

**EEO AND THE LAW
SHORT-ANSWER TEST ITEMS
GUTMAN CHAPTER 2 - MAJOR TITLE VII JUDICIAL SCENARIOS**

1. What is the distinction between presumptive and direct evidence?

Presumptive evidence is that which occurs during the prima facie phase, in which no factual evidence of a violation is necessary. It forces an explanation for a selection decision. It includes protection, qualification, application, and rejection and continuation of search. Presumptive evidence however, is evidence that is not conclusive. It is deemed true and sufficient unless it is discredited by the other side.

Direct evidence is that which factually convinces that the defendant discriminated illegally. It forces the defendant to challenge the evidence or show that there was a legal motive for the selection decision in question. Direct evidence is evidence that is based on personal knowledge or observation and if it is found to be true, proves a fact without inference or presumption.

2. What is the distinction between pattern of practice and disparate treatment?

Pattern or practice is when the plaintiff demonstrates by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than unusual practice. Pattern or practice claims are usually based on cross-job or composition statistical disparities, and there are usually multiple claims by individual plaintiffs. Disparate treatment does not address whether the employment decision was regular practice, only that an illegal motive was a motivating factor in a personnel selection decision. Basically, the motivating factor in selection is what is in question, whereas pattern or practice examines whether disparate treatment was regular practice. Pattern of practice is disparate treatment on a larger scale. It is classwide disparate treatment that is typically based on cross-job or composition statistics, and is often accompanied by individual claims of disparate treatment.

3. What is the distinction between pattern of practice and adverse impact?

Whereas pattern or practice focuses on the evidence of racial discrimination as standard operating procedure, adverse impact focuses on evidence that an identified facially neutral practice disproportionately excludes protected group members. It is demonstrated with applicant flow statistics. Pattern or practice is demonstrated with stock analysis of composition or cross job statistics. Pattern or practice focuses more upon the motive of racial discrimination, whereas adverse impact focuses more upon the proportionality of majority to minority groups selected.

4. What are the 3 phases of the McDonnell-Burdine scenario?

Phase 1 Presumptive evidence of a violation: protection, qualification, application, and rejection and continuation of search. (Plaintiff opens with presumptive evidence.)

Phase 2 Productive defense: articulation of legitimate reason for the

selection decision made. (Productive defense to match presumptive attack.)

Phase 3 Pretext: direct evidence that defendant discriminated illegally or indirect evidence that the articulation given is false. (Persuasive burden on the plaintiff)

5. Post-CRA91, what role do “derogatory remarks” play in mixed motive cases?

In post-CRA 91 cases, courts have deemed derogatory remarks a motivating factor in selection decisions if such remarks are made or connected to decision makers. If they are made by non-decision makers, they are deemed insufficient to survive summary judgment.

6. What are the 3 phases of Mixed Motive scenarios?

Phase 1 Proof by a preponderance of evidence that an illegal motive was a motivating factor in a personnel decision.

Phase 2 Proof by a preponderance of evidence that the selection decisions made would have been made anyway in spite of an illegal motive.

Phase 3 Proof by a preponderance of evidence that the defense is a pretext.

7. What are the 3 phases of a Pattern of Practice scenario?

Phase 1 Circumstantial statistical evidence (cross-job or composition) usually accompanied by multiple individual motive claims.

Phase 2 McDonnell-Burdine defense for pattern statistics; defense for individual claims varies with the mode of the prima facie attack.

Phase 3 Same consideration for pretext as in any disparate treatment claim.

8. What role does “inexorable zero” play in pattern of practice cases?

Gross statistical disparities are probative and require explanation. An inexorable zero, when zero of the non-majority applicants are hired, shows that minorities are overwhelmingly excluded from the prospective job. A statistical disparity in hiring to the extent of zero accepted applicants is most likely indefensible in cases where there is no BFOQ. When statistical disparity was an inexorable zero, articulations (as in Teamsters) have been implausible.

9. What role does each of the following play in BFOQ defenses? Workforce safety, worker safety, customer safety, customer privacy, customer confidentiality, customer preference.

Workforce Safety: Workforce safety likely will be successful in a BFOQ defense. As in *Dothard v. Rawlinson*, the issue was whether or not the workplace would be safe if women were allowed to work and it was decided that there could be an all male workforce for the safety of the prison.

Worker Safety: Worker safety likely will not be successful as a BFOQ defense. As in *Johnson Controls* the individual worker has the decision to weigh and accept the risks of employment.

Customer Safety: The BFOQ defense likely will be successful for customer safety. For example, airlines can exclude pregnant flight attendants if there is an implied threat to the safety of passengers.

Customer Privacy: The BFOQ defense likely will be successful for customer privacy. For example, all male bathhouses are able to exclude female janitors.

Customer Confidentiality: The BFOQ defense likely will be successful for customer confidentiality. For example, all-female reformatories may exclude male counselors because the males may be perceived as a threat by the female patients.

Customer Preference: Customer preference likely will not be successful as a BFOQ defense. Airlines are not able to exclude male flight attendants based on passenger preference, for example . . . a sexy image.

BFOQ defense can succeed for workplace or customer safety and, sometimes for customer privacy or confidentiality. When workplace safety or worker safety are compromised by instances such as pregnancy during some point, defense may be made. Also, when customer privacy or confidentiality could be compromised by instances such as a female janitor in an all male bathroom facility, defense may be made. However, customer preference does not constitute defense. Because customers prefer males, females should not be excluded. Also, worker safety is not likely to hold up because we are talking about an individual who can choose not to heed safety warnings.

10. What is the adverse impact scenario under CRA91?

Phase 1 – Circumstantial statistical evidence via applicant flow or demographics that an identified practice disproportionately excludes protected group members.

Phase 2 – Proof that the challenged practice is job related and consistent with business necessity.

Phase 3 – Proof that an equally valid or job-related practice with less or no adverse impact could have been used.

11. The key to proving a “manifest relationship” between test performance and job performance depends on what?

To prove a manifest relationship is, one should show, by professionally acceptable methods, that selection procedure performance is “predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are evaluated.”

12. When with regard to job demands and the consequences of job failure, does the employer have a lighter burden to demonstrate the job relatedness of a predictor(s)?

When the job clearly requires a high degree of skill and the economic and human risks are great, the employer bears a correspondingly lighter burden to show that its employment criteria are job related. When a job calls for a lower level of skill and the consequences of failure in job performance are less, the employer has a heavier burden to demonstrate that selection procedures are job related.

13. What is the distinction between a “target attribute” and a “surrogate attribute” and what role does it play in adverse impact cases?

A target attribute is the capability that is job related. A surrogate attribute is a proxy for the target attribute. An example is that of a police officer. It was argued by the defendant that it was necessary for an officer to be tall in order to demand respect and fight criminals. The target attribute in this instance is the capability to fight criminals and demand respect. The proxy is height. In adverse impact cases, when physical characteristics are surrogates, courts should demand that the implied target attributes be directly evaluated via, “professionally accepted methods.” For example, in *Boyd v. Ozark Airlines*, the airline proved that shorter pilots couldn’t safely operate all cockpit instruments. In this case height was the target attribute. However, in *Dothard v. Rawlinson*, height was the surrogate, or proxy, for other attributes.

14. What is the distinction between job-relatedness and business necessity and what role does it play in determining cases?

A criterion-related validity study that uses professionally accepted methods may demonstrate that a test is job related, that is, test scores predict job performance. However, the validity study does not prove that the test is necessary for the business to survive. Business necessity is demonstrated using cost and economic data, plus an indication that there is no alternative with equivalent validity but less adverse impact. There may be alternative methods to make the same prediction, or the degree of utility added by the test might be small enough for the company to survive without it. In *Griggs v. Duke Power Company* the touchstone was business necessity. For example, if an employment practice which operates to exclude African Americans can’t be shown to be related to job performance, the practice is prohibited. Case law reveals that prior to *Watson* and *Wards Cove* rulings, the Griggs-Albermarle type cases used a job-relatedness standard, whereas *Dothard* type cases used a business necessity standard.

15. What was the CRA91 Ward’s Cove compromise? Where did it leave the standing on O’Connor’s opinion in Watson?

The CRA 1991 Wards Cove compromise was both Republican and Democratic parties working together to reach a compromise which maintained the identification and causation provisions of Griggs, but overturned the productive phase 2 defense. O’Connor’s opinion in *Watson* was held up for the first two suggestions made, which were identification (if decision-making processes are functionally integrated, they can be analyzed as one practice) and causation (plaintiff must

produce evidence that a selection process is inseparable before making statistical proof causation). The burden of production of phase 2 described in Wards Cove was reversed. The Supreme Court decided that adverse impact is unlawful if the defendant fails to demonstrate job relatedness and business necessity of the challenged practice.

(These are not really “discussion” questions. They are intended to direct students to key points in the chapter. I distribute them prior to class and encourage students to come to class with answers prepared, and then refine their answers shortly after class before turning in the exam. It is open-book and open-notes. These weekly quizzes in total constitute the “exam” portion of the course in my grading system.)