

EEO 101 – The Basic Theories of Employment Discrimination

- An overview of the anti-discrimination statutes enforced by the EEOC
- An introduction to the theories under which claims of discrimination can be brought

Title VII of the Civil Rights Act of 1964 (Title VII)

- Protects employees and applicants for employment from discrimination based on:
 - Race
 - Color
 - National Origin
 - Gender
 - Religion



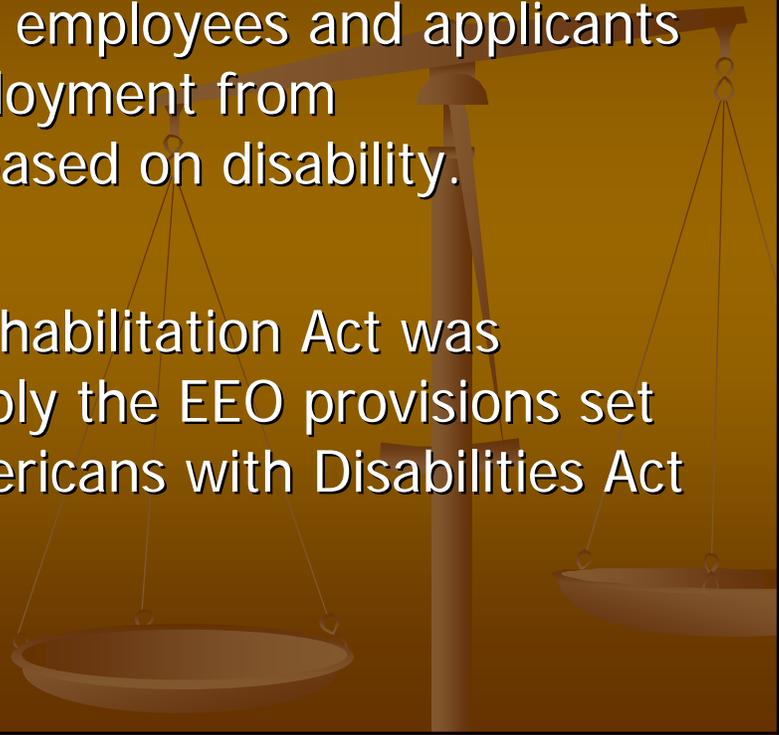
Age Discrimination in Employment Act of 1967 (ADEA)

- Protects employees and applicants for employment from discrimination based on age.
- To be covered, an individual must be **40 years of age or older.**



Rehabilitation Act of 1973

- Protects federal employees and applicants for federal employment from discrimination based on disability.
- In 1992, the Rehabilitation Act was amended to apply the EEO provisions set forth in the Americans with Disabilities Act of 1990.



Retaliation

- It is illegal for an employer to retaliate against an individual because s/he engaged in protected activity under Title VII, the ADEA, or the Rehabilitation Act/ADA. The two types of activity are:
 - **Opposition** – Implicit or explicit communication that employer's actions are discriminatory.
 - **Participation** – Individual has filed a complaint, testified, or participated in an investigation, proceeding, hearing, or litigation under the aforementioned anti-discrimination statutes.

Basic Theories of Discrimination

- Disparate Treatment
- Harassment
- Failure to Accommodate an Individual's Disability

Disparate Treatment

An intentional act that **discriminates** against an individual based on his/her membership in a group protected by Title VII, the ADEA, or the Rehabilitation Act/ADA, or **retaliates** against an individual for engaging in protected EEO activity under one of those statutes.

Disparate Treatment – Circumstantial Evidence

- Three-part test set forth in **McDonnell Douglas Corp. v. Green (1973)**
 1. Prima facie case of discrimination
 2. Legitimate, nondiscriminatory reason;
and
 3. Pretext.

Prima Facie Case

- Individual experiences an **adverse action**, (e.g., discipline, termination, not promoted).
- Circumstances exist that support an **inference** of discrimination/retaliation.

Legitimate, Nondiscriminatory Reason

- Employer can rebut the *prima facie* case by articulating a legitimate, nondiscriminatory reason(s) for the challenged action(s).
- Employer merely has to articulate such a reason(s), not prove that it was the actual reason for the challenged action(s).

Pretext

- Complainant has burden to establish that the articulated reason(s) is not credible.
 - The articulated reason is **factually incorrect**.
 - The reason, although factually correct, is **not the true reason** for the challenged action(s).

Scenario 1

John is not promoted by Supervisor Ted in favor of Mary. John alleges that it is because of his gender. During the investigation, Ted is unable to offer a reason why he promoted Mary instead of John. The agency argues that, because John and Ted are the same gender, John cannot establish a *prima facie* case of discrimination.

Assess John's case.

What if the promoted co-worker were also a male?

Scenario 2

Lisa receives notice that Fran, one of her employees, has filed a complaint accusing her of discrimination. During a subsequent staff meeting, Lisa says that “the agency’s mission would be best served if we did not have so many complainers.” She then states that employees James and Karen are good employees who focus on getting the job done instead of complaining.

- **Does Fran have a claim of retaliation?**
- **What if Fran’s complaint had no merit?**

Disparate Treatment – Direct Evidence

- **Direct evidence:** action/statement reflecting discriminatory attitude that correlates to the challenged act.
- Direct evidence = automatic finding of discrimination against employer.
- Damages can be mitigated with evidence that the same employment action would have been taken absent discriminatory reason – this is known as a “**mixed motive.**”

Disparate Treatment - Recap

- Most cases involve circumstantial evidence – complainant **always** retains burden of proof.
- A tangible adverse action is not necessary to bring a claim of retaliation.
- Direct evidence of discrimination **always** results in a finding against the employer.

Harassment

- Unwelcome verbal or physical conduct based on one or more of an individual's protected bases under Title VII, the ADEA, or the Rehabilitation Act/ADA or on protected activity under these statutes.
- The two types of harassment are **hostile environment** and **quid pro quo**.

Hostile Environment Harassment

- Individual subjected to **unwelcome conduct** based on membership in protected group(s).
 - Offensive verbal or written comments
 - Jokes, slurs, name calling, graffiti, etc.
- Conduct was **sufficiently severe and pervasive** to alter the conditions of individual's employment and create an abusive working environment.

Quid Pro Quo Harassment

- Submission to or rejection of unwelcome conduct by an individual is used as the basis for employment decisions affecting such individual.
- Theory applies exclusively to sexual harassment and religious harassment.

Employer Liability

- Harasser is a **co-worker** of complainant.

- Employer is liable if it **knew or should have known** about the harassment and failed to take immediate and appropriate corrective action.

- Generally only applicable to hostile environment theory.

Employer Liability cont.

- If harasser is a **supervisor**, whether employer is liable depends on the effects of the harassment.
- Did the harassment result in a **tangible employment action** being taken against the employee?

Tangible Employment Action

- If harassment resulted in a **tangible employment action** (e.g., hiring, firing, demotion etc.), employer is **automatically liable**.
- Typically applies to **quid pro quo harassment**.

No Tangible Employment Action

■ Employer can avoid liability by satisfying a two-part test:

1. It exercised **reasonable care** to prevent and correct promptly any harassment, and

2. Complainant **unreasonably failed** to take advantage of any preventive or corrective opportunities provided by employer or to avoid harm otherwise.

Scenario 3

Richard (Hispanic) is regularly called an "idiot" by his supervisor. The supervisor rarely calls non-Hispanic employees derogatory names. On one occasion, the supervisor calls Richard a name that is derogatory to Hispanics.

- **Can Richard potentially satisfy the elements of a hostile environment harassment claim?**

Harassment - Recap

- **Hostile environment:**
Was conduct **severe and pervasive**?
- **Coercion of participation/non-participation:**
Claim is viable even if an employment benefit is received.
- **Liability:**
If supervisor is harasser, determining liability depends on the effects of harassment (**tangible vs. not tangible**).

Disability Accommodation

- Under the Rehabilitation Act/ADA, an employer is required to provide a reasonable accommodation(s) for the known physical or mental limitations of a “**qualified individual with a disability**” unless to do so would cause an undue hardship.
- A reasonable accommodation is any change in the work environment or in the way things are customarily done that would enable an individual to enjoy equal employment opportunities.

“Individual With a Disability”

- Individual has a physical or mental impairment that **substantially limits** one or more of that person’s **major life activities.**

“Qualified Individual With a Disability”

- An “individual with a disability” who:
 - Satisfies the requisite skill, experience, education, and other job-related requirements of the position; and
 - Can perform the essential functions of the position with or without a reasonable accommodation(s).

Types of Accommodations

- Making facilities accessible
- Job restructuring
- Part-time or modified work schedules
- Acquiring or modifying equipment
- Providing interpreters
- Reassignment to a vacant position

Undue Hardship

- Employer can avoid providing an accommodation if it demonstrates undue hardship
 - General conclusions are not sufficient to demonstrate undue hardship
 - Showing must be based on an individualized assessment of current circumstances showing that a specific accommodation would cause significant difficulty or expense

Scenario 5

Tony has back surgery and is out of work for several weeks. Supervisor Len calls Tony's house to get an update and speaks with Tony's wife, May. May tells Len that Tony will return in a week, that his back is much improved, but that Tony will need a better chair.

- Does it matter that Mary, rather than Tony, asked for the chair or that she did not tell Len that Tony was seeking a reasonable accommodation?
- Does the cost of the chair matter?

Scenario 6

Teresa, who is hearing impaired, is interviewing for a position with Agency A. She requests to have an interpreter present at the interview. Agency A denies the request on the grounds that she's an applicant, not an employee, and that providing an interpreter would be an undue hardship.

- **Is the Agency's position persuasive?**

Disability Accommodation - Recap

- Does the individual have an impairment that **substantially limits a major life activity**?
- Request for accommodation does not have to be overly formal.
- If accommodation was properly requested, what actions, if any, did employer take?

A Final Note – Helpful Resources

- Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (10/17/02)
- Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (06/18/99)
- Enforcement Guidance on St. Mary's Honor Center v. Hicks (04/12/94)