Chapter 2
The Employment Law Toolkit: Resources for Understanding the Law and Recurring Legal Concepts

[*Note to users: Users can click on the case icon* 

to access the case brief included at the end of the IM chapter.]

Chapter Objective

The objective of this chapter is to provide students with an understanding in the background legal issues that pervade the issues discussed in this textbook. What is involved in citations and reading cases have been explained so that the students will better understand the law and how court decisions are constructed. Regarding legal concepts, rather than explaining the concepts over and over as they relate to the particulars of the specific chapter, the concepts have been explained here. There are toolkit icons in the substantive chapters in case the student wishes to review the concept.

Learning Objectives

After reading this chapter, students should be able to:

1. Understand how to read and digest legal cases and citations. LO
2. Explain and distinguish the concepts of *stare decisis* and precedent. LO
3. Evaluate whether an employee is an at-will employee. LO
4. Determine if an at-will employee has sufficient basis for wrongful discharge. LO
5. Recite and explain at least three exceptions to employment-at-will. LO
6. Distinguish between disparate impact and disparate treatment discrimination claims. LO
7. Provide several bases for employer defenses to employment discrimination claims LO
8. Determine if there is sufficient basis for a retaliation claim by an employee. LO
9. Identify sources for further legal information and resources. LO

Detailed Chapter Outline

Scenarios—Points for Discussion

Scenario One: Yes, Mark may well have a basis for an unlawful termination suit, depending upon the jurisdiction in which he brings his suit and the type of work agreement he is employed under. If he is a contract employee, he can sue for breach of contract. If he is instead, an at-will employee, he may have a claim for an exception to the at-will rule created by his jurisdiction. This may be breach of a covenant of good faith and fair dealing, breach of an implied contract, or some other exception created by the law of his jurisdiction.

Scenario Two: Like Mark, in Scenario 1, Jenna may have a basis for a lawsuit for unlawful termination if her jurisdiction recognizes a public policy exception to at-will employment, has a statute providing a cause of action for termination for serving jury duty, or there is some other provision in her jurisdiction covering what occurred.

Scenario Three*:* The department's policy has been shown to have a disparate impact on women as well as on men from nationalities of statistically shorter stature such as Hispanics and Asians. As such, if the department cannot show a business necessity for the requirement then it will fail.

Scenario Four: No. Anyone with responsibility for any part of the hiring process has the potential for exposing the employer to liability for Title VII issues.

I. Introduction

The students may never have taken a law course before. Thus, it might be useful to take some time up front to introduce students to helpful information that will make their legal journey easier. Much of the legalese that tends to stump people has been taken out from the textbook and the legal concepts have been made as accessible as possible for a non-legal audience.

This chapter offers several tools to help the students navigate the text. As a procedural matter, a guide to reading cases and understanding what it takes to have a legally recognized cause of action has been offered in the textbook. In addition, several of the substantive issues the students will face in the chapters ahead will use information that is based on the same legal concepts. Rather than repeat the information in each chapter's discussion, the concept has been explained once in this "toolkit" chapter.

There is a corresponding icon used throughout the text. When students see the toolkit icon, they should know that the text is referring to information that has been covered in this toolkit chapter and, if students need to, they should refer to this chapter to refresh their recollection. Part one explains how to read the cases and a couple of important concepts to keep in mind for all legal

cases. Part two provides information on the concept of employment-at-will. Part three discusses the theoretical bases for all employment discrimination actions. Part four describes legal resources for searching for further legal information.

II. Guide to Reading Cases

The cases are considered to be an important and integral part of the chapters. By viewing the court decisions included in the text, students get to see for themselves what the court considers important when deciding a given issue. This in turn gives the student a decision maker insight into what they need to keep in mind when making decisions on similar issues in the workplace. The more students know about how a court thinks about issues that may end up in litigation, the better they can avoid it. In order to tell the students about how to view the cases for better understanding, a little background on the legal system has to be given. Mostly, it will only be a refresher of the students' previous law or civics courses.

Learning Objective Two: Explain and distinguish the concepts of stare decisis and precedent.

A. Stare Decisis and Precedent

The American legal system is based on *stare decisis*, a system of using legal precedent. Once a judge renders a decision in a case, the decision is generally written and placed in a law reporter and must be followed in that jurisdiction when other similar cases arise.

Federal courts consist of trial courts (called the U.S. District Court for a particular district), courts of appeal (called the U.S. Circuit Court for a particular circuit), and the U.S. Supreme Court. U.S. Supreme Court decisions apply to all jurisdictions, and once there is a U.S. Supreme Court decision, all courts must follow the precedent. Circuit court decisions are mandatory precedent only for the circuit in which the decision is issued. All courts in that circuit must follow that circuit's precedents. District court precedents are applicable only to the district in which they were made.

When courts that are not in the jurisdiction are faced with a novel issue they have not decided before, they can look to other jurisdictions to see how the issue was handled. If such a court likes the other jurisdiction's decision, it can use the approach taken by that jurisdiction's court. However, it is not bound to follow the other court's decision since that court is not in its jurisdiction.

States have court systems parallel to the federal court system. They vary from state to state,

but generally there is also a trial court, an intermediate court of appeals, and a state supreme court. The state court system works very much like the federal system in terms of appeals moving up through the appellate system, though some states have more levels. Once the case is decided by the state supreme court, it can be heard by the U.S. Supreme Court if there is a basis for appealing it to that court.

On the federal side, once a case is heard by the U.S. Supreme Court, there is no other court to which it can be appealed. Under our country's constitutionally based system of checks and balances, if Congress, who passed the law the Court interpreted, believes the Court's interpretation is not in keeping with the law's intended purpose, Congress can pass a law that reflects that determination.

Perhaps the most recent is the Lilly Ledbetter Fair Pay Act of 2009 discussed in the gender chapter. The Supreme Court interpreted Title VII of the 1964 Civil Rights Act barring workplace discrimination on the basis of gender such that even though it was clear that gender-based pay discrimination had occurred, there was no basis for a remedy. Ledbetter did not find out about the pay discrimination for 19 years. By that time, the 180-day statute of limitations had long expired. Congress responded to this Supreme Court decision with the Lilly Ledbetter Fair Pay Act that allows the statute of limitations to begin to run anew each time an employee receives a paycheck based on discrimination.

B. Understanding the Case Information

Learning Objective One: Understand how to read and digest legal cases and citations.

Each of the cases included in the textbook is an actual law case written by a judge. The students can choose a case, any case, to go through this exercise. The first thing the students will see is the *case name.* This is derived from the parties involved—the one suing (called **plaintiff** at the district court level) and the one being sued (called **defendant** at the district court level). At the court of appeals or Supreme Court level, the first name reflects who appealed the case to that court. It may or may not be the party who initially brought the case at the district court level. At the court of appeals level, the person who appealed the case to the court of appeals is known as the **appellant** and the other party is known as the **appellee**. At the Supreme Court level they are known as the **petitioner** and the **respondent**.

Under the case name, the next line will have several numbers and a few letters. This is called a *case citation.* A case citation is the means by which the full case can be located in a law reporter if one wants to find the case for in a law library or a legal database such as

LEXIS/NEXIS or Westlaw. Reporters are books in which judges' case decisions are kept for later retrieval by lawyers, law students, judges, and others.

After the citation a short paragraph has been included to tell one what the case is about, what the main issues are, and what the court decided. This is designed to give the students a heads-up to make reading the case easier. The next line will have a last name and then a comma followed by "J." This is the name of the judge who wrote the decision you are reading. The J stands for *judge* or *justice*. Judges oversee lower courts, while the term for them used in higher courts is *justices*. C.J. stands for *chief justice*. The next thing in the chapter case is the body of the decision. The last thing in the chapter cases is the final decision of the court itself. If the case is a trial court decision by the district court based on the merits of the claim, the court will provide relief either for the plaintiff or for the defendant.

Sometimes, the court does not reach the actual merits of the case, however. If a defendant makes a **motion to dismiss**, the court will decide that issue and say either that the motion to dismiss is *granted* or that it is *denied.* A defendant will make a motion to dismiss when he or she thinks there is not enough evidence to constitute a violation of law. If the motion to dismiss is granted, the decision favors the defendant in that the court dismisses the case. If the motion to dismiss is denied, it means the plaintiff's case can proceed to trial. This does not mean that the ultimate issues have been determined, but only that the case can or cannot, as the case may be, proceed further. This decision can be appealed to the next court.

The parties also may ask the court to grant a **motion for summary judgment**. This essentially requests that the court take a look at the documentary information submitted by the parties and make a judgment based on that, as there is allegedly no issue that needs to be determined by a jury. Again, the court will either grant the motion for summary judgment or deny it.

If the case is in the appellate court, it means that one of the parties did not agree with the trial court's decision. This party, known as the *appellant,* appeals the case to the appellate court, seeking to overturn the decision based on what the appellant alleges are errors of law committed by the court below. The *appellee* is the party against whom an appeal is brought.

After the appellate court reviews the lower court's decision, the court of appeals will either *affirm* the lower court's decision and the decision is allowed to stand, or it will *reverse* the lower court's decision, which means the lower court's decision is overturned. If there is work still to be done on the case, the appellate court also will order *remand.* Remand is an order by the court of appeals to the lower court telling it to take the case back and do what needs to be done based on the court's decision.

It is also possible that the appellate court will issue a *per curiam* decision. This is merely a brief decision by the court, rather than a long one, and is not issued by a particular judge. Rather than seeing a judge's name, the words *Per Curiam* will be seen.

Following the court's decision is a set of questions intended to translate what the students have read in the case into issues that they would be likely to have to think about as a business owner, manager, or supervisor.

C. *Prima Facie* Case

When a legal case is brought, it must be based on legal rights provided by statutes or common law. When an individual's legal rights have been violated, the ability to file a case on that basis is known as having a **cause of action**. Each cause of action has certain requirements that the law has determined constitute the cause of action. In court if it can be shown that those requirements are met, then the party bringing the cause of action is said to have established a ***prima facie* case** for that cause of action. Generally, if the claimant is not able to present evidence to establish a *prima facie* case for his or her claim, the claim will be dismissed by the court. If the claimant establishes a *prima facie* case, then the claim may advance to the next step in the proceedings.

III. Employment-At-Will Concepts

A. Wrongful Discharge and the Employment-At-Will Doctrine

Learning Objective Three: Evaluate whether an employee is an at-will employee.

Learning Objective Four: Determine if an at-will employee has sufficient basis for wrongful discharge.

The American employer–employee relationship was originally based on the English feudal system. When employers were the wealthy landowners who owned the land on which serfs (workers) toiled, employers met virtually all of the workers' needs, took care of disputes that arose, and allowed the workers to live their entire lives on the land, even after they could no longer be the productive serfs they once were.

When Americans moved from an agrarian to an industrialized society, the employee-employer relationship became further removed than before: The employee could work for the employer as long as the employee wished and leave when the employee no longer wished to

work for the employer (therefore, the employees worked at their own will). The reverse was also true: The employer employed the employee for as long as the employer wished, and when the employer no longer wished to have the employee in his or her employ, the employee had to leave. This relationship was called **at-will employment**.

Both parties were free to leave at virtually any time for any reason. If, instead, there is a contract between the parties, either as a collective bargaining agreement or an individual contract, the relationship is not governed by the will of the parties, but rather by the contract. Further, government employees generally are not considered at-will employees. Limitations are imposed on the government employer through rules governing the terms and termination of the federal employment relationship.

When equal employment opportunity legislation entered the equation, the employer's rights to hire and fire were circumscribed to a great extent. While an employer was free to terminate an employee for no particular reason, it could not terminate a worker based on race, gender, religion, national origin, age, or disability. Providing protection for members of historically discriminated-against groups through such laws as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act also had the predictable effect of making all employees feel more empowered in their employment relationships.

However, since the system is one of at-will employment, an employer is only prohibited from terminating employees based on what the law dictates. Any terminated at-will employee may bring suit against the employer, seeking reinstatement or compensatory and punitive damages for the losses suffered on the basis of *unjust dismissal* or *wrongful termination*. Whether or not the employee wins depends on how state law has developed around this issue since it is not governed by federal law.

Probably because the law also began to recognize certain basic rights in its concept of the employment relationship, and because of the basic unfairness involved in some of the cases that the courts were asked to decide, courts all over the country began making *exceptions* to the at-will doctrine. To bring uniformity, predictability, and consistency to the area, the Commission on Uniform State Laws issued in 1991 a model termination act that states may use.

The state-by-state approach to addressing the exceptions to the at-will doctrine has created a crazy quilt of laws across the country. (See Exhibit 2.2, "State Rulings Chart.") In some states, the at-will doctrine has virtually no exceptions and, therefore, remains virtually intact. In other states, the courts have created judicial exceptions to the at-will doctrine that apply in certain limited circumstances. At this time, the at-will doctrine still survives as the default rule in 49 of the 50 states, with Montana remaining as the single state holdout.

B. Exceptions to the At-Will Doctrine

Learning Objective Five: Recite and explain at least three exceptions to employment-at-will.

Even though an employer can terminate an employee for any legal reason, if the reason is one that falls within an exception to the at-will doctrine, the employee can claim wrongful termination and receive either damages or reinstatement.

Though they are difficult cases for employees to prove, state courts and state legislation have been fairly consistent in holding that exceptions will be permitted where the discharge is in violation of some recognized public policy, where the employer breaches an implied covenant of good faith and fair dealing, or where an implied contract or implied promise to the employee was breached (the latter involves the legal concept of *promissory estoppel*).

If the employee and employer have an individual contract or a collective bargaining agreement, then the employment relationship is governed by that agreement. However, the contract, of course, can be one that states simply that the relationship is at-will; that the employer's right to discharge or take any other action is at its discretion; that the relationship may be terminated at any time by either side, with or without cause; and that the employee understands the nature of this arrangement. In addition, if the employer is the government, then the employment relationship regarding dismissals is governed by relevant government regulations.

Violation of Public Policy

One of the most visible exceptions to employment at-will that states are fairly consistent in recognizing, either through legislation or court cases, has been a violation of **public policy**; at least 44 states allow this exception. Violations of public policy usually arise when the employee is terminated for acts such as refusing to violate a criminal statute on behalf of the employer, exercising a statutory right, fulfilling a statutory duty, or reporting violations of statutes by an employer. States vary in terminology for the basis of a cause of action against her or his employer on this basis, and some require that the ex-employee show that the employer's actions were motivated by bad faith, malice, or retaliation.

While courts often try to be sensitive to family obligations, being there for one's family is not a sufficient public policy interest; and a refusal to work overtime in consideration of those obligations was deemed a legal basis for termination. The termination of an at-will

employee for meeting family obligations did not violate a public policy or any legally recognized right or duty of the employee. While the courts that have adopted the public policy exception agree that the competing interests of employers and society require that the exception be recognized, there is considerable disagreement in connection with *what the public policy is* and *what constitutes a violation of the policy*.

Whistle-Blowing

Some states have included terminations based on whistleblowing under the public policy exception. Whistle-blowing occurs when an employee reports an employer's wrongdoing. One of the most infamous cases of whistle-blowing occurred when Sherron Watkins chose to speak up in connection with Enron's wrongdoings with regards to its accounting procedures.

In 1982, Congress enacted the Federal Whistleblower Statute, which prohibits retaliatory action specifically against defense contractor employees who disclose information pertaining to a violation of the law governing defense contracts. The statute is administered by the Department of Defense and is enforced solely by that department; that is, an individual who suffers retaliatory action under this statute may not bring a private, common-law suit.

In 1989, Congress amended the Civil Service Reform Act of 1978 to include the Whistleblowers Protection Act, which expands the protection afforded to federal employees who report government fraud, waste, and abuse. The act applies to all employees appointed in the civil service who are engaged in the performance of a federal function and are supervised by a federal official.

Certain statutes on other subjects or specific professions include whistle-blowing protections. For example, the Health Care Worker Whistleblower Protection Act protects nurses and other health care workers from harassment, demotion, and discharge for filing complaints about workplace conditions. At least 43 states, including California, Florida, New York, and Texas, also provide some additional and general form of legislative protection for whistleblowers.

If there is a statute permitting an employee to take certain action or to pursue certain rights, the employer is prohibited from terminating employees for engaging in such activity. The act provides protection to employees of publicly traded companies who disclose corporate misbehavior, even if the disclosure was made only internally to management or to the board of directors and not necessarily to relevant government authorities. The *Palmateer* case at the end of the chapter is a seminal one in this area.

Palmateer v. International Harvester Company

Retaliatory Discharge

Learning Objective Eight: Determine if there is sufficient basis for a retaliation claim by an employee.

Retaliatory discharge is a broad term that encompasses terminations in response to an employee exercising rights provided by law. To protect an employee's right to protest adverse employment actions, courts are sensitive to claims of retaliation. If workers are not protected against retaliation, there would be a strong deterrent to asserting one's rights. On the other hand, if the employer's actions are legitimately based in law, the employer's actions are protected.

In order to prove a retaliatory discharge claim, an employee must show that he or she was participating in a protected activity, there was an adverse employment action toward the employee by the employer, and there is causal connection between the employee's protected activity and the adverse action taken by the employer. (See Exhibit 2.4, "Retaliatory Discharge: *Prima Facie* Case.") In determining whether the adverse action is sufficient to support a claim, courts will look to an objective standard and measure whether a "reasonable employee" would view the retaliatory harm as *significant*.

Herawi v. State of Alabama , Department of Forensic Sciences

Finally, the third element of retaliatory discharge requires a causal connection between the first two elements. Courts often require more than a simple showing of close timing; however, when the adverse employment action happens immediately after the protected activity, courts recognize that there may be no time for any other evidence to amass.

If an employee originally claims wrongful behavior on the part of the employer and suffers retaliation, it does not matter whether the employer proves that the original wrongful behavior actually occurred. The question is only whether there was retaliation for engaging in protected activity.

Constitutional Protections

An employer is prohibited from terminating a worker or taking other adverse employment action against a worker on the basis of the worker's engaging in constitutionally protected activities. However—and this is a significant limitation—this prohibition applies only where the employer is a public entity, since the Constitution protects against government action rather than action by private employers.

Case 3

Breach of Implied Covenant of Good Faith and Fair Dealing

Another exception to the presumption of an at-will employment relationship is the implied **covenant of good faith and fair dealing** in the performance and enforcement of the employee's work agreement. This requirement should not be confused with a requirement in some contracts of "good cause" prior to termination.

The implied covenant of good faith and fair dealing means that any agreement between the employer and the employee includes a promise that the parties will deal with each other fairly and in good faith. Only 13 states recognize this covenant as an exception to at-will employment. Some states allow the cause of action but limit the damages awarded to those that would be awarded under a breach of contract claim, while other states allow the terminated employee to recover higher tort damages.

Critics of this implied agreement argue that, where an agreement is specifically nondurational, there should be no expectation of guaranteed employment of any length. As long as both parties are aware that the relationship may be terminated at any time, it would be extremely difficult to prove that either party acted in bad faith in terminating the relationship. Courts have supported this contention in holding that an implied contract or covenant seems to upset the balance between the employee's interest in maintaining her or his employment and the employer's interest in running its business as it sees fit.

Guz v. Bechtel National Inc.

Breach of Implied Contract

An **implied contract** is a contract that is not expressed but, instead, is created by other words or conduct of the parties involved. Though primarily an implied contract arises from the acts of the parties, the acts leading to the creation of an implied contract vary from situation to situation.

Courts have found contracts implied from off-hand statements made by employers during preemployment interviews, such as a statement that a candidate will become a "permanent" employee after a trial period. In such cases, when the employee has been terminated in less than the time quoted as the salary, the employee may be able to maintain an action for the remainder of the salary on the theory of this establishing an implied contract for a year's duration. However, these statements must be sufficiently specific to be enforceable.

Court rulings finding implied contracts based on statements of employers have caused some employers to restructure terms of agreements, employee handbooks, or hiring practices to ensure that no possible implied contract can arise. Some commentators believe that this may not result in the fairest consequence to employees.

Guz v. Bechtel National Inc.

Employers should be careful when creating an employment policy manual that includes a statement that employees will only be terminated for good cause, or that employees become "permanent" employees once they successfully complete their probationary period. This type of language has been held to create binding agreements between the employer and the employee; and the employer's later termination of the employee, if inconsistent with those statements, has resulted in liability.

Exception Based on Promissory Estoppel

Promissory estoppel is similar to the implied contract claim except that the promise, implied or expressed, does not rise to the level of a contract. It may be missing an element; perhaps there is no mutual consideration or some other flaw; however, promissory estoppel is still a possible exception to an employer's contention of an at-will environment. For a claim of estoppel to be successful, the plaintiff must show that the employer or prospective employer made a *promise* upon which the worker *reasonably relied* to her or his *detriment.*

Statutory Exceptions to Employment At-Will

A number of statutory exceptions also exist that limit the nature of employment-at-will. Though some employers have argued that the list of exceptions makes mockery of the at-will rule, the list itself is actually finite rather than limitless. Employers are free to make business decisions based on managerial discretion outside of certain judicially limited and legislatively imposed parameters.

If there is no express agreement or contract to the contrary, employment is considered to be at-will; that is, either the employer or the employee may terminate the relationship at her or his discretion. Nevertheless, even where a discharge involves no statutory discrimination, breach of contract, or traditional exception to the at-will doctrine discussed above, the termination may still be considered wrongful and the employer may be liable for "wrongful discharge," "wrongful termination," or "unjust dismissal."

C. Constructive Discharge

Constructive discharge exists when the employee sees no alternative but to quit her or his position; that is, the act of leaving was not truly voluntary. Constructive discharge usually evolves from circumstances where an employer knows that it would be wrongful to terminate an employee for one reason or another. To avoid being sued for wrongful termination, the employer creates an environment where the employee has no choice but to leave. If courts were to allow this type of treatment, those laws that restrict employers' actions from wrongful termination, such as Title VII, would have no effect.

The test for constructive discharge is whether the employer made the working conditions so intolerable that no reasonable employee should be expected to endure. The courts have softened this language somewhat so that an employee need not demonstrate that the environment is literally unbearable but simply that she or he "has no recourse within the employer's organization or reasonably believes there is no chance for fair treatment," then or in the future.

A police officer in *Paloni v. City of Albuquerque Police Department* sued her police department claiming constructive discharge after she had been found in violation of the department's use of force policy and asked to go through a retraining on the practice. Because she could not provide evidence that other officers had lost confidence in her or that the situation was made intolerable because of the retraining, the Tenth Circuit found that there was no constructive discharge.

Conditions that one might consider to be traditionally intolerable, such as harassment, are not required to find constructive discharge. Courts have found that a failure to accommodate a disability, or even an employer's offer of a severance package without a release of claims (but be wary of the Older Workers Benefit Protection Act, discussed in a later chapter), is grounds for constructive discharge.

D. The Worker Adjustment and Retraining Notification Act

The Worker Adjustment and Retraining Notification (WARN) Act is included in this section because it also places restrictions on an employer's management of its workforce in terms of

discharging workers. Before termination, WARN requires that employers with over 100 employees must give 60 days' advance notice of a plant closing or mass layoff to affected employees. A plant closing triggers this notice requirement if it would result in employment loss for 50 or more workers during a 30-day period.

Mass layoff is defined as employment losses at one location during any 30-day period of 500 or more workers, or of 50–499 workers if they constitute at least one-third of the active workforce. Employees who have worked less than 6 months of the prior 12 or who work less than 20 hours a week are excluded from both computations. If an employer does not comply with the requirements of the WARN Act notices, employees can recover pay and benefits for the period for which notice was not given, up to a maximum of 60 days.

The number of employees is a key factor in determining whether the WARN Act is applicable. Only an employer who has 100 or more full-time employees or has 100 or more employees who, in the aggregate, work at least 4,000 hours per week are covered by the WARN Act. In counting the number of employees, U.S. citizens working at foreign sites, temporary employees, and employees working for a subsidiary as part of the parent company must be considered in the calculation.

There are three exceptions to the 60-day notice requirements. The first, referred to as the *faltering company* exception involves an employer who is actively seeking capital and who in good faith believes that giving notice to the employees will preclude the employer from obtaining the needed capital. The second exception occurs when the required notice is not given due to a "sudden, dramatic, and unexpected" business circumstance not reasonably foreseen and outside the employer's control. The last exception is for actions arising out of a "natural disaster" such as a flood, earthquake, or drought.

E. Wrongful Discharge Based on Other Tort Liability

A *tort* is a violation of a duty, other than one owed when the parties have a contract. Where a termination happens because of intentional and outrageous conduct on the part of the employer and causes emotional distress to the employee, the employee may have a tort claim for a wrongful discharge in approximately half of the states in the United States.

One problem exists in connection with a claim for physical or emotional damages under tort theories: In many states, an employee's damages are limited by workers' compensation laws. Where an injury is work-related, such as emotional distress as a result of discharge, these statutes provide that the workers' compensation process is a worker's *exclusive* remedy. An exception exists where a claim of injury is based solely on emotional distress; in that situation, many times workers' compensation will be denied. Therefore, in those cases, the employee may proceed against the employer under a tort claim. If an employer seeks to

protect against liability for this tort, it should ensure that the process by which an employee is terminated is respectful of the employee, as well as mindful of the interests of the employer.

One tort that might result from a discharge could be a tort action for defamation, under certain circumstances. To sustain a claim for defamation, the employee must be able to show that:

- The employer made a *false and defamatory statement* about the employee
- The statement was *communicated* to a third party *without the employee's consent*
- The communication *caused harm* to the employee

Claims of defamation usually arise where an employer makes statements about the employee to other employees or her or his prospective employers. Where the termination results from a wrongful invasion of privacy, an employee may have a claim for damages.

Employment-at-will is a broad power for both the employer and the employee. The most likely challenge in employment-at-will is the employee being terminated rather than the employee quitting the job. There are, however, many bases upon which the employee can challenge what is perceived to be the employer's wrongful termination.

IV. Employment Discrimination Concepts

Federal law prohibits employment discrimination on the basis of race, color, gender, religion, national origin, age, and disability. Since Title VII was the first comprehensive protective legislation for workplace discrimination, most of the law was developed under it, and for that reason Title VII is often referred to. However, as the age discrimination and pregnancy discrimination and disability discrimination law was later passed, the legal considerations were applied to those categories as appropriate.

In alleging discrimination, an employee plaintiff must use one of two theories to bring suit under Title VII and protective legislation—disparate treatment or disparate impact. The suit must fit into one theory or the other to be recognized under the protective legislation. A thorough understanding of each will help employers make sounder policies that avoid litigation in the first place and enhance the workplace in the process.

A. Disparate Treatment

Learning Objective Six: Distinguish between disparate impact and disparate treatment discrimination claims.

Disparate treatment is the theory of discrimination used in cases of individual and overt discrimination. The plaintiff employee (or applicant) bringing suit alleges that the employer treated the employee in a way different from other similarly situated employees based on one or more of the prohibited categories. Disparate treatment is considered intentional discrimination, but the plaintiff need not actually know that unlawful discrimination is the reason for the difference.

McDonnell Douglas Corp. v. Green

If an employer makes decisions in accordance with these requirements, it is less likely that the decisions will later be successfully challenged by the employee in court. Disparate treatment cases involve an employer's variance from the normal scheme of things, to which the employee can point to show he or she was treated differently. Employers should therefore consistently treat similarly situated employees similarly.

The employer should think carefully before deciding to single out an employee for a workplace action. Is the reason for the action clear? Can it be articulated? Based on the information the employer used to make the decision, is it reasonable? Rational? Is the information serving as the basis for the decision reliable? Balanced? Is the justification job related? If the employer is satisfied with the answers to these questions, the decision is probably defensible. If not, reexamine the considerations for the decision, find its weakness, and determine what can be done to address the weakness. The employer will then be in a much better position to defend the decision and show it is supported by legitimate, non-discriminatory reasons.

Legitimate, Non-Discriminatory Reason Defense

Learning Objective Seven: Provide several bases for employer defenses to employment discrimination claims.

Even if the employee establishes all the elements of the *prima facie* case of disparate treatment, it is only a rebuttable presumption. Establishing the *prima facie* case alone does not establish that the employer discriminated against the employee. There may be some other explanation for what the employer did. As the Court stated in *McDonnell Douglas,* the employer may defend against the *prima facie* case of disparate treatment by showing that there was a legitimate, non-discriminatory reason for the decision. That reason may be

virtually anything that makes sense and is not related to prohibited criteria. It is only discrimination on the basis of prohibited categories that is protected by the law.

Even if the employer can show a legitimate, non-discriminatory reason for the action toward the employee, the analysis does not end there. The employee can then counter the employer's defense by showing that the legitimate, nondiscriminatory reason being shown by the employer is a mere pretext for discrimination. That is, that while on its face the employer's reason may appear legitimate, there is actually something discriminatory going on.

The Bona Fide Occupational Qualification Defense

Learning Objective Seven: Provide several bases for employer defenses to employment discrimination claims.

Employers also may defend against disparate treatment cases by showing that the basis for the employer's intentional discrimination is a **bona fide occupational qualification (BFOQ)** reasonably necessary for the employer's particular business. This is available only for disparate treatment cases involving gender, religion, and national origin and is not available for race or color. BFOQ is legalized discrimination and, therefore, very narrowly construed by the courts.

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 that predominant attributes of the group discriminated against are at odds with that business. (See Exhibit 2.7, "BFOQ Test.") The evidence supporting the qualification must be credible, and not just the employer's opinion. The employer also must be able to show it would be impractical to determine if each individual member of the group who is discriminated against could qualify for the position.

Wilson v. Southwest Airlines Company

For an employer to establish a successful bona fide occupational qualification reasonably necessary for the employer's particular business that will protect the employer from liability for discrimination, the courts use a *two-part test.* The employer has the burden of proving that it had reasonable factual cause to believe that all or substantially all members of a particular group would be unable to perform safely and efficiently the duties of the job

involved. This is most effective if the employer has consulted with an expert in the area who provides a scientific basis for the belief. The two-part test must answer the following questions affirmatively:

- Does the job require that the employee be of one gender?
- If yes, is that reasonably necessary to the "essence" of the employer's particular business?

Since a BFOQ is legalized discrimination, the bar to obtaining it is set very high. (See Exhibit 2.7, "BFOQ Test.")

B. Disparate Impact

Learning Objective Six: Distinguish between disparate impact and disparate treatment discrimination claims.

While disparate treatment is based on an employee's allegations that she or he is treated differently as an individual based on a policy that is discriminatory on its face, **disparate impact** cases are generally statistically based group cases alleging that the employer's policy, while neutral on its face (**facially neutral**), has a disparate or adverse impact on a protected group. If such a policy impacts protected groups more harshly than others, illegal discrimination may be found if the employer cannot show that the requirement is a legitimate business necessity. This is why the police department's policy fails in the opening scenario. The 5′4″, 130-pound policy would screen out many more females than males and would therefore have to be shown to be job-related in order to stand. Statistically speaking, females, as a group, are slighter and shorter than males, so the policy has a disparate impact on females and could be gender discrimination in violation of Title VII.

Griggs v. Duke Power Co.

Disparate impact cases can be an employer's nightmare. No matter how careful an employer tries to be, a policy, procedure, or **screening device** may serve as the basis of a disparate impact claim if the employer is not vigilant in watching for its indefensible disparate impact. Even the most seemingly innocuous policies can turn up unexpected cases of disparate impact. Ensure that any screening device is explainable and justifiable as a legitimate business necessity if it has a disparate impact on protected groups. This is even more important now that the EEOC has adopted its new E-RACE initiative. The purpose of the initiative is to put a

renewed emphasis on employers' hiring and promotion practices in order to eliminate even the more subtle ways in which employers can discriminate.

What Constitutes a Disparate Impact?

Any time an employer uses a factor as a screening device to decide who receives the benefit of any type of employment decision—from hiring to termination, from promotion to training, from raises to employee benefit packages—it can be the basis for disparate impact analysis.

Title VII does not mention disparate impact. On August 25, 1978, several federal agencies, including the EEOC and the Departments of Justice and Labor, adopted a set of uniform guidelines to provide standards for ruling on the legality of employee selection procedures. The Uniform Guidelines on Employee Selection Procedures takes the position that there is a 20 percent margin permissible between the outcome of the majority and the minority under a given screening device. This is known as the **four-fifths rule**. Disparate impact is statistically demonstrated when the selection rate for groups protected by the law is less than 80 percent, or four-fifths, that of the higher-scoring majority group.

The four-fifths rule guideline is only a rule of thumb. The U.S. Supreme Court stated in *Watson v. Fort Worth Bank and Trust* that it has never used mathematical precision to determine disparate impact. What is clear is that the employee is required to show that the statistical disparity is significant and has the effect of selecting applicants for hiring and promotion in ways adversely affecting groups protected by the law.

The terminology regarding scoring is intentionally imprecise because the "outcome" depends on the nature of the screening device. The screening device can be anything that distinguishes one employee from another for workplace decision purposes, such as a policy of hiring only ex-football players as barroom bouncers; a minimum passing score on a written or other examination; physical attributes such as height and weight requirements; or another type of differentiating factor. Disparate impact's coverage is very broad and virtually any policy may be challenged.

Disparate Impact and Subjective Criteria

When addressing the issue of the disparate impact of screening devices, subjective and objective criteria are a concern. *Objective criteria* are factors that are able to be quantified by anyone, such as scores on a written exam. *Subjective criteria* are, instead, factors based on the evaluator's personal thoughts or ideas (e.g., a supervisor's opinion as to whether the employee being considered for promotion is "compatible" with the workplace). Initially, it was suspected that subjective criteria could not be the basis for disparate impact claims

since the Supreme Court cases had involved only objective factors such as height and weight, educational requirements, test scores, and the like.

Disparate Impact of Preemployment Interviews and Employment Applications

Quite often questions asked during idle conversational chat in preemployment interviews or included on job applications may unwittingly be the basis for discrimination claims. Such questions or discussions should therefore be scrutinized for their potential impact, and interviewers should be trained in potential trouble areas to be avoided. If the premise is that the purpose of questions is to elicit information to be used in the evaluation process, then it makes sense to the applicant that if the question is asked, the employer will use the information.

It may seem like innocent conversation to the interviewer, but if the applicant is rejected, then whether or not the information was gathered for discriminatory purposes, the applicant has the foundation for alleging that it illegally impacted the decision-making process. Only questions relevant to legal considerations for evaluating the applicant should be asked. There is virtually always a way to elicit legal, necessary information without violating the law or exposing the employer to potential liability. Training employees who interview is an important way to avoid liability for unnecessary discrimination claims.

Applications often ask the marital status of the applicant. Since there is often discrimination against married women holding certain jobs, this question has a potential disparate impact on married female applicants (but not married male applicants for whom this is generally not considered an issue). If the married female applicant is not hired, she can allege that it was because she was a married female. This may have nothing whatsoever to do with the actual reason for her rejection, but since the employer asked the question, the argument can be made that it did.

In truth, employers often ask this question because they want to know whom to contact in case of an emergency should the applicant be hired and suffer an on-the job emergency. Simply asking who should be contacted in case of emergency, or not soliciting such information until after the applicant is hired, gives the employer exactly what the employer needs without risking potential liability by asking questions about protected categories that pose a risk.

The Business Necessity Defense

Learning Objective Seven: Provide several bases for employer defenses to

employment discrimination claims.

In a disparate impact claim, the employer can use the defense that the challenged policy, neutral on its face that has a disparate impact on a group protected by law is actually job related and consistent with **business necessity**. However, business necessity may not be used as a defense to a disparate treatment claim.

In a disparate impact case, once the employer provides evidence rebutting the employee's *prima facie* case by showing business necessity or other means of rebuttal, the employee can show that there is a means of addressing the issue that has less of an adverse impact than the challenged policy. If this is shown to the court's satisfaction, then the employee will prevail and the policy will be struck down.

Knowing these requirements provides the employer with valuable insight into what is necessary to protect itself from liability. Even though disparate impact claims can be difficult to detect beforehand, once they are brought to the employer's attention by the employee, they can be used as an opportunity to revisit the policy. With flexible, creative, and innovative approaches, the employer is able to avoid many problems in this area.

C. Other Defenses to Employment Discrimination Claims

Once an employee provides *prima facie* evidence that the employer has discriminated, in addition to the BFOQ, legitimate non-discriminatory reason, and business necessity defenses discussed, the employer may perhaps present evidence of other defenses:

- That the employee's evidence is not true—that is, this is not the employer's policy as alleged or it was not applied as the employee alleges, the employee's statistics regarding the policy's disparate impact are incorrect and there is no disparate impact, or the treatment the employee says she or he received did not occur.
- That the employer's "bottom line" comes out correctly—initially it was said that disparate impact is a statistical theory. Employers have tried to avoid litigation under this theory by taking measures to ensure that the relevant statistics will not exhibit a disparate impact.

  Employers' policies should ensure that everyone has an equal chance at the job, based on qualifications. The employer therefore had nearly two years of actual job performance that it could consider to determine the applicant's promotability. Instead, an exam was administered, requiring a certain score, which exam the employer could not show to be related to the job. Of course, the logical question is, "Then why give it?" People should make sure that they ask that question before using screening devices that

may operate to exclude certain groups on a disproportional basis. If one cannot justify the device, one takes an unnecessary risk by using it.

D. Accommodation

Religious discrimination under Title VII, as well as disability discrimination under the Americans with Disabilities Act (ADA), both require that employers attempt to accommodate workplace conflicts based on these categories. Discrimination is simply prohibited on the basis of race, color, gender, national origin, or age. However, discrimination on the basis of religion or disability is prohibited only as long as trying to accommodate the conflict between the status and the workplace policy does not create an undue hardship for the employer.

The considerations are quite different for religious accommodation and accommodation of those with disabilities. Suffice it to say that in both cases, rather than an out-and-out prohibition against discrimination, the employer must try to accommodate conflicts, but only up to the point that it creates an undue hardship on the employer.

E. Retaliation

Title VII specifically includes provisions allowing employees to file separate claims for negative consequences they experience from their employer for pursuing their lawful rights under Title VII. This is a separate cause of action for retaliation. Even if the substantive claim of discrimination is not proved to a court's satisfaction, the employee may still win on the retaliation claim.

Retaliation can take any number of forms. However, employers are not allowed to retaliate against employees for filing workplace discrimination claims. Retaliation claims may be filed not only by the employee who filed the discrimination claim, but also by others against whom the employer allegedly retaliated because of the claim, for instance the spouse of the claimant who is terminated because her spouse filed a claim. They can be filed not only for the adverse action taken while the employee was employed, but also for actions taken later to negatively impact the former employee (such as trying to block the employee's later re-employment).

F. Exhaustion of Administrative Remedies

The statutory schemes set out for employment discrimination claims require that claimants first pursue their grievances within the agency created to handle such claims, the Equal Employment Opportunity Commission (EEOC). All of the protective statutes provide for courts to hear employment discrimination claims only after the claimant has done all that can be done at the agency level. This is called **exhaustion of administrative remedies**.

G. Employment Discrimination Remedies

Title VII and other protective legislation have specific remedies available to employee claimants. If the employee in an EEOC case is successful, the employer may be liable for **back pay** of up to two years before the filing of the charge with the EEOC; for **front pay** for situations when reinstatement is not possible or feasible for claimant; for reinstatement of the employee to his or her position; for **retroactive seniority**; for injunctive relief, if applicable; and for attorney fees. Until passage of the Civil Rights Act of 1991, remedies for discrimination under Title VII were limited to **make-whole relief** and injunctive relief.

The Civil Rights Act of 1991 added **compensatory damages** and **punitive damages** as available remedies. Punitive damages are permitted when it is shown that the employer's action was malicious or was done with reckless indifference to federally protected rights of the employee. They are not allowed under the disparate/adverse impact or unintentional theory of discrimination and may not be recovered from governmental employers. Compensatory damages may include future pecuniary loss, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. (See Exhibit 2.9, "Employment Discrimination Remedies.")

There are certain limitations on the damages under the law. Gender discrimination (including sexual harassment) and religious discrimination have a $300,000 cap total on nonpecuniary (pain and suffering) compensatory and punitive damages. There is no limitation on medical compensatory damages. The cap depends on the number of employees the employer has. (See Exhibit 2.10, "Compensatory and Punitive Damages Caps.") Juries may not be told of the caps on liability. Since race and national origin discrimination cases also can be brought under 42 U.S.C. § 1981, which permits unlimited compensatory damages, the caps do not apply to these categories. In 2001, the U.S. Supreme Court ruled that, though compensatory damages are capped by the law, the limitations do not apply to front pay. Also, the U.S. Supreme Court's *Hoffman* decision foreclosed the ability of undocumented workers to receive post-discharge back pay, and the EEOC rescinded its policy guidance suggesting otherwise.

With the addition of compensatory and punitive damages possible in Title VII cases, litigation increased dramatically. It is now more worthwhile for employees to sue and for lawyers to take the cases. The possibility of monetary damages also makes it more likely that employers will settle more suits rather than risk large damage awards. The best defense against costly litigation and liability is solid, consistently applied workplace policies.

III. Additional Legal Resources

Learning Objective Nine: Identify sources for further legal information and resources.

A section on how to find additional legal resources once one has been exposed to the law has been included. The section in the textbook is not exhaustive but will give the students quite enough to be able to search for additional information when the need arises. With the resources now available to everyone, there is no excuse not to be informed.

A. Law Libraries

Law libraries can be found everywhere from private firms to public courthouses and can contain only a few necessary legal resources or vast ones. If one is lucky enough to live in or near a town that has a law school, there will inevitably be a law library and the legal world is within one's reach. In addition to reporters containing law cases, there will also be law journals from around the world, legal treatises on any area of law one can imagine, books on legal issues, legal research updating sources, and local, state, federal, and international legal resources. Most institutions open their doors to everyone, and that is certainly the case at public institutions.

B. The Internet

The evolution of the Internet has been very exciting to watch as the Internet includes more and more legal databases for public consumption, taking the law out of the hands of the lucky few who could access it as lawyers and law students and giving it to the public at large who could now be much more informed. Such access is imperative for an informed democratic society.

A few websites on which students can find legal resources for free are listed below, but there are also other legal databases that cost to access. The students could check with their institution or employer to see if they have available the legal databases of Westlaw or Lexis/Nexis. Both of these are vast full-service legal databases, but Lexis has limited free public access for at least the cases. In addition, many law firms maintain as part of their websites free recent information on issues they deal with.

At the end of the listings below, one will find two compilation resources that allows one to stay up to date by subject matter based on many of these resources created by law firms. Of course, one would welcome suggestions by students and faculty alike for general resources to add to this list.

- FindLaw is a great legal research Web site that is easy to navigate and has extensive legal resources. public.findlaw.com

- The U.S. Supreme Court maintains a website that includes access to its decisions. http://www.supremecourt.gov/
- The Oyez Project Web site has easily searchable major U.S. Supreme Court decisions that include media such as the Court's oral arguments. http://www.oyez.org/
- The Government Printing Office maintains a searchable website for federal agency regulations in the Code of Federal Regulations. http://www.gpoaccess.gov/cfr/index.html

IV. Management Tips

One should always be allowed to hire the best person for a job; the law merely states that one may not make this decision based on prejudice or stereotypes. In order to avoid a wrongful discharge suit and, more importantly, to ensure the ethical quality of your decisions, do not fire someone for some reason that violates basic principles of dignity, respect, or social justice.

Make sure that the policies and procedures create a space for employees to voice any concerns and complaints. It is most effective for employees to be able to share these issues with you long before they reach a breaking point. Then, make sure that everyone knows about them through appropriate training.

Chapter-End Questions

1. Ron and Megan Dible needed some extra money so they decided to charge money for viewing some sexually explicit photographs and videos of themselves that they had posted on the Internet. While this was an otherwise legal act, Ron Dible was a police officer, and after the Chandler Police Department, his employer, learned of his actions, he was terminated. Is his termination in violation of his right to freedom of expression under the First Amendment? [*Dible v. City of Chandler*, 502 F.3d 1040 (9th Cir. 2007).]

   The court determined that the police officer's termination did not violate the officer's First Amendment right to freedom of speech, expression, privacy, and association. Since such an act would be likely to bring disrespect and opprobrium to the police department, the court determined that the officer had the right to have his own internet porn business but not to be an officer at the same time.

2. Think about the following questions from the point of view of violation of public policy or breach of a covenant of good faith and fair dealing and see what the outcome would be.
   a. A female child care worker alleges that she was unlawfully terminated from her position as the director of a child care facility after continually refusing to make staff cuts. The staff cuts she was asked to make resulted in violation of state regulations

governing the minimum ratios betweens staff and child. After the employee was terminated, the employer's child care center was in violation of the staff-to-child ratio. [*Jasper v. H. Nizam, Inc*., 764 N.W.2d 751, 2009 Iowa Sup]

b. A machine operator employee with a major depressive disorder intermittently takes leaves under the Family and Medical Leave Act, resulting in alleged harassment by her employer surrounding her FMLA usage as well as a transfer to various difficult machines after her return from leave. Two months after her last FMLA leave, she is terminated for "improper phone usage." [*Hite v. Vermeer Mfg. Co*., 361 F. Supp. 2d 935 (S.D. Iowa, 2005)]
c. A nurse is asked by her employer to sign a backdated Medicare form. She refuses and is terminated that day. As a health care provider, she is required to complete that particular form. [*Callantine v*. *Staff Builders, Inc*., 271 F.3d 1124 (8th Cir. 2001).]
d. A legal secretary to a county commissioner is terminated because of her political beliefs. **[***Armour v*. *County of Beaver* 271 F.3d 417 (3d Cir. 2001).]
e. A teacher under contract is terminated after insisting that his superiors report a situation where a student was being physically abused. The teacher refused to commit an illegal act of not reporting the suspected abuse to family services. [*Keveney v. Missouri Military Academy*, 304 S.W.3d 98 (MO 2010)].
f. A recent college graduate found a job with an office supply company as a reverse logistics analyst. Soon after being hired, he found that some practices within the department could be deemed unlawful and unethical. Three specific types of practices were written up in a formal complaint to his supervisor: (1) The issuing of monetary credits to customers without proper documentation thus overpaying customers without returned goods; (2) the department's knowing withholding from contract customers by underissuing credits over $25; and (3) the canceling and reissuing of pickup orders that could allow couriers to overbill the company. After his formal complaint and multiple meetings on the procedures of the department, the employee was terminated based on his insubordination and inflexibility. [*Day v. Staples Inc.,* 28 IER Cases 1121 (1st Cir. 2009)].
g. An employee engaged in protected whistle-blowing activity after filing a complaint against his employer for his termination. The employee, a licensed optician, claimed his employer was violating state statute by allowing unlicensed employees to sell optical products without a licensed optician present. There was also a complaint filed to his supervisor about the promoting and hiring of unlicensed employees. *[Dishmon v. Wal-Mart Stores Inc., 28 IER Cases 1393 (M.D. Tenn. 2009)*].
h. A legal secretary is hired by a law firm. The Letter of Employment stated, "In the event of any dispute or claim between you and the firm… including, but not limited to claims arising from or related to your employment or the termination of your employment, we jointly agree to submit all such disputes or claims to confidential binding arbitration, under the Federal Arbitration Act." On his third day of work, the employee informs his superiors that he would not agree to arbitrate disputes. He was

told that the arbitration provision was "not negotiable" and that his continued employment was contingent upon signing the agreement. The employee declined to sign the agreement and was discharged [*Lagatree v. Luce, Forward, Hamilton & Scripps,* 74 Cal. App. 4th 1005 (Cal. App. 2d Div. 1 1999).]

i. An employee is licensed to perform certain medical procedures, but he is terminated for refusing to perform a procedure he is not licensed to perform. [*O'Sullivan v. Mallon*, 390 A.2d 149 (N.J. Super. Ct. Law Div. 1978).]
j. An employee was fired from his job as security manager for a medical center because he was suspected of making an obscene phone call to another employee and refused to submit to voice print analysis to confirm or refute the accusation. He sued the employer for wrongful discharge, claiming that the employer's request violated public policy. A state statute prohibits an employer from requiring an employee to submit to a polygraph examination as a condition or precondition of employment. [*Theisen v. Covenant Medical Center*, 636 N.W.2d 74 (Iowa 2001).]

a. The court found strong evidence that the need for adequate staffing at a child care facility daycare centers is a well-recognized and defined public policy of Iowa. Further, it is a violation of public policy to terminate an employee for refusing to do an illegal act. The clearly defined public policy element was met.
b. The jury returned a verdict in favor of Hite and awarded her back pay. The district court awarded Hite front pay, liquidated damages plus interest, and attorney's fees.
c. The court determined that the employee not signing the form did not constitute an illegal act that would have violated public policy because she had actually performed the home visit and the court concluded that in the regular course of business it is not always possible to sign the form on the date an act was actually performed.
d. The court determined that the nature of the duties of the secretary, requiring high levels of responsibility and confidentiality and the particular way in which the county government staffed these positions made it such that the decision to terminate did not violate the state's law against political patronage.
e. The court affirmed the judgment in favor of the employee on his breach of an employment contract claim; it reversed the dismissal of the employee's claim for wrongful discharge in violation of public policy and remanded.
f. The appellate court held that the employee failed to demonstrate an objectively reasonable belief that the identified practices constituted shareholder fraud, and thus whistleblower protection from termination was inapplicable.
g. Wal-Mart's motion for summary judgment was denied because the court found that there was sufficient evidence for a jury to conclude that the short time between the employee blowing the whistle and his termination, along with the history preceding it, was the basis for his termination in violation of the whistleblowing statute.
h. The court held that this did not violate the law, as an employee signing a mandatory arbitration clause is not compelled to do so since they can seek employment

elsewhere.

i. The court held that this was an unlawful termination and adopted for the state of New Jersey the position that and employer terminating an employee because the employee refused to do an illegal act is unlawful termination. The court said this was especially so since it involved medical procedures. The X-ray technician was terminated for refusing to perform a catheterization procedure that by state law could only be performed by a licensed doctor or nurse.

j. The court said that the employer's actions violated neither a statute nor a public policy. The court said that the statute regarding polygraphs did not apply to voice prints.

3. Mariani was a licensed CPA who worked for Colorado Blue Cross and Blue Shield as manager of general accounting for human resources. She complained to her supervisors about questionable accounting practices on a number of occasions and was fired. She claims that her termination was in violation of public policy in favor of accurate reporting, as found in the Board of Accountancy Rules of Professional Conduct. BCBS claims that the rules are not an arbiter of public policy as ethics codes are too variable. Who is correct? [*Rocky Mountain Hospital v. Mariani*, 916 P.2d 519 (Colo. 1996).]

   The court sided with the employee in finding that her code of professional conduct prohibited her from making misrepresentations about the defendant's activities. The defendant's argument that the policy must violate a statute was not acceptable to the court.

4. Patricia Meleen, a chemical dependency counselor, brought charges alleging wrongful discharge, defamation, and emotional distress against the Hazelden Foundation, a chemical dependency clinic, in regard to her discharge due to her alleged sexual relations with a former patient. Hazelden's written employment policies prohibited unprofessional and unethical conduct, including sexual contact between patients and counselors. A former patient alleged that Meleen had initiated a social and sexual relationship with him within one year of his discharge. A committee appointed by Hazelden told Meleen of the allegation against her and suspended her with pay in spite of Meleen's denial that she was involved in any improper relations or sexual contact with the former patient. Hazelden offered Meleen a nonclinical position, and when she refused, she was dismissed. Is the dismissal wrongful? [*Meleen v. Hazelden Foundation*, 928 F.2d 795 (8th Cir. 1991).]

   No, the dismissal was not wrongful. The court of appeals affirmed the district court's dismissal of the claim, finding that the foundation's employment policies prohibited such conduct and the employer had followed its policies in handling the issue with Meleen.

5. Max Huber was the agency manager at Standard Insurance's Los Angeles office. He was employed as an at-will employee, and his contract did not specify any fixed duration of guaranteed employment. Huber was discharged by the company after eight years because of

his alleged negative attitude, the company's increasing expense ratio, and the agency's decreasing recruiting. Huber provided evidence that he had never received negative criticism in any of his evaluations, and that his recruiting had been successful. Huber demonstrated that, even though the company had a decrease in recruitment during his employment, he himself had a net increase of contracted agents of 1,100 percent. Huber claims that he was discharged because he was asked to write a letter of recommendation about his supervisor, Canfield, whose termination was being considered. Johnson, Canfield's supervisor, was disappointed with the positive recommendation that Huber wrote because it made Canfield's termination difficult to execute. Johnson is alleged to have transferred Huber to expedite Canfield's termination, and he eventually discharged Huber in retaliation for the positive letter of recommendation. If Huber files suit, what will the result be? [*Huber v. Standard Insurance Co*., 841 F.2d 980 (9th Cir. 1988).]

The court held that there was sufficient evidence to go to a jury on the issue of breach of the covenant of good faith and fair dealing. Each of the three reasons provided by Standard for Huber's termination had objective proof of being untrue. Since California recognizes the covenant of good faith and fair dealing as part of every contract, this was in violation of that covenant and must go to trial on the evidence.

6. A new employer policy at a dental office stated that the employees were unable to leave the office except to use the restroom, even with a patient cancellation. A husband of an employee emailed the employer that he had discussed the new rules with an attorney who noted they were in violation of state law. The employer let the employee go soon after the complaint. Does the employee have a claim? [*Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.,* 186 P.3d 80, 2008 Colo.]

   The judgment in favor of the employee was affirmed, but the award of damages was reversed, and the case was remanded for the proper calculation of back pay and for further findings regarding the propriety of exemplary damages.

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

   Disparate treatment in the radio station has a policy that is discriminatory on its face in treating black deejays differently than white ones.

8. An employee files a race discrimination claim against the employer under Title VII. The employee alleges that after filing a claim with the 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. 2d 773 (D. Del. 2000).]

No, the discrimination claim and retaliation claims are separate and the retaliation claim does not depend on the discrimination claim.

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

   Tiffany has no claim because her claim fails under both disparate impact and disparate treatment theories. The policy does not on its face discriminate on a basis protected by workplace protective legislation because height, in and of itself, is not a protected class. Tiffany will also not be able to prove a disparate impact of the policy on women because statistically, most women will fall into the 5'4 requirement.

Case Icons:

Palmateer v. International Harvester Company,* 85 Ill. 2d 124, 421 N.E.2d 876 (1981*)

Issue: Whether employees who assist law enforcement agencies should be protected as a matter of public policy.

Facts: Ray Palmateer had worked for International Harvester (IH) for 16 years at the time of his discharge. Palmateer sued IH for retaliatory discharge, claiming that he was terminated because he supplied information to local law enforcement authorities regarding a co-worker's criminal activities and for offering to assist in the investigation and trial of the co-worker if necessary.

Decision: The court agreed and found in favor of Palmateer. The court discusses the history of the tort of retaliatory discharge in Illinois and explains that the law will not support the termination of an at-will employment relationship where the termination would contravene public policy. When a discharge contravenes public policy in any way, the employer has committed a legal wrong. However, the employer retains the right to fire workers at-will in cases "where no clear mandate of public policy is involved."

Case Questions:

1. Is there a difference between the court's protection of an employee who reports a rape by a co-worker or the theft of a car, and an employee who is constantly reporting the theft of the company's paper clips and pens?

   Students' answers will vary as there is considerable disagreement in connection with what public policy is and what constitutes a violation of public policy.

2. Should the latter employee in the above question be protected? Consider that the court in Palmateer remarked that "the magnitude of the crime is not the issue here. It was the General Assembly who decided that the theft of a $2 screwdriver was a problem that should be resolved by resort to the criminal justice system."

   Students' answers will vary. Some students might say that an employee who is constantly reporting the theft of the company's paper clips and pens should be protected considering the remark of the court in Palmateer. Students should keep in mind that in determining whether the adverse action is sufficient to support a claim, courts will look to an objective standard and measure whether a "reasonable employee" would view the retaliatory harm as *significant*.

3. What are other areas of public policy that might offer protection to terminated workers?

   Some other areas of public policy that might offer protection to terminated workers include whistle-blowing; bad faith, malicious, or retaliatory termination.

Click here to return to the reference to the above case in the chapter outline.

***Herawi v. State of Alabama, Department of Forensic Sciences,* 311 F. Supp. 2d 1335 (M.D. Ala. 2004)**

Issue: Whether there were legitimate non-discriminatory reasons for terminating an employee who alleged national origin discrimination and retaliation.

Facts: Herawi is an Iranian medical doctor who also holds a PhD. Her employment was terminated. The actions toward her took place just after 9/11 when feelings were running high against Iranians. She filed a complaint against the defendant, the state Department of Forensic Sciences, alleging national origin discrimination and retaliation. The state responded that it had legitimate non-discriminatory reasons for terminating her.

During the relevant time period, Herawi's supervisor in the Montgomery office [of the Alabama Department of Forensic Sciences] was Dr. Emily Ward. Herawi, like all state employees, was a probationary employee for her first six months on the job.

In this case, Ward made remarks related to Herawi's national origin on three occasions. On November 7, 2001, Ward threatened to report Herawi's national origin to law enforcement agencies. On January 2, 2002, Ward told Herawi that she was getting calls asking who Herawi was and why she was working there; Ward suggested that she was getting these calls because of Herawi's accent. Finally, on March 7, 2002, Ward told Herawi that no one liked her, that she did not belong at the department, that she should leave, and that her English was bad.

Events came to a head on March 28, at a meeting attended by Herawi, Ward, Bailey, and Steve Christian, the department's personnel Manager. Herawi claims that she was terminated during the meeting and that when she met with Christian shortly after the meeting, he told her it was unofficial policy that terminated employees could submit a letter of resignation. Memoranda written by Ward, Bailey and Christian present slightly different accounts.

Herawi submitted a letter of resignation on April 1, 2002. A letter from Downs, dated April 18, confirmed Herawi's "separation from employment" at the department effective April 19. Downs's letter states that the reason for Herawi's separation is that she continued "to require additional training in autopsy procedures and failure to properly use the chain of command."

Decision: The Forensic Department moved for summary judgment on the ground that its decision not to offer her a permanent position was based on legitimate, nondiscriminatory reasons.

For the reasons given above, it is ordered as follows:
(1) The motion for summary judgment, filed by defendant Alabama Department of Forensic Sciences on November 12, 2003 (doc. no. 20), is granted with respect to plaintiff Mehsati Herawi's hostile-environment claim.

Case Questions:

1. Are you persuaded by the state's evidence that it had an individual of a different national origin who was treated similarly to Herawi? If Ward (or other managers) treated everyone equally poorly, perhaps there is no national origin claim. What if Ward's defense is simply that her poor treatment of Herawi had nothing to do with national origin, but that she just really did not like Hewari, specifically? Would that be an acceptable defense and could it have saved the state's case?

Students' answers will vary. Some of them may say that it would not have been an acceptable defense because Ward had made references to her Iranian origin saying that she was getting calls from people asking about her accent, and she also threatened to expose Hewari's nationality to law enforcement agencies.

2. The court explains that pretext may be based on comments depending on "whether their substance, context, and timing could permit a finding that the comments are causally related to the adverse employment action at issue." What elements would you look to in order to find pretext, if you were on a jury?

   Students' answers will vary. Some of their answers may include comments made by Ward about Hewari's national origin. Also, that almost immediately after Hewari joined Ward was highly critical of her, the statements in the narrative performance appraisal by Ward that was in accordance with the general stereotype held about Middle Eastern people being aggressive, and so on.

3. The court explains that timing, alone, would not be enough to satisfy the causality requirement of retaliatory discharge. Given the facts of this case, if you were in charge of the department, and if Hewari truly were not performing at an acceptable level and you wished to terminate her after all of these circumstances, how might you have better protected the department from a retaliatory discharge claim?

   Students' answers will vary. Some of them may say that there should have been no references made about her national origin by Ward and also by the people she complained to.

Click here to return to the reference to the above case in the chapter outline.

***Guz v. Bechtel National Inc.,* 100 Cal. Rptr. 2d 352 (Cal. 2000)**

Issue: Whether there is an implied covenant in at-will employment.

Facts: Plaintiff John Guz, a longtime employee of Bechtel National, Inc. (BNI), was terminated at age 49 when his work unit was eliminated as a way to reduce costs. At the time he was hired and at his termination, Bechtel had a Personnel Policy (no. 1101) on the subject of termination of employment which explained that "Bechtel employees have no employment agreements guaranteeing continuous service and may resign at their option or be terminated at the option of Bechtel."

Guz sued BNI and its parent, Bechtel Corporation, alleging age discrimination, breach of an implied contract to be terminated only for good cause, and breach of the implied covenant of good faith and fair dealing.

Decision: The trial court found in favor of Bechtel and dismissed the action. The Court of Appeals reversed and determined that the trial should be permitted to proceed. Bechtel appealed to the Supreme Court of California, which in this opinion reverses the judgment of the Court of Appeals based on a finding that no *implied* contract exists and remands only for a determination of whether there are any enforceable *express* contract terms.

The trial court dismissed Guz's separate claim for breach of the implied covenant of good faith and fair dealing because, on the facts and arguments presented, this theory of recovery is either inapplicable or superfluous. To the extent Guz's implied covenant cause of action seeks to impose limits on Bechtel's termination rights *beyond* those to which the parties actually agreed, the claim is invalid. To the extent the implied covenant claim seeks simply to invoke terms to which the parties *did* agree, it is superfluous. Guz's remedy, if any, for Bechtel's alleged violation of its personnel policies depends on proof that they were contract terms to which the parties actually agreed. The trial court thus dismissed the implied covenant cause of action.

Case Questions:

1. Based on *Guz*, can the implied covenant of good faith and fair dealing apply to any conditions not actually stated in a contract? In other words, can the covenant apply to anything beyond that which is actually stated in an employment contract? If not, is there no implied covenant as long as someone is at-will without a contract?

   Students' answers will vary. If a situation arises in a state that recognizes the implied covenant, the court will then look into the facts to see whether the termination is in breach of the implied covenant of good faith and fair dealing.

   Only 13 states recognize this covenant as an exception to at-will employment. Some states allow the cause of action but limit the damages awarded to those that would be awarded under a breach of contract claim, while other states allow the terminated employee to recover higher tort damages.

2. Explain the distinction between the court's discussion of the covenant of good faith and fair dealing and the possibility of an implied contract term.

   Students' answers will vary. Some of the points they may say that the covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement*

actually made. The covenant thus cannot "be endowed with an existence independent of its contractual underpinnings." It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.

The mere existence of an employment relationship affords no expectation, protectable by law that employment will continue, or will end only on certain conditions, unless the parties have actually adopted such terms. Thus if the employer's termination decisions, however arbitrary, do not breach such a substantive contract provision, they are not precluded by the covenant.

3. How might an employer create an "implied-in-fact term" and how could a failure to follow such policies when terminating an employee create a breach of the contract?

   An employer might create an "implied-in-fact term" with off-hand statements during preemployment interviews, such as a statement that a candidate will become a "permanent" employee after a trial period, or quotes of yearly or other periodic salaries, or statements in employee handbooks. In cases, when the employee has been terminated in less than the time quoted as the salary, (e.g.$50,000 per year), the employee may be able to maintain an action for the remainder of the salary on the theory of this establishing an implied contract for a year's duration. However, these statements must be sufficiently specific to be enforceable.

Click here to return to the reference to the above case in the chapter outline.

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

Issue: The order and allocation of proof in a private, nonclass action challenging employment discrimination.

Facts: Green, an employee of McDonnell Douglas and a black civil rights activist, engaged with others in "disruptive and illegal activity" against his employer in the form of a traffic stall-in. 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 reemployment application on the ground of the illegal conduct. Green filed a case with the EEOC charging violation of the Title VII of the Civil Rights Act of 1964, sued in U.S. District Court, and also appealed to the U.S. Court of Appeals for the Eighth Circuit.

Decision: The EEOC made no finding on the respondent's allegation of racial bias under racial bias under 703(a) (1) that prohibits discrimination in any employment decision. However, it did find reasonable cause to believe that the petitioner had violated 704 (a) of the Act that forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory employment conditions.

The respondent then brought suit in the District court. The District court also found that the petitioner's refusal to rehire the respondent was based solely on the respondent's participation in the disruptive and illegal activity. The conclusion by the court was that nothing in Title VII or 704 protected "such activity as employed by the plaintiff in the "stall-in" and "lock-in" demonstrations." On appeal, the Court of Appeals for the Eight Circuit affirmed the 704 (a) ruling, but reversed with respect to 703 (a) (1), holding that an EEOC determination of reasonable cause was not a jurisdictional prerequisite to claiming a violation of that provision in federal court.

The case was remanded. The case is important because it is the first time the U.S. Supreme Court set forth how to prove a disparate treatment case under Title VII.

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?

   Students' answers will vary. Some of them may say that the Court should require actual evidence of discrimination in disparate treatment case so that it is not misused. Other students might say that an inference should be permitted. They may say that disparate treatment cases involve an employer's variance from the normal scheme of things, to which the employee can point to show he or she was treated differently, and so on.

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

   Students' answers will vary. Students may say that the employer's burden is not really met after the employer "articulates" a legitimate nondiscriminatory reason for rejecting the employee because if the employer's defense was not strong enough, then the plaintiff could come back and possibly win on rebuttal.

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

   Students' answers will vary. Some of them may say that the Court has not out and out said whether Green must be kept on or not in spite of his illegal activities as the petitioner successfully rebutted the case. But on retrial, the respondent may show that the company's refusal to reemploy was discriminatory.

Click here to return to the reference to the above case in the chapter outline.

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

Issue: Whether allowing only females to be flight attendants was a BFOQ.

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. Southwest reasons it may discriminate against males because its attractive female flight attendants and ticket agents personify the airline's sexy image and fulfill its public promise to take passengers skyward with "love." Also, the airline claims maintenance of its females-only hiring policy is crucial to its continued financial success.

Decision: The court disagreed. 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.

Applying the first level test for a BFOQ to Southwest's particular operations results in the conclusion that being female is not a qualification required to perform successfully the jobs of flight attendant and ticket agent with Southwest. Mechanical, nongender-linked duties dominate both these occupations. The 'essence' of Southwest's business is to safely transport its passengers. Attractive women can be viewed as tangential.

Case Questions:

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

   Students' answers will vary. Some of them may opine that companies should be able to choose whatever marketing scheme suits them, and the court should not interfere if the people support it. Some others may be of the view that things will go out of hand if there is absolutely no regulation in these matters. The students may also relate this to various other scenarios where the court regulates such as in the case of taking or possessing drugs, and so on.

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

   Students' answers will vary. Some of them may say that there are reasons apart from those narrowly construed by the court, and hence the standards are too strict. Some others may use the "precedent" argument and say that if an exception is provided then it might have to be granted to others in future as well.

3. Should a commercial success argument be given more weight by the courts? How should

that be balanced with concern for Congress's position on discrimination?

Students' answers will vary. Some students may be of the view that a person who is qualified for a job, and yet loses out on it merely because he or she does not fit in with the particular company's marketing idea is unfair. It is even more unfair if the company's activities can be run smoothly, and yet someone is refused a job only to retain the company's marketing scheme. It could be balanced if the company can prove somehow that they will incur losses if they deviate from their marketing scheme.

Click here to return to the reference to the above case in the chapter outline.

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

Issue: Whether an employer can be held liable for race discrimination if their policy of requiring a high school diploma, even if this is not necessary to perform well on the job, has an adverse impact on black employees.

Facts: Until the day Title VII became effective, it was the policy of Duke Power Co. that blacks be employed in only one of its five departments: the Labor Department. The highest-paid black employee in the Labor Department made less than the lowest-paid white employee in any other department. Blacks could not transfer out of the Labor Department into any other department. The day Title VII became effective, Duke instituted a policy requiring new hires to have a high school diploma and passing scores on two general intelligence tests in order to be placed in any department other than Labor and a high school diploma to transfer to other departments from Labor. Two months later, Duke required that transferees from the Labor or Coal Handling Departments who had no high school diploma pass two general intelligence tests. White employees already in other departments were grandfathered in under the new policy and the high school diploma and intelligence test requirements did not apply to them. 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 and 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 the act dictated that job requirements which have a disproportionate impact on groups protected by Title VII be shown to be job related. Griggs claimed that Duke's policy discriminated against blacks in violation of the Title VII of the 1964 Civil Rights Act. The District Court found that respondent's former policy of racial discrimination had ended, and that Title VII, being prospective only, did not reach the prior inequities. The Court of Appeals reversed in part. It rejected the holding that residual discrimination arising from prior practices was insulated from remedial action But, it agreed with

the lower court that there was no showing of discriminatory purpose in the adoption of the educational requirements. The Court held that, when such discriminatory purpose was absent, the use of the requirements was allowed. It rejected the claim because a disproportionate number of Negroes were rendered ineligible for promotion, transfer, or employment, the requirements were unlawful unless shown to be job-related.

Case Questions:

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

   Students' answers will vary. Some of them may say that it makes no sense because a company should have the freedom to decide their employees' educational qualifications. But, others may be of the opinion that since this happened immediately after Title VII became effective there might have been an intention to discriminate.

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

   Students' answers will vary. Among the many say that could be put forth by the students, some of them may say that if the employer's intent mattered then all the employer has to do is to prove that they had no intention to discriminate. Others may say that the employer's intent does matter because otherwise it could be just be something that is perceived to be wrong or misused by the employee. Only when the intention of the employer is wrong would it become an actual discrimination.

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

   An employer who read this decision would be very concerned about employees feigning discrimination, which may come as a surprise to them if it was unintentional. Employers would have to take precautionary measures and be very careful about their actions and behaviors with regard to employees.

Click here to return to the reference to the above case in the chapter outline.