



United States Equal Employment Opportunity Commission

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Race and Color Discrimination in the Workplace

Can you tell ...?



Can you tell, just by looking at a person:

- what that person believes?
- that person's capabilities?
- that person's values?



Can you tell from a person's attire, speech, or mannerism:

how honest is that person?

how collegial is that person?

the work ethics of that person?

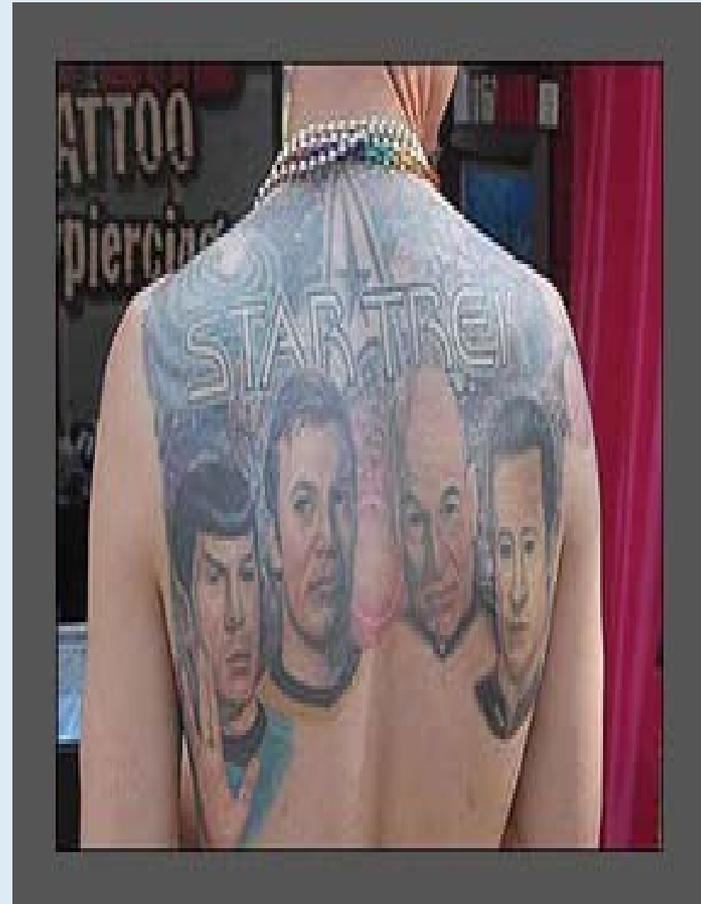


Have you ever determined your level of closeness, the type of interaction you will have, or when to use your well developed avoidance skills towards a person based solely upon:

What you have heard about the person?

Your perception about the person?

Your pre-determined image of who/what that person is?



YES!



You avoid the office gossipier based upon the last time he cornered you for two hours to share his theory that the owner was secretly plotting to sell the company



You decide to get close to the senior associate because you hear how articulate she is and you see how much the partners respect her



You make a decision whether to give money to the very able-bodied looking young man who is panhandling at the traffic light based upon what you think about him.



You have a high level of trust in the plumber who shakes your hand, looks you in the eyes, and says, in a very sincere tone, “I will have the job done in under one hour.”



The process we use to determine how we relate to others follows us into our workplace

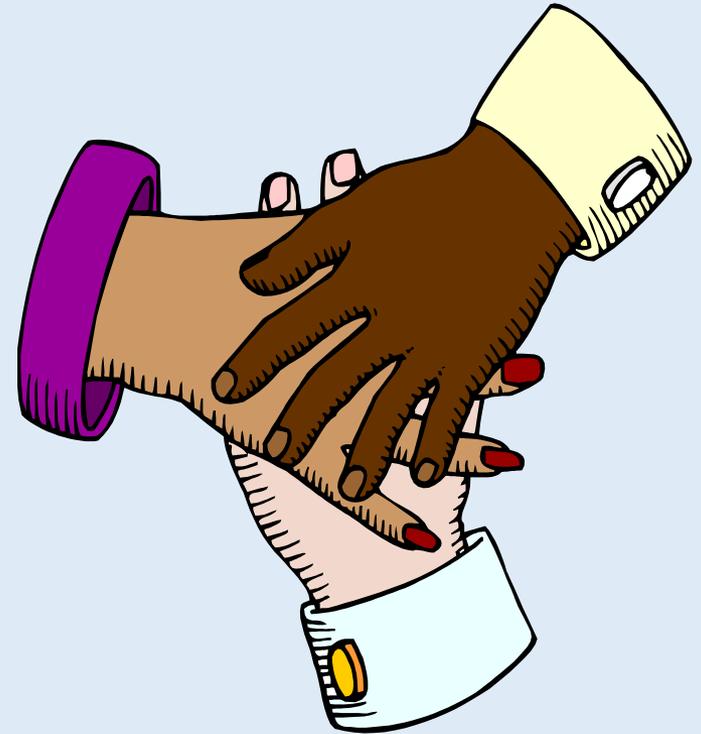


We establish relationships, make decisions and react to situations based upon our beliefs, our perceptions, and our judgment



Race and Color Discrimination in the Workplace – Presentation Overview

- ❖ How workplace relationships and decisions are made
- ❖ How to identify and address any resulting issues of race and color discrimination in the workplace



AGENDA

- Legal Overview of Employment Discrimination
- Understanding Race and Color Discrimination
- Laws, Policies, Guidance and Enforcement of Race and Color Discrimination in Employment
- Best Practices and Benefits of Addressing and Preventing Race and Color Discrimination

LEGAL OVERVIEW

EMPLOYMENT DISCRIMINATION

The Civil Rights Act of 1964

“An idea whose time has come.”

A landmark achievement in the effort to end

- Segregation
- Discrimination



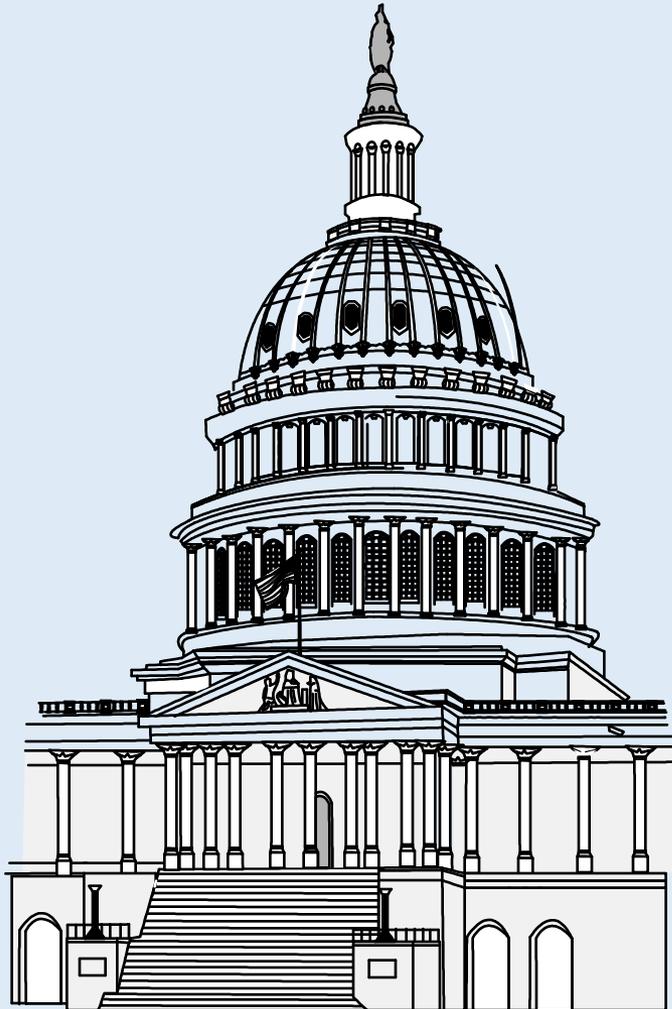
TITLE VII

Title VII's primary aim was to prohibit race discrimination in employment

Addressed the “*moral crisis of our time.*”

- Blacks relegated to unskilled & semi-skilled work
- High black unemployment
- Poverty gap

Creation of the Equal Employment Opportunity Commission



Title VII of the Civil Rights Act of 1964 created the EEOC as the key civil rights agency responsible for enforcing federal laws that prohibit employment discrimination

TITLE VII

Title VII prohibits discrimination based on

Race



Color



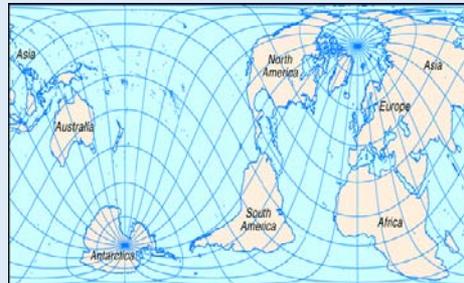
Religion



Sex



National Origin



Who is an Employers under Title VII?

- Private Employers
- Educational Institutions
- Labor Organizations
- Joint Labor-Management Apprenticeship and Training Committees (Title VII & ADA)
- Employment Agencies Serving Covered Employers
- State and Local Governments
- Federal Agencies (Administrative Hearings)

Other Laws Enforced by the EEOC

- Age Discrimination in Employment Act of 1967 (ADEA)
- Equal Pay Act of 1963 (EPA)
- Title I of the Americans with Disabilities Act of 1990, as amended (ADAAA)
- Genetic Information Non-Discrimination Act of 2009 (GINA)

Title VII

**Race and Color
Discrimination**

Title VII Prohibition against Race and Color Discrimination in Employment

It shall be an unlawful employment practice for an employer -

- (1) to **fail or refuse to hire or to discharge** any individual, or otherwise to discriminate against any individual with respect to his **compensation, terms, conditions, or privileges** of employment, because of such individual's **race, color**, religion, sex, or national origin; or
- (2) to **limit, segregate, or classify** his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's **race, color**, religion, sex, or national origin.

Components of Title VII

Two Parts:

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

First part requires:

- Equal Access to Jobs (hire, termination, discharge)
- Equal treatment once employed

Components of Title VII

(2) to **limit, segregate, or classify** his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's **race, color**, religion, sex, or national origin.

Second part requires:

- Equal Opportunity for Job Success (limit, segregate, classifications)
- Level playing field

Who is
Protected under
Title VII?

Who is Protected under Title VII?

Existing Employees; or

Applicants for
Employment

Who is Protected under Title VII?

Any Race

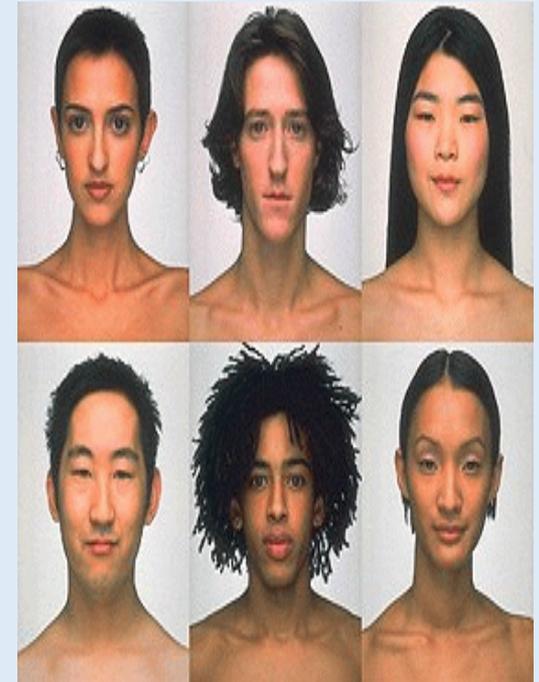
Any Color

**What is Race?
What is Color?**

**Title VII contains
no definition of
“race” or “color”**

Race

- Ancestry
- Physical characteristics – e.g., hair
- Cultural characteristics – e.g., names, or accent / manner of speech
- Perceived race – appearance, attire, speech, mannerisms, past time, hobby, beliefs
- Association or perceived association
- Race “plus”
- Intersection of protected bases – e.g., race/religion
- “Reverse” race discrimination



Color



Distinction based on

- skin color
- pigmentation
- complexion
- shade; or
- tone

Color includes

- interracial and
- intra-racial

differences in skin color

Same Standard of Proof Required

- Unlike some courts, the EEOC applies the same standard of proof to all race discrimination claims, regardless of the victim's race or the type of evidence used.
- In either case, the ultimate burden of persuasion remains always on the plaintiff.

Who is Protected under Title VII?

VICTIMS OF RETALIATION

- An individual who engages in protected activity is protected by law

An employer may not take adverse employment action against an employee because the employee:

- complains of discrimination
- complains of harassment
- participates in an investigation of discrimination or harassment
- assists another person in taking any of these actions

Who is Protected under Title VII?

ASSOCIATION

Equal employment opportunity cannot be denied because of marriage to or association with an individual of a different race

Who is Protected under Title VII?

MEMBERSHIP

Membership in or association with ethnic based organizations or groups

Who is Protected under Title VII?

ATTENDANCE or PARTICIPATION

Attendance or participation in schools or places of worship generally associated with certain minority groups

Who is Protected under Title VII?

PRACTICES and PAST-TIME

Cultural practices or characteristics often linked to race or ethnicity, such as cultural dress or manner of speech, as long as the cultural practice or characteristic does not materially interfere with the ability to perform job duties.

Who is Protected under Title VII?

PERCEIVED RACE - Based upon:

- Appearance
- Mannerisms
- Actions
- Speech
- Attire
- Beliefs

**Employment
Activities in which
Discrimination
Occurs**

Employment Activities in which Discrimination Occurs

- Recruiting, Hiring, Transfer, and Promotion
- Compensation and Other Employment Terms, Conditions, and Privileges
- Job Assignment and Classification
- Discipline and Discharge
- Retaliation

Title VII also prohibits employment decisions based on stereotypes and assumptions about:

- abilities;
- traits; or
- performance

of individuals of certain racial groups.

Types of Discrimination

Types of Discrimination

Title VII prohibits both:

- Intentional discrimination; and
- Neutral job policies that disproportionately exclude minorities and that are not job related

Disparate Treatment

- Intentional Discrimination
- Was race a motivating factor?
- “Smoking gun” is rare

Disparate Treatment

- **Circumstantial evidence key –**
 - **Oral or written statements, including code words**
 - **Comparative treatment evidence**
 - **Background and contextual evidence**
 - **Relevant employment policies**
 - **Statistics – both to assess pretext and to determine if there might be a “pattern or practice” of discrimination**
 - **EEOC SEP Systemic Focus**

Disparate Impact

- Theory aimed at “practices fair in form, but discriminatory in operation” in that they operate as “built-in headwinds [for a protected class] and are unrelated to measuring job capability.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).
- Three analytical steps:
 - Does policy or practice have significant disparate impact?
 - If so, has the employer proven that the policy or practice is job related and consistent with business necessity?
 - Is there a less discriminatory alternative that meets the business need?

Race-Related Characteristics and Conditions

Immutable Characteristic:

Discrimination on the basis of an immutable characteristic associated with race, even though not all members of the race share the same characteristic

e.g. -

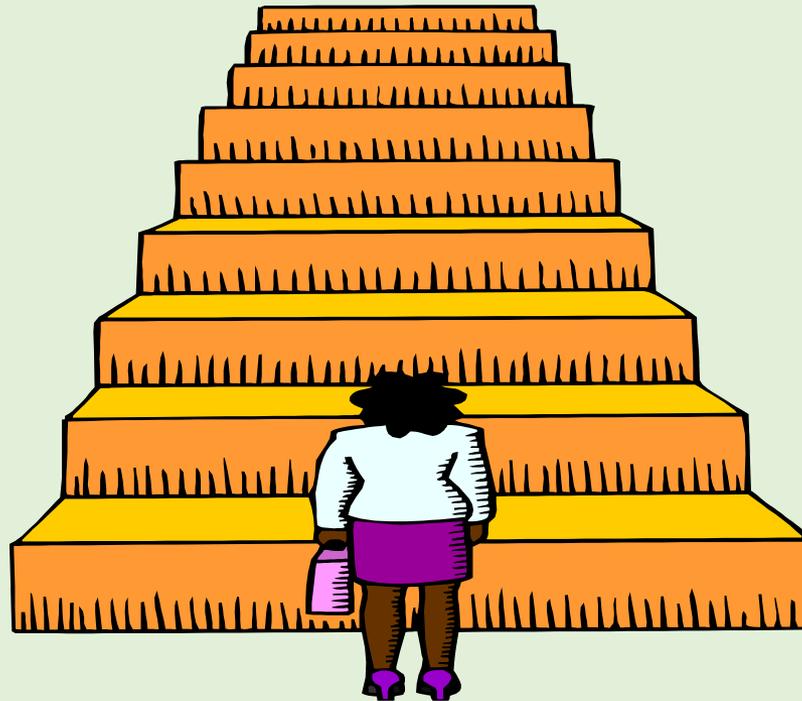
- skin color;
- hair texture;
- certain facial features

Condition which Predominantly Affects one Race

- Conditions that are predominantly experienced by one race
- e.g. sickle cell anemia predominantly occurs in African-Americans
- e.g. pseudofolliculitis barbae (severe shaving bumps)

**UNDERSTANDING
RACE AND COLOR
DISCRIMINATION**

Obstacles to Addressing Race and Color Discrimination in the Workplace



**MYTHS,
PERCEPTIONS,
STEREOTYPING
AND BIASES**

7 Myths about Race and Color Discrimination in the Workplace

**Race and Color
Discrimination
no longer exist**

Gallup Poll

In a 2005 EEOC-sponsored Gallup poll:

- **31%** of Asian Americans surveyed reported having witnessed or experienced employment discrimination
- 26% of African Americans reported witnessing or experiencing employment discrimination



CNN Poll

In a December 2006 CNN poll:

- 84% of African Americans and 66% of Caucasians surveyed think racism is a “very serious” or “somewhat serious” problem in America.



EEOC Charge Data

- In 2013, over 31,194 EEOC charges alleged race-based discrimination, accounting for 33% of all charges filed.
- Race is still one of the most-alleged basis of discrimination.
- Does not include charges of retaliation based on race

Research

- **Criminal Record Study (Devah Pager, 2003) - Blacks received job call-backs at a lower rate than Whites, even when White applicants had a criminal record and Blacks did not. Call-back rates:**
 - **Whites without criminal record – 34%**
 - **Whites with criminal record – 17%**
 - **Blacks without criminal record – 14%**
 - **Blacks with criminal record – 5%**

**I have my eyes open
and I will know
discrimination when
I see it**

Stereotypes

- Assigning everyone in a certain group the same attributes
- Fails to acknowledge that there are differences even within groups
- Places individuals into “boxes” and limits expectations and opportunities

What's in a Name?

50% more likely
to get a callback

Neil

Sarah

Carrie

Brendan

Todd

Rasheed

Jamal

Ebony

Lakisha

Latonya

Result of Stereotyping

- Prejudice
- Bias
- Insensitivity
- Exclusion

**Discrimination is
only based upon
hate**

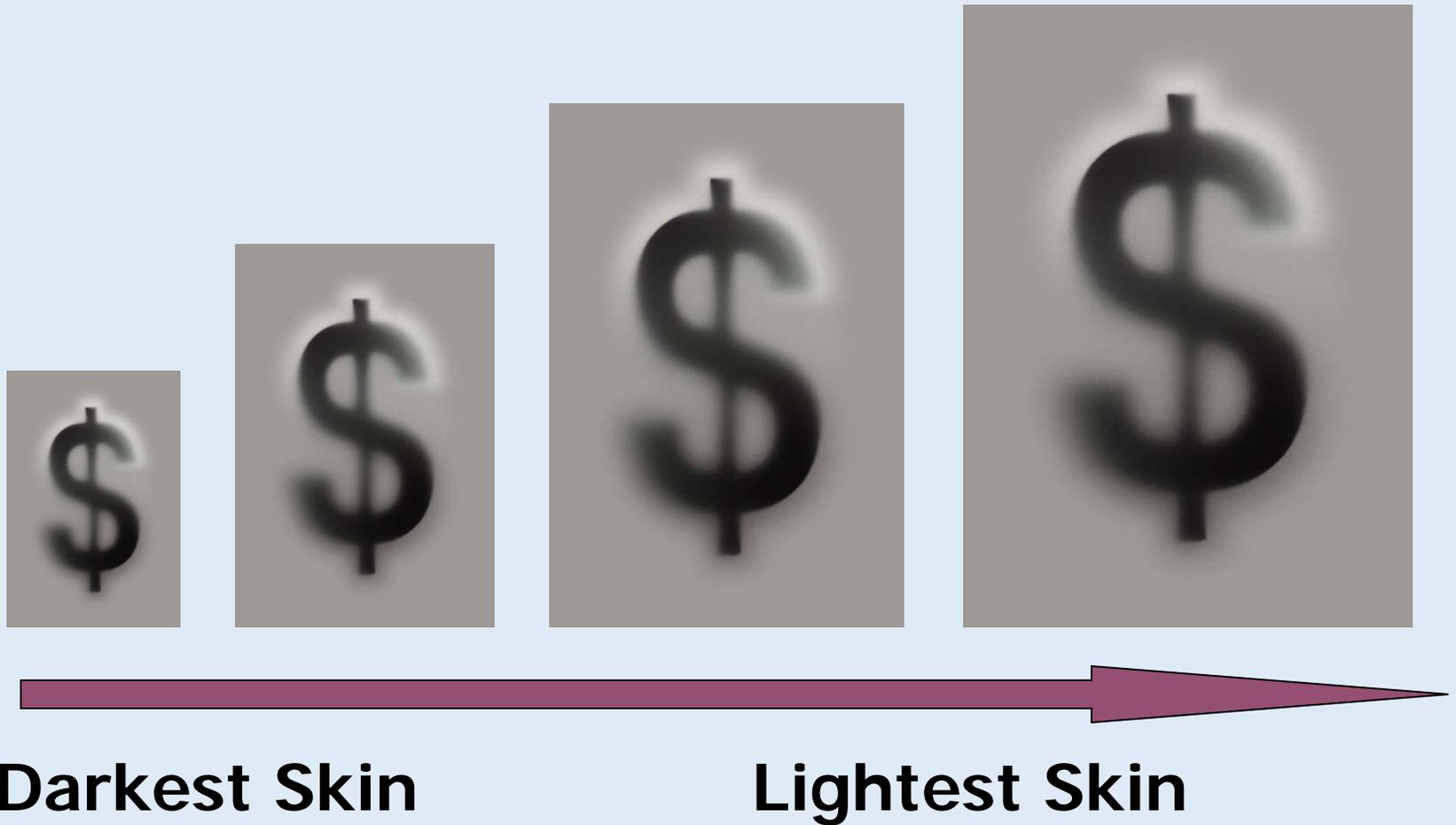
Research

- **Temp Agency Study** (Discrimination Research Center, 2003) – California temporary agencies preferred White applicants three to one over African American applicants
 - Los Angeles: 4 to 1
 - San Francisco: 2 to 1



**We have many
people who are of
that race or color,
so we cannot have
discrimination**

Color Pay Premium?



Joni Hersch, *Profiling the New Immigrant Worker: The Effects of Skin Color and Height*,
Journal of Labor Economics (Forthcoming 2008).

**The manager/owner
is of that race or
color, so we cannot
have discrimination**

Subtle Discrimination

- **More subjective decision making**
- **Implicit bias**
- **Cat's Paw Doctrine**

**The person accused
of discrimination is
the same race as the
accuser, so that
cannot be
discrimination**

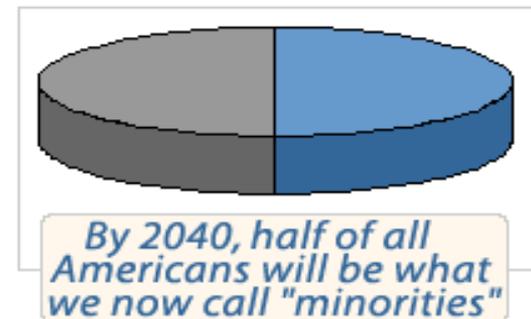
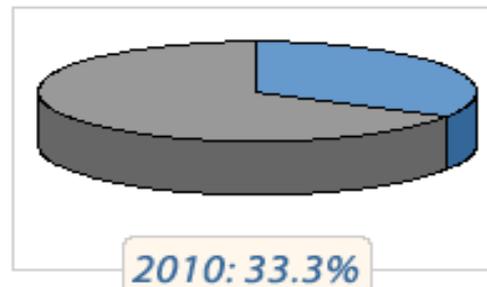
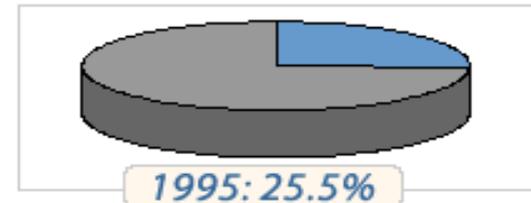
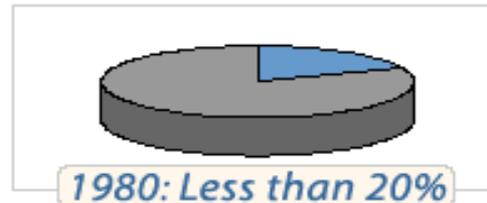
**One incident of
discrimination against
one person affects only
that one person. We
just need to resolve
that one and move on**

Demographic Changes

- Increasing numbers of people of more than one race



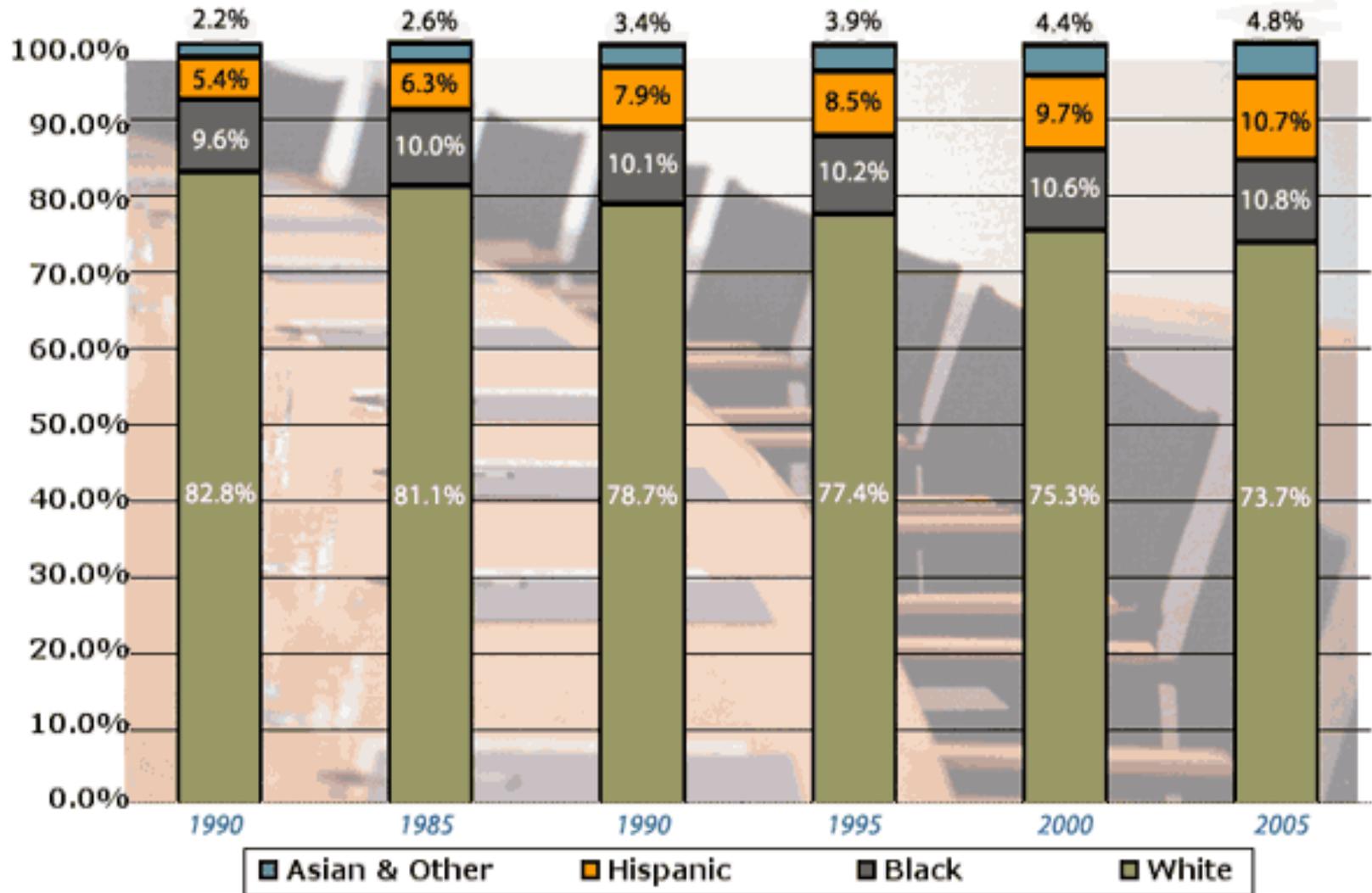
The Demographics of the U.S. are Shifting



■ White ■ Multiethnic

Source: Securities Industry Association, U.S. Census Bureau

Composition of Workforce By Race



Source: Workforce 2020 (Compiled from Bureau of Labor Statistics, 1995-2005)

**Laws, Policies,
Guidance and
Enforcement of Race
and Color
Discrimination in
Employment**

Harassment

Racial Harassment

- Harassment – Unlawful words or conduct that make the workplace uncomfortable and hostile for individuals or groups
- Some harassment may be willful and some may simply be unknowing conduct that is hostile, offensive or threatening to others

Harassment (Cont'd)

- It is illegal to harass an employee because of race or color
- It is also illegal to harass someone because they have complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Racial Harassment

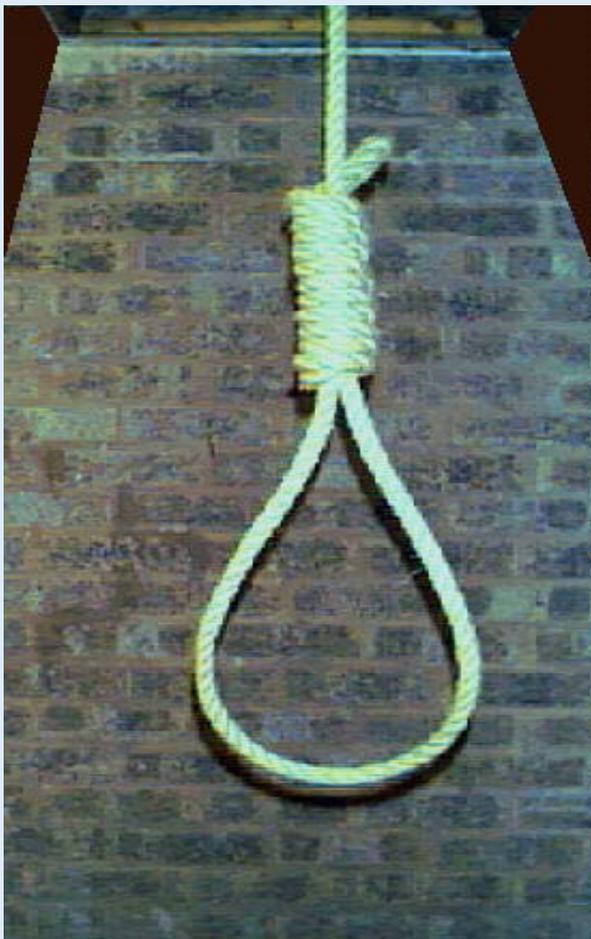
- Unwelcome, and Severe or Pervasive (subjectively and objectively)
- Slurs, pictures, name calling, use of the N-word
- Single incident if sufficiently severe (e.g., physical assault or threat of physical assault, noose, etc.)
- Conduct need not be explicitly racial in character – e.g., interference with work

Harassment (Cont'd)

- The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.
- Harassment outside of the workplace may also be illegal if there is a link with the workplace. For example, if a supervisor harasses an employee while driving the employee to a meeting

- An African American worker was allegedly subjected to a barrage of egregious racial harassment that culminated with a white co-worker putting a noose around his neck in the company restroom.
- EEOC alleged the employer was aware of the unlawful conduct and did nothing to stop it.

EEOC et al. v. Commercial Coating Serv., Inc. No. H-03-3984 (S.D. Tex. March 21, 2006)



Harassment – Employer Best Practices

- **Explanation of prohibited conduct with examples**
- **Protection against retaliation for those who make complaints or provide information**
- **Description of complaint process**
- **Multiple avenues of complaint**
- **Confidentiality to extent possible**
- **Prompt, thorough, and impartial investigation**
- **Immediate and appropriate corrective action if harassment occurred**

Bullying

Bullying

- A form of harassment – the willful, conscious desire to hurt another and put him/her under stress through:
 - Social alienation, e.g., jokes
 - Gossip, rumors
 - Symbols of threats or offensive symbols like a noose
 - Name calling
 - Embarrassing others
 - Taking personal items
 - Threats, physical violence

- Victims are often weaker or in a position of subordination
- The bully acts out only when others are not around and is often hiding their own inadequacies

The harasser can be:

- The victim's co-worker;
- The victim's supervisor/boss;
- A supervisor in another area; or
- Someone who is not an employee of the employer, such as a client or customer

Pre-Employment Inquiries about Race

Pre-Employment Inquiries about Race

- Employers should not request information that discloses or tends to disclose an applicant's race

Pre-Employment Inquiries about Race (Cont'd)

- unless –

The employer has a legitimate business need for such information.

If an employer legitimately needs information about its employees' or applicants' race use a mechanism, such as "tear-off" sheets.

Pre-Employment Inquiries about Race (Cont'd)

- State and Federal equal opportunity laws do not clearly forbid employers from making pre-employment inquiries that relate to, or disproportionately screen out members based on race or color
- Such inquiries may be used as evidence of an employer's intent to discriminate unless the questions asked can be justified by some business purpose.

Background Checks

U.S. Criminal Justice System: Who is Impacted?

U.S. has highest rate of incarceration in the world

- U.S. incarcerates more people than the top 35 European nations combined
- 92 million individuals in U.S. with criminal histories
- 14 million arrests annually
- Overall effect:
 - One in 3-4 adults in the U.S. has a criminal record on file

Who is impacted the most?

- Men, Young, Racial/Ethnic Minorities
- Rates of incarceration (by race):
 - 1 in 87 White men are incarcerated
 - 1 in 37 Latino men
 - 1 in 12 Black men

Racial Disparities in the Criminal Justice System

At various stages of criminal justice system, including:

- Law Enforcement/Policing
- Adjudication and Sentencing
- Probation/Community-Based Alternatives to Incarceration

Racial Disparities in the Criminal Justice System

e.g. DRUG ARRESTS

- Black men 12 times more likely to go to prison for a drug offense, **yet...**
 - Household surveys show that Whites and African Americans use and sell drugs at about the same rates
- Black people are:
 - **12%** of population/**14%** of drug users
- Yet, they are:
 - **34%** of people arrested for drug offenses
 - **45%** of people incarcerated for drug offenses

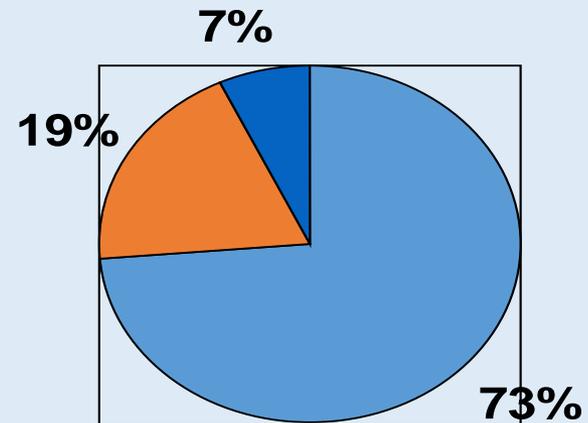
Criminal Justice
Disparities
become
Workplace Disparities

Employers' Increased Use of Criminal Background Checks

- Criminal background checks have become more popular as a tool to screen job applicants.
 - *See generally, U.S. Dep't of Justice, Attorney General Report on Criminal History Background Checks (June 2006), available at www.usdoj.gov/olp/ag_bgchecks_report.pdf.*

SHRM 2010 survey

- 91% of surveyed employers do criminal history screening for all or some of their job candidates.



<http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx>

How is this a Title VII Issue?

- Title VII prohibits intentional and unintentional discrimination:
 - Disparate treatment
 - Disparate impact

EEOC's New Enforcement Guidance on Criminal Records

- Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII (April 25, 2012)
 - http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
- Supersedes Commission's previous policy statements
 - Updates & Consolidates

ANALYSES

- Disparate Treatment
 - Employer violates Title VII when it uses an individual's criminal records differently based on his/her status in a protected class
- Disparate Impact
 - Neutral criminal record exclusion policy or practice disproportionately excludes applicants/employees on the basis of

DISPARATE TREATMENT

Plaintiff shows that the employer treated him/her differently because of his/her race, national origin, or another Title VII protected basis. 42 U.S.C. 2000e-2(a)

DISPARATE TREATMENT

2003 study suggests that employers do not treat African Americans with criminal histories the same as Whites with the same or similar qualifications and criminal records.

~Pager, Devah, 2003, "The Mark of a Criminal Record," American Journal of Sociology 108:937-75.

Pager 2003 Study

Applicant Call-backs by Employers:

- Whites without a record: 34% call back
- Whites with record: 17%
- Blacks without record: 14%
- Blacks with record: 5%

Disparate Impact Analysis

- Buck Green, an African-American Vietnam-era conscientious objector excluded by a blanket policy from working for the Missouri Pacific Railroad (1975/1977)
- Douglas El, an African-American para-transit driver-trainee, who was fired when the employer learned of a 40-year old conviction for a sole, violent offense. (2007)

Title VII

Disparate Impact if:

1. The employment practice causes a **disparate impact** on the basis of race (or other protected characteristics)

AND

2. The employer fails to demonstrate that the challenged practice is **job-related** for the position in question and **consistent with business necessity** –
OR -
3. If the procedure is job-related and consistent with business necessity, there a less discriminatory alternative that the employer refused to adopt.

Disparate Impact Analysis

- ELEMENT #1: Did criminal records policy disproportionately screen out applicants based on race or another protected factor?
- ELEMENT #2: If the evidence shows disparate impact, is the exclusion job-related and consistent with business necessity for the job in question?
- ELEMENT #3: Is there another policy that serves employer's legitimate goal as effectively with less of a disparate impact?

Element #1: Identify the Exclusion

- Identify the exclusionary policy or practice at issue.
 - Is there a published or unpublished policy?
 - All jobs or certain jobs? All locations?
 - Automatic exclusion? Or careful consideration?
 - Who did background check?
 - With criminal background policies: exclusions for classes of crimes?

Element #1: Proving Impact - Burden; Types of Evidence

- Title VII: Burden for prima facie case is to establish that exclusion disproportionately excluded a Title-VII protected group.
- Federal courts typically rely on a combination of national, regional, and local population statistics, and applicant flow data, to find that exclusions have a disparate impact on members of a Title VII-protected group.

Element #1: Factors that May be Considered in Determining Disparate Impact

- Internal statistics (Respondent data)
- External statistics (National and Local data)
- Geography
- Diversity of Workforce
- Size of Employer
- Single establishment vs. nationwide scope

Disproving Impact: Employer's Statistics

The employer may present more narrow local, regional, or applicant-flow data, showing that the policy probably does not have an adverse impact on its applicant pool and/or in fact does not have an adverse impact on the pool.

Element #2: If Disparate Impact is
Established...

The Respondent employer must
prove that its criminal records
policy or practice was:

1. job-related and
2. consistent with business necessity

Applying the *Green* Factors

Employer must show that the policy operates effectively to link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.

Individualized Assessment: Process

- Inform the individual that he may be excluded because of his past criminal conduct (typically, as identified by a targeted screen); and
- Provide the individual an opportunity to show that the exclusion does not properly apply to him, and consider his information.

Individualized Assessment: Information

- Information about the accuracy of the criminal record, for example:
 - Mistaken identity
 - Inaccurate reporting
- Age at the time of conviction
- Consistency, quality, and length of employment history before and after the offense or conduct
- Rehabilitation efforts (e.g., education/training), and
- Employment/character references regarding fitness, among other factors.

Compliance with State or Local Laws or Regulations

- States and local jurisdictions also have laws and/or regulations that restrict or prohibit the employment of individuals with records of certain criminal conduct.
- But Title VII - by its express terms - preempts state and local laws or regulations if they “purport[] to require or permit the doing of any act which would be an unlawful employment practice” under Title VII. 42 U.S.C. Section §2000e-7.
- Therefore, if an employer’s exclusionary policy or practice is not job-related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from, and is not a legal defense to, Title VII liability.

EMPLOYER BEST
PRACTICES FOR
BACKGROUND
CHECKS

Employer Best Practices: General

- Eliminate policies or practices that exclude people from employment based on any criminal record.
- Train managers, hiring officials, decision-makers about Title VII and its prohibition on employment discrimination

Employer Best Practices: Developing a Policy

- Develop a narrowly-tailored written policy and procedure for screening applicants and employees for criminal conduct
 - Essential job requirements
 - Determine specific offenses that may demonstrate unfitness for performing such jobs (evidence, not “common sense”)
 - Determine the duration of the exclusions
 - Include an individualized assessment
 - Record the justification
 - Note and keep a record of consultations/research
- Train (implementation)

Employer Best Practices

- Questions about Criminal Records
 - Limit inquiries to records for which exclusions would be job-related for the position in question and consistent with business necessity
- Confidentiality
 - Keep information confidential. Use only for the purpose intended.

Advertising, Recruiting and Hiring

Job Advertisements

- Employer may not publish a job advertisement that shows a preference for or discourages someone from applying for a job because of his or her race or color
- For example, a help-wanted ad that seeks “suburban soccer mom” may discourage some applicants from applying and may violate the law;
- For example, a help-wanted ad that seeks “street-smart” teen may discourage some applicants from applying and may violate the law

Recruitment

- It is also illegal for an employer to recruit new employees in a way that discriminates against applicants because of their race or color.
- For example, an employer's reliance on word-of-mouth recruitment by its mostly White work force may violate the law if the result is that almost all new hires are White

Application & Hiring

- It is illegal for an employer to discriminate against a job applicant because of his or her race or color
- For example, an employer may not refuse to give employment applications to people of a certain race
- An employer cannot give different test to applicants based upon the applicants' race or color
- An employer cannot apply different standards, qualifications or process based upon applicants' race or color
- An employer may not base hiring decisions on stereotypes and assumptions about a person's race or color.

Application & Hiring (Cont'd)

Applicant Testing

- Test must be necessary and related to the job
- The employer may not exclude people of a particular race or color
- The test cannot be designed to exclude applicants from a certain race
- Disparate Impact may be a factor

Terms and Conditions of Employment

Job Assignments & Promotions

- It is illegal for an employer to make decisions about job assignments and promotions based on an employee's race or color.
- For example, an employer may not give preference to employees of a certain race when making shift assignments and may not segregate employees of a particular color from other employees or from customers.
- An employer may not base assignment and promotion decisions on stereotypes and assumptions about a person's race or color

Terms & Conditions Of Employment

- An employer may not make any employment decision because of a person's race or color.
- E.g. hiring, firing, promotions, and pay.
- An employer may not discriminate regarding benefits, for example, when granting breaks, approving leave, assigning work stations, or setting any other term or condition of employment - however small.

Dress Code

- Employer may establish a dress code which applies to all employees or employees within certain job categories.
- While 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, 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 East Indian attire, but otherwise permits casual dress would treat some employees less favorably because of their national origin.

Dress Code

- Employee may show that the prohibition was intended to discriminate based on race
- Moreover, if the dress code conflicts with an employee's religious practices and the employee requests an accommodation, the employer must modify the dress code or permit an exception to the dress code unless doing so would result in undue hardship.



EEOC

Training Institute

...Learn from the Experts

**Malcolm S. Medley, District Director
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