

The Court held that once an employer makes an offer to reasonably accommodate an employee's religious beliefs, the employer has met its obligation of reasonable accommodation under Title VII. The issue of undue hardship therefore never arises. Undue hardship only becomes an issue when the employer fails to make *any* offer of reasonable accommodation.

Here, the employer offered to reasonably accommodate the employee's religious beliefs by allowing Philbrook to take three of his holy days off from work without pay. The employer's offered accommodation in this case was therefore seen as being reasonable by the Court. As a result, the inquiry ends there.

The underlying policy consideration at work here is that the courts do not want to get into a contest as to whose accommodation is *more* reasonable, either the employee's or the employer's. In this case, Ansonia met its burden of reasonably accommodating Philbrook's religious beliefs by offering *any* accommodation to Philbrook deemed to be reasonable. The Court saw that as being sufficient.

C. Undue Burden

After Philbrook was decided, it became clear that as long as an employer offered any reasonable solution to accommodate an employee's religious beliefs that the inquiry as to whether the employer had satisfied its duty of reasonable accommodation had been satisfied. The question of whether the employee had suggested a more reasonable solution to the employer, or if the employee's solution would place an undue burden on the employer, would therefore never even come into issue.

Of course, what happens if the employer does **not** make **any** offer of **reasonable accommodation**? What does the term "undue burden" mean then?

In Trans World Airlines, Inc., v. Hardison, 432 U.S. 60 (1977), Larry Hardison was a TWA employee who was subject to a seniority system that gave first choice for shift assignments to the most senior employees. Hardison's religious beliefs did not permit him to work on Saturdays. However, Hardison had not earned

enough seniority with TWA to get Saturdays off, and TWA refused to make an exception for him. When Hardison refused to work on Saturdays, he was fired.

Hardison contended that TWA had failed to make any effort to reasonably accommodate his religious beliefs. In fact, Hardison contended that he had suggested three viable solutions that would not have placed an undue burden on TWA, and all three were rejected.

These solutions were:

a) To let Hardison work a four-day week,

b) To have another employee work his shift for him, or

c) To let Hardison "swap shifts" with another employee.

However, the U.S. Supreme Court dismissed all of Hardison's suggestions.

The Court reasoned that if TWA had ordered another more senior employee to work Hardison's shift, **then the more senior employee would have been deprived of his rights under the union's collective bargaining agreement.** The Court reasoned that Title VII does not endorse unequal treatment in order to eliminate employment discrimination.

Furthermore, the Court reasoned that the cost of paying someone overtime or the cost of not replacing Hardison on his Saturday shift, as suggested by Hardison, would have placed more than a "de minimus" burden on TWA. The Court deemed this to be an undue burden under Title VII.

Therefore, even though TWA failed to accommodate Hardison's religious beliefs, it was found not to have violated the religious discrimination portion of Title VII. The Court reasoned that **any of the accommodations suggested by Hardison would have placed more than a de minimus burden on TWA**, which the Court viewed as being an undue burden under Title VII.

Between Philbrook and Hardison, **it is apparent that if an employer offers at least some type of reasonable accommodation to an employee, then the requirements established under Philbrook are satisfied and the question of undue burden under Hardison never arises.**

However, if the employer offers no reasonable accommodation to the employee at all, then under Hardison, an employer is required to accept an employee's reasonable accommodation solution only when doing so would not impose an undue burden, which is really no more than a de minimus burden.

Perhaps the logical question to ask at this point is why are the burdens of "reasonable accommodation" and "undue burden" placed on employers so low?

The answer is simple: **Separation of church and state**.

The First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion...." This section of the Constitution is referred to as the **Establishment Clause**, and the Courts have been very wary of enforcing the religious discrimination portion of Title VII too vigorously out of fear of violating it. Enforcing the "reasonable accommodation" and the "undue burden" portion of Title VII's religious discrimination by setting a very low standard for employers to meet infringes on the Establishment Clause in only a de minimus way and is therefore permissible.

D. Exemption For Religious Entities

In EEOC v. Kamehameha Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993), Carole Edgerton applied for an advertised position as a substitute French teacher with the Kamehameha Schools. However, Edgerton was not offered the position because she was not a member of the Protestant religion, so the EEOC filed suit claiming religious discrimination. **The school defended itself by claiming that it was exempt from the religious discrimination provision of Title VII since its purpose and character were primarily religious, thus qualifying it for the "religious institution exemption" under the Act.**

The Ninth Circuit held that religious educational institutions are indeed exempt from the religious discrimination portion of Title VII under § 702 and § 703 of the Act. However, in this case, **the school failed to meet the test qualifying it as a true religious entity.**

In reaching this conclusion, the court reasoned **that no religious organization has ever controlled this school or given it support**.

Additionally, the school is not affiliated with any denomination of the Protestant religion or with any organization of religious schools.

Furthermore, the school's purpose and character is primarily secular, not religious. In fact, the only real claim the school has to being a religious entity is that a grant from a member of the Hawaiian family establishing the school directed that the teachers "shall" all be Protestant. Such a directive is not enough to qualify the school as being a religious entity and thus exempting it from the religious discrimination portion of Title VII.

Therefore, the Ninth Circuit held that the Kamehameha School did not qualify for the religious institution exemption under Title VII.

E. BFOQ Defense For Religious Discrimination

If an employer fails to show that it is a religious institution under Kamehameha, the secular employer can still discriminate on the basis of religion if it can show that hiring individuals of a certain religion is a **BFOQ. However, due to the**

Establishment Clause, the standard used by the courts for establishing the BFOQ defense for religious discrimination tends to be much lower than the BFOQ standard used in Southwest Airlines and Playboy Clubs International.

In Pime v. Loyola University, 803 F.2d 351 (7th Cir. 1986), where the plaintiff was denied a teaching position with Loyola because he was Jewish, the Seventh Circuit held that although being a Jesuit, which is what Loyola required its instructors to be, did not make an individual more qualified to teach, **the court found that such a requirement was reasonably necessary to the normal operation of the school.** The court held that a BFOQ was appropriate in this case since a Jesuit presence was significant to the educational tradition of the school.

Obviously, upholding a religious BFOQ on the basis that religion is **"significant" to the tradition of a school is a much lower standard to meet than the "narrowly construed" BFOQ exception used in Southwest Airlines and Playboy Clubs International.**

Again, the reason the BFOQ exception for religious discrimination tends to be much lower than the BFOQs allowed for the other protected classes under the Act is due to the Constitution's Establishment Clause, since the courts are trying to avoid a conflict between church and state.

F. U.S. Supreme Court Decides Religious Accommodation

In EEOC v. Abercrombie & Fitch Stores, Inc., No. 14–86 (U.S. Supreme Ct. 2015), Samantha Elauf, a young Muslim woman, interviewed for a job at an Abercrombie store in Oklahoma in 2008. Even though she met the basic requirements for the job, she was not offered the position because she wore a **hijab**. At the time, Abercrombie had a "**look policy" that prohibited employees from wearing head coverings on the job.**

The interviewer didn't ask Elauf if she would need a religious accommodation, but the interviewer said she suspected the applicant wore the Muslim head scarf for religious reasons.

The Court said that suspicion was enough to trigger an inquiry into an accommodation. It wasn't necessary for the applicant to specifically request one.

The EEOC sued Abercrombie on Elauf's behalf, claiming that Abercrombie's refusal to hire Elauf violated Title VII. The district court granted **summary judgment** to the **EEOC on liability**.

The 10th Circuit reversed and awarded Abercrombie summary judgment, holding that an employer cannot be liable under Title VII for failing to accommodate a religious practice until the applicant provides the employer with actual knowledge of the need for an accommodation.

In an 8-1 ruling, the Supreme Court on June 1, 2015 reversed and **found for the EEOC, holding that "the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward**:

> **An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."**

The Court rejected Abercrombie's argument that an employer must have **actual knowledge** of the applicant's need for an accommodation, noting that Title VII "does not impose a knowledge requirement." Instead, the Court concluded that "the intentional discrimination provision" of Title VII "prohibits certain **motives**, regardless of the state of the actor's knowledge."

An "employer who acts with the **motive of avoiding accommodation** may violate Title VII even if he has no more than an **unsubstantiated suspicion** that accommodation would be needed." **Hence, an "applicant need only show that his need for an accommodation was a motivating factor in the employer's decision."**

The Court concluded that "[a] request for accommodation, or the employer's certainty that the practice exists, may make it easier to infer motive, but it is not a necessary condition of liability."

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Title VII of the Civil Rights Act of 1964 requires employers to provide a reasonable accommodation for an employee's sincerely held religious beliefs or practices unless it would cause the employer an undue hardship.

Title VII defines "religion" to include "all aspects of religious observance and practice as well as belief." "Beliefs" aren't protected under Title VII merely because they are sincerely held (e.g., many people adhere to a vegan diet for purely secular reasons). The definition of a "religious practice" isn't exactly clear, but it's safe to say that wearing a head scarf in observance of the Muslim faith met the definition in this case.

Other religious practices include, but are not limited to, a Christian wearing a cross, a Sikh wearing a turban, or a Jew wearing a yarmulke; taking breaks during the workday to pray; fasting; being home by sundown on the Jewish Sabbath or holidays; and attending religious services on certain days or at certain times.

Employers are required to reasonably accommodate the religious practices of an employee or applicant unless the accommodation would cause an "undue hardship," which may occur when the accommodation would require more than ordinary administrative costs. For example, adjusting rest breaks to accommodate daily prayers likely wouldn't involve an undue hardship.

Employers aren't required to accommodate employees if doing so would require changing a bona fide seniority system. For instance, if shift schedules are determined by a seniority system, such as one described in a union contract, the employer isn't required to give a shift to an employee as an accommodation if it would require bumping an employee with seniority.

Options for reasonable accommodations include flexible arrival and departure times, floating or optional holidays, flexible work breaks, use of lunchtime in exchange for early departure, staggered work hours, and permitting an employee to make up time lost because of the observance of religious practices. Voluntary swapping of shifts also may be a reasonable accommodation.

In the Abercrombie case, the assistant manager assumed that the otherwise qualified applicant was wearing a head scarf during her interview because she is Muslim. After confirming with the district manager that the head scarf wasn't permitted under Abercrombie's uniformly applied dress code, the assistant manager declined to make a job offer because the applicant was believed to be Muslim and would need to wear the head scarf at work.

In short:

- You are prohibited from denying employment opportunities to an applicant or employee on the basis of her confirmed or suspected religious beliefs or practices.

- You shouldn't ask applicants about religious beliefs during the interview process or assume, based on appearance, that an applicant has certain religious beliefs or requirements.

- You may explain to all applicants the job requirements, such as their work schedule, and ask if they can meet those requirements.

- If an applicant or employee requests an accommodation, you should engage in an interactive process to determine what accommodation is needed and the effect it will have on the business.

- Reasonable accommodations should be made if they won't create an undue hardship.

- You may be required to accommodate dress and grooming habits based on a religious practice or belief unless you have a policy against the dress or grooming habits that is **justified by a business necessity**. For example, you aren't required to accommodate head scarves or long garments in an industrial plant where loose clothing may get caught in moving machinery.

XXI. ARE HAIRSTYLES PROTECTED?

A. Are "Dreadlocks" Protected Under Racial Discrimination?

In Equal Employment Opportunity Commission v. Catastrophe Management Solutions, — F.3d —, No. 14-13482, 2016 WL 4916851 (11th Cir. Sept. 15, 2016), Chastity Jones, a black woman with short dreadlocks, was hired for a customer service position with Catastrophe Management Solutions ("CMS"). She subsequently met with CMS's human resources manager, Jeannie Wilson, who is white, in private to discuss scheduling required pre-employment lab tests.

During the meeting, Ms. Wilson asked Ms. Jones if she had dreadlocks. Ms. Jones said yes, and Ms. Wilson advised her that CMS could not hire her with the dreadlocks. Ms. Wilson told Ms. Jones that dreadlocks "tend to get messy," though she did not say Ms. Jones's dreadlocks were messy.

CMS's race-neutral grooming policy required all employees to dress and groom themselves "in a manner that projects a professional and business-like image while adhering to company and industry standards and/or guidelines."

The policy also stated that "hairstyle should reflect a business/professional image," and that "no excessive hairstyles" would be permitted.

The EEOC filed suit, alleging disparate treatment under Title VII. According to the EEOC, dreadlocks are "a manner of wearing hair that is common for black people and suitable for black hair texture. Dreadlocks are formed in a black person's hair naturally, without any manipulation, or by manual manipulating the hair into larger coils."

The court characterized many of the EEOC's allegations as legal conclusions about the concept of race.

For example, the EEOC alleged that:

- "Race is a social construct [with] no biological definition,"
- That "the concept of race is not limited to or defined by immutable physical characteristics,"
- That the "concept of race encompasses cultural characteristics related to race or ethnicity, including grooming practices," and
- That "dreadlocks are . . . a racial characteristic, just as skin color is a racial characteristic."

According to the EEOC, prohibiting "dreadlocks in the workplace constitutes race discrimination because dreadlocks are a manner of wearing the hair that is physiologically and culturally associated with people of African descent." Therefore, according to the EEOC, "the decision of CMS to interpret its race-neutral written grooming policy to ban the wearing of dreadlocks constitutes an employment practice that discriminates on the basis of race."

The district court dismissed the complaint, finding that the EEOC failed to state a plausible claim for relief. In so doing, the district court concluded that "[a] hairstyle, even one more closely associated with a particular ethnic group, is a mutable characteristic.

On appeal to the Eleventh Circuit Court of Appeals, the EEOC argued that:

- Dreadlocks are a natural outgrowth of the immutable trait of black hair texture,
- That the dreadlocks hairstyle is directly associated with the immutable trait of race,
- That dreadlocks can be a symbolic expression of racial pride and
- That targeting dreadlocks as a basis for employment can be a form of racial stereotyping.

Most significantly for the Eleventh Circuit, the EEOC's "proposed amended complaint did not allege that dreadlocks are an immutable characteristic of black persons." In fact, the EEOC stated that "black persons choose to wear dreadlocks because that hairstyle is historically, physiologically, and culturally associated with their race."

In order to decide the case, the Court needed to define the term "race." After noting that Title VII does not define the term, the Court concluded that, at the time Title VII was enacted, 'race' as a matter of language and usage, referred to common physical characterizes shared by a group of people and transmitted by their ancestors over time. Although the period dictionaries did not use the word 'immutable' to describe such common characterizes, it is not much of a linguistic stretch to think that such characterizes are a matter of birth, and not culture.

Based on its understanding of the meaning of the word "race" at the time Title VII was enacted, and relying on two binding Fifth Circuit cases, the court concluded that "Title VII protects persons in covered categories with respect to their **immutable** characteristics, but not their cultural practices."

Indeed, "discrimination on the basis of black hair texture (an immutable characteristic) is prohibited by Title VII, while adverse action on the basis of black hairstyle (a mutable choice) is not." And even if dreadlocks are a "'natural

outgrowth' of the texture of black hair, [that] does not make them an immutable characteristic of race."

The court was careful not to "take a stand on any side of [the] debate" with respect to the "role and complexity of race in our society." That debate, the Court concluded, is best "resolve[d] thought the democratic process." Nonetheless, the Court's discussion on the topic—and its impact on Title VII litigation—is likely to spark debate and could potentially lead to a new approach by the EEOC in similar cases. For now, the take away for employers is this: enforcing a race-neutral grooming policy that prohibits employees from wearing dreadlocks is not intentional racial discrimination under Title VII. Employers should keep in mind, however, that a race-neutral grooming policy enforced in a manner that selectively targets members of a particular race can lead to liability under Title VII.

B. Are "Dreadlocks" Protected Under Religious Discrimination?

In EEOC v. Hospitality Staff, Civil Action No. 6:16-cv-1250-CEM- DAB (M.D. Fla. consent decree entered June 2017), Courtnay B. Joseph, a Rastafarian, worked for HospitalityStaff. In order to comply with its client's grooming standards in order to keep his position at an Orlando-area hotel, it required him to cut his dreadlocks.

Joseph claimed this constituted religious discrimination law since his employer failed to provide him with a reasonable accommodation

When he refused, HospitalityStaff took Joseph off his assignment and never reassigned him. Joseph claimed this constituted religious discrimination law since his employer failed to provide him with a reasonable accommodation

The EEOC's lawsuit charged that HospitalityStaff violated religious discrimination law by failing to provide a reasonable accommodation.

Rastafarians wear dreadlocks as part of their sincerely held religious belief, and making an employment decision because of such a religious practice violates Title VII of the Civil Rights Act of 1964. The EEOC filed suit (Civil Action No. 6:16-cv-1250-CEM-DAB) in U.S. District Court for the Middle District of Florida after first attempting to reach a pre-litigation settlement through its conciliation process.

Under the consent decree, which was agreed to soon after EEOC filed its lawsuit, HospitalityStaff agreed to pay Joseph $30,000 in damages. The company also agreed to amend its employee handbook and policy manual to include a clear policy providing for reasonable accommodations covering both disability and religious-based requests. Further, HospitalityStaff agreed to provide training to its managers and human resources personnel, and to voluntarily provide information to EEOC concerning its handling of religious discrimination complaints for three years.

XXII. NATIONAL ORIGIN

A. Definition

Title VII also forbids covered employers from discriminating against individuals due to their national origin, which includes those people from a particular country or region of the world who share a common culture, heritage or ancestry. It is also important to note that like the other protected classes of Title VII, it is illegal to discriminate against an individual due to the fact that he may associate with persons of a particular national origin.

American Indians have been treated as both a racial and a national origin minority by many jurisdictions under Title VII.

B. Language

In Fragante v. City and County of Honolulu, 888 F.2d 591 (9th Cir. 1989), Manuel Fragante was a Filipino immigrant who applied for a clerk's job at the Honolulu Bureau of Motor Vehicles (BMV). The job involved orally providing information to the public. Fragante had the highest score on the written test out of all the applicants applying for the job. However, when the BMV interviewed Fragante, the interviewers had difficulty understanding him because of his accent. The BMV therefore concluded that Fragante would have difficulty communicating with the public and offered the job to another candidate.

Fragante filed suit under Title VII claiming national origin discrimination. The BMV argued that having such a **strong accent** as Mr. Fragante's was a **BFOQ** for this position because being understood by others was a critical part of this job.

The Ninth Circuit found that **employment decisions may be predicated on an applicant's accent when it materially interferes with the candidate's job performance.** The plaintiff failed to demonstrate to the court that the BMV had any discriminatory motive other than the need to have an applicant who speaks clearly. Although accent and national origin are closely intertwined in many cases, there is nothing improper about an employer making an honest assessment of the oral communication skills of a job candidate when such skills are material to the job. The BFOQ in this case was therefore granted.

In reality, the court never really had to consider the BFOQ defense in this case since language is not protected by Title VII. Therefore, an employer could refuse to hire someone simply because the person does not speak English or because the person has an accent. An employer does not have to tie this requirement of speaking clearly to the job. However, such an approach may open the door to a disparate impact or a pretext claim under disparate treatment.

Of course, employers can always argue that speaking clearly is job-related to **some** extent in support of a business necessity defense, which is a much lower

standard to meet than the disparate treatment's BFOQ defense. (i.e., safety reasons, communicating with supervisors, etc.)

C. EEOC Updates Guidance On National Origin Bias

Due to the surge in national origin discrimination and harassment charges since September 11, 2001, on December 12, 2002, the EEOC released its updates to it "Guidance On National Origin Bias" manual. These are some of the more interesting points made by the EEOC, which should be passed along to managers.

- **What security requirements may an employer impose?**

  Security requirements may be used as long as they are applied to employees or applicants **without regard to national origin**. The key is to avoid singling out an individual or group based on national origin when applying security requirements. Other federal laws also may require security clearances for sensitive positions.

- **When does harassment violate Title VII?**

  Harassing conduct, such as ethnic epithets or other offensive conduct toward an individual's nationality, violates Title VII when the conduct unreasonably interferes with the affected individual's work performance or creates an intimidating, hostile, or offensive work environment for the affected individual, as illustrated below:

  Muhammad, an Arab-American, works for XYZ Motors, a large automobile dealership. His coworkers regularly call him names like "camel jockey," "the local terrorist," and "the ayatollah," and intentionally embarrass him in front of customers by claiming that he is incompetent. Muhammad reports this conduct to higher management, but XYZ does not respond. The constant ridicule has made it difficult for Muhammad to do his job. The frequent, severe, and offensive conduct linked to Muhammad's national origin has created a hostile work environment in violation of Title VII.

- **What steps should an employer take to prevent unlawful workplace harassment?**

  The most important step for an employer in preventing harassment is **clearly communicating to employees** that harassment based on national origin will not be tolerated and that employees who violate the prohibition against harassment will be disciplined. Other important steps include adopting effective and clearly communicated **policies and procedures for addressing complaints** of national origin harassment, and **training managers** on national origin discrimination and harassment, as well as identifying and responding effectively to instances of harassment. By encouraging employees and managers to report harassing conduct at an

early stage, employers generally will be able to prevent the conduct from escalating to the point at which it violates Title VII.

- **May an employer ever base an employment action on an individual's foreign accent or limited English proficiency?**

  An employer may consider an employee's foreign accent if the individual's accent materially interferes with the ability to perform job duties. This assessment depends upon the specific duties of the position in question and the extent to which the individual's accent affects his or her ability to perform job duties. Similarly, an English fluency requirement should reflect the actual level of proficiency required for the position for which it is imposed. The following example illustrates these principles:

  Jorge, a Dominican national, applies for a sales position with XYZ Appliances, a small retailer of home appliances in a non-bilingual, English-speaking community. Jorge has very limited skill with spoken English. XYZ notifies him that he is not qualified for a sales position because his ability to effectively assist customers is limited. However, XYZ offers to consider him for a position in the stock room. Under these circumstances, XYZ's decision to exclude Jorge from the sales position does **not** violate Title VII.

- **May employers adopt policies that require employees to speak only English in the workplace?**

  An English-only rule may be used if it is **needed to promote the safe or efficient operation of the employer's business**. Some situations in which business necessity would justify an English-only rule include: communications with customers, coworkers, or supervisors who only speak English; emergency situations in which workers must speak a common language to promote safety; and cooperative work assignments in which a common language is needed to promote efficiency. An employer's use of an English-only rule should relate to specific circumstances in the workplace.

- **What types of dress codes may an employer adopt?**

  A dress code must not treat some employees **less favorably** because of their national origin. For example, a dress code that prohibits certain kinds of ethnic dress, such as traditional African or Indian attire, but otherwise permits casual dress would treat some employees less favorably because of their national origin. An employer may require all workers to follow a uniform dress code even if the dress code conflicts with some workers' ethnic beliefs or practices. However, if the dress code conflicts with religious practices, the employer must modify the dress code unless doing so would result in undue hardship.

XXIII. PREGNANCY DISCRIMINATION ACT OF 1978

A. Coverage of PDA

When Title VII was passed, it forbade employers from discriminating against individuals "on the basis of sex" or "because of sex." Consequently, the question arose over whether or not this language also made it illegal to discriminate against a woman due to the fact that she might be pregnant or might become pregnant. A split of authority arose over this issue. Some federal circuits held that sex discrimination under Title VII naturally included pregnancy discrimination, while others held that pregnancy was a separate issue entirely and was not covered by Title VII.

Congress later settled this debate by passing the Pregnancy Discrimination Act of 1978 which amended § 701(k) of Title VII to specifically include pregnancy as being a type of sex discrimination. Today, covered employers are required to treat pregnancy the same as they would treat any other disability. Employers are also required to provide their pregnant employees with the **same benefits and privileges of employment that are enjoyed by any other disabled employee**.

B. U.S. Supreme Court Adopts New PDA Standard

In Young v. United Parcel Service, Inc., 575 U.S. ___ (2015), Peggy Young was working as a delivery driver for United Parcel Service ("UPS") when she requested time off in order to undergo in vitro fertilization IN 2006. After becoming pregnant, Young's doctors told her that "she should not lift more than 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter."

United Parcel Service (UPS) requires that delivery drivers be able to lift parcels up to 70 pounds (150 pounds with assistance).

UPS informed Young that she could not work while she was under these lifting restrictions. So, she stayed home without pay during most of the time she was pregnant. Because of her time away from work, Young lost her employee medical coverage.

She then filed suit in federal court, claiming that "UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction."

Additionally, Young claimed that UPS followed a policy of accommodating other, non-pregnant drivers. At the time, UPS accommodated only:

(1) Drivers who were injured on the job;

(2) Drivers who lost their Department of Transportation certifications; and

(3) Drivers who suffered from a disability under the Americans with Disabilities Act.

UPS argued that, since Young did not fall within those categories, it had not discriminated on the basis of pregnancy, but had treated her as it treated all "other" relevant "persons."

Young sued claiming that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. She brought only a disparate-treatment claim of discrimination, which a plaintiff could prove either by **direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or by using the burden-shifting framework set forth in McDonnell Douglas Corp v. Green.**

Under the McDonnell Douglas framework, an individual pregnant worker who seeks to show disparate treatment must show:

1. She belongs to the protected class,

2. She sought an accommodation,

3. The employer did not accommodate her, and

4. The employer accommodated others "similar in their ability or inability to work."

The District Court granted summary judgment in favor of UPS because, among other reasons, Young could not meet her initial burden of establishing a prima facie case of discrimination under the McDonnell Douglas framework because the other employees she compared herself to under the ADA were **too different** to qualify as "similarly situated comparators."

Young appealed, and the Fourth Circuit Court of Appeals affirmed the trial court, concluding that Young could not make out a prima facie case of discrimination under McDonnell Douglas.

However, the US Supreme Court found for Young, holding that an individual pregnant worker who seeks to show disparate treatment through **indirect** evidence may do so through application of the McDonnell Douglas framework.

The Pregnancy Discrimination Act amended Title VII of the Civil Rights Act of 1964 to clarify that Title VII's longstanding prohibition of discrimination on the basis of sex includes a prohibition of discrimination on the basis of pregnancy, childbirth, and related medical conditions. Central to Young's case, the Pregnancy Discrimination Act also requires that employers treat pregnant women "**the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.**"

It is this clause that the Supreme Court's decision in Young v. UPS interprets.

UPS argued that its decision not to provide an accommodation to Young was non-discriminatory because it followed a company policy that does not take pregnancy into account. It is a so-called "**pregnancy-blind**" policy.

The Supreme Court **disagreed** with UPS, but did not necessarily agree with Young either.

The majority opinion stated that the key inquiry was **"whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination."** Consequently, Justice Breyer provided a **balancing test** for determining whether employers engaged in intentional discrimination under the terms of the Pregnancy Discrimination Act.

The test provided that, "[a] worker making a claim that her company intentionally treated her differently due to her pregnancy must show that she:

- Sought an accommodation,
- Her company refused, and then
- Granted accommodations to others suffering from "similar restrictions."

The company, in turn, can try to show that its reasons were legitimate, but not because it is **more expensive or less convenient** to add pregnant women to the categories of workers who are accommodated."

But as it turns out, despite finding in her favor, the Supreme Court didn't agree with Young's interpretation of the law either.

Young said that employers are required to accommodate pregnant women when they provide an accommodation **to anyone other non-pregnant employee who is similar in ability to work.**

Breyer's decision (and a separate concurrence written by Alito) did not buy into this analysis.

However, that may not have much effect on the practical implications of the decision.

The Court articulated a high legal burden employers will have to meet in order to justify their policies or practices that provide accommodations **to some categories of employees, but not to pregnant women**. The Court then remanded the case to the lower court to determine whether UPS can meet this burden here.

Under a "disparate treatment" theory of liability, as alleged by Young, an aggrieved employee **must show that she has been intentionally discriminated against**. The Supreme Court found that to make this showing, the employee must

demonstrate that the employer's policies impose a "**significant burden**" on pregnant workers, and that the employer has not raised a "**sufficiently strong" reason to justify that burden**.

But what is a "significant burden," and what is a "sufficiently strong" reason for imposing it?

An employee may persuade a court that a significant burden exists by providing evidence that the **employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers**.

For example, in Young's case, she may show that UPS accommodates **most non-pregnant employees** with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations.

Policies that provide accommodations or light duty to certain categories of employees, but not to pregnant women, will likely be found to impose a significant burden on pregnant employees.

As to evaluating the strength of an employer's justification for imposing such a burden, the Court warned that the employer's reason "**normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those . . . whom the employer accommodates**." What justifications may be strong enough then, the court did not say, but sufficiently strong justifications based on factors **other than cost or difficulty** may prove to be rare.

Further, the fact that an employer accommodates some employees tends to show that the employer does not have a good justification for not accommodating pregnant women also. As Justice Breyer put it: "**why, when the employer accommodated so many, could it not accommodate pregnant women as well**?"

WHAT DOES THIS MEAN FOR HUMAN RESOURCES?

Employers should make sure that they're on the right side of the law by taking the following steps:

- Ensure that light duty policies that apply to some categories of employees, such as those with on-the-job injuries, apply also to pregnant women.

- Take a good look at other workplace policies to ensure compliance with both the Pregnancy Discrimination Act and the Americans with Disabilities Act's mandates to provide accommodations to pregnant women. Employers in cities and states that have pregnancy accommodation laws will need to ensure compliance with those laws, which may offer employees more expansive rights. Employers should review at least the following types of policies to ensure pregnant women are not disfavored: accommodation, leave, scheduling, and attendance.

The easiest solution may be to simply amend existing policies and procedures to include accommodations on the basis of pregnancy, childbirth, or related medical conditions (including lactation).

- Establish procedures for determining what accommodations are necessary and appropriate.

- Train supervisors about how to recognize and respond to pregnant employees' needs for accommodation.

C. EEOC Issues PDA Guidance Under Young

In 2015, due to a great increase in the number of pregnancy discrimination charges filed with the Equal Employment Opportunity Commission (EEOC), the agency has released new enforcement guidance on pregnancy discrimination for the first time in over 30 years. This guidance provides in-depth interpretation of compliance requirements under the Pregnancy Discrimination Act (PDA), the Americans with Disabilities Act (ADA), and other state and federal laws related to pregnancy and childbirth.

The three primary areas of employer obligations discussed by the EEOC include:

- When employer actions may constitute unlawful discrimination on the basis of pregnancy, childbirth, or related medical conditions in violation of the PDA;

- Employers' obligation to provide pregnant workers with equal access to employment benefits such as leave, light-duty work, and health benefits; and

- How the ADA, in light of the 2008 amendments broadening the definition of disability, applies to pregnant individuals.

The foundation of the PDA bars employers from discriminating against employees on the basis of pregnancy, childbirth, or related medical conditions. The PDA holds that such discrimination is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964.

In the new guidance document, the EEOC clarifies that the PDA's protection extends not only to current, existing pregnancies but also to discrimination based on ***past*** pregnancy, as well as discrimination based on a woman's potential or intention to become pregnant.

Another key element of the PDA is the requirement that pregnant women who are able and willing to work must be permitted to do so ***on the same conditions*** as other employees. The EEOC guidance points out that employers should never attempt, even with the best of intentions and genuine concern, to impose ***unsolicited leave or work modifications*** on pregnant workers.

The guidance also states that excluding pregnant or fertile women from certain jobs will be valid only in ***extremely narrow exceptions.*** However, such exclusions cannot be based on fear that the employee or her fetus are in danger, the fear of potential legal liability, or any assumptions or stereotypes about the employment characteristics of pregnant women, such as turnover rate, returning to work, customer preference, etc.

Finally, the guidance notes that lactation is a medical condition related to pregnancy. Therefore, an employer that discriminates against an employee based on her need to take reasonable lactation breaks may be in violation of the PDA. (Additional protection and guaranteed break time for lactating mothers are also provided by many state laws and the federal Fair Labor Standards Act (FLSA).)

The PDA also states that when an employee becomes unable to work for reasons related to pregnancy or childbirth, she must be given the same rights, leave privileges, and other benefits as other employees possessing similar temporary disabilities or work restrictions.

PDA Discrimination Under Young

In order to show that an employer has committed PDA discrimination, a plaintiff must produce evidence that a similarly situated worker was treated differently or more favorably than the pregnant worker to establish a prima facie case of discrimination.

According to the Supreme Court's decision in Young v. United Parcel Serv., Inc., a PDA plaintiff may make out a prima facie case of discrimination by showing:

> "that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"

As the Court noted, "[t]he burden of making this showing is not 'onerous.'" For purposes of the prima facie case, the plaintiff does not need to point to an employee that is "similar in all but the protected ways."

For example, the plaintiff could satisfy her prima facie burden by identifying an employee who was similar in his or her ability or inability to work due to an impairment (e.g., an employee with a lifting restriction) and who was provided an accommodation that the pregnant employee sought.

Even if an employer can show that is had a legitimate non-discriminatory reason for treating the pregnant employee differently, the pregnant worker may still show that the reason offered by the employer is pretextual.

In Young, the U.S. Supreme Court explained:

> … [t]he plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather-when considered along with the burden imposed-give rise to an inference of intentional discrimination.
>
> An employer's policy of accommodating a large percentage of nonpregnant employees with limitations while denying accommodations to a large percentage of pregnant employees may result in a significant burden on pregnant employees.

For example, the U.S. Supreme Court held that a policy of accommodating most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations would present a genuine issue of material fact for the plaintiff.

PDA and Light Duty Disparate Impact

A plaintiff does not have to show that the employer intended to violate the PDA when there is direct evidence that pregnancy-related animus motivated the denial of light duty.

A policy of restricting light duty assignments may also have a disparate impact on pregnant workers. If impact is established, the employer must prove that its policy was job related and consistent with business necessity.

For instance:

Leslie, who works as a police officer, requested light duty when she was six months pregnant and was advised by her physician not to push or lift over 20 pounds. The request was not granted because the police department had a policy limiting light duty to employees injured on the job. Therefore, Leslie was required to use her accumulated leave for the period during which she could not perform her normal patrol duties.

In her subsequent lawsuit, Leslie proved that since substantially all of the employees who are denied light duty were pregnant women, the police department's light duty policy had an adverse impact on pregnant officers.

In its defense, the police department claimed that state law required it to pay officers injured on the job regardless of whether they worked and that the light duty policy enabled taxpayers to receive some benefit from the salaries paid to those officers.

However, there was evidence that an officer **not** injured on the job was assigned to light duty. This evidence contradicted the police department's claim that it truly had a business necessity for its policy.

This policy may also be challenged on the ground that it impermissibly distinguishes between pregnant and non-pregnant workers who are similar in their ability or inability to work based on the cause of their limitations.

ADA and the PDA

Under the ADA, pregnancy itself isn't a disability. However, that doesn't mean pregnant workers and applicants are excluded from the ADA's protections. Impairments related to pregnancy, such as gestational diabetes, preeclampsia, and sciatica, can still be protected disabilities if they substantially limit one or more major life activities.

The EEOC guidance reminds employers that the 2008 amendments to the ADA have expanded the definition of disability so that it is much easier for workers with complications related to pregnancy and childbirth to meet the definition of a disability.

The EEOC also reminds us that the ADA prohibits employers for taking adverse actions against employees, including pregnant workers, who are regarded as having disabilities. Therefore, an employer that reassigns a pregnant worker to a lower-paying position based on the belief that she is unable to perform her job because of her pregnancy may also be in violation of the ADA.

Remember: **EEOC guidance documents aren't law.**

Instead, they are exactly what the name implies: Guidance.

Nonetheless, these documents provide important insight into how the EEOC will interpret and enforce relevant statutes when discrimination charges are brought before the agency itself. This new EEOC guidance also provides detailed examples of how it intends to apply the PDA.

Also, because the guidance documents aren't law, the courts are not required to follow the various interpretations of the EEOC. However, many courts do give the EEOC's interpretations substantial weight, so trying to follow them would be a very good idea.

It is usually not a good idea to become a test case for these issues.

You will find the EEOC's guidance document by following the link below:
www.eeoc.gov/laws/guidance/enforcement_guidance.cfm

XXIV. MATERNITY POLICIES ILLEGAL?

The EEOC's case against Estée Lauder arose when a male employee, who was working as a stock person in an Estée Lauder store in Maryland, wanted parental leave benefits after his child was born. He requested, and was denied, the six weeks of paid child-bonding leave that biological mothers automatically receive. The employee, however, was only allowed to take two weeks of paid leave to bond with his newborn child. According to the EEOC, such policies violate Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, which prohibit discrimination in pay or benefits based on sex.

According to the suit, in 2013 Estée Lauder adopted a new parental leave program to provide employees with paid leave for purposes of bonding with a new child, as well as flexible return-to-work benefits when the child bonding leave expired. Under its parental leave program, in addition to paid leave already provided to new mothers to recover from childbirth, Estée Lauder also provides eligible new mothers an additional six weeks of paid parental leave for child bonding. Estée Lauder only offers new fathers whose partners have given birth two weeks of paid leave for child bonding. The suit also alleged that new mothers are provided with flexible return-to-work benefits upon expiration of child bonding leave that are not similarly provided to new fathers.

The EEOC sought back pay and compensatory and punitive damages on behalf of the aggrieved class members, as well as injunctive relief.

The EEOC alleged that Estée Lauder discriminated against a class of 210 male employees. The suit claims Estée Lauder provided them, as new fathers, less paid leave to bond with a newborn, or with a newly adopted or fostered child, than it provided new mothers. The parental leave at issue was separate from medical leave received by mothers for childbirth and related issues.

The EEOC also alleged that the company unlawfully denied new fathers return-to-work benefits provided to new mothers, such as temporary modified work schedules, to ease the transition to work after the arrival of a new child and exhaustion of paid parental leave.

The EEOC filed suit in U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 2:17-cv-03897-JP on Aug. 30, 2017.

On July 17, 2018, the court entered a consent decree resolving the case.

Under the decree, Estée Lauder agreed to pay a total of $1,100,000 to the class of male employees who, under Estée Lauder's parental leave policy, received only two weeks of paid parental leave as compared to the six weeks of paid leave for child-bonding, which was the same amount of paid time off allotted to the new mothers after their medical leave ended.

In the end, the EEOC prevailed on its view that parental leave policies that are unrelated to a medical disability due to pregnancy or childbirth must be gender-neutral.

WHAT DOES THIS MEAN FOR HR?

Employers should review their parental leave policies to ensure they don't discriminate against employees on the basis of sex.

"Maternity," "pregnancy," or "childbirth" leave should be covered as part of a short-term disability policy or a medical leave policy and limited to the period of a medical inability to work preceding or following childbirth.

Parental or child-bonding leave should be gender-neutral. Ideally, it should be offered to all employees, regardless of their parental role.

XXV. U.S. SUPREME COURT REJECTS CONTRACEPTIVES MANDATE FOR PRIVATELY HELD COMPANIES

On June 30, 2014, the United States Supreme Court ruled in Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___ (2014), that the Religious Freedom Restoration Act (RFRA) exempts a closely held for-profit company from federal government regulations requiring employers to provide contraceptive coverage to their female employees.

The court struck down the contraception mandate under the Affordable Care Act for all closely held for profit companies, a regulation adopted by the U.S Department of Health and Human Services (DHHS). The DHHS claimed this regulation was the least restrictive way to ensure access to contraceptive care. The ruling could have widespread impact on the issue of whether companies can be religiously exempt from any federal law that protects the interests of other individuals.

The case was previously titled Sebelius v. Hobby Lobby. However, when Kathleen Sebelius resigned her position as Secretary of Health on April 10, 2014, Sylvia Burwell, the new Secretary of Health, was automatically substituted as the petitioner in this case.

Religious Freedom Restoration Act

The United States Supreme Court ruled in Employment Division, Department of Human Resources of Oregon vs. Smith, 494 U.S. 872 (1990) that the state of Oregon could deny unemployment benefits to a person fired for using peyote, even though the use of the drug was part of a religious ritual. The Court ruled that even though the states have the ***power*** to accommodate otherwise illegal acts done in pursuit of religious beliefs, they are not *required* to do so.

In short, the Court ruled that a person may not defy neutral laws of the state that have general applicability to everyone, even as an expression of religious belief.

"To permit this," wrote Justice Scalia, "would make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." He wrote that generally applicable laws do not have to meet the high standard of strict scrutiny, because such a requirement would create "a private right to ignore generally applicable laws." Strict scrutiny would require a law to be the "least restrictive" means of furthering a compelling government interest.

The US Congress responded by passing the "Religious Freedom Restoration Act" (RFRA). The RFRA required courts to review future cases with "strict scrutiny" in determining whether a neutral law of general applicability "substantially burden[s] a person's exercise of religion."

Affordable Care Act

In 2010, Congress passed the Affordable Care Act. Under this Act, the Health Resources and Services Administration (HRSA), which is part of the Department of Health and Human Services (DHHS), is empowered to specify what kinds of preventive care for women should be covered in certain employer-based health plans. The HRSA decided that all FDA approved contraception should be covered. Companies that refuse are fined $100 per individual per day.

Hobby Lobby Stores

Hobby Lobby is an arts and crafts company founded by self-made billionaire David Green and owned by the Evangelical Christian Green family. Hobby Lobby has about 21,000 employees.

Hobby Lobby covered contraceptives under its health plan until it dropped its coverage in 2012, the same year it filed its lawsuit. Hobby Lobby is also the largest funder of the National Christian Charitable Foundation, an organization that uses its billion-dollar endowment to fund a network of political groups including the Alliance Defending Freedom, which recently supported the Arizona SB 1062 bill that attracted national controversy.

Hobby Lobby's case against the DHHS was consolidated with another case by Conestoga Wood Specialties, a furniture company owned by the Mennonite Hahn family that has about 1,000 employees.

Lower Court History

In September 2012, Hobby Lobby filed its lawsuit in the U.S. District Court for the Western District of Oklahoma. The district court denied Hobby Lobby's request for a preliminary injunction against enforcement of the contraception rule.

In March 2013, the U.S. Court of Appeals for the Tenth Circuit granted a hearing of the case. In June 2013, the appeals court ruled that Hobby Lobby Stores, Inc. is a "person" who has religious freedom. Under this decision, the court ruled that a corporation is to be treated under the law like a living, breathing person with all of the rights and

responsibilities of an individual. Therefore, since Hobby Lobby was viewed as a legal person, it was able to file lawsuits on its own behalf.

The court then ordered the government to stop enforcing its contraception rule against Hobby Lobby and sent the case back to the district court. The district court then granted Hobby Lobby a preliminary injunction in July 2013.

In September 2013, the government appealed to the U.S. Supreme Court.

At this same time, two other federal appeals courts ruled against the contraception coverage rule, while another two have upheld it.

U.S. Supreme Court

On November 26, 2013, the Supreme Court accepted and consolidated the Hobby Lobby case along with the Conestoga Wood Specialties v. Sebelius case.

The Court announced its decision on June 30, 2014. The Court found for Hobby Lobby.

Associate Justice Samuel Alito delivered the opinion of the Court. Four justices (Roberts, Scalia, Kennedy, and Thomas) joined him in striking down the DHHS mandate, as applied to closely held corporations with religious objections, and to prevent the plaintiffs from being compelled to provide contraception under their healthcare plans.

The Court based its decision on the RFRA. Using the standard of "strict scrutiny," the Court struck down the contraceptives rule because the DHHS mandate was not the "least restrictive" method of implementing the government's interest.

Consequently, the Court's ruling did not have to address Hobby Lobby's claims under the Free Exercise Clause of the First Amendment to the U.S. Constitution.

Again, just as with the circuit court, the Court found that for-profit corporations could be considered "persons" under the RFRA, noting that that the government was already treating non-profit corporations as persons for this purpose. The Court ruled that "no conceivable definition of 'person' includes natural persons and non-profit corporations, but not for-profit corporations." (Syllabus p. 3)

Alito acknowledged the dissent's "worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws..."

"But," Alito further noted, "Congress, in enacting RFRA, took the position that 'the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.' ...The wisdom of Congress's judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the DHHS contraceptive mandate is unlawful."

WHAT DOES THIS MEAN FOR HUMAN RESOURCES?

First, many employers across this country will now have the choice of whether they are going to cover contraceptives under their health plans ***IF*** they are closely held companies.

Under ObamaCare, as of July 2015, except for the following, all plans must provide at least one method from each of the 18 FDA approved birth control categories at no out-of-pocket costs:

- Religious employer health plans (houses of worship don't have to provide coverage. For all other religious employers, women are given contraceptive coverage through a third party.
- Grandfathered health plans (plans purchased before March 23, 2010)
- Short Term Health Insurance
- Alternative plans offered by insurers that specifically exclude some forms of birth control (each exchange is supposed to offer at least one plan that doesn't provide coverage for controversial contraception).

All non-exempt plans must cover basic birth control, but only some specific plans cover all birth control types. The rule is that each of the 18 FDA approved categories has to be covered by at least one drug or service, not that everything related to contraception must be covered. Plans that were "grandfathered in" before the new ACA protections kicked in may be exempt from offering contraception for free. This includes some group health plans. In addition, short term health insurance does not have to provide contraception.

Second, keep an eye on how this case is used in the future. The potential consequences for the Hobby Lobby case could extend far beyond contraception. Supporters of the contraception requirement say that this decision for Hobby Lobby could weaken health, safety, and civil rights laws. Walter Dellinger, former acting solicitor general said, "for the first time, commercial enterprises could successfully claim religious exemptions from laws that govern everyone else."

Solicitor General Donald B. Verrilli Jr. said that a broad ruling would strengthen religious challenges to laws on vaccinations, minimum wage, overtime, and Social Security.

Fifteen states filed briefs in the Hobby Lobby case arguing that businesses would be able to deny coverage for transfusions, stem cell treatments, and psychiatric care.

Marcia Greenberger, co-president of the National Women's Law Center, said that the Supreme Court has never ruled that companies have religious beliefs and that "it has

never held that religious exercise provides a license to harm others, or violate the rights of third parties."

Louise Melling, ACLU deputy legal director, said religious freedom "gives us all the right to hold our beliefs, but it doesn't give you the right to impose your beliefs on others, to discriminate against others."

In other words, stay tuned and see how the world of benefits will change across the next few years.

XXVI. BREAST FEEDING LAW

Hidden among the thousands of pages in the Patient Protection and Affordable Care Act, signed April of 2010 by President Barack Obama, is a series of provisions that amend the Fair Labor Standards Act (FLSA) to require employers to provide "reasonable" unpaid breaks for nursing employees. The law doesn't specify exactly how many breaks must be provided each workday or even the length of the breaks, but it states that a break must be provided "each time the employee has a need to express the milk."

It also states that employers must provide lactation breaks for up to one year after a child's birth.

In addition to the unpaid break time, the amendment to the FLSA provides that employers must furnish a private location **other than a restroom** to be used by employees to express breast milk. The location must be **"shielded from view and free from intrusion from coworkers and the public."**

Employers with **fewer than 50 employees** are not subject to this amendment if it **"would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business."** Therefore, some small and medium-size employers may not have to comply with the new provisions if they can show compliance would cause them undue burden.

Relationship with other FLSA provisions

This amendment creates some confusion about existing federal law covering employee breaks. While the FLSA doesn't require that employees be given breaks, there are federal regulations indicating that rest periods of short duration (usually five to 20 minutes) are considered compensable work hours. The new FLSA amendment, however, specifically states that employers are not required to compensate nursing mothers during their reasonable break times.

Many states have already passed laws requiring employers to provide nursing mothers with reasonable breaks. Ohio's breastfeeding laws address the right to breastfeed in a place of public accommodation, which only applies to some employers, such as banks and stores. In fact, in March 2009, the Ohio Supreme Court rejected an employee's claim that Ohio's

pregnancy discrimination laws prohibited her employer from firing her for taking unauthorized lactation breaks. Allen v. Totes/Isotoner (decided March 11, 2009).

DOL CLARIFIES NEW LAW

In 2011, the U.S. Department of Labor's Wage and Hour Division (WHD) recently decided against providing detailed regulations because of the wide variety of workplace and employee needs. Instead, the WHD has published a request for information and public comment (RFI) that provides helpful preliminary interpretations of the new break-time amendment.

Paid vs. unpaid break time

The RFI clarifies that nursing break time may be treated the same as other breaks under the FLSA. Specifically, the break time need not be paid unless it's a short break (typically less than 20 minutes) that is considered work time under standard FLSA break-time requirements.

So, if (1) you regularly provide paid short breaks and (2) a nursing employee uses that time plus additional time to express milk, then the excess time over the short break wouldn't have to be compensated. As with standard FLSA unpaid breaks, however, you must completely relieve the employee of all duties for the break time to be unpaid.

Though the FLSA doesn't require employers to permit extended workdays so employees can make up unpaid break time, the WHD encourages you to be flexible and, when practical, allow employees to do so if they desire.

Figure at least 20 minutes

When determining how long a "reasonable break time" is, the WHD consulted with public health officials to better understand nursing moms' needs. The RFI's preliminary guidance suggests that you consider both the frequency and number of breaks a nursing mother might need as well as the amount of time required to express milk.

Factors such as the baby's age and whether solid food is being consumed will determine each mother's needs, but the WHD estimates that nursing moms typically will need **two to three breaks** during an eight-hour shift. The length of time needed for each break also varies. At least 20 minutes should be expected, but the time will vary based on the location of the private facilities as well as the amenities provided in the space (running water, refrigerated storage, and so on).

Space 'shielded from view'

The RFI also discusses the type of facilities you must provide. You aren't required to maintain a permanent, dedicated space for nursing mothers. If it's impossible to provide a separate room, you may create a private space with partitions or curtains, so long as it's "shielded from view" and the mother has a way to indicate occupancy and ensure privacy (whether by locking the door or posting a sign).

Although bathrooms aren't permissible because of sanitary concerns, lounge areas connected to a bathroom may be sufficient so long as there is ample separation between the restroom space and the nursing space. The WHD has asked for specific guidance on the use of locker rooms as nursing space because similar sanitary and privacy concerns exist.

At a minimum, the space must contain a place to sit, a flat surface on which to place the pump, and ideally, an electrical outlet. Additional amenities such as sinks and refrigerators are encouraged but not required. If refrigerated storage isn't available, however, nursing mothers must be allowed to bring personal storage (such as an insulated cooler) for the milk.

Ohio law provides a rebuttable presumption that intoxication causes an industrial injury if the employee tests positive or refuses the test, assuming the employer gave appropriate notice of the test and consequences of refusing it and the employer proves it had "reasonable cause" to test. All of these provisions can be included in your formal policy. In this case, the employer required itself to prove the intoxication directly caused the accident. Had it not done so, the employer would have enjoyed a rebuttable presumption that the intoxication caused the accident.

XXVII. AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) OF 1967

A. Coverage

The ADEA prohibits discrimination in employment by an employer of **20 more employees** for each working day in each of 20 or more calendar weeks in the current or preceding calendar year against individuals who are **40 years of age or older**.

Specifically, 29 U.S.C. §623(a)(1) states:

> It shall be unlawful for an employer - (1) to...discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of** such individual's age.

B. Prima Facie Case

In 1996, the prima facie case plaintiffs were required to establish in ADEA cases changed. In O'Connor v. Consolidated Coin Caterers, Corp., 116 S.Ct. 1307 (1996), James O'Connor was a **56-year-old** employee who was terminated from his job and was subsequently replaced by a **40-year-old** worker. O'Connor sued his employer, Coin Caterers, for age discrimination under the ADEA.

In its defense, Coin Caterers argued that in order to have an ADEA claim, O'Conner must first establish a prima facie case, which meant O'Connor must show that:

1. He was 40 years of age or older,

2. He received an adverse employment action, such as termination,

3. When he received this adverse employment action he was performing his job properly within the legitimate standards established for the position and

4. He was replaced by someone who was under the age of 40 and was therefore not part of O'Connor's protected class.

Coin Caterers claimed that since it had replaced O'Conner with another worker who was 40 years of age, and therefore belonged to the same protected class as O'Connor, it had not violated the ADEA. Therefore, Coin Caterers claimed that O'Connor's ADEA suit must be dismissed.

However, the U.S. Supreme Court held that the ADEA was intended to protect workers due to the fact that they are 40 years of age or older…not because they belong to a certain class of people. **Therefore, the Court held that plaintiffs in ADEA cases are no longer required to show that they were replaced by someone outside of their protected class, or, in other words, by someone who was under the age of 40.**

Instead, the Court stated that plaintiffs such as Mr. O'Connor need only show that they were replaced by someone who is "substantially" or "significantly" younger than they are in order to satisfy this fourth prong of the prima facie cases in ADEA suits. As a result, such a showing will now be sufficient to establish an "inference" that age discrimination has occurred.

Of course, the Court did not state what degree of difference is needed to qualify as discrimination under this "substantially or significantly" younger test. Such a determination remains a question of fact to be decided in each case, or by the jury.

C. Disparate Impact?

Clearly, claims of disparate treatment can be made under the ADEA. However, whether a disparate impact claim can be made under the ADEA is still undecided in some jurisdictions.

In ADEA disparate treatment cases, for instance, employer liability depends on whether the plaintiff's age actually influenced the employer's decision. Making such a determination can be difficult since many employment decisions on the surface seem to be based on age-related factors, when in essence they are not.

For instance, in Hazen Paper Company v. Biggins, 507 U.S. 604 (1993), Walter F. Biggins, the plaintiff, was fired just two weeks before his pension was due to vest. **Biggins was 62 years old and had been with the Hazen Paper Company for 10 years.** The company claimed Biggins was fired for doing business with a competitor, but Biggins claimed he **was fired because his pension was going to vest just two weeks after he was terminated.** Biggins filed suit under ERISA (Employee Retirement Income Security Act) and under the ADEA, claiming that

age discrimination could be inferred in this case since he was fired only two weeks before his pension vested.

However, the U.S. Supreme Court held that the ADEA does not regulate or limit salary or retirement vesting discrimination. In other words, firing an employee for seniority reasons alone does not constitute age discrimination since age and seniority are not necessarily the same thing.

For instance, if Biggins had been hired by Hazen Paper at the age of 22 and was fired two weeks before his pension was due to vest, no ADEA claim would exist since Biggins would have been only 32 years old. However, an ERISA claim may exist on the basis that Biggins was fired in order to prevent him from vesting in his pension, even though an ADEA violation does not.

In this case, since Biggins was over the age of 40, Hazen Paper's action may be evidence of an ADEA violation, but it is not a per se ("by itself") violation. In order to substantiate an ADEA violation, **Biggins must show that age motivated Hazen Paper's decision to fire him.** Merely showing that Biggins was fired since his pension was about to vest is not enough by itself to support an ADEA claim.

The Court then went on to reason that Congress enacted the ADEA to address the inaccurate and stigmatizing stereotypes so often attributed to older workers. The ADEA is not implicated if the employer's decision is wholly motivated by factors other than the plaintiff's age, even if those factors, like vesting for pension benefits, are closely correlated to age. Such decisions are not the result of denigrating generalizations about age, which is what the ADEA was enacted to prevent.

Still, the Court was clear in stating that if age is a factor influencing the employer's decision, the ADEA is implicated. Therefore, if a 75-year-old man is rejected for a job and a 41-year-old man is hired as his replacement, the 75-year-old may still have an ADEA claim if age was a determining factor in making the decision. The mere fact that both individuals were over 40 years old and belong to the same protected class does not necessarily destroy the 75-year old's ADEA claim, since there is still a "substantial" or "significant" difference between the ages of these individuals.

It is important to note that the Court fell short of stating whether or not Biggins could have prevailed on a disparate impact claim since Biggins did not raise such an argument. Consequently, the issue of whether a disparate impact claim can be made under the ADEA still remains undecided.

Proponents of allowing a disparate impact theory in ADEA cases state that some employer practices clearly impact older workers. These proponents argue that Title VII allows for the use of a disparate impact claim, so the ADEA should as well since the purpose of both Acts is to end illegal discrimination. Proponents also argue that allowing plaintiffs to make disparate impact claims under the

ADEA does not guarantee that they will prevail in their action since employers still have the defense of business necessity to rely upon, which is a much lower standard for employers to meet than the BFOQ defense of a disparate treatment claim.

Opponents of applying the disparate impact theory to the ADEA argue that allowing plaintiffs to make such a claim was never Congress' intent. If Congress wanted plaintiffs to be able to use the disparate impact claim in ADEA cases, it would have done so when it passed the Civil Rights Act of 1991. Opponents also argue that the ADEA is different from Title VII. With the ADEA, discrimination within the class itself may exist, such as when a policy impacts employees over 60 years old but not those under that age.

Additionally, these opponents look to the language of the ADEA itself, which specifically states that it does not violate the Act for employers to take any action otherwise prohibited where the differentiation between employees is based on any reasonable factor other than age. (29 U.S.C. § 623(f)(1)) These opponents argue that such language is evidence that Congress never intended for disparate impact claims to be allowed in ADEA suits, since these "reasonable factors other than age" may indeed have a disparate impact against older workers.

In Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161 (7th Cir. 1992), where the employer made certain cuts in benefits which adversely affected older workers, the court rejected the plaintiff's use of a disparate impact claim in an ADEA case. **The court reasoned that it is impossible to reduce the costs of benefits given to employees without making deeper cuts in the benefits of older workers. Such a result is unavoidable**. Therefore, the court reasoned that if plaintiffs were allowed to present disparate impact claims under the ADEA, every time an employer tries to reduce its labor costs it will be dragged into federal court.

Other courts have held differently and agree that disparate impact claims should be permitted in ADEA cases. Consequently, this aspect of the law continues to be an undecided area and a split of authority among various jurisdictions.

D. Reduction in Force

Terminating a competent older employee by itself when an employer is making economic cuts is not sufficient to establish a prima facie case.

Retention of a younger person in a position plaintiff was qualified to perform also does not establish a prima facie case.

E. Defenses to ADEA

If a bona fide occupational qualification (BFOQ) exists, then an employer may discriminate on the basis of age. Again, the BFOQ must be reasonably necessary

to the normal operation of the business and the position (e.g., physical endurance, high degree of coordination, dexterity, or strength).

If the employer is observing the terms of a bona fide seniority system and/or bona fide employee benefit plan, then no discrimination under the ADEA exists.

The ADEA specifically mentions **two instances** where age discrimination will not be found to exist.

- First, the ADEA states that it shall not be unlawful to discharge or otherwise discipline an employee for **good cause** (29 U.S.C. § 623(f)(1)).

- Additionally, the ADEA specifically states that it is not unlawful to take any action otherwise prohibited where the differentiation is based on any reasonable factors other than age (29 U.S.C. § 623(f)(1)) (e.g., poor job performance, reorganization, position eliminated, etc.)

Further, although mandatory retirement policies are prohibited by the ADEA, unless a BFOQ is granted, as in the case of airline pilots, employers may also force their executive employees to retire at age 65 under 29 U.S.C. § 631(c)(1) of the ADEA if:

- The employee was a bona fide **executive** (holding a high policy-making position) for the two-year-period preceding retirement, and

- The employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan, or a combination of these, from the employer totaling in the aggregate of **$44,000 or more per year**.

XXVIII. 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 altered the way Title VII and its related statutes (i.e., ADA, PDA, etc., collectively hereafter referred to as "Title VII.") would be enforced and how its cases would be tried in many regards. Even though its impact has been mentioned already in many of the previous sections of this text, it is useful to review a compilation of its more important aspects.

A. Jury Trials

Before the CRA of 1991 was enacted, a judge decided Title VII cases; the plaintiff had no right to a jury trial. Employers therefore enjoyed an advantage in such a setting since judges tend to be less swayed by emotional appeals. Instead, judges tend to more strictly follow the wording of the statute in reaching their decisions. Since plaintiffs are now entitled to have their Title VII cases decided by a jury, even though the technical requirements of the law must still be adhered to, the door is now open for more emotionally charged verdicts, which tends to

handicap employers.

B. Compensatory And Punitive Damages

1. Limitations On Damages

Prior to the CRA of 1991 becoming law, employees could only recover what are referred to as "make whole" remedies, which basically allowed the courts to restore the aggrieved employees to the same situation they would have been in had the discriminatory act never occurred. Typically, plaintiffs could receive back pay, front pay, attorney's fees, and a court order to remedy the situation, such as ordering the reinstatement or instatement of the employee.

Under the Civil Rights Act ("CRA") of 1991, if an employer is found to have intentionally discriminated against an individual, that individual may receive "compensatory" damages, which includes awards for any future monetary losses, emotional suffering, inconvenience, mental anguish, and loss of enjoyment of life.

If the plaintiff can show that the employer acted with malice or reckless indifference towards the law or the plaintiff's rights, which is now interpreted as having intentionally committed these discriminatory acts, the jury may award punitive damages.

Still, Congress placed a limit on the amount of compensatory and punitive damages plaintiffs can receive in Title VII cases. These "caps" are set according to the number of employees an organization has under the following amounts:

- Fifteen or more and fewer than 101 employees: $ 50,000
- More than 100 and fewer than 201 employees: $100,000
- More than 200 and fewer than 501 employees: $200,000
- More than 500 employees: $300,000

However, since the CRA of 1991 was passed, the question has been raised as to whether Congress meant for these caps to apply for each company or for each plaintiff. Obviously, how this difference is interpreted could make a substantial economic difference to the employer and the plaintiffs.

2. Damage Cap Apply To Each Plaintiff … Not Each Company

In EEOC v. Moser Foods d/b/a L.J.'s Pizza, D.C. AZ, No. 94-2516 (1997), the EEOC filed a sexual harassment suit against the employer on behalf of six plaintiffs. The EEOC prevailed.

However, in assessing damages, the employer contended that the limits on damages that can be awarded should apply to the EEOC, and thus all of the plaintiffs collectively and not individually.

The court rejected the employer's argument. The court instead ruled that the cap on damages in Title VII suits must apply to each aggrieved individual. Otherwise, each plaintiff would be deprived of his or her true statutory limits.

3. Front Pay Not Covered By Damages Cap

In Pollard v. E.I. du Pont de Nemours, No. 00-763 (U.S. June 4, 2001) Sharon Pollard sued her former employer, E. I. du Pont de Nemours and Company (DuPont) for illegal sexual harassment hostile work environment in violation of Title VII of the Civil Rights Act of 1964. The trial court found that Pollard was subjected to illegal sexual harassment by a co-worker and awarded Pollard $107,364 in backpay and benefits, $252,997.00 in attorney's fees, and, $300,000 in compensatory damages, which was the maximum amount allowed under the Civil Rights Act of 1991 statutory cap. Pollard also requested front pay, but this request was declined. The court held that front pay (money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement) was subject to the damages cap.

Pollard appealed to the U.S. Supreme Court. The Court held that front pay is **not** an element of compensatory damages under §1981a and thus is **not subject** to the damages cap imposed by §1981a(b)(3), or the Civil Rights Act of 1991.

("Front pay" is calculated from the date of the judgment to the date the employee is reinstated. In lieu of reinstatement, such as when there is an ongoing hostility between the employee and the employer, the award may cover up to the time the employee planned on retiring from the company.)

C. The Kolstad Case

In Kolstad v. American Dental Assoc., 119 S. Ct. 2118 (1999), Carole Kolstad was one of two employees being considered for a promotion in the Washington D.C. office of the American Dental Association. Instead of promoting Kolstad, the male employee was chosen. Kolstad claimed she was not given the promotion because she was a woman. She then sued her employer for gender discrimination under Title VII.

Kolstad won her case and the jury awarded her $52,718.00 in back pay. However, the court refused to instruct the jury that they could also award Kolstad punitive damages since it did not feel that the employer's behavior was "egregious" or "outrageous" enough to warrant such damages.

Kolstad appealed this decision and the case eventually went to the U.S. Supreme Court. The Supreme Court agreed with Kolstad and held that the lower court should have instructed the jury of its right to award punitive damages in this Title VII case.

Specifically, the Court's ruling had two major holdings for employers:

1. "Malice" or "Reckless Indifference" Means "Intentional"

The Court reiterated that in order to be entitled to receive punitive damages in a Title VII case, the plaintiff must show that the employer acted with "malice" or "reckless indifference" to the law.

However, contrary to popular belief by many courts, these terms **do not** mean that the plaintiff has to show that the employer's actions were **"egregious" or "outrageous."**

Instead, the plaintiff need only show that the employer intended to violate the law. **In others words, the plaintiff must show that the employer knew its actions might be illegal…but went ahead and did it anyway.**

Therefore, punitive damages will not be permitted in disparate impact cases…only in disparate treatment suits.

In disparate treatment lawsuits, punitive damages are intended to punish those employers who "knowingly" break the law.

Acting in an egregious or outrageous manner is no longer a requirement.

CONSEQUENTLY, THE STANDARD EMPLOYEES HAVE TO MEET IN ORDER TO OBTAIN PUNITIVE DAMAGES HAS JUST BEEN LOWERED.

2. Acting Contrary To The Employer's Good Faith Efforts

However, the Court also gave some added protections to employers to help protect themselves from punitive damages.

The Court went on to state that even if a plaintiff can show that a company employee, who is typically a supervisor or manager, knew he/she was probably breaking the law, and thus violating the plaintiff's rights, but did it anyway, the employer can still avoid any liability for paying punitive damages if it can show that perpetrator of these illegal actions acted **"contrary to the employer's good faith efforts to comply with Title VII."**

Of course, the question to ask now is

"WHAT ARE THE GOOD FAITH EFFORTS EMPLOYERS MUST UNDERTAKE TO PROTECT THEMSELVES FROM PUNITIVE DAMAGES?"

Specifically, the Court said employers MUST:

- **Adopt and Institute Anti-Harassment and Anti-Discrimination Policies**
- **Adopt An Effective Grievance Procedure For Employees To Report Their Concerns Over Potential Illegal Harassment and Discrimination And**
- **Employers Must TRAIN Their Employees About Illegal Discrimination Under Federal Law.**

D. Application Of The Law To American Workers Abroad

Before the CRA of 1991, Title VII did not apply to American workers employed by American-owned or American-controlled companies located beyond the territorial jurisdiction of the U.S. However, the CRA of 1991 now specifically provides such workers with the protections of Title VII and its related statutes. Still, the enforcement of such laws cannot violate the laws of the host country.

E. ADEA Statute Of Limitations

Before the CRA of 1991 was passed, civil suits based on the Age Discrimination in Employment Act of 1967, or the "ADEA," had to be filed within two years of the illegal act occurred, or within three years if the illegal act was "willfully" committed. However, the CRA of 1991 now requires individuals to file their ADEA civil suits within 90 days of receiving their "right to sue" letters from the EEOC.

XXIX. NO "TENDER BACK DOCTRINE" EXISTS FOR TITLE VII OR EPA CLAIMS

Under the common law doctrine, when a party seeks to avoid a contract on the grounds that it was obtained by fraud, duress, or the like, she must first "tender back" any benefits received under the contract. Under the Sixth Circuit's ruling, employees who receive severance in exchange for a release of claims but later allege that the release was obtained under duress, do not need to return the severance pay prior to instituting a lawsuit under Title VII or the EPA. Instead, if their claims are successful, the severance pay will be deducted from any damages ultimately recovered.

In Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998), the U.S. Supreme Court held that an ADEA plaintiff does not have to tender back (offer to return) any consideration paid to the employee in settling a claim as a condition to challenge that settlement in court. Now, the Sixth Circuit (in a 2-1 decision) has extended that same ruling to Title VII and Equal Pay Act (EPA) claims.

In McClellan v. Midwest Machining, No. 17-1992 (Sixth Cir 08/16/2018) Jean McClellan was terminated by her employer, Midwest Machining. Upon her termination, she was offered $4,000.00 in exchange for signing a severance agreement.

McClellan signed the severance agreement and Midwest Machining paid her the $4,000.00.

However, McClellan later felt that she'd been "blindsided" and hired a lawyer to challenge the agreement. McClellan sued her former employer under Title VII and the Equal Pay Act.

After McClellan filed her lawsuit, her lawyer sent a letter to Midwest saying she was rescinding the severance agreement and enclosed a $4,000.00 check. Midwest Machining returned the check, saying there was no legal basis for the rescission.

At the trial, the district court found that there were genuine disputes of material facts about the enforceability of the severance agreement.

> "[S]he felt 'bullied,' did not feel free to leave the room, and did not feel like she could ask any questions." The boss "insisted [McClellan] sign the agreement and forcefully said if she wanted any money after her abrupt termination, she would need to sign the agreement; she had no time to consider whether to sign the release, and certainly no time to consult with a lawyer."

Still, the trial court granted summary judgment for the employer on the grounds that McClellan's claims were barred by the common law "tender-back doctrine," which requires the party to a contract to return any monies paid to them to bind the contract before proceeding with any kind of legal action that violates the agreement. The trial court concluded that even though a jury could find that McClellan did not enter into the agreement knowingly and voluntarily, McClellan did not tender back the $4,000.00 before she filed her lawsuit.

McClellan appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit reversed the lower court's decision and found for McClellan. The Sixth Circuit held that, as a matter of law, the tender-back doctrine **does not apply** to claims brought under Title VII and the Equal Pay Act..

The Sixth Circuit relied largely on the Supreme Court's reasoning in Oubre. The Court in Oubre reasoned that "contracts tainted by mistake, duress, or even fraud are voidable at the option of the innocent party."

However, the Court in Oubre also reasoned that "before the innocent party can elect avoidance, she must first tender back any benefits received under the contract." But the federal statute in Oubre, the ADEA in particular, allows for the settlement of such claims and does not require the employee to tender back any monies paid by the employer.

The Sixth Circuit then found that the U.S. Supreme Court's reasoning regarding the ADEA also applies to Title VII and the EPA, so the employee was under no obligation to tender back the $4,000.00 paid to her before filing her lawsuit.

In this case, the Sixth Circuit gave considerable weight to the fact that the employee was under considerable "economic duress."

> "[W]e worry that requiring recently-discharged employees to return their severance before they can bring claims under Title VII and the EPA would serve only to protect malfeasant employers at the expense of employees' statutory protections at the very time that those employees are most economically vulnerable."

The court went onto say:

"The same (need to vindicate civil rights) could be said in the Title VII and EPA contexts, which confront the same economic realities; indeed, employees discharged following instances of sex discrimination (and especially those fired because they are pregnant) are just as likely to need their severance funds for living expenses as are employees discharged following any other form of discrimination."

WHAT DOES THIS MEAN FOR HR?

Without a doubt, how an organization delivers a contract to an employee is just as important as what it says.

Giving employees a chance to look the contract over, to get the advice of an attorney and to ask questions in a non-threatening setting are all important rules to follow when they are asked to enter into any type of employment agreement.

XXX. WHEN ARE SEPARATE EMPLOYERS JOINT EMPLOYERS FOR TITLE VII PURPOSES?

In Wittenbrook v. Electronics Recycling Services, Inc., 2018-Ohio-208 (January 8, 2018), Kristen Wittenbrook started working for Electronic Recycling Service, Inc. (ERS Ohio), in Bellaire in May 2012. Within months of her hire, she claimed that a coworker sexually harassed and intimidated her. She reported the incident to ERS Ohio management, including its senior vice president of operations, Daniel Brown.

Wittenbrook claimed that Brown failed to investigate her allegations and instead mocked her by displaying sexual harassment posters and portraying her as a drama queen to other employees. He also disciplined her for including a nonemployee consultant on an e-mail in which she referenced the harassment and ultimately terminated her employment.

In May 2013, Wittenbrook filed a lawsuit against ERS Ohio and Brown alleging claims of sexual harassment, retaliatory discharge, and tortious (wrongful) interference with employment. In July 2015, she amended her complaint to add JSS Developments, Ltd., as a defendant. JSS is a business headquartered near Toronto, Canada, that has an ownership

interest in ERS Ohio as well as other recycling facilities throughout the United States and other countries, including the Bahamas, China, and Mexico. Wittenbrook's amended complaint alleged that ERS Ohio and JSS were joint employers.

The evidence Wittenbrook presented in support of her assertion that JSS should be treated as a joint employer with ERS Ohio included the following:

- An individual named Sam Kazemeini was the president of both ERS Ohio and JSS.
- Nearly all of the funding ERS Ohio received for start-up and operational costs came from JSS.
- JSS's global financial controller prepared profit and loss statements for ERS Ohio.
- JSS and ERS Ohio employees all used the same e-mail domain name (ers-international.com).
- The noncompete agreement Wittenbrook signed when she was hired described the agreement as being between her and a business located near Toronto that had the same address as JSS's corporate office, and the agreement stated that it was to be interpreted in accordance with the laws of Canada.
- When a fire destroyed part of the ERS Ohio facility, the check for the insurance proceeds paid for the damage was made out to JSS.
- JSS was made aware of Wittenbrook's claims soon after she first reported them to ERS Ohio.
- At trial, Wittenbrook presented evidence that Brown was concerned that her allegations would bring negative scrutiny on ERS Ohio by JSS.
- The decision to fire Wittenbrook was made by Brown and Kazemeini.

The matter proceeded to a jury trial on April 12, 2016. The jury decided in favor of Wittenbrook on her retaliatory discharge and hostile work environment claims and found that JSS and ERS Ohio were joint employers. Wittenbrook was awarded $700,000 in economic damages, $250,000 in general damages, and $1 in punitive damages against each of the three defendants.

ERS Ohio and Brown didn't appeal the jury's verdicts against them. However, JSS appealed the lower court's ruling that it was a joint employer with ERS Ohio.

In its decision, the court of appeals noted that the concept of joint-employer liability hasn't been discussed at length in Ohio case law, and it was therefore appropriate to look to federal employment law jurisprudence. The court went on to state, "Two entities may be considered a single joint employer if, upon review of their inter-corporate relationship,

one exercises a degree of control that exceeds the control normally exercised by a parent corporation over its separate and distinct subsidiary corporation."

The four primary factors that courts look to when addressing joint-employer liability are:

1. **Interrelations of operations;**

2. **Common management;**

3. **Centralized control of labor relations; and**

4. **Common ownership and financial control.**

Applying those factors to the relationship between ERS Ohio and JSS, the court ruled that there was sufficient evidence of interrelations of operations to support a joint-employer finding. The evidence on this element included the fact that JSS's global financial controller keeps records relating to the finances of both JSS and ERS Ohio; the general manager for ERS Ohio works in the office of another subsidiary, ERS Chicago; and Brown is in daily contact with JSS on a variety of matters, ranging from the current market prices for metals, company policy and compliance issues, and new business opportunities, to employee issues.

With regard to the second element, common management, the court noted that Kazemeini is the president of both companies, and there is evidence that JSS managers oversee business operations at ERS Ohio. Regarding the centralized control of labor relations, the court observed that the decision to terminate Wittenbrook was made by both Brown and Kazemeini. The court also noted that her noncompete agreement specified that it was governed by Canadian law.

Finally, regarding common ownership and financial control, the court stated that ERS Ohio is entirely dependent on JSS for funding, and when a fire destroyed part of the ERS Ohio facility, the insurance check was made out to JSS.

Based on the totality of that and other evidence, the court of appeals concluded there was sufficient proof to support the jury's conclusion that JSS acts as a single joint employer with ERS Ohio.

WHAT DOES THIS MEAN FOR HR?

The relationships between parent and subsidiary or affiliated businesses are often complex. Careful planning usually goes into how to set up business ventures and operate them in ways that give each company maximum advantages for business, tax, liability, and other purposes. However, over time, the strategies behind the reasons for setting up business entities differently sometimes fade, and the degree of separateness between two or more entities can become blurred. If it's important to your business to avoid being deemed a joint employer, you should be aware that a court may rule against you on the issue if you don't take the proper steps to preserve the requisite

degrees of separateness. That, in turn, could result in increased liability for employment-related legal claims.

XXXI. NO "MAGIC WORDS" NEEDED TO FILE A TITLE VII CLAIM FOR RETALIATION

In Mumm v. Charter Twp. of Superior, Sixth Cir. No. 16-2142, 2018 U.S. App. LEXIS 29505 (Mar. 2, 2018), Susan Mumm worked for Superior Township in Michigan in multiple capacities, such as an accountant, an HR administrator, and an IT administrator. On February 14, 2014, she received a verbal and written reprimand and was suspended for one day without pay for performance-related reasons. She disagreed with the discipline and filed a complaint with the township.

On February 19, 2014, three township officials met with Mumm to discuss her complaint. During the meeting, the parties agreed to decrease Mumm's workload without decreasing her pay. One of the township officials, Ken Schwartz, proposed that she withdraw her complaint and that they "move on from this."

Mumm requested another meeting with the township officials to discuss Schwartz's request that she withdraw her complaint. At that meeting, she complained about a pattern of mistreatment. She informed the officials that she would withdraw her complaint only if the township granted her an immediate $10,000 pay increase because she was "tired of being underpaid for all these years in relation to Keith Lockie," a male coworker whose job duties were similar to hers.

When the township officials refused, Mumm alternatively proposed that she resign with one year's severance pay. **She informed the officials that she had consulted a labor attorney and intended to file a lawsuit "about this."**

After the meeting, the township officials met privately and agreed that they had lost trust in Mumm and could no longer work with her. That same day, the township suspended Mumm with pay and began the process of terminating her employment. The board of trustees fired her on April 3, 2014.

Mumm filed a civil rights complaint alleging violations of the Equal Pay Act (EPA), Title VII of the Civil Rights Act of 1964, and Michigan's non-discrimination statute. She claimed that the township paid her less than Lockie for substantially similar work because of her sex and retaliated by firing her when she complained about the alleged sex discrimination.

The district court granted summary judgment in favor of the township.

Mumm appealed to the Sixth Circuit, challenging only the district court's denial of her retaliation claims under federal and Michigan law.

Interpreting all the facts and making all reasonable inferences in Mumm's favor, the Sixth Circuit reversed the trial court's ruling and held that a jury could find her threat

to sue over the pay disparity was clear enough to qualify as protected activity under Title VII.

Although the court admitted that Mumm did not use the phrase "sex discrimination" during her meeting with the township officials, it ultimately "made no difference" because she wasn't required to use any magic words to engage in activity protected by Title VII.

An employee's objection to an employment practice is protected activity if her supervisors "should have reasonably understood" that she was making a complaint of sex discrimination.

In this case. the township officials should have known that Mumm was charging the township with sex discrimination because she told them that she believed she should be paid as much as Lockie and would sue if they did not rectify the alleged pay discrimination. The township officials also knew that she was an at-will nonunionized employee, which meant that sex discrimination was the only viable basis for a lawsuit over the pay disparity between her and Lockie.

The court also held that Mumm created a triable issue of fact over whether the township's proffered reason for firing her, which was that the officials "lost trust" in her, was a pretext, or excuse, for retaliation. Specifically, the township officials assured Mumm that she would not be fired over her performance-related issues, and Schwartz told her before the final meeting that the township could "move on" if she withdrew her complaint about the suspension.

A jury could therefore agree with Mumm that the true reason for her termination was her threat to sue the township, not a lack of trust.

The court's Title VII analysis applied equally to Mumm's retaliation claim under Michigan civil rights law.

WHAT DOES THIS MEAN FOR HR?

This case is a useful reminder that an employee doesn't need to use certain magic words to engage in activity protected by Title VII. If it's a close call, it may be wise to treat the employee's complaint as protected activity. Additionally, you should ensure that you don't retaliate against employees who make complaints.

XXXII. CIVIL RIGHTS ACT OF 1866: SECTION 1981

A. Equal Rights Under Contracts

In 1866, Congress passed 42 U.S.C. § 1981, or simply § 1981, which was part of the Civil Rights Act of 1866. The purpose of the Act was to effectuate the rights supposedly given to the newly freed slaves under the Thirteenth Amendment of the U.S. Constitution.

Specifically, § 1981 states that:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens..."

As a result, today, in addition to Title VII's prohibition against race discrimination, § 1981 also makes it unlawful to discriminate against individuals due to their race regarding their right to contract with others, which includes the employment relationship.

Section 1981 applies to all private and public employers, including state and local governments, except for employees of the federal government.

However, §1981 differs from Title VII in a number of ways.

- First, it is much broader than Title VII in that it applies to nonemployment contracts as well as to the employment setting.

- Also, § 1981 applies to all persons, whereas Title VII applies only to employers who employ 15 or more employees for at least 20 weeks out of the year.

- However, § 1981 is also much more narrow than Title VII since it applies only to race, whereas Title VII also covers sex, national origin, and religion.

- Additionally, § 1981 has a two-year statute of limitation for filing claims, whereas the statute of limitations for filing a Title VII claim with the EEOC is either 180 or 300 days, depending on whether the violation occurred in a work-sharing state.

- Next, plaintiffs can file their § 1981 claims directly in federal court since no administrative procedural requirements exist as do in Title VII actions. (i.e., A plaintiff in a Title VII action must file a charge of discrimination with the EEOC before filing a private civil suit.)

- Also, no limit on punitive or compensatory damages exists under § 1981 as do under Title VII.

All three theories of discrimination apply to § 1981 actions, which include disparate treatment, systemic disparate treatment, and disparate impact causes of action. The U.S. Supreme Court has also held that § 1981 disparate treatment claims are decided in the same manner as Title VII disparate treatment claims.

B. All Races Are Covered By § 1981

In McDonald v. Santa Fe Trail Transportation Company, 427 U.S. 273 (1976), two white employees were discharged from their employer for stealing company property, even though a black employee who was charged with the same offense was not discharged. The two white plaintiffs sued for race discrimination under Title VII and § 1981.

The Court first held that the two white employees could sue for race discrimination under Title VII since the plain language of the Act specifically prohibits discrimination against "any individual" due to "such individual's race, sex, religion, color, or national origin." However, the Court then examined the question of whether these white employees were also covered by § 1981. The Court held that § 1981 covered white and black citizens alike.

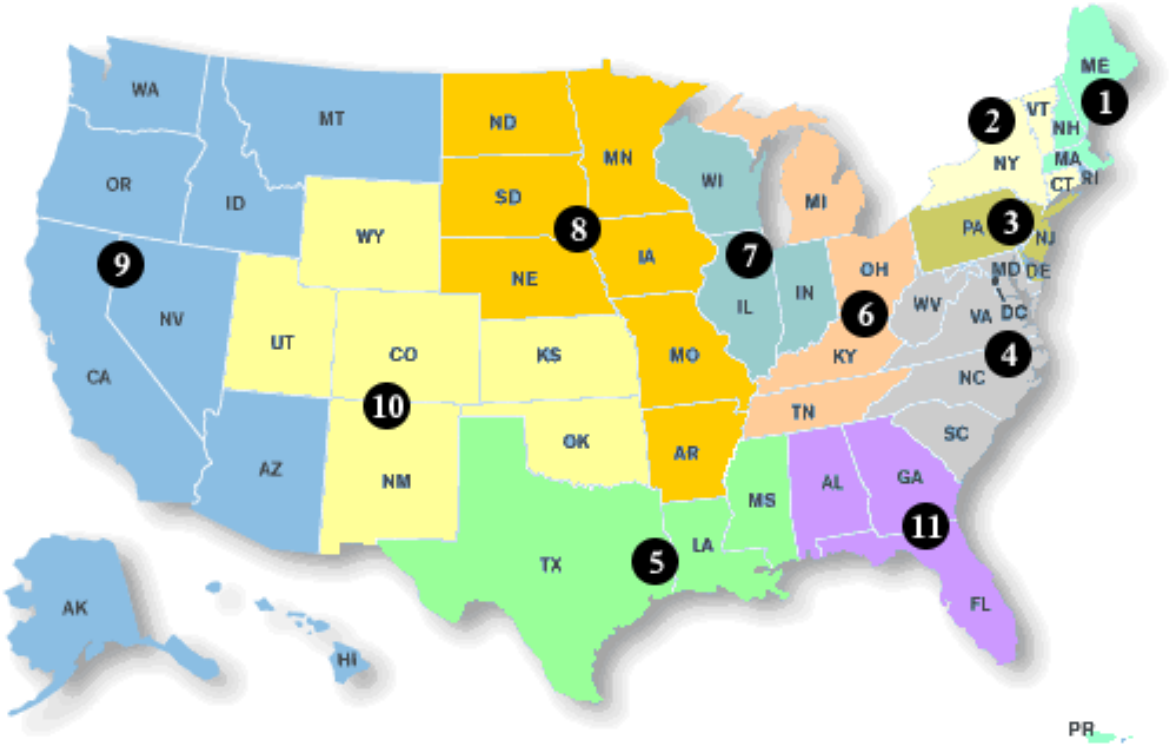
The Court reasoned that § 1981 granted the same rights to all persons as "enjoyed by white citizens," which includes white citizens. The Court then looked to § 1981's legislative history where Senator Trumbull, author of the bill, said on the Senate floor that "this bill applies to white men as well as black men." Therefore, the Court held that § 1981 covered both white and black citizens alike. Consequently, § 1981 now applies to all races.

C. What Is A "Race" Under § 1981?

In Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987), the U.S. Supreme Court engaged in a lengthy discussion regarding the meaning of the term "race" under § 1981. The Court concluded that § 1981 protects those who are subject to differential treatment solely because of their ethnic or cultural backgrounds or physical characteristics, whether such discrimination would be classified as being racial in terms of modern scientific theory or not. Following that reasoning, the Court held that an Arabian plaintiff could indeed bring suit under § 1981.

Based on this definition of "race" for § 1981 actions developed by the U.S. Supreme Court in Al-Khazraji, the courts have also held that such classifications of people as Mexicans and Hebrews constitutes a "race" of people under the Act.

FEDERAL CIRCUIT COURTS



Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.

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Scott has been named one of Business First's 20 People To Know In HR, CEO Magazine's 2008 Human Resources "Superstar," a Nationally Certified Emotional Intelligence Instructor and a SHRM National Diversity Conference Presenter in 2003, 2006, 2007, 2008 and 2012.

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