

## Chapter 2 Title VII of the Civil Rights Act of 1964











[Note to users: You can click on the case icon to access the case brief included at the end of the IM chapter.]

### **Chapter Objectives:**

The objectives for the chapter are to introduce students to Title VII of the Civil Rights Act of 1964, provide the mechanics of the Act, including to whom it applies, the prohibited categories, how to proceed with alleged violations under the Act, the two theories upon which claims can be brought and the cases which spawned the theories. When finished with the chapter, the student should have a good overview of the mechanics and specifics of Title VII and why the law was enacted.

**Learning Objectives** (Click on the icon following the learning objective to be linked to the location in the outline where the chapter addresses that particular objective.)

At the conclusion of this chapter, students should be able to:

1. Explain the history leading up to passage of the Civil Rights Act of 1964. 
2. Give examples of the ways that certain groups of people were treated differently before passage of the Civil Rights Act. 
3. Discuss what is prohibited by Title VII. 
4. Recognize who is covered by Title VII and who is not. 
5. State how a Title VII claim is filed and proceeds through the administrative process. 
6. Define disparate treatment and an employer's defenses to such a claim. 
7. Define disparate impact and how it works, including the four-fifths rule and employer defenses to disparate impact claims. 
8. Discuss what management can do to comply with Title VII. 

### ***Authors' Note***

During the first few minutes of your first Employment Law class, if you were to ask students whether it is illegal to discriminate in employment on the basis of gender, race, etc., virtually all of them would say yes. Nearly everyone knows this, yet the area of Employment Law remains alive and well--and in fact flourishing mightily--in the courts. Most of the cases of discrimination for which employers are found liable today stem not from the employer being overtly discriminatory or intentionally malicious. Instead, much of it comes from policies or responses based upon societal notions about certain groups which notions many of us grew up with or have gotten through the media. Therefore, the student simply knowing the mechanics of the law is not enough. Knowing they should not discriminate is not enough. We must teach them how discrimination occurs.

If we are to effectively teach students how to avoid liability for workplace discrimination, we must also teach them how to recognize it in all of its manifestations. It will do little good for them to learn that they must not discriminate on the basis of gender and think they understand this, then, for instance, not recognize that it is gender discrimination when an employer refuses to allow a female employee to have toileting facilities that do not cause her to become ill (*Lynch v. Freeman*, the Gender chapter).

Thus, inherent in a good deal of the subject matter, and just as important, is making students aware of the existence of employment discrimination and its manifestations and impacts. Without appropriate background, students will think of discrimination only as something "awful" people do, and miss the subtleties they might engage in which can be just as great a source of employer liability.

It is important to keep in mind that most students taking the course will have been born more than twenty years after the 1964 Civil Rights Act was passed. For all of their lives it has been illegal to discriminate on the basis of the prohibited categories. **Bringing students' attention to the actual newspaper classified ad index from just before passage of the 1964 Civil Rights Act** is helpful to show them in a very real way what not having the law meant. However, since discrimination has been illegal all their lives, they will have little or no experience with overt, institutionalized discrimination, though they will be vaguely aware of the slavery, Jim Crow laws, and civil rights eras of US history. Do not take too much for granted in this area. Our experience with both students and employees is that many will have only the vaguest knowledge of this. **Using resources such as the Web, your library's videos or books on the subject, or television shows or news items to supplement the introduction** to the Act set forth in the text, will be most helpful in providing a measure of historical perspective on why such a law should be passed and is still so active today.

Much of the students' ideas (as well as those of employers, managers and supervisors ) of what employment discrimination is has been shaped by the media, their family and friends, and by what they have heard of the concept of affirmative action. To them the concept tends to be negative and mean blacks and women get jobs they are not qualified for, while whites and males who are qualified and had nothing to do with discrimination are left out. It can also mean someone has been “playing the race card” or being “too sensitive” about something. Since this attitude can get in the way of them seeing the reality of how employment discrimination occurs and when liability may be likely to attach to an employer, it should be dispelled.

It is also important to note that the world the students have lived in is quite different than the one that has heretofore existed. They have seen a female and a black man as serious contenders for the presidency of the U.S. They have seen an African American female secretary of state and an Hispanic as head of the U.S. Department of Justice. They have seen two states pass legislation permitting same-gender marriages. They have watched, admired and cheered on high profile African American athletes and perhaps listened to the music or worn the clothing lines of African American performers or athletes. They may well have gone to school with students different from themselves and never have noticed a difference. It may take an effort to get them see that even the possibility of discrimination still exists since it seems so at odds with what they have perceived as their reality. However, our experience has been that the effort is worth it. Once students are aware of the reality, they tend to be incensed that the world is not as they thought it was and they wish to get on with the business of making sure the laws are enforced so that it will be.

In order for students to understand where we are today, it is important for them to understand from the outset that the reason the law was passed was because of an entire societal approach to certain groups which negatively impacted them in the workplace, in housing, education, etc., therefore protecting them from discrimination did not afford them *special* privileges, but was necessary in order to attempt to provide them with the *same* opportunities as everyone else--a concept with its roots in our constitution. Also make clear that affirmative action is not about “making up for slavery,” which has long passed. It is about correcting imbalances in employment (generally viewed as vestiges of a discriminatory system) which have been found to exist in the employer’s workplace *today*.

The students have little direct knowledge of the historical basis for the passage of the Civil Rights Act, and this forms an important platform on which the rest of the course is built, therefore we have found it most helpful to spend some time discussing these matters. You may want to **conduct discussion** in which they simply tell you what they know **of employment discrimination, or discrimination in general**. You may **question them on issues such as**:

- whether they think discrimination occurs with any frequency
- what they think it is—have them give examples
- whether they, or someone they know has ever experienced it
- what they think the effect is on the employee discriminated against
- what they think the effect is on the workplace
- how they think it can be stopped

- what their feelings are about the groups we hear most about alleging discrimination: that is, are they being overly sensitive, too confrontational and impatient, etc.
- what would they suggest as alternatives?
- if discrimination occurs, how do they think it takes place; that is, does an employer simply say, "we don't hire women?," is it subtle harassment by fellow employees?, etc.
- if they had been in a position of power in the 60's and this issue arose, how would they have addressed it? Same legislation as Title VII? Different in some way? How?
- what do they think is an appropriate role for an employer who sees employment discrimination occur?

The purpose of the discussion is to assess where the students are in their knowledge of the issues and to lay a foundation for what is to come. There are no right or wrong answers. However, it is important for students to think about their attitudes because their attitudes form a good deal of what they take into the workplace as managers and supervisors and use as a basis for making judgment calls about situations that arise once there. This greatly impacts what action they will take when employees come to them with complaints of discrimination, or they themselves view instances of discrimination and determine what action will be taken. This response can ultimately either help or hurt an employer's liability, depending upon the nature of the attitude and response.

We have found that it is an important part of discussing discrimination issues for you, as the professor and the one in charge of the class, to provide a safe, nonjudgmental classroom environment in which students feel comfortable to share their real feelings about these issues. Not much real learning can take place without this. This can be done, in part, by telling them your intent and discussing with them the importance of their perceptions about these issues to the decisions they will make as managers and supervisors, the importance of the classroom environment to the quality of discussion, including students being respectful of each other and of the professor and vice versa. We make it clear that each and every student has a right to feel however they want about the groups discussed, and even to express their views respectfully, but it is important for them to separate their personal feelings from their legal responsibilities to their employer in this area. This relieves students of the burden of thinking they must make sure they "say the right thing" all the time (what some call being "politically correct—a term we do not use). It also means they do not feel like you as their professor are pushing a particular agenda (if the information you provide happens to be different from their position). Allowing the free flow of ideas and exploration of our views creates the opportunity for new learning to take place that better informs the students' approach to making decisions as managers and supervisors in the future.

Semester after semester we find we are able to discuss even the most controversial topics with the most sensitive students, simply by approaching it the right way. Students appreciate the head-on approach and the opportunity to be able to discuss these issues in a non-judgmental forum that provides them with information they wanted to know but did not know where to comfortably go for answers. Our students have been profoundly challenged and have come away from classes with fundamental changes in their views simply because they have now had exposure to more information. It is touching to see the classes bond as they take the journey together and go through the process of gaining insight and information from each other on subjects they may never have discussed openly across racial, cultural, gender, religious, affinity orientation or ethnic grounds before.

It is also important to convey that history is history and cannot be changed. Discussing history, in which white males may have had overwhelming responsibility for what occurred, is not at all a condemnation of all white males, is not “picking on” or “singling out” white males for derision, or any such thing, and make sure that they recognize this. Discussing history is not for the purpose of making anyone feel guilty, but rather to gain a proper perspective on where we find ourselves today and where we can go from here. We have found it helpful to remind our students that they are not responsible for history and should not lament what cannot be changed. However, they can insure that history not repeat itself by the choices they make today. We have had excellent success in getting the students to open up and frankly discuss issues which they may not have heretofore done. This, in turn, has given them an incredibly rich appreciation of the depth of the challenges discrimination causes which goes far beyond newspaper headlines and dinner table speculation. In turn, that better prepares them to be more effective managers and supervisors.

You may **have the students keep a journal** for the class. They should detail what their thoughts are on the area discussed that day. Over the course, they are bound to change a great deal and will surprise even themselves with what they have learned. The journal also has the impact of forcing them to think about what they have learned and it thus tends to stay with them better. During the course of the class, it has been our experience that they will become much more aware of their own attitudes, those of their friends, family and media, and they will become much more sensitive to the potential for liability in the workplace. Journaling, even for those who have not done so before, greatly helps with this. In fact, the idea came from our experience of having so many students at the end of the class tell us how far they have come in their thinking about our issues. We finally decided they would get a kick out of seeing it for themselves. It has been a success.

We have found it profoundly helpful to **assign students to read articles** which are particularly helpful in shedding light on evaluating and sharing, the reality and views of others to which they may otherwise not be exposed, but who they may have to address as managers in the workplace. Reading about how middle class black professionals experience race discrimination in the workplace and life, the terrain a gay employee must traverse in the workplace each day, or how a disabled person perceives her life and disability gives the students a new appreciation of the depth and range of these issues. In turn, this better prepares them as managers and supervisors, to be sensitive to potential trouble spots which may lead to liability. For ideas for articles, feel free to access the Web page for Bennett-Alexander's Employment Law class for a look at the articles she assigns students to read. The URL is <http://www.terry.uga.edu/~dawndba/>. A one page paper about the article is generally assigned, exploring how the student thinks this article impacts the workplace and their role as a manager or supervisor. While they think of the assignments as a pain, students have routinely been *very* glad they read the articles and were required to put their thoughts in the form of a paper. It allows them to process their thoughts and convey them in a way they would not be able to do otherwise, and they gain invaluable insight into issues they had only heard of before--issues which they now realize greatly impact the workplace and their role as managerial employees.

A good tool for making students aware, on an on-going basis, and in the context of the world in which they live is to have one of them assigned to **bring in and discuss a news article each day**. The article may come from any source, but it must have as its subject matter some type of discrimination. We do not limit the articles to employment discrimination because we want them to see discrimination in all of its manifestations, only one of which happens to be employment. It is important for students to understand that employment discrimination is not isolated. It is part of a larger environment of discrimination in everything from housing loans to hospital care. The presenter tells the class about the article, then the class can ask questions for clarification or insight. It will not take long before students begin to see many of the ways in which discrimination is manifested, what its impact on the workplace can be, and how costly it can be for an employer. The more ways they see discrimination manifested, the more open their eyes will be as managers, supervisors and business owners, to recognize the possibility of it when they see it in the workplace. When articles are not directly about employment discrimination, but some other kind of discrimination, it will not be difficult to use this an example of the ripple effect of employment discrimination (or vice versa), and also to give further manifestations of ways in which people may be treated differently and its impact on them and society and society's views about such matters. Discrimination in areas other than employment provide an overall context for discrimination, in which discrimination in employment can be seen as just one manifestation.

We were initially concerned with whether there would be enough appropriate discrimination articles to cover the entire academic term. Unfortunately, our fears were unfounded. There has always been more than enough for students to report on for the entire time we were in class. Students are routinely astonished at the frequency of the issues arising, and how blind they had been to them before (their characterizations, not ours).

We have found that **showing the video** of the *ABC Prime Time Live* television piece, "**True Colors**" is very helpful in setting up the class for a discussion of discrimination. Our experience is that some of the students may have already seen the piece and now have a context in which to view it as more than just television entertainment. Though it was aired in 1991, the show is still astonishingly (and unfortunately) relevant. In the piece, two men, one black and one white, who are virtually the same on paper, are sent to St. Louis to see what their experiences will be when they try to start life there. They look for a place to live, look for jobs, shop at a car dealer, shoe store, jewelry store and music store. Each has a hidden camera that records their experiences.

In each instance, there is little overt discrimination, but rather, things such as the white man being warmly greeted as he walks into the shoe store, while the black man is left to fend for himself as the salesman simply ignores him. A stopwatch records the time it takes for each to be waited on. It is always much longer for the black man. The black man is followed around in the music store, without the clerk even asking to help him, while the white male is not. The black male is made to wait when shopping for a car, while sales personnel are gathered nearby talking, while they immediately come out to help the white customer. The black customer is quoted a larger down payment and higher interest costs than the white customer. When looking for a job, the black man is lectured on blacks being lazy and giving away job leads to others who did not pay for the service, while the white man is pleasantly told of the job. At the job site the black man is told the job is no longer open, while the white man is told that it is. In searching for an apartment, the white man is given a key to the apartment and told about the neighborhood, as if welcoming him. The black man is lectured about how strict the place is, is not given a key, is escorted around, and at one place is told an apartment is taken, while it is offered to the white man. If your school does not have a copy, the video/CD can be **ordered**:

Phone 1-800-537-3130 or order on line at <http://Corvision.com>

The segment title is "True Colors" and it aired 9/26/91

The piece is an excellent demonstration for students to see how often subtle, unconscious actions towards members of various groups may form a pervasive pattern of discrimination. It makes them aware of the fact that we may not always be looking for workplace discrimination which is obvious or people who "look" like they would discriminate. We do not want workplace liability for discrimination to attach due to our being unaware of the possibilities.

We have also had great success with an **exercise** we do prior to discussing the specifics of discrimination. Called “**cultural introductions**”, students are put into groups of 3 to 5 and are told that each of them has about 5 minutes or so to tell the others their name, where they grew up, their socio-economic status, and messages they received growing up about (each) race, gender, affinity orientation, ethnicity, disabilities, age, weight and religion. Messages means not just what their parents told them, but what general idea they came away with about the issue from parents, friends, church, teachers, TV, movies, music, books, etc. Our experience is that they will end up wanting to spend far longer talking once the groups get started. As the professor, stay away from the groups while discussions are ongoing so that the students are not tempted to change their discussion because you are there. When the groups are finished, bring the students back together and take each topic in turn and ask the students what they discovered. Anyone can speak. You can write their comments on the board. Our experience with thousands of people (students and employees) has been that it quickly becomes apparent that no matter where they grew up, certain ideas tend to prevail: women are the caretakers, men are breadwinners, white is better than black, Hispanics have lots of kids, being gay is a no-no, people with disabilities make us uncomfortable but we are supposed to be nice to the disabled, etc. Let their responses flow and put no judgments on them. Do not let the students argue about what comes out in the discussion. It is not about whether the message is right or wrong, “correct” or “incorrect”. It is about what the messages were that were received.

When you have received all the comments for a particular category, clarify for the students the bottom line that seems to come from their discussions. Our experience has been that they see that no matter where they come from, what their personal experience has been, etc., we pretty much all received the same basic messages. Let them know that we come here as empty trash cans with no filters and much goes in long before we develop filters for ourselves—often this is not until they come to college. These ideas stay with us and are known to us, consciously or unconsciously, even after we are old enough to form our own ideas and may think differently. It is extremely important for them to know what is in their heads, as this forms the foundation for many of the thoughts, stereotypes and ideas they have about others and the decisions they may make as managers and supervisors. Nothing magic happens when we step foot into the workplace. All of this does not magically empty out of our heads. It is in there somewhere and we should know that so that it does not lead to trouble in decisions we make as managers and supervisors.

With the discussions which take place regarding the history of the Act, the social climate surrounding its passage, the students' assessment as to their own knowledge and appreciation for how it fits into the Title VII, their discovery of the messages they have received in their lifetimes, and the information from the daily articles, a solid foundation is laid for the subsequent chapters.



We made the decision to include this author's note for you because we understand that it can be uncomfortable discussing matters of race, color, gender, affinity orientation, religion, and national origin. Most of us do not have experience discussing such issues in a meaningful way or even with others outside of close family or friends. Ellis Cose, in his book, *The Rage of a Privileged Class*, says that as Americans, our discussions on race are generally in shouts or whispers and it is true. We know that it does not have to be this way. We have experienced the exhilaration that comes from connecting with a room of students or employees who have engaged in meaningful and productive discussions on these thorny issues and really connected with it and understood the value. We are sure that you can have the same experience.

As for the pedagogy, recall that the case questions generally have no pre-set answers. They are provided in an effort to prompt students to think of the cases they have read from the point of view of what management should consider and issues to be analyzed. There are no real right or wrong answers and students should be encouraged to let their minds flow during discussions. As the professor, you will see from the students' input that the discussions take on a life of their own which you can develop as you think appropriate. In some instances thoughts about the case questions have been provided, but they are in no way dispositive, and merely provide food for thought. Feel free to disregard the insights and develop the questions and discussions as you see fit. The reason the questions are structured as they are, asking for students' input, is to get them used to thinking on their own. It is not about legal analysis, but rather, about the management decisions that have resulted in the situation becoming a legal case.

**Birdcage - Points for Discussion**

This piece has been incredibly insightful in helping students to understand how everyday, seemingly insignificant matters end up helping to create or continue a system of discrimination. It is effective for all types of discrimination, but it is particularly helpful with affirmative action and gender discrimination. With affirmative action, students often bring up a scenario in which a friend or family member or someone they heard of (generally a white male) has had a negative experience with affirmative action. That is, their friend said he didn't get hired because the employer told him they had to hire someone black or female or some variation on this theme. With gender, students, both male and female, often have difficulty understanding how something like making catcalls at a woman, or ogling big breasts, can have an impact on their attitudes at work. It seems like such a small thing, a personal thing, and in no way related to discrimination. However, in both these instances, seeing that the "big" discrimination is made up of little, daily attitudes, helps them to see the bigger picture. It has worked wonders with our students in facilitating them coming to grips with how they fit into the equation, and why it is important not to just look at the little picture (i.e., what happened to their friend with affirmative action) but also the larger picture (affirmative action addressing an institutionalized system of discrimination that adversely impacts people today, even though the system may have begun long ago). It is this larger picture that is always at work, so it is in their best interest to understand it. Understanding that things cannot be addressed in a vacuum (i.e., the problem is much larger than just their friend and his obtaining this particular job) really helps to put these matters into a much better perspective for the students.

### **Scenarios - Points for Discussion**

***Scenario 1:*** The class may well respond to the obvious issue of whether national origin is covered by Title VII, which it is. However, there still remains the issue of exhaustion of administrative remedies. The employer must first file a complaint with the EEOC or the appropriate state agency before going to court, therefore the lawyer would tell the employee that it would be useless to file a law suit before the EEOC procedures had been followed first.

***Scenario 2:*** As an interviewer, Jill is in the position of screening applicants for the job. Though Jill does not have ultimate authority to hire and fire, she needs to know the intricacies of Title VII because she may use illegal criteria to screen out employees, in violation of Title VII.

***Scenario 3:*** The policy is probably illegal because it has a disparate impact on females since most women would not be able to qualify for the position purely based on the height and weight requirement rather than ability to do the job. If the requirement has a disparate impact on females, but is shown to be a business necessity, it is not illegal.

### **A Historic Rights Act**

**LO**

*Learning Objective 1: Explain the history leading up to passage of the Civil Rights Act of 1964.*

**LO**

*Learning Objective 2: Give examples of the ways that certain groups of people were treated differently before passage of the Civil Rights Act.*

**Use the information in this chapter as a strong background for the students to be introduced to the need for the Civil Rights Act of 1964.**

Timeline: 1619-1865 – Slavery

1865 – 1964 – Jim Crow

1954- Brown v. Bd. Of Education decision desegregating public schools

1963 – August 28, March on Washington for Civil Rights

1963 - September 15, 4 little girls killed in Sixteenth St. Baptist Church bombing

1964 – Passage of Civil Rights Act of 1964

1965 – Passage of Voting Rights Act of 1965

Have the students read Exhibit 2.2, the “I Have a Dream” speech, and see if it appears to them that the dream has been realized.

### **The Structure of Title VII**

**LO**

*Learning Objective Three: Discuss what is prohibited by Title VII.*

**LO**

*Learning Objective Four: Recognize who is covered by Title VII and who is not.*

1. Title VII prohibits employers who employ 15 or more employees from discriminating in any aspect of employment on the basis of race, color, gender, national origin or religion.
2. Unions and employment agencies are covered also, but not independent contractors.
3. The law only applies to employers who deal in interstate commerce, but that is almost a non-issue, as the interpretation of interstate commerce by courts has been so broad until it would be difficult for an employer to use that as a basis upon which to be exempted.
4. Religious establishments which employ workers, those whose business is operated near Native American reservations (and who discriminate in favor of Native Americans), and those who wish to discriminate on the basis of membership in a Communist organization are permitted to disregard Title VII's prohibitions.

5. Until passage of the Civil Rights Act of 1991 compensatory and punitive damages were not allowed in Title VII cases, nor were jury trials permitted.
6. Plaintiffs may now receive compensatory and punitive damages, and in cases where damages are requested, either party may request a jury trial.
7. Damages in all but race and national origin cases are capped at \$300,000 total, depending upon the number of employees, though medical payments are not subject to the cap.
8. Americans working outside the U.S. are covered by the law unless it violates the law of the country they are in.
9. Undocumented workers are covered by the law, but EEOC has recently limited remedies so that they do not conflict with overriding immigration considerations.



*Petruska v. Gannon University*

## Filing Claims Under Title VII

LO

*Learning Objective Five: State how a Title VII claim is filed and proceeds through the administrative process.*

1. Employees who feel they have a claim under Title VII must first go through the administrative process set up by the Act.
2. Under this process, nonfederal employees must first file the claim with the federal or state (“706 agency”) equal employment opportunity office within 180 days of the precipitating event. Federal employee claims are handled differently and their procedure is currently under review by the EEOC to make them more consistent with non-federal claims.
3. If an employee brings the claim in a federal office when a state office is available, the federal office will defer action on it for 60 days in order to allow the state office to act. If there is a 706 agency, the employee has 300 days to file a claim rather than 180 days.
4. Under EEOC’s expanded mediation program, it screens all new charges for mediation referral. Complex and weak cases will not be referred for mediation.
5. Both parties are sent letters offering mediation, and each has ten days to respond to the offer.

6. If both parties elect mediation, the charge must be mediated within 60 days for in-house of 45 days for external mediation.
7. During mediation, each party will have the opportunity to present its position, provide information, and express their request for relief. If the parties reach agreement, it is binding.
8. If the parties choose not to mediate or the mediation is unsuccessful, the charge goes back to EEOC for the usual handling of being investigated by EEOC talking to any necessary parties and witnesses.
9. If no reasonable cause for the claim is found, the complainant is given a right-to-sue letter which can be used as a basis for taking the claim to court.
10. If reasonable cause is found, an appropriate remedy is imposed. The employer, in such a case, may appeal the cause finding up to the Commission itself.
11. After exhaustion of Title VII's administrative remedies, if the case is taken to court, the district court reviews the case *de novo*, as if it had not been previously addressed.
12. Most claims are sifted out of the EEOC system for various reasons, but EEOC's success rate is pretty high. (90+ percent).
13. Mandatory arbitration of EEOC cases is receiving a good deal of attention recently and should be monitored for change.
14. In *Circuit City v. Adams*, 532 U.S.105 (2001) the U.S. Supreme Court held that mandatory arbitration clauses are enforceable. *EEOC v. Wafflehouse* held that even though the employee is subject to such a clause, it does not prevent EEOC from pursuing victim-specific relief. 534 US 279 (2002 )

### **Theoretical Basis for Title VII Suits**

1. There are two basis upon which an employee can sue: disparate impact and disparate treatment.
2. Cases involving one employee being treated differently from another based on a policy discriminatory on its face prohibited category are addressed by the disparate treatment theory.
3. Cases in which the employment policy is neutral on its face, but which have a disparate or greater negative impact on a protected class are addressed under the disparate treatment theory.

### **Disparate Treatment**

**LO**

*Learning Objective Six: Define disparate treatment and an employer's defenses to such a claim.*

1. This theory is used for cases of discrimination against an individual rather than a group. The theory is that the employer is treating an individual who is a member of a Title VII group differently from a similarly situated non-Title VII group member. For instance, allowing unduly criticizing a black employee publicly, while telling a white employee of their shortcomings in a more professional and private way.
2. Disparate treatment is shown by the employee establishing that:
  - (i) the employee belongs to a racial minority
  - (ii) the employee applied and was qualified for a job for which the employer was seeking applicants;
  - (iii) despite his qualifications, the employee was rejected; and
  - (iv) after rejection, the position remained open and the employer continued to seek applicants from persons with employee's qualifications.



*McDonnell Douglas Corp. v. Green*

### **Legitimate, Nondiscriminatory Reason Defense**

**LO**

*Learning Objective Six: Define disparate treatment and an employer's defenses to such a claim.*

1. Establishing the four elements of disparate treatment only sets up a rebuttable presumption.
2. The rebuttable presumption can be rebutted by a showing by the employer that there was a legitimate, nondiscriminatory reason for the employer's action which had nothing to do with discrimination.
3. If this is established, the employer is not liable for discrimination in the action taken regarding the employee.
4. Even if the employer establishes a legitimate nondiscriminatory reason for the employer's action, the employee can still rebut this with a showing that the employer is using this reason as a mere pretext for discrimination.

## The Bona Fide Occupational Qualification (BFOQ) Defense

### LO

*Learning Objective 6: Define disparate treatment and an employer's defenses to such a claim.*

1. BFOQ is available only for disparate treatment cases involving gender, religion and national origin, and is not available for race or color or for disparate impact cases.
2. BFOQ is legalized discrimination and therefore BFOQs are very narrowly construed. To have a successful BFOQ defense, the employer must be able to show that the basis for preferring one group over another goes to the essence of what the employer is in business to do and the attribute of the group discriminated against is at odds with that



*Wilson v. Southwest Airlines Company*

## Disparate Impact

### LO

*Learning Objective Seven: Define disparate impact and how it works, including the four-fifths rule and employer defenses to disparate impact claims.*

1. The second theory which a claimant can use as a basis for Title VII actions is disparate impact.
2. This theory is used when an employer has a policy which is neutral on its face but has a negative impact upon a category protected by Title VII.
3. The impact required is that the protected employees do not fare at least 80% as well as the majority under the policy.
4. This is a statistical argument based on groups of employees, rather than an individual employee, as is the case with disparate treatment.
5. Disparate impact can be used for subjective as well as objective criteria (see *Teal* below).

## Business Necessity Defense

LO

*Learning Objective Seven: Define disparate impact and how it works, including the four-fifths rule and employer defenses to disparate impact claims.*

1. *Griggs v. Duke Power Co.* was the real beginning of Title VII. It was not until *Griggs* established the disparate impact in 1971 that litigation under Title VII began in earnest. The business necessity defense was also established by the case.
2. Business necessity is only used for a defense to a disparate impact claim which is facially neutral but has a harsher impact on employees in a category protected by Title VII.
3. This is a defense to a disparate impact claim of discrimination.
4. To establish this defense, the employer must show that the screening device that results in a disparate impact on a group covered by Title VII is being used as a business necessity and is needed for the job. If this can be shown, the employer may use the screening device unless it can be shown that there is a way to address the business necessity without so much of an adverse impact.



*Griggs v. Duke Power Co.*

1. *Griggs* was severely impacted by *Wards Cove Packing Co. v. Atonio* (490 U.S. 642 (1989)) which held that it was the burden of the employee to show that the employer's policy that had a disparate impact and was not job related, rather than the employer proving that the employer's policy was job related. Since this was considered a setback to well-established *Griggs* precedent, Congress codified the *Griggs* precedent into law under the Civil Rights Act of 1991.
2. Anything used to separate one employee from another for purposes of determining workplace decisions, whether it is objective and written, or unspoken and subjective, can be subjected to the disparate impact analysis.
3. The four-fifths or 80 percent rule is only a rule of thumb for determining *the disparate impact of a policy*. The Court said in *Watson v. Fort Worth Bank and Trust* (487 U.S. 997 (1988)) that it had never used mathematical precision to determine disparate impact.
4. *Watson* determined that not only objective, but also subjective criteria could form a basis for a disparate impact. The subjective criteria that caused a disparate impact in *Watson* was a policy of using its all-white supervisory staff to determine promotions, which resulted in black employees not being promoted at the bank.



5. Pre-employment interviews and employment applications are often the basis for disparate impact claims because they ask questions that may tend to screen out more of one group than another and screen them out at a higher rate, with no business necessity for the question. For example, asking females if they are married and have children and not asking males. This presents the possibility that the employer is considering not hiring women who are married or who have children, while not using the same screening device for men.

### Other Defenses to Title VII Claims

1. Once employee provides prima facie evidence that the employer has discriminated, in addition to the other defenses above, the employer has the opportunity to present evidence that employee's evidence is not true.
2. Employers cannot avoid liability under Title VII by arguing that their discriminatory employment policies are permitted because the bottom line numbers resulting from use of the device did not exhibit a disparate impact, as it is equal employment **opportunity** that the law was made to guarantee, **not** equal employment.
3. Employers have frequently chosen to impose a limit on the number of women or minorities hired that corresponds with what will not indicate a disparate impact. They do this in order to avoid claims of disparate impact of their policies. This is often where the mistaken idea of quotas comes from. It is not because the law imposed them, but rather, because the employer chose to do this rather than simply adopt an open, fair employment process. This is **not** advisable, as the bottom line defense was soundly rejected by the U.S. Supreme Court in *Connecticut v. Teal* (457 U.S. 440 (1982)).



#### *Connecticut v. Teal*

### An Important Note

1. There is a common misconception that all an employee or applicant must do to bring home tons of money from court is to allege discrimination and sue an employer. This is not so.
2. Discrimination cases must be proved just as any other cases are required to be proved, and failure to do so results in dismissal of the case or plaintiff otherwise not winning.



*Ali v. Mount Sinai Hospital*

## Management Tips

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*Learning Objective Eight: Discuss what management can do to comply with Title VII.*

Since potentially all employees can bind the employer by their discriminatory actions, it is important for all employees to understand the law. This not only will greatly aid them in avoiding acts that may cause the employer liability, but it will also go far in creating a work environment in which discrimination is less likely to occur. Through training, make sure that all employees understand

- What Title VII is.
- What Title VII requires.
- Who Title VII applies to.
- How the employees' actions can bring about liability for the employer.
- What kinds of actions will be looked at in a Title VII proceeding.
- That the employer will not allow Title VII to be violated.
- That all employees have a right to a workplace free of illegal discrimination.



### Case Icons

***Petruska v. Gannon University 350 F. Supp. 2d 666 (W. D. PA 2004)***

**Issue:** Whether a church affiliated university could discriminate on the basis of gender against a female chaplain who reported Title VII violations of a superior.

**Facts:** A female chaplain at Gannon University, a private, Catholic diocesan college was instrumental in bringing to the attention of the area bishop accusations of sexual harassment of a female employee by the president of the university for a number of years. The university engaged in a cover-up of the events as per instructions of the bishop. Employee was vocal in opposing the coverup and the university's policies she viewed as discriminatory against females. In her capacity as chair of the university's Institutional Integrity Committee, she was instrumental in submitting an accreditation report which raised gender-based pay inequalities of Gannon employees and was critical of its procedures for addressing sexual harassment and other discrimination claims. The university pressured her to change the report and she refused. She alleges that they retaliated against her and in contemplation of being terminated, she resigned. The next day she was notified her resignation was immediately effective and she was to gather her things and leave campus. Her access to the campus and student was limited by the university.

**Decision:** The court said the ministerial exception to Title VII applied in discrimination cases involving religious institutions, rooted in the First Amendment's prohibition on government entanglement with religion, precludes courts from adjudicating employment discrimination suits between church and minister. These are matters of church administration and would necessarily involve an investigation and review of church practices and administration and threaten the separation of church and state.

### Case Questions

1. Do you agree with the court's decision? Explain.

*This gives the students a chance to discuss the issue of how just because something is discriminatory doesn't necessarily mean it is covered by Title VII. Students have a common misconception that any workplace discrimination is illegal, but this is an example of the fact that there are limitations. Only what Title VII says is discriminatory violates the law.*

2. As a manager in this situation, how do you think you would have handled the chaplain's complaints?

*Students are pushed to try to think of ways to create an organization that is pretty much discrimination free even in the absence of laws covering such things.*

3. Given the power that religious organizations have under Title VII, how do you think employment discrimination concerns can be addressed in the religious workplace?

*Thought question for the students, in order to expand their view of possibilities, as well as to deal with being within legal limitations.*

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***McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)***

**Issue:** What is the proper method of proceeding with a disparate treatment case under Title VII?

**Facts:** Green, an employee of McDonnell Douglas and a black civil rights activist, engaged with others in "disruptive and illegal activity" activity against his employer. The activity was done as part of Green's protest that his discharge from McDonnell Douglas was racially motivated, as were the firm's general hiring practices. McDonnell Douglas later rejected Green's re-employment application on the ground of the illegal conduct. Green sued alleging race discrimination.

**Decision:** The case was remanded for further fact finding in accord with the Court's decision, but the Court's language favored the employee. The case is important because the U.S. Supreme Court for the first time set forth how to prove a disparate treatment case. In these cases the employee can use an inference of discrimination drawn from a set of inquiries the Court set forth.

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons with complainant's qualifications. The Court recognized that the facts necessarily will vary in different types of Title VII cases, and the specification of the prima facie proof required from Green is not necessarily applicable in every respect to differing factual situations.

**Case Questions**

1. Do you think the Court should require actual evidence of discrimination in disparate treatment cases rather than permitting an inference? What are the advantages? Disadvantages?

*This is for purposes of having the students discuss the underpinnings of the Court's logic. Often students do not agree with court decisions, and think it harsh to impose liability when no actual discrimination is shown. This gives them the opportunity to think through the consequences of such thoughts, propose alternative analyses, and think through the different approaches.*

2. Practically speaking, is an employer's burden really met after the employer "articulates" a legitimate nondiscriminatory reason for rejecting the employee? Explain.

*This gets the student to see the futility of an employer not presenting a vigorous defense to the plaintiff's prima facie case so that the plaintiff will not be able to come back and win on rebuttal.*

3. Does the Court say that Green must be kept on in spite of his illegal activities? Discuss.

*Often employers have trouble distinguishing between the fact that the Court set forth the test to be applied in disparate treatment cases on the one hand, and the fact that it did not out and out permit Green to be kept out of the workplace, on the other. This question permits the students to analyze those two different issues and see that they are, in fact, separate. Just because the Court required that certain requirements be met in order to prove a disparate treatment case does not mean that once an employee alleges discrimination, liability attaches, regardless of what else the employee has done which serves as a basis for the employer's action of termination.*

[Click here to return to chapter outline at location of above case reference.](#)

***Wilson v. Southwest Airlines Company, 517 F. Supp. 292 (N.D. Tex. Dallas Div. 1981)***

**Issue:** Whether being female is a BFOQ for a position as a flight attendant.

**Facts:** A male sued Southwest Airlines after he was not hired as a flight attendant because he was male. The Airline argued that being female was a BFOQ for being a flight attendant because, among other things, it was consistent with its successful marketing scheme of advertising itself as the "love airline".

**Decision:** The court disagreed and said this Circuit's decisions have given rise to a two step BFOQ test: (1) does the particular job under consideration require that the worker be of one gender only; and if so, (2) is that requirement reasonably necessary to the "essence" of the employer's business. To rely on the bona fide occupational qualification exception, an employer has the burden of proving that he had reasonable cause to believe, that is a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved. The second level is designed to assure that the qualification being scrutinized is one so important to the operation of the business that the business would be undermined if employees of the "wrong" gender were hired. ... Discrimination based on gender is valid only when the essence of the business operation would be undermined by not hiring members of one gender exclusively. That was not the case here.

**Case Questions**

1. What should be done if, as here, the public likes the employer's scheme?

*Student response. Students will probably opine that employers should be able to have whatever successful marketing schemes they wish, and the courts should not interfere if people wish to support it. You may discuss the significance of the regulation of law as it relates to certain kinds of activity. Are we usually permitted to do whatever we like, simply because the parties involved consent? (cite things like laws against consensual sodomy, taking/possessing illegal drugs, and pornography). What is the distinction? What is the purpose to be accomplished by the regulation?*

2. Do you think the standards for BFOQs are too strict? Explain.

*Student response. Student often say the law has no business regulating such areas because there should be reasons other than those narrowly defined by the courts for BFOQs. Discuss the "floodgates" and "precedent" arguments which say that if exceptions are granted, it will open the floodgates to other exceptions. Once there is precedent for permitting the exceptions, it will be harder to argue a narrow view should be taken.*

3. Should a commercial success argument be given more weight by the courts? How should that be balanced with concern for Congress' position on discrimination?

*Student response. See above comments. Explore with the students the why or why not of their answers. Since many students believe businesses should be able to market or have whatever themes they wish, this gets them to consider what happens if these schemes run afoul of simple considerations like a person's being qualified to do the job, yet not "fitting in" with the employer's marketing idea. Hopefully they come to see that in the balance, being qualified ought to count for a good deal.*

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**Griggs v. Duke Power Co., 401 U.S. 424 (1971).**

**Issue:** Whether an employer can be held liable for race discrimination if its policy of requiring a high school diploma has an adverse impact on black employees and diploma is not related to the job.

**Facts:** Black employees brought this action under Title VII of the Civil Rights Act of 1964, challenging the employer's requirement of a high school diploma or the passing of intelligence tests as a condition of employment in or transfer to jobs at the power plant. They alleged the requirements are not job related and have the effect of disqualifying blacks from employment or transfer at a higher rate than whites.

**Decision:** The U.S. Supreme Court held that Title VII dictated that job requirements which have a disproportionate impact on groups protected by Title VII be shown to be job related. In some of the most quoted language under Title VII, the Court said that what is required by Congress [under Title VII] is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

### Case Questions

1. Does this case make sense to you? Why/Why not?

*Discussion may center on the fact that the Court's decision may make sense here because the high school diploma, instituted as it was, directly after passage of Title VII, and after grandfathering in virtually all white employees, many of whom did not have high school diplomas, was obviously an attempt to circumvent Title VII. On the other hand, students often wish to argue that an employer having a high school diploma requirement seems reasonable--despite the requirement that the requirement must be reasonably related to the job.*

2. The Court said the employer's intent does not matter here. Should it?

*Students and employers often find it difficult to deal with the fact that Title VII does not require specific intent by the employer to discriminate. Discussion may involve the alternative. That is, how the law may accomplish its goal of eliminating employment discrimination if all an employer had to do was to say there was no intent. The students can be reminded of the long history our country has regarding race, gender, religious and other discrimination, and the impact on the workplace and the protected employees whether or not the discrimination was intentional.*

3. What would be your biggest concern as an employer who read this decision?

*Students may discuss that the decision may make it easier for insincere employees to feign discrimination since no showing of intent is involved. Also, that the employer may be held liable for discrimination which was not intentional and which could, conceivably come as a surprise.*

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**Connecticut v. Teal, 457 U.S. 440 (1982)**

**Issue:** Whether an employee can bring a disparate impact case if the employer's screening device resulted in a disparate impact, but the employer's adjustment of those results concluded in a bottom line percentage which did not reflect an adverse impact.

**Facts:** Unsuccessful black promotion candidates sued the employer for race discrimination. Employees alleged that even though the employer's final promotion figures showed no disparate impact, the employer's process of arriving at the bottom line figures should be subject to scrutiny for disparate impact.

**Decision:** The Supreme Court agreed and held for employees. The Court held that the "bottom line" does not preclude employees from establishing a prima facie case, nor does it provide the employer with a defense to such a case. A non-job-related test that has a disparate racial impact, and is used to "limit" or "classify" employees, is "used to discriminate" within the meaning of Title VII, whether or not it was "designed or intended" to have this effect and despite an employer's efforts to compensate for its discriminatory effect. It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force.

### Case Questions

1. After being sued, but before trial, why do you think that the agency promoted a larger percentage of blacks than whites when a larger percentage of whites passed the exam?

*Student response. Students should discuss means management might use to avoid liability and the pros and cons of doing such.*

2. Should the employees have been allowed to sue if the bottom line showed no discrimination?

*Student response. Some students will say yes, because it is not in keeping with Title VII to permit the law to be circumvented in this way. Others will probably say no because the law requires a showing of disparate impact and if a case can be brought without it, then the requirement is of little use. For the latter, the professor can discuss the effect that upholding the letter of the law has when to do so is not in keeping with the spirit of the law.*

3. How could the employer here have avoided liability?

*Student response. Among other things, the employer could have used valid job requirements such as the experience of the candidates in their two-year provisional status, not used the written exam as an absolute cut-off for moving on to the next step in the process, and made a sincere and good faith effort to base promotions on necessary job qualifications rather than upon unnecessary barriers unrelated to the job's requirements*



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***Ali v. Mount Sinai Hospital, 68 Empl. Prac. Dec. (CCH) &44,188 (6/12/96)***

**Issue:** Whether an employee can receive a judgment in a race discrimination case without offering evidence of racial discrimination.

**Facts:** A black female employee sued the employer for racial discrimination in violation of Title VII, for discriminatory enforcement of the employer's dress code. Employee alleged she was disciplined for violation of the code while whites were not. In support of her claim, employee gave evidence that other employees had violated the dress code, but she gave no evidence that they had not been disciplined as she was for similar offenses. Despite the fact that employer had made statements to employee which employee perceived as derogatory, there was no showing of race discrimination.

**Decision:** The court found that the employee offered no evidence of discriminatory enforcement, therefore it had no choice but to hold for the employer.

**Case Questions**

1. What do you think of the way in which Ali was approached by Dr. Shields about her violation of the dress code? Does this seem advisable to you?

*Student response. The purpose of this question is to get students to think, as managers, of other ways to approach undesirable situations rather than saying the first thing that comes to mind without thinking of the possible legal consequences. The employee could have easily been approached in a way that gave her the necessary feedback, in the strongest terms, without being belittling, unnecessarily harsh and potentially racial (steer clear of references to black employees being equated with animals, since the history of race relations in our country has included comparing blacks with monkeys, apes, "coons," etc.)*

2. How much of a role do you think different cultural values played in this situation? Explain.

*Clearly the employee's response as to how she looked "beautiful" differed from how Dr. Shields thought employee looked "like something in a zoo... or disco". Since Dr. Shields did not confine her comments merely to employee's violation of the dress code by the wearing of inappropriate apparel and hairstyling at odds with the code, she leaves herself open for analysis of her estimation of the differences being based on a qualitative, culturally-based difference in the employee's appearance. That is, of course, based on cultural preferences. That is, Shield's did not merely say to employee, "Your attire and hairstyle is not in keeping with the dress code." Rather, she said employee looked like something in the zoo and someone going to a disco. Have students discuss what the role of cultural differences may be in managers' perceiving and judging the behavior, including attire, of employees. For instance, how something like saying "conservative dress" is a particular cultural concept which means it can be left open to interpretations which may differ based on one's culture. Remind the students that this is aside from the fact that the dress code was clear, the code was specifically designed to meet the needs of the particular workplace involved, and employee, in fact, violated her boss's interpretation of the code.*

3. What can the employer do avoid even the appearance of unfair enforcement of its dress policy in the future?

*Student response.*

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### **Chapter-End Questions**

1. While reviewing pre-employment reports as part of her job, claimant read a report in which an applicant admitted commenting to an employee at a prior job that "making love to you is like making love the Grand Canyon." Later, at a meeting convened by her supervisor, the supervisor read the quote and said he didn't understand it. A male subordinate said he would explain it to him later, and both chuckled. The claimant alleges that nearly every action after the incident constituted retaliation for her complaint, including a lateral transfer. Will the court agree? (**Clark Count School District v. Breeden, 532 U.S. 268 (2001)**)

*No, the Supreme Court did not agree. In its per curiam decision it said that claiming sexual harassment for incidents that do not alter the conditions of employment to be able to claim retaliation should there be later employment actions with which the employee disagrees, is not permissible. Here, the Court held that no one could reasonably believe that the incident violated Title VII, and based on its precedent, Title VII forbids only behavior so objectively offensive that it alters the conditions of the employee's employment. The Court made clear that every single occurrence of sexual harassment does not constitute legally actionable sexual harassment either for purposes of violation of the gender provision of sexual harassment or for the anti-retaliation provisions of Title VII.*

2. How long does a private employee have to file a claim with EEOC or be barred from doing so?

*180 days.*

3. Lin Teung files a complaint with EEOC for national origin discrimination. His jurisdiction has a 706 agency. When Teung calls up EEOC after 45 days in order to see how his case is progressing, he learns that EEOC has not yet moved on it. Teung feels the EEOC is violating its own rules. Is it?

*No. If there is a state or local 706 agency, and the complainant files with EEOC, EEOC must hold off on investigating the complaint, for 60 days.*

4. Althea, black, has been a dee jay for a local Christian music station for several years. The station gets a new general manager and within a month he terminates Althea. The reason he gave was that it was inappropriate for a black dee jay to play music on a white Christian music station. Althea sues the station. What is her best theory for proceeding?

*Disparate treatment. Based on an actual situation. Since the statistical base would be so small here, Althea has a better case for disparate treatment.*

5. Melinda wants to file a sexual harassment claim against her employer but feels she cannot do so because he would retaliate against her by firing her. She also has no money to sue him. Any advice to Melinda?

*It is a separate offense under Title VII to retaliate against an employee for pursuing his or her rights under the Act. Melinda can file her sexual harassment and retaliation claims with the EEOC and need pay nothing.*

6. Saeid, a Muslim, alleges that his supervisor made numerous remarks belittling his Muslim religion, Arabs generally, and him specifically. The comments were not made in the context of a specific employment decision affecting Saeid. Is this sufficient for the court to find discriminatory ill will? (**Maarouf v. Walker Manufacturing Co., 210 F.3d 750 (7<sup>th</sup> Cir. 2000)**)

*Yes. The court determined that even under the circumstances, the comments were evidence that the supervisor's opinion of the employee was tainted by discriminatory ill will, though not direct evidence of discrimination.*

7. A construction company was sued for harassment when it failed to take seriously the complaints about offensive graffiti scrawled on rented portable toilets. The employer defended by saying (1) employees should be used to such rude and crude behavior. (2) the employer did not own or maintain the equipment, which came with graffiti already on it. (3) it took action after a formal employee complaint, and (4) the graffiti insulted everyone. Will the defenses be successful? (**Malone v. Foster-Wheeler Constructors, Westlaw 21 Fed. Appx. 470 (7<sup>th</sup> Cir. 2001) unpub. opinion**)).

*No the court did not buy the defenses. As to (1) the court said that even though employees in the construction industry may regularly see graffiti, it did not mean the employer could ignore it. (2) the employer was responsible for the graffiti even though it did not own the equipment since it was responsible for providing employees with restroom or other facilities that did not create a hostile environment. (3) Because the employer could see the graffiti on the toilets, it should not take a formal complaint for the employer to abate the harassment. (4) Graffiti that is equally insulting to everyone does not make the graffiti that creates a hostile environment acceptable.*

8. An employee files a race discrimination claim against the employer under Title VII. The employee alleges that after filing a claim with EEOC, her ratings went from outstanding to satisfactory and she was excluded from meetings and important workplace communications, which made it impossible for her to satisfactorily perform her job. The court denied the race discrimination claim. Must it also deny the retaliation claim? (**Lafate v. Chase Manhattan Bank, 123 F. Supp. 2773 (D. DE 2000)**).

*No, the jury rejected the race claim, but found sufficient evidence for the retaliation claim and granted the claimant \$600,000.*

9. Day Care Center has a policy stating that no employee can over 5 foot 4 because the employer thinks children feel more comfortable with people who are closer to them in size. Does Tiffany, who is 5 foot 7, have a claim? If so, under what theory could she proceed?

*The employer's policy is neutral on its face, but has a disparate impact on men, since, statistically speaking, most men would be taller. However, Tiffany is not a man, and thus, does not have standing to sue on the policy. She is not adversely affected by the policy based on gender, but rather, on height, which, in and of itself, is not a protected category. It would only be a problem if it adversely impacted those of the gender of the claimant. Gender, through the height requirement, would not be appropriate as a BFOQ because height is not reasonably necessary to the employer's business of caring for children. That is, those over a certain height do not lose the ability to care for the children.*

10. During the interview Gale had with Leslie Accounting Firm, Gale was asked whether she had any children, whether she planned to have any more children, to what church she belonged and what her husband did for a living. Are these questions illegal? Explain.

*Yes. These questions are often asked of women in interviews, but they are illegal. Questions about children, childbearing and what one does for a living are almost exclusively asked only of women, and thus, is disparate treatment, since men do not receive the same questions. Once a question is asked, it is assumed that the employer must plan to use the answer in making a determination as to suitability of the candidate for the job. It is virtually impossible to prove otherwise. Therefore, it is best to forego such questions or ask more direct, relevant questions. For instance, it is appropriate to ask every interviewee if there is anything which will interfere with his or her ability to come to work consistently and on time. For the religion question, since most employers ask it to find out where an ill employee should be taken for medical assistance, or what religious figure to call in case of serious on the job injury, simply asking this specific question, and doing so after hire, would accomplish the employer's goal, while eliminating the liability.*