

Instructor's Manual

Chapter 2

Equal Employment Opportunity: Regulatory Issues

Lecture Notes

This chapter provides a historical overview of equal employment opportunity. Particular attention is given to Title VII of the Civil Rights Act of 1964. The chapter also highlights the process for handling complaints filed with the EEOC or FEPA. It begins a discussion of the two theories of discrimination, detailing disparate treatment theory and touching on disparate impact, which is discussed in Chapter 3.

Key Terms and Concepts

Black codes: Following the passage of the Thirteenth Amendment, states passed these laws to prevent freedmen from enjoying the benefits of citizenship, such as denying the rights to bear arms, to assemble after sunset, to serve on juries, to vote, etc.

complaining party: this is the person or persons making the complaint against unlawful discrimination

conciliation: a negotiated settlement with the complaining party

dismissal: the EEOC stops the investigation into a complaint without any determination being made

disparate treatment: management intentionally treats individuals in the workplace differently because of their membership in a protected class

disparate impact: management unintentionally causes statistical imbalances by imposing the same facially-neutral standards on all employees with different outcomes for different groups

fair employment practices agencies (FEPAs): the collective name for individual state-based enforcement agencies that investigate unlawful discrimination

Jim Crow laws: a means for state governments to get around the Civil Rights Acts of 1866, 1870, 1871, and 1875; based on the concept of “separate but equal”

no cause: the EEOC investigation failed to produce sufficient evidence to establish that an unlawful employment practice had likely occurred

notice of right to sue: After a no cause determination, the complaining party may still bring suit against the employer in federal court if a right to sue letter is requested within 90 days

protected class: identifies the classification of employees that are expressly protected by Title VII's antidiscrimination provisions

reasonable cause: the EEOC's investigation has found enough evidence to believe that an unlawful employment practice has occurred

remand: process of returning an appealed case to the court of original jurisdiction

respondent: this is the party against whom the complaint of unlawful discrimination is made
Title VII—the portion of the Civil Rights Act of 1964 which governs discrimination in the workplace

vacates: the original damage award of a lower court is annulled or canceled by an appellate court

Learning Objectives

- Understand the evolution of equal employment opportunity laws in American History
- Explain what employment practices are unlawful under Title VII.
- Identify the classes of employers and types of people required to comply with Title VII.
- Describe how an EEO complaint is filed with the EEOC or a fair employment practice agency.
- Explain how “reasonable cause” is determined by an investigative agency.

Notes on Opening Scenario

Malcolm, an Asian American, applies for a management position at a pharmaceutical marketing research company employing ten fulltime and four part-time employees. Malcolm has a B.S. in biology, seven years experience in pharmacy sales and marketing research, and an Executive M.B.A. Malcolm was one of two finalists brought back for a final round of interviews. On January 3, 2007, the company chose Robert, a White male, who had no marketing research experience, and whose highest degree was an online MBA. Malcolm later found a job, but was still bothered by the outcome from ET. He decided to file a complaint with the EEOC on February 14, 2008 claiming that ET had unlawfully discriminated against him on the basis of his race.

Can Malcolm make a Title VII claim that he was unlawfully discriminated against because of his race? This scenario introduces two concepts that affect EEO complaints: employee thresholds and timely filings.

ET has less than the 15 employees necessary for employer coverage under Titled VII. If ET informs the court prior to a verdict, Title VII would not apply. Malcolm took 13 months (407 days since the date of the unlawful discrimination) to make his claim, and it is too old to pursue under Title VII and will likely be administratively closed. Claims must be filed within 180 days in nondeferral states, and within 300 days in those states permitting deferrals.

The Historical Background of Equal Opportunity

Following the abolition of slavery many states passed **Black Codes** to restrict the full benefits of citizenship from freedmen. The Civil Rights Act of 1866 was passed to curb this unequal treatment. This statute became the basis for imposing punitive and compensatory damages under the Civil Rights Act of 1991. The Civil Rights Act of 1866 was followed by the Civil Rights Act of 1875 which provided for equal access to all public areas for African Americans, except for schools. **Jim Crow laws** were a means for state governments to get around civil rights laws by establishing the concept of separate but equal accommodations. The Supreme Court ruled that separate but equal arrangements were lawful in the 1896 decision, *Plessy v. Ferguson* and this concept would continue until 1954 when it was overturned by the Supreme Court decision, *Brown v. Topeka Board of Education*.

Executive Orders

The executive branch made several attempts to guarantee equal employment opportunity within federal contracts by penalizing federal contractors who discriminated by the loss of the contract. President Franklin Roosevelt's Executive Order 8802 prohibited discrimination based on race in federal employment and by private companies holding federal defense contracts. It also created the Fair Employment Practice Commission (the precursor to the Office of Federal Contract Compliance Programs) to enforce its provisions. The Truman, Eisenhower, and Kennedy administrations all initiated executive orders that continued to expand this prohibition on racial discrimination by federal contractors.

The Civil Rights Act of 1964

The Civil Rights Act of 1964 was enacted to ensure that employers did not take any individual's race, color, religion, sex, or national origin into account when making an employment decision. **Title VII** is that portion of the Civil Rights Act of 1964 which governs discrimination in the workplace. Because the primary social concerns in 1964 focused on race relations, the remainder of this chapter focuses on racial discrimination prohibited by Title VII. This discussion on group versus individual rights perspectives, which resulted in two different definitions of "equal employment opportunity," will help students better understand affirmative action in Chapter 8.

Individual v. Group Rights Perspectives

As Congress debated the new civil rights law, three distinct factions shaped: those who opposed the legislation, those who wanted it to protect individual rights, and those who desired it to protect group rights. Those who opposed the Civil Rights Act were defeated. The other two factions are very much with us today. Many of the apparent contradictions in EEO law and regulations can be better understood in the context of these two differing views (see Fig 2.1).

Individual Rights Approach to EEO

The underlying proposition of the individual rights party was that it was morally wrong to deny an individual the opportunity to compete for employment opportunities merely because he or she was the member of a particular group. The damage suffered was by the individual and it was the individual who needed protection. The past could not be undone, but discrimination could be

prohibited in the present and future. The ultimate end was to create a workplace which guarantees equal treatment.

Group Rights Approach to EEO

The underlying proposition of the group rights party was certain groups had been historically wronged and that it was the government's responsibility to make them whole, to make up for past discrimination. This view attempted to compensate groups for past injuries. The ultimate end is to create a workplace which guarantees equal results among the different gender and ethnic groups.

The Purpose of Title VII

Section 703 of Title VII forbids any employer to use an applicant's race, color, religion, sex, or ethnicity in making any employment-related decision. Congress intended Title VII to create a work environment in which only an individual's qualifications and performance were the appropriate considerations for any employment outcome (see Fig. 2.2). The term **protected class** classifies employees that are expressly protected by Title VII's antidiscrimination provisions (see Fig. 2.3). In the case of *McDonald v. Santa Fe Transportation Company* the Supreme Court concluded that Title VII protected White employees from racial discrimination just as it protected African Americans. Race in the context of Title VII means all races.

Employers Covered By Title VII

Only those entities specifically included in the Act's definition of "employer" are required to follow its provisions (see Figure 2.4). Any private sector employer who employs 15 or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year is an "employer" under the Act. Both fulltime and part-time employees can be tolled in meeting this minimum. The Government of the United States is excluded from the list of "employers," though roughly 42,000 employees who work for the Congress of the United States are protected. Most federal employees are protected under the Civil Service Reform Act of 1978.

This is a good point to introduce the 2006 Supreme Court decision, *Arbaugh v. Y & H Corporation*. In this decision, the Supreme Court said that the employer had the obligation of declaring that he or she did not employ the requisite 15 employees to be covered under Title VII. If the employer fails to bring this to the attention of the Court before a verdict is rendered, the verdict will stand.

Employees Not Protected by Title VII

Any person who works for an organization that does not meet the Act's definition of "employer" would not be covered under Title VII. Indian tribes are covered by treaties, not Title VII. Elected officials and individuals appointed to such officials' personal staff are excluded from protection. Members of the Communist Party are not covered under the Act. Title VII does not apply to citizens of other countries working for a U.S. firm outside the United States and its territories, though it does protect U.S. citizens working for U.S. firms outside the United States and its

territories. Title VII protects foreign nationals who are working *within* the United States and its territories. It does not matter if the foreign national is in the country legally or illegally. Under Section 702 of the Act, religious corporations, associations, educational institutions, and societies may give preference to members of their religion in hiring. This issue will be examined in greater detail in Chapter 8.

The U.S. Congress is included on the list of “employers” in the Civil Rights Act of 1991. But this applies only to the legislative branch. All other federal employees receive similar employment protection to Title VII under the Civil Service Reform Act of 1978.

Filing a Charge with the EEOC

If an employee believes he or she has been discriminated against in employment or workplace decisions, a complaint may be filed with the EEOC (See Fig. 2.5). The party making the complaint, or **complaining party**, may contact the EEOC by phone, letter, or making a visit to a regional office. The party against whom the complaint is made, typically the employer, is the **respondent**.

Deferral to a State Agency

If a state has its own antidiscrimination laws with a state enforcement agency to investigate unlawful discrimination, the federal EEOC may choose to forward a charge to the state agency first (a **deferral**). Since the name of these agencies varies from state to state they are collectively referred to as **Fair Employment Practices Agencies** or **FEPAs**. In the case of a deferral, the complaining party may file a complaint with the EEOC within 300 days of the alleged discriminatory act, or within 30 days of the State FEPA closing the charge. In nine states (Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, North Dakota, and Virginia) the period for timely filing is limited to 180 days (See Table 2.1).

Timeliness for Compensation Matters, Lilly Ledbetter Fair Pay Act of 2009

The Lilly Ledbetter Fair Pay Act was signed into law on January 29, 2009 to overturn the 2007 Supreme Court decision, *Ledbetter v. Goodyear Tire & Rubber Co.* The Supreme Court of the United States held in its 2007 decision, *Ledbetter v. Goodyear Tire & Rubber Company*, that a complaint was time barred when the complaining party failed to process her complaint within 180 days of the alleged discrimination. Under the Fair Pay Act, each paycheck triggers a new EEOC charging period during which the complainant may properly challenge any previous discriminatory conduct which may have affected that paycheck’s amount, regardless of how long ago that discrimination may have occurred.

Investigation Outcomes

Whether the complaint is investigated by the EEOC or the FEPA, an investigator is assigned to the case and the employer is notified. Investigators may then question witnesses and may require employers to provide personnel records and documents or other evidence as is needed. Once the initial investigation is completed, the complaint is assigned one of three outcomes: no reasonable cause, dismissal, or reasonable cause.

No Cause

Under a **no cause** determination, the investigation failed to produce sufficient evidence to establish that an unlawful employment practice has likely occurred (see Table 2.2). Even with a finding of no cause, the complaining party may still bring suit against the employer in federal court provided that the complaining party requests a **notice of right to sue** within 90 days of being formally notified of the EEOC's no cause determination.

Dismissal

In a complaint **dismissal** the EEOC stops the investigation without any determination being made. Among the common reasons that a complaint may be dismissed is that it may not have been made in a timely manner or the complaining party refuses to otherwise cooperate with the investigation.

Timeliness in Filing

Time limits are very important to both complaining parties and respondents. The Supreme Court of the United States held in its 2007 decision, *Ledbetter v. Goodyear Tire & Rubber Company*, that a complaint was time barred when the complaining party failed to process her complaint within 180 days of the alleged discrimination.

Reasonable Cause

Under **reasonable cause**, the EEOC's investigation has found enough evidence to believe that an unlawful employment practice has occurred. In making such a determination, the EEOC will use either direct evidence of unlawful discrimination or acquire sufficient circumstantial evidence to establish a *prima facie* case. What constitutes a *prima facie* case will be discussed in Chapter 3. If the EEOC or FEPA determines reasonable cause, the employer is formally notified and may request reconsideration based on new evidence that has surfaced since the initial investigation.

Conciliation

If conciliation is chosen, the EEOC will attempt to work out a mutually-agreeable settlement between the complaining party and the employer. This option is preferred by the EEOC and is encouraged even before the determination of reasonable cause is reached.

Litigation

If the parties cannot agree to conciliation, the EEOC has the option of filing suit on behalf of the complaining party. When the EEOC litigates a complaint, it uses the resources of its own legal staff, so it usually commits to cases which promise large monetary settlements or would create judicial precedent favorable to the agency. If the EEOC chooses not to file suit, as it does in the vast majority of complaints, the EEOC will issue the complaining party a notice of right to sue (See Table 2.3).

Who Litigates?

The federal district court exercises the authority to impose a legal remedy for the injured party. Prior to 1991, all EEOC cases were heard before a judge in a “bench trial.” Since the Civil Rights Act of 1991, either party has the right to request jury trials if a complaining party is seeking compensatory or punitive damages. In the event that either party believes the ruling in the district court is in error the case may be appealed to a federal appellate court. If an appellate court wants to modify a remedy, it **vacates** the remedy of the lower court (the original damage award is now annulled) then **remands** (sends the case back to the district court) the appealed case.

Frivolous Appeals

An appeal only occurs when one of the parties can show that the lower court made an error in its interpretation or application of the law. If it can be clearly shown that a party has made an appeal that is blatantly meritless, it is said to be frivolous. If the complaining party initiates a frivolous appeal, that individual will incur the employer’s legal expenses. If the employer initiates the meritless appeal, then it will be responsible for the complaining party’s expenses.

Two Theories of Discrimination

Under Title VII, there are two basic theories of actionable unlawful discrimination. **Disparate treatment** results from treating individuals in the workplace differently because of their membership in a protected class. It is intentional and is characterized by imposing different standards on different people. **Disparate impact** focuses managers’ and HR professionals’ attention on statistical imbalances in their workforces. It is often unintentional and is characterized by imposing the same standards on all employees with different outcomes for different groups. This form of unlawful discrimination is addressed in Chapter 3.

Disparate Treatment Theory of Discrimination

When the Civil Rights Act of 1964 was first enacted, there was essentially only one form of unlawful discrimination, disparate treatment. To engage in disparate treatment, an employer, or its agent, treats applicants or employees differently because of their protected class status. Thus, there are different standards for applicants, or employees, based on an individual’s race, color, religion, sex, or national origin. Chapter 3 focuses its attention on this form of unlawful discrimination.

Steps in Conducting Cases Analysis

When confronted with a potential a violation of Title VII, it is important to investigate it in a systematic manner (see Fig. 2.7). First, ascertain which law applies to the situation and then determine whether the employer is covered. Did the complaining party initiate the complaint in a timely manner? Is the employee covered? If the answer to all of this is yes, then see if the complaining party can establish a *prima facie* case. If the *prima facie* case is established, then can the employer show that the decision was not based on illegal discrimination? Once the

employer's rebuttal is accepted, can the employee now provide evidence that the employer's rebuttal is flawed?

Chapter Questions and Answers

1. Once you have been notified that the EEOC has received a complaint from one of your employees, what are the three (3) possible outcomes once the investigation begins?

Answer: Reasonable Cause, No Reasonable Cause, Administrative Closure (Dismissal)

2. What are the five protected classes under Title VII?

Answer: Race, Color, Religion, Sex, National Origin

3. What are the seven classifications of employers who are covered under Title VII?

Answer:

All private sector employers with 15 or more employees

All educational institutions (public or private)

All labor unions with 15 or more members

All employment agencies (public & private)

All state and local governments

All joint (labor-management) committees for apprenticeship and training

Employees of the U.S. Congress (Civil Rights Act of 1991). Note that other parts of the federal government are not

4. What are the statutes of limitation (time-limits) for filing a Title VII complaint? What determines the length of the time limit?

Answer: The statutes of limitation are 300 days in states with FEPAs approved for deferral or 180 day in states without FEPAs approved for deferral. The time limit is determined by whether or not the state's FEPA is approved for EEOC deferrals.

5. Describe the process by which a Title VII complaint is filed.

Answer:

See Figure 2.5 for answer

6. Under what circumstances is the EEOC or a FEPA likely to dismiss a complaint?

Answer:

The complaint was not filed in a timely manner.

The complaining party cannot be located after the initial charge was filed.

The complaining party fails to provide the EEOC with requested information.

The complaining party may have failed to appear at scheduled interviews or conferences.

The complaining party otherwise failed to cooperate with the investigation.

Case Answers

Case 1

- a. Will the EEOC investigate Rayburn's complaint? Why or why not?

Rayburn's complaint is a likely candidate for dismissal (administrative closure) as 309 days have elapsed since the last alleged discrimination occurred on March 14, 2012.

- b. What do you think the likely outcome will be?

The employer will not be culpable for a Title VII violation. Even if he had filed in a timely manner, the disciplinary action appears to be work-based rather than race-based. This will become more apparent in Chapter 3.