ED Outline

**I. Procedure and Remedies**

1. Employment Discrimination Laws
   1. US Constitution
      1. Equal Protection Clause
   2. Title VII of CRA; 42 USC 2000:
      1. Covers discrimination based on race, color, national origin, religion, sex
      2. Established in 1964, amended in 1991
      3. Discrimination claims can be raised by both majority and minority classifications
   3. Age Discrimination in Employment Act (ADEA); 29 USC 621
      1. Covers discrimination for those over age 40 (age requirement)
      2. Established in 1967
   4. American with Disabilities Act, Title I; 42 USC 12111
      1. Established in 1990, amended in 2008
      2. Qualified disability is required to be in the specialized class
   5. Goals of these laws are not only to remedy the discrimination and make the EE whole, however, attempt to deter them from continuing on into the future
2. EEOC Claims Procedure
   1. If probable cause of discrimination is found, there is an opportunity to negotiate settlement
      1. If no settlement is reached, EEOC files claim in court, and you can join suit
   2. If EEOC discovers no probable cause, you receive *right to sue* notice
      1. Have 90 days to file claim in civil court
      2. Civil court is *trial de novo*, slate is wiped clean and the EEOC’s determination is irrelevant
   3. Can request a notice to sue anytime after 180 days
      1. Once EEOC begins investigating, no pertinent records are destroyed
      2. Once receiving your right to sue, EEOC no longer files the claim in court
         1. If positive notification is received, best course is to put off request notice and wait for the final cause determination
         2. Once a “right to sue” request is received, EEOC investigation ends
3. Ledbetter v. Goodyear Tire
   1. Main Issue: When did the alleged unlawful employment practice occur
      1. **You have 180 days (or 300 where applicable) to file a charge with the EEOC after discriminatory act first occurs**
   2. 2 Lines of reasoning for case
      1. **Harassment**: If a claim is filed, as long as any of the continued acts that make up harassment claim happened during 180 period, the aggregate of incidents creates a hostile environment argument
      2. **Discrete Acts**: If acts are isolated, 180 day period begins when the act occurred, not when the effects of the act are felt
   3. Held that employers cannot be sued under Title VII of the Civil Rights Act over race or gender pay discrimination if the claims are based on decisions made by the employer 180 days ago or more
      1. Court found accumulation of small pay dock decisions were individually each a discrete act, rather than aggretating into a harassment claim
4. Lily Ledbetter Fair Pay Act
   1. Amends Civil Rights Act of 1964, stating that the 180 day period for filing an EEOC claim resets with each new discriminatory paycheck
5. Remedies: Generally
   1. Upon a finding of unlawful discrimination, a court may enjoin the ER from engaging in the unlawful practice and order such affirmative action as may be appropriate
      1. Reinstatement or hiring; with or without back pay; or any other equitable relief that the court deems appropriate
   2. Presumptive entitlement rule: allows victims of unlawful ED to be awarded whatever remedies are necessary to achieve rightful place **and** make-whole relief
      1. Plaintiff has a relatively light burden of establishing the “presumptive entitlement” to a particular form of relief
6. Remedies: Restore to Rightful Place; Deterrence policy (*Franks*)
   1. Reinstatement: affirmative injunction directing the defendant to (re)employ the plaintiff in the position she (would have) had, but for discriminatory conduct of ER
      1. Not mandatory, but is an equitable remedy depending on appropriateness
   2. Reinstatement may be denied when:
      1. “Innocent employee” currently occupies the at-issue job; and
      2. Hostility or animosity between plaintiff and ER would make productive and amicable working relationship impossible
   3. Presumptive reinstatement is overruled in mixed motive cases where ER proves “same decision” defense where ER learns after dismissing an employee for prohibited reasons the worker had engaged in conduct that would’ve justified dismissal
      1. Generally, in after acquired evidence case, plaintiffs are not entitled to reinstatement or front pay, and back pay should be calculated to end on day the new evidence was discovered
7. Remedies: Make whole; Compensatory policy (*Moody*)
   1. Successful plaintiffs are entitled to monetary compensation remedy the economic harm suffered in the past or may suffer in the future as a consequences of ER’s unlawful ED
   2. Back pay:
      1. Focus on wages, salary, bonuses, commissions, raises and fringe benefits
      2. Duty to mitigate employment wages: Plaintiff is required only to try to find a substantially equivalent position or to use reasonable diligence to try to find a job that is the substantial equivalence in responsibility, working conditions and status
   3. Front pay: Money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement or to compensate for lost future wages
      1. Generally not awarded in Equal Pay Act
      2. Elements used to determine amount are generally same as those used to determine back pay
8. Compensatory and Punitive Damages
   1. Subject to the caps that apply to the aggregate of all claims brought by a single plaintiff, not to each individual claim on which plaintiff prevails
      1. Employers with 15 - 100 employees: up to $50,000
      2. Employers with 101 - 200 employees: up to $100,000
      3. Employers with 201 - 500 employees: up to $200,000
      4. Employers with 501 or more employees: up to $300,000
   2. Compensatory damages: future pecuniary losses, emotional pain, inconvenience, mental anguish, loss of enjoyment of life and other non-pecuniary losses
      1. Recoverable as CD: injury to professional standing, character, reputation, credit standing, health, and aggravation of preexisting emotional difficulties
   3. Punitive Damages: Recovered against a defendant if the plaintiff proves that the ER engaged in unlawful employment practice with malice or reckless indifference to the federally protected rights of plaintiff
      1. To determine the amount of PD consider nature and severity of DC, duration and frequency, and net worth/financial status of the ER
   4. ER Vicarious liability for Punitive Damages
      1. ER liability for punitive damages where an employee is serving in a “managerial capacity” and is “acting in the scope of employment”
9. Liquidated Damages (EPA & ADEA)
   1. Additional amount awarded that is equal to the back pay award
      1. Double unpaid wages that are viewed as a substitute for punitive damages
   2. Recoverable in ADEA cases if the evidence supports a finding of a willful violation
      1. Requires proof that the ER knew or showed reckless disregard whether the conduct was prohibited by the ADEA standard

**II. Theories of Discrimination and Proof Structures**

*A. Individual Disparate Treatment*

1. Introduction
   1. Disparate treatment occurs where ER treats some people less favorably than others because of their race, color, sex, religion or national origin
      1. Proof of discriminatory motive **is** **critical**
   2. Critical issues is whether the plaintiff has proven an **adverse employment action** is based upon unlawful, intentional discrimination
      1. Plaintiff may prove this through direct or circumstantial evidence
      2. Fact finder’s determination set aside on appeal only if clearly erroneous
   3. Classic example: formal policy that is facially discriminatory
      1. Treats a protected status differently on the face of the statute or policy
2. Burden Shifting Framework for Individual DT claim: *McDonnell Douglass*
   1. P must establish a **Prima Facie Case for ER discrimination**
      1. P belongs to racial minority or a protected class
      2. Applied and was qualified for a job (minimum qualifications)
         1. **Futile gesture doctrine**: Where person’s desire for a job is not translated into a formal application because he knows it’s a waste of time to apply
         2. **Other excuses**: no formal application; made reasonable attempts to convey interest to the ER; no clear procedure for promotion
      3. Despite qualifications was rejected/fire/etc… (adverse employment action)
      4. After not receiving job, position remained open or someone was hired instead
         1. Not precluded from bringing a claim though position filled by someone in same protected class, so long as ***he lost because of his status***
         2. Age difference less than ten years are not enough for a PFC
   2. Burden shifts to ER who must establish legitimate, nondiscriminatory reason (LNR)
   3. P must prove that the ER’s LNR is pretext for discrimination
      1. Similarly situated comparators: person outside the protected class, who is directly comparable in all material aspects, was treated better
3. Burden shifting to identify pretext: *Texas Dept. of Community Affairs v. Burdine*
   1. At all times, the burden of persuasion ultimately lies with the plaintiff bringing suit
      1. Burden of production shifts to ER to show a LNR after the P establishes a PFC
      2. If the ER does not say anything, the P wins; but so long as the ER establishes a possible LNR, the burden returns to the P
      3. P would then have burden of proving that the LNR was actually a pretext for discrimination
   2. P may prove that the LNR was a pretext for discrimination in 2 ways
      1. Directly: Show discriminatory reason more likely motivated the ER’s actions
      2. Indirectly: Show that the ER’s proffered explanation is unworthy of credence
   3. 3 possible results if P tries to prove pretext directly or indirectly
      1. P wins as a matter of law (pretext only)
      2. Fact finder decides, P or D could win (Pretext may)
      3. Defendant wins as a matter of law (pretext plus)
   4. Evidence sufficient to establish a PFC creates a legally mandatory, rebuttable presumption
4. *St. Mary’s Honor Center v. Hicks*
   1. Pretext is not enough to win as a matter of law, but fact finder may rule in your favor
      1. By only establishing pretext, you cannot win on summary judgment
      2. An ER’s proffered reason was unpersuasive, or even contrived, did not necessarily establish that an EE’s proffered reason of race was correct
5. Same Actor Defense
   1. Where the same supervisor both hired and fired an EE and the period between the hiring and firing is relatively short, the ER is entitled to an inference that discharge was **not motivated** by discriminatory animus…has been applied up to 3 years
6. Cats Paw/Subordinate Bias Liability
   1. Situation where biased subordinate, lacking decision making power, uses formal decision maker as a dupe in scheme to trigger discriminatory employment action
   2. To recover, plaintiff must show that the decision maker followed the biased recommendation of a subordinate without independently investigating the complaint against the EE
   3. Must establish more than mere influence or input in decision making process, issue is whether biased subordinate’s discriminatory reports, recommendation caused the adverse employment action
7. Reverse Discrimination
   1. Should be able to establish a Title VII PFC in the absence of direct evidence of discrimination by presenting sufficient evidence to allow a reasonable fact finder to conclude that the ER treated the plaintiff less favorably than other due to race, color, religion, sex, or national origin (considering totality of “background circumstance”)
8. Intersectionality
   1. Theory posits that individuals have multiple identities that are not addressed by legal doctrines based solely on single identity or status
      1. When addressing membership in 2 classes individually, court may reject the 2 claims that are separate from one another
      2. Ex: ER should not escape from liability for discrimination against black women by showing it does not discrimination against blacks or women standing alone, if it does discriminate specifically against black women.
9. Origins of Mixed Motive: *Price Waterhouse*
   1. Plurality opinion:
      1. If gender was a motivating (not substantial, nor “but for”) factor of the decision when it was made, that is enough to establish a PFC
      2. ER can escape full liability if, by a preponderance of the evidence, it shows that it would have made same decision even if gender played no role
      3. Court acknowledged the role that stereotyping can play in limiting employment opportunities, and allowed the use of stereotyping evidence to support the discrimination claim
   2. O’Connor’s Concurrence: Controlling opinion and Higher Standard
      1. Mixed motives theory was **only** appropriate in cases that involved **direct evidence** of discrimination…akin to admission or confession of liability
      2. Distinguished “stray remarks” from direct evidence in determining whether statements constitute direct or circumstantial evidence of discriminatory intent
         1. Related to protected class of which P is a member
         2. Proximate time to the termination
         3. Made by an individual with authority over decision at issue
         4. Related to the employment decision at issue
      3. Where comments are vague and remote they are insufficient, where specific comments made over lengthy time periods are sufficient
         1. Stray remarks may still constitute circumstantial evidence that is probative of ultimate fact of intentional discrimination
10. Mixed Motive Today: *Desert Palace v. Costa*
    1. **Mixed Motive Definition**: To obtain a mixed motive instruction, P only needs sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice (even though other factors also motivated the practice)
       1. Rejects O’Connor’s framework, direct evidence of discrimination is not required for mixed motive
       2. When a P does offer **direct evidence**, it avoids *McDonnell Douglas* burden shifting and moves directly to remedial phase determining whether ER would have made the same decision absent discriminatory motive
    2. Defendant’s affirmative defense from *Price Waterhouse* no longer absolves of all liability, only restricts remedies to include declaratory relief, certain injunctive relief, attorneys fees and costs
       1. No reinstatement or damages associated if ER establishes affirmative defense
11. Post *Price Waterhouse* and amendment to Title VII 703(m)
    1. Title VII: Mixed motive analysis very important, separate from *McDonald Douglass*
       1. Preponderance of evidence that protected aspects were motivating factors
       2. Defendant has affirmative defense to limit damages
    2. ADEA: No mixed motive analysis
       1. Plaintiff must show that, but for age over 40, a different decision would have been reached, even if other factors involved

*B. Retaliation*

1. Introduction
   1. Both Title VII (704a) and the ADEA (4d) contain almost identical provisions making it unlawful employment practice to:
      1. Discriminate against any individual because he **opposed** any practice made unlawful under these statutes; or
      2. Because he **participated** in any manner in proceedings to enforce these statute
   2. ADA prohibits retaliation due to opposition to unlawful practices or participation in enforcement proceedings (503b)
      1. Unlawful to coerce, intimidate, threaten, or interfere with any individual based on the exercise of rights under the ADA, or bc an individual has aided or encouraged any individual in the exercise or enjoyments of protected rights under the ADA
   3. CRA of 1991 holds that retaliation claims are actionable under §1981
2. Analytic Framework
   1. Adjusted burden-shifting scheme of *McDonnell Douglas* for retaliation claims
      1. P must establish a **PFC of retaliation** by proving that:
         1. She was engaged in statutorily protected activity;
            1. Participated in Title VII investigation, proceeding, or hearing; or opposed an unlawful employment practice
         2. She suffered a materially adverse action at the hands of the employer; **and**
         3. Causal link exists between protected activity and the adverse action
         4. ER had knowledge of the protected activity (some courts list 4th element)
      2. PFC establishes a rebuttable presumption of unlawful retaliatory motive, and burden then shifts to the ER to rebut the presumption via LNR for its adverse action
      3. P then has ultimate burden of proving pretext; that adverse action was motivated by some retaliatory animus
         1. Some debate over whether this burden shifting analysis applies to ADA
   2. Individuals Protected from Retaliation
      1. §704(a) of Title VII specifically covers “employees” and “applicants” for employment, and SCOTUS has included former employees (*Robinson v. Shell)*
      2. *DeMedina* establishes that individuals can be victims of actionable retaliation under third-party reprisal, but circuit courts have rejected this analysis
3. Scope of Statutorily Protected Activity
   1. **Participation clause**: prohibits retaliation because an individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce laws prohibiting discrimination in employment
      1. Exceptionally broad protection extends to persons who have participated in any manner in Title VII proceedings, regardless of underlying merits of the claim
      2. Does not mater if the EE is wrong on the merits of the charge, nor is protection lost if the contents of the charge are malicious and defamatory
   2. **Opposition clause**: prohibits retaliation bc an employee or applicant has opposed any practice made an unlawful employment practice by Title VII
      1. Narrower protection than under participation clause
      2. Courts must balance purpose of Title VII against Congress’ desire not to handcuff ER’s in objective selection and control of EE’s
      3. EE is not protected if he violates legitimate rules and orders of the ER, disrupts the employment environment, or interferes with attainment of ER’s goals
   3. Participation clause covers a narrower range of activities, but greater protection
4. Opposition Clause: *Crawford v. Metropolitan Gov’t*
   1. **No protection** **under participation clause** if no formal Title VII/EEOC charge was filed
   2. As for opposition clause protection, **no line at active opposition**
      1. EE’s participating in internal investigation processes can file retaliation claims under the opposition prong of Title VII’s retaliation claim
5. Retaliation and No formal EEOC filing: *Clark County v. Breeden*
   1. If an EEOC complaint is filed, and that claims loses, retaliation protection still exists under the protection clause for claimant & participants (as long as it is filed in good faith)
      1. If you participate in an **internal matter** (no formal EEOC filing) and file an internal complaint, **falls under the** **opposition clause**, and claim must be objectively reasonable that conduct violated Title VII, or no protection
   2. Filing the original EEOC charge extends broader protection, even if the charge is baseless
      1. There is a formal gap in coverage under the EEOC between the opposition and protection prongs of retaliation coverage
   3. Internal matter + no reasonable person could have believed that the single incident violated Title VII standard = no opposition prong retaliation protection
6. Meaning of “Discriminate Against” – Materially Adverse Action: *Burlington Northern*
   1. For retaliation to be actionable under Title VII, the ER’s actions must be objectively materially adverse, **actions that would dissuade a reasonable person from making or supporting a charge of discrimination**
      1. Under Title VII, discrimination claims can be brought any time prohibited discrimination affects terms and conditions of employment
      2. Focus not on suffering actual material loss, but mere possibility of suspension w/o pay could dissuade the filing of a discrimination claim…meets this standard
   2. Workplace harassment in response to Title VII complaints can now be materially adverse
      1. Petty slights, minor annoyances, and simple lack of good manners is not sufficient
         1. Transfer to a position of equal prestige and an undesirable but routine assignment do not apply
         2. Being subjected to rude and hostile behaviors, along with acts targeted at committees or departments but not employees individually, do not qualify as materially adverse
      2. Retaliatory transfers can meet the Burlingtonstandard even if no loss of pay
7. Causation: *Breedon* (again)
   1. Causal link between EE’s protected activity and ER’s materially adverse action can be established by showing the protected conduct and adverse action are not wholly unrelated
      1. Direct evidence of retaliatory animus
      2. Other EE’s engaged in protected activity were subjected to adverse ER action
      3. Close temporal proximity between adverse action and protected activity
   2. If you participate, even if you don’t file the original EEOC charge, still protected
      1. By establishing ER knowledge and temporal link, potential retaliation claim exists even if no individual discrimination against you

*C. Systemic Disparate Treatment (Pattern-or-practice Cases)*

1. Introduction
   1. Where ER has engaged in a pattern-or-practice of intentional discrimination, and that pattern is primarily demonstrated through use of statistics
      1. Cases are almost always class actions
   2. In a disparate treatment (PPC), stats are relied on to establish an intent to discriminate
      1. In a disparate impact case, stats establish a PFC of discriminatory effect of a particular employment practice, shifting burden to ER to justify the practice
   3. If there is indeed no discrimination, work force should be broken down like the relevant labor market, but that market is difficult to determine
2. PFC of a pattern-or-practice case depends upon the relative quality of the evidence presented by the opposing parties
   1. Statistical Significance Rule: Unless statistical evidence supports the inference that a policy or practice has a significant effect on limiting the employment opportunities of a protected class, the statistical evidence is **not probative of discrimination**
3. Gross statistical disparities alone in some cases may be sufficient to establish a PFC of systemic disparate treatment (rarely)
   1. In *Teamsters*, SCOTUS observed that the inability of ER to rebut inference of discrimination based on stats was not result of the misuse of stats, but from the total absence of blacks and Hispanics from at-issue jobs (the inexorable zero)
   2. In *Hazelwood*, SCOUTS held that gross statistical disparities alone may properly constitute prima facie evidence of pattern or practice of discrimination
4. **Standard deviation** is the most widely accepted statistical methods
   1. Focuses on questions of whether a protected group has been hired or passed a test at a differential rate; if **disparity is greater than two standard deviations**, law will infer **discrimination** as most likely cause of discrimination
      1. Equation: Square root of (total drivers)(% minority group)(% non-minority)
         1. Total drivers x % of minority in work force = expected minority drivers
      2. (Expected minority drivers – actual # of minority drivers)/standard deviation figure = number of standard deviations difference (p. 207)
   2. Courts are willing to accept proof of more than 2 standard deviation difference as evidence of discrimination, because no other plausible explanation offered
      1. Defendant ER has then the opportunity to dispute statistical proof, by showing that stats are inaccurate, incomplete, or focused on the wrong measure
      2. Burden of ER to show that there is a meaningful difference between the African-American and white groups
      3. Futility Doctrine: If (potential) EE’s argue that application process would be useless, ER can counter with argue the minute flow of minority application
         1. Individualized evidence/stories important in this claim
   3. **Relevant Labor Market** includes both the geographical area from which ER draws its EE’s and the population in that area which is qualified for the at-issue job
5. Multiple Regression Analysis
   1. Designed to measure the effect of factors like race, sex, age, education, and experience on the outcome of an employment decision

*D. Disparate Impact*

1. Disparate Impact Defined: *Griggs v. Duke Power*
   1. If an employment practice/rule that is facially neutral in its treatment of different groups but has a disparate impact on one group, then the **ER** **must establish that is job related and has a business purpose, or it is interpreted as discriminatory** 
      1. If employment practice is not specifically job related, but is professionally related, continue to presume disparate impact on groups is discriminatory
      2. DI claim **does not require proof of an intent to discriminate**, only assesses the consequences of employment practices
   2. EEOC 80% Rule: Not a bright line requirement, but typically, plaintiff may establish adverse impact by showing that the employees in the protected class are hire, or pass a test at a rate that is below 80% of the rate of the most successful group
      1. Ex: Rate of blacks with diploma cannot be less than 20% of the rate of white people with a diploma
         1. Black passage rate (.12) / White passage rate (.34) = .35
            1. 35% is less than 80%, fails the 80% Rule
         2. If Black passage rate was say 30%, (.3)/(.34) = 88%
            1. Practice would not be considered discriminatory, over 80%
2. Bottom Line Defense: *Teal v. Connecticut* 
   1. Non-discriminatory “Bottom Line” is no defense to PFC under §703(h)
      1. In this case, test passage rate for Blacks failed the 80% test, however passed the test for promotion of Blacks after initial hiring
      2. Bottom line statistics of promotion for blacks do not insulate an employer from liability, nor do they provide a defense from disparate impact
   2. Courts are not interested in the bottom line in this circumstance because it is unlawful to deprive individuals of an **employment opportunity** under §703(h)(2)
      1. Basis for disparate impact exists when people are deprived of an opportunity to be part of an employment hiring pool due to a test that is not proven to be job related nor a business necessity
      2. §703(h)(2) is statutory basis for disparate impact analysis
3. Subjective Criteria: *Watson v. Fort Worth Bank & Trust*
   1. *Griggs* disparate impact analysis applies to subjective criteria
      1. Subjective practices can be challenged as discriminatory by EE’s
         1. Unstructured interviews, word of mouth recruiting, etc…
      2. Courts recognized that ER’s could potentially get out of DI violations by introducing subjective test (interviews) with discriminatory objective tests
   2. To establish a PFC, EE must isolate and identify the specific ER practices that are allegedly responsible for any observed stats disparities (80% rule)
      1. After practice at issue is established, EE must offer stats evidence sufficient to show that the employment practice excluded applicants due to membership in a protected group…sufficiently substantial to infer causation
      2. ER can adduce countervailing evidence
   3. Burden then shifts to ER to prove that employment practices are job related and based on business purposes
      1. If ER does so, EE must show that other tests, w/o similar racial effect, would serve the ER’s legitimate interest in efficient and trusting workmanship
   4. Unlike Disparate Treatment, no compensatory or punitive damages are available under Disparate Impact
4. Griggs Revisited: *Wards Cove Packing v. Atonio* 
   1. To determine the statistics for the relevant labor market, SCOTUS states that you should look at the racial composition of the qualified population in the relevant labor market
      1. EE must identify specific practice that is discriminatory, despite fact that there is a significant difference in composition of work forces
   2. ER can justify an employment practice with a disparate impact if the challenged practice serves, significantly, the legitimate employment goals of the ER
      1. No requirement that the challenged practice is essential or indispensible
      2. Effectively lowers standards of *Griggs* by only requiring adequate justification, compared to business necessity
      3. EE can nonetheless succeed on his claim by showing a less discriminatory alternative that is in accordance with the law
   3. Congress eventually reaffirms *Griggs* and the business necessity standard in 1991 CRA, making this irrelevant
      1. ER has the burden of proving the business necessity defense
      2. EE’s are required to identify a specific employment practice, but if they can show that the decision-making process cannot be separated for analysis, it can be analyzed as one employment practice
      3. However, *Wards* statements on statistics and relevant labor market hold true, must continue to compare *qualified* men v. *qualified* women (or race, etc…)
         1. If absence of minority group from certain position is due to a dearth of minority applicants, ER’s methods can be said to have disparate impact
5. Remedying the Disparate Impact of Selection Procedures: *Ricci*
   1. Held that an ER must have a “strong basis in evidence” that it would be subject to Title VII liability before it can discard results of an examination process
      1. **Strong-Basis-in-Evidence standard**: Before an ER can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the ER must have strong basis in evidence to believe it will be subject to disparate impact liability if it fails to take the race-conscious discriminatory action
   2. If examinations were job-related and consistent with business necessity, and there was no strong basis in evidence of an equally valid, less-discriminatory testing alternative, it cannot discard the examination results
      1. The threshold showing of statistical disparity between black passage and white/Hispanic passage in the examination results was insufficient by itself to constitute a strong basis in evidence of unlawful disparate impact
      2. Raw racial results often cannot be the predominant rational for refusal to certify results and take race-conscious discriminatory action

**III. Specific Applications of Discrimination Principles**

*A. Bonafide Occupational Qualification (BFOQ) and Stereotypes*

1. Introduction
   1. Under Title VII, §703(e), it is not an unlawful employment practice to hire on basis of religion, sex, or national origin (**not race or color**) in those certain instances when it is reasonably necessary to the normal operation of that particular business or enterprise
2. Basic Test for BFOQ: *Southwest Airlines*
   1. Does the particular job require that only members of a certain class (race, gender) fill it?
      1. Sex appeal is not a requirement
      2. BFOQ as enacted cannot be interpreted so broadly to include customer preferences or attitudes
   2. If so, is the particular job essential to the business
      1. Even if employment practice affects overall revenue, does not make the practice essential to the business
      2. Sexual preference is not essential enough for a BFOQ exception
         1. Does the specific job within the business require it to be of a certain sex/race, and is it essential to the requirement (ex. strip club)
         2. “Silliness” exception exists, see the strip club
3. Sex-based BFOQ Defense: *Dothard v. Rawlinson*
   1. PFC for Disparate Treatment and BFOQ
      1. Facially discriminatory requirement is established, can ER establish that the employment practice is job responsibility related
         1. Womanhood would directly undermine capacity to provide the security that is the essence of a correctional counselor’s responsibility
      2. Dissent: Women pay price for lost opportunities from threat of depraved conduct by inmates, proper inquiry is to take swift and sure punitive actions against inmate offenders
   2. BFOQ exception meant to be narrow exception to the general prohibition of discrimination on the basis of sex
      1. Adopted “narrow ambit” constraining an ER’s safety justification for its BFOQ defense
4. Establishing a BFOQ: *International Union* v. *Johnson Controls*
   1. ER must direct concerns about a woman’s ability to perform her job safely and efficiently to the aspects of the woman’s job related activities that fall within the “essence” of a particular business
      1. ER cannot discriminate against women and their capacity to become pregnant, and the reproductive potential prevents her from performing duties of the job
      2. If job is battery making, a uterus does not affect ability to make batteries
   2. BFOQ only applies to employment practices reasonably necessary to the normal operation of that particular business or enterprise
5. Privacy Based BFOQ
   1. Courts have recognized sex as a BFOQ where health care providers have defended hiring EE’s of only one sex on the basis of the privacy interests of their patients
      1. Preferences of patients for sexual privacy
      2. Assumptions by courts and ER’s about patient preferences in situations whether patients have to undress, bathe, or perform toilet functions in presence of EE’s
   2. 3 part test for an ER asserting a privacy based BFOQ defense (*EEOC v. Sedita*)
      1. Factual basis exists for believing that hiring any member of one sex would undermine the essence of its business
         1. Gym served old, overweight women, and petition from 10,000 women that stated they had joined gym to receive personal info and would not have joined the gym if it hired males to perform functions violating privacy
      2. Asserted privacy interest is entitled to protection under the law, and
         1. Business involved touching breasts, thighs, butt, and crotch during workout information process (all-female gym)
      3. No reasonable alternatives exist to protect the privacy interests other than gender based hiring policy
         1. Concern over costs of hiring males, restructuring facilities are relevant to reasonableness of suggested alternatives
6. Stereotyping and Sex Discrimination: *Price Waterhouse* revisited
   1. Broader Holding, ER cannot evaluate EE’s by assuming or insisting that they match the stereotype associated with gender
      1. Descriptive (tend to be this way)
      2. Normative (should be this way)
      3. Interpretive (perceived to be this way, when majority class would not be)
   2. Narrow Holding: ER who objects to aggressiveness in women, but whose positions require this trait places women in an intolerable and impermissible employment situation
      1. Grey area: If evidence indicates that clients did not deal with the woman well because she was not feminine…enters scope of customer preference
   3. Stereotyping interfered with ability to perform at work, discouraged to use techniques and traits that were considered praiseworthy to men
      1. If policy applied to all workers, no evidence that policy was adopted to make women conform to commonly-accepted stereotypes, and deemed reasonable under context of overall policy, no impermissible sex stereotyping
   4. ERwho discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex
7. Sex Discrim. based on Dress, Grooming, & Appearance Requirements: *Jespersen v. Harrah’s*
   1. Courts have consistently rejected challenges to ER rules and informal practices regarding EE workplace attire, grooming standard, and personal appearance
      1. EEOC expressly permits different dress codes for men and women, requiring only that ER’s impose equivalent standards or burdens on both males and female EE’s
   2. Rationale upholding ER dress and grooming codes based explicitly on gender
      1. Reflect reasonable community norms of appearance, trivial impact on EE’s working conditions
      2. Codes are outside legitimate scope of Title VII by focusing more on how to run a business, rather than equality of employment
      3. Only way to treat sex equally with regard to appearance is to adopt disparate rules reflecting community norms about appropriate appearance and attire
   3. “Unequal Burdens” Test
      1. Not whether policies for men and women are different, but whether the policy imposed creates an “unequal burden” for plaintiff’s gender
      2. When an ER’s grooming and appearance policy does not unreasonably burden one gender more than the other, no Title VII violation
   4. Tort Liability
      1. Women can waive their rights to harm from work site, but cannot waive the rights of their children; pre-empted by federal law
      2. Company is following all pertinent OSHA guidelines and should not be held liable in a court sense, but if wanted to avoid risk of liability, make it safer
      3. Under Title VII, just have to expose men and women to same risk, equal exposure to potential harm
      4. Concern over safety for women (and their unborn children) is not enough to exclude them from these jobs under Title VII

*B. Pregnancy and Family Responsibilities*

1. Pregnancy Discrimination Act (Title VII, §701k)
   1. Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work
      1. It is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions
   2. An ER’s plan is unlawful to afford male EE’s less protection than female EE’s
      1. If a plan gives married male employees a benefit package for their dependants that is less inclusive than the dependency coverage provided to married female employees, it is unlawful
   3. Exemption for Bona fide seniority systems (703h)
      1. Exempts seniority systems that apply different standards of compensation provided that such differences are not the result of an intention to discriminate
      2. If an accrual rule limiting the seniority credit for time taken for pregnancy leave did not unlawfully discriminate on the basis of sex, an exclusion of pregnancy from a disability-benefits plan providing general coverage was not a gender based discrimination at all
2. Meaning of “Discrimination Based on the Basis of Pregnancy”: *Troupe v. May Dept. Stores Co.*
   1. To establish a PFC and survive summary judgment, EE must produce evidence from which a rational trier of fact could reasonably infer that the ER had fired the EE because the EE was a member of a protected class, in this case a pregnant woman
      1. If an EE does not have an employment k and cannot work because of illness, nothing in Title VII requires the ER to keep the EE on the payroll
   2. Termination upon an inference that reason for termination was ER’s belief that EE would not return after maternity leave, standing alone, is not enough to establish discrimination
      1. No evidence that ER failed to exhibit comparable rapacity toward similarly situated, non-pregnant EE’s
      2. EE made no effort to show that if all the pertinent facts were as they are, except for her pregnancy, she would not have been fired; no reasonable inference of discrimination due to her protected class status
   3. PDA does not require ER’s to offer maternity leave or take other steps to make it easier for pregnant women to work
      1. ER’s can treat pregnant women as badly as they treat similarly affected but non-pregnant EE’s
      2. PDA requires an ER to ignore an EE’s pregnancy, but not her failures in the workplace
   4. “Similarly Situated” Non-pregnant worker
      1. Circuits split on when pregnancy creates workplace difficulty, whether workplace arrangements should be made as it is not technically an on-the-job injury
      2. *Spivey v. Beverly Enters*: ER does not violate the PDA when it offers modified duty solely to EE’s who are injured on the job and not to EE’s who suffer from a non-occupational injury
      3. *EEOC v. Horizon:* Claim for liability under PDA may go forward on evidence eth ER offered modified duty to EE’s injured off the job but not to pregnant EE’s
3. Discrimination against Caregivers: Family and Medical Leave Act (FMLA)
   1. FMLA requires covered ER’s to provide an eligible EE with up to 12 workweeks of leave during any 12-moth period because of:
      1. Birth of the EE’s child and attendant child care;
      2. The placement of a child with the EE for adoption or foster care;
      3. Serious health condition of the EE’s spouse, son, daughter or parent requiring the EE’s care; or
      4. **Serious health condition** that makes the EE unable to perform the functions of the job (29 USC §2612(a))
         1. Illness, injury or mental condition requiring either:
            1. Overnight stay in a hospital or health care facility; or
            2. Continuing treatment by a health care professional

Incapacity to work for 3 or more days; and

Two or more doctor’s visits or single doctor’s visit with a continuing course of treatment

* 1. FMLA does not necessarily extend leave already provide by an ER
     1. ER can choose to provide additional leave beyond FMLA’s 12 weeks, but is also entitled to treat all leave as concurrent
     2. FMLA provides unpaid leave, but EEE may elect, or ER may require, that paid leave already offered by the ER be substituted for all or part of FMLA leave
  2. EE taking FMLA leave must provide ER with 30 days notice if leave is foreseeable; otherwise EE must provide such notice as is practicable
     1. EE cannot lose benefits accrued prior to start of leave, and ER must maintain the EE’s benefits had he continued to work sans leave
     2. Generally, an EE returning from leave is entitled to reinstatement to her former job or an equivalent position if the former job is no longer available
  3. FMLA covers EE’s who have worked at least one year (1250 hours) for an ER who employs at least 50 employees (w/in 75 miles of worksite)

1. Family Responsibilities Discrimination: *Chadwick v. Wellpoint*
   1. Congress created the FMLA’s gender neutral 12 week leave program to attack the formerly sanctioned stereotype that only women are responsible for family care giving
      1. Under Title VII, unlawful sex discrimination occur when an ER takes an adverse job action on the assumption that a woman, because she is a woman, will neglect her job responsibilities in favor of her presumed childcare responsibilities
      2. If work performance does actually suffer due to child care, an ER is free to respond accordingly w/o Title VII liability
      3. Women have the right to prove their mettle in the work arena w/o the burden of stereotypes regarding whether they can fulfill their responsibilities
   2. Combination of suggestive (but no overtly/explicitly discriminatory) comments regarding ability to handle demands of work and family responsibility, and objectively stronger qualifications is enough evidence to survive summary judgment in a FMLA case
      1. Even when comparator had children (though different bc they were older)
      2. Reasonable jury could find that ER would not have denied a promotion to a similarly qualified man bc he had “too much on his plate” and would be overwhelmed, “given the young kids”
2. Validity of the FMLA under the EPC: *Nevada Dept of Human Resources v. Hibbs*
   1. By creating an across-the board, routine employment benefit for all eligible EE’s, Congress sought to ensure that family-care would not be based upon pre-existing stereotypes, and evasion of ER obligations by only hiring men
   2. Setting a minimum standard of family leave for all eligible EE’s, irrespective of gender, it attacks stereotypes that women are responsible fore care giving, reducing ER’s incentives to engage in discriminatory hiring and promotions on stereotypes

*C. Harassment*

1. Introduction
   1. EE’s covered by Title VII, ADEA, and the ADA have a right to work in an environment free of discriminatory harassment that adversely affects their terms, conditions, or privileges of employment
2. Three-Part-Test for Harassment
   1. Is the harassment serious enough to affect a term or condition of employment?
      1. Results in a tangible employment action; or
      2. “Severe or pervasive” enough to create a subjectively and objectively abusive workplace environment
         1. EE was subjected to sexual advances, requests for sexual favor and other verbal or physical conduct of a sexual nature
         2. Conduct was unwelcome; and
         3. Conduct was sufficiently sever or pervasive as to alter the conditions of the victim’s employment and create an abusive work environment
   2. Is it because of sex, race, color, religion, or national origin (or age or disability)?
   3. Is (or should) the ER be held responsible?
      1. Harasser **is** a supervisor
         1. Harassment **did not result** in tangible employment action
            1. ER liable unless it establishes (1) It has effective preventative measures; **and (**2**)** EE unreasonably failed to use them
            2. These are the *Ellerth/Faragher* defenses
         2. Harassment **did result** in tangible employment action:
            1. Vicarious liability and ER is strictly liable
      2. Harasser **is not** a supervisor:
         1. Negligence standard applies
         2. ER is liable only if it knew or should have known of the harassment and failed to respond accordingly
3. Quid Pro Quo Sexual Harassment: The PFC
   1. QPQ sexual harassment occurs when an individual explicitly or implicitly conditions a job, job benefit, or the absence of a job upon an EE’s acceptance of sexual conduct
      1. Clear if a manager explicitly tells a subordinate “I will fire you unless you sleep with me”
      2. Less clear if a manager asks the subordinate to have a drink to talk about a possible promotion, and after she refuses, the position is awarded to someone else
      3. Even less clear if manager merely invites the EE out for a drink on several occasions, but does not want to discuss work matters; if a manager is spurned and withholds anticipated benefits, alarm is set, but further evidence is needed
4. PFC for Hostile Work Environment – Welcome Acts: *Meritor Savings Bank v. Vinson*
   1. Workplace conduct actionable under title VII includes unwelcome sexual advances, requests for sexual favor and other verbal or physical conduct of a sexual nature
   2. SCOTUS Standard: Correct inquiry is whether respondent by her **conduct indicated that the alleged sexual advances were unwelcome**, not whether her actual participation in sexual intercourse was voluntary
      1. Was the relationship consensual, or was there any explicit or implicit coercion, or any indication that ER’s acts were unwanted
   3. Determinative Facts:
      1. EE went on a date with the ER (not dispositive, perhaps compelled)
      2. Alleges that this occurred 50 times (neutral effect)
      3. Evidence of provocative dress could indicate voluntariness
   4. Complainant’s sexually provocative speech or dress is obvious relevant as a matter of law in determining whether she found particular sexual advances unwelcome
      1. EEOC guidelines emphasize that trier of fact must determent the existence of sexual harassment under the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred
5. PFC for Hostile Work Environment – **Severe or Pervasive**: *Harris v. Forklift Systems*
   1. When the workplace is permeated with discriminatory intimidation, ridicule and insult, that is sufficiently sever or pervasive to alter conditions of victim’s employment and create an abusive working environment, Title VII is violated
   2. SCOTUS Standard: Behavior does not have to be so bad as to create psychological damage, so long as the **environment would reasonably be perceived and is perceived as hostile or abusive**, no need to be psychologically injurious
      1. Even w/o regard to tangible effects, discriminatory conduct so servere or pervasive that it creates a work environment abusive to EE’s because of protected class status offends Title VII’s broad rule of work place equality
   3. Factors that determine hostile or abusive, severe or pervasive
      1. Frequency of discriminatory conduct
      2. Severity
      3. Physically threatening or humiliating, or just an offensive utterance
      4. Unreasonably interferes with EE’s work performance
   4. No single factor is required under Title VII, totality off circumstances
      1. Rape, undoing a bra, forcing tongue down throat is all enough
      2. Jokes, hiking up a skirt, looking up and down is not enough
6. Vicarious Liability – Harassment by Supervisors: *Burlington Industries v. Ellerth* 
   1. Test and Affirmative Defense to Vicarious Liability for the ER
      1. ER is subject to vicarious liability to a victimized EE for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the EE
      2. When no tangible employment action is taken, a defending ER may raise, by the preponderance of evidence, an affirmative defense to liability or damages
         1. ER exercised reasonably care to prevent and correct promptly any sexual harassing behavior; and
         2. EE unreasonably failed to take advantage of any preventive or corrective opportunities provided by the ER to avoid harm otherwise
      3. No affirmative defense when the supervisor’s harassment culminates in tangible employment action: discharge, demotion, undesirable reassignment
   2. Here, EE quits due to harassment, but difficult to determine if severe or pervasive enough
      1. Overwhelmingly humiliating and pervasive, but generally more factors established under *Harris*, stronger claim is established
   3. Even if the harassment was sufficiently severe and pervasive, must focus on whether ER had an adequate policy in place, and here the EE failed to use it
7. Constructive Discharge and Tangible Employment Action: *Penn. St. Police v. Suders*
   1. ER does not have recourse of the *Ellert/Faragher* affirmative defense when a supervisor’s **official act** (TEA) precipitates the constructive discharge
      1. Absent such a tangible employment action, extent to which the supervisor’s misconduct has been aided by agency relation is less certain
      2. *Ellerth/Faragher* defenses are available to ER’s in a supervisor harassment claim for constructive discharge when there is no TEA precipitating the resignation
      3. From damages aspect, want to approach it as if you were fired (though you quit)
   2. Hostile-environment constructive discharge claim
      1. Plaintiff who advances this compound claim must show working conditions so intolerable that a reasonable person would have **quit**
      2. Involves both an EE’s decision to leave and precipitating conduct
      3. Absent an “official act of the enterprise” as the last straw, the ER would ordinarily have no particular reason to suspect that the resignation was anything out of the ordinary
   3. Here, is constructive discharge precipitated by TEA?
      1. Supervisor grabbing his privates and making crude sexual jokes would not constitute a TEA, but probably a hostile workplace environment claim
      2. Supervisor’s failure to submit a test on time (which makes her eligible for promotion) is more in line of a TEA - tantamount to denying her the promotion
   4. If the failure to send in tests on time is a TEA, the ER is vicariously liable with no affirmative defenses available to the ER
      1. If this was not a TEA, must look as to whether harassment policy was adequate
      2. EEOC officer was in the office, however, were their offerings adequate?

*D. Sexual Orientation, Gender Identity, and Same-Sex Sexual Harassment*

1. Introduction
   1. *Desantis v. Pacific Tel.* held that discrimination against EE’s on the basis of their sexual orientation is not discrimination on the basis of “sex” under Title VII
      1. Court rejected all attempts to bootstrap sexual orientation claims onto Title VII
   2. Courts have continually held that claiming discrimination solely for being gay provides you no protection under Title VII
      1. Even after *Price Waterhouse* (where court recognized that sex stereotyping can be evidence of sex discrimination), because you are discriminating against all gay people, you are discriminating against both men and women equally
2. Protection against sexual orientation discrimination
   1. No federal protection, but state and local laws typically prohibit discrimination based on sexual orientation
   2. Could attempt for a harassment claim
   3. Individual ER’s may have policies against sexual orientation discrimination
   4. Executive Order 13.160 prohibits discrimination based upon sexual orientation in federal employment; does not extend to armed forces or military academy students
3. Same-Sex Sexual Harassment: *Oncale v. Sundowner Offshore Services* 
   1. Sex discrimination including same-sex sexual harassment is actionable under Title VII
      1. Whatever evidentiary route (3) the plaintiff chooses, he or she must always prove that the conduct at issue was not just offensive sexual connotations
      2. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment (an environment that a reasonable person would find hostile or abusive) is beyond Title VII review
   2. **3 evidentiary routes** to prove that same-sex harassment is discrimination because of sex
      1. Credible evidence that the harasser was homosexual
      2. If a female victim is harassed in such sex specific and derogatory terms by another woman as to make it clear that the harassment is motivated by general hostility to the presence of women in the workplace
         1. Harassing conduct does not have to be motivated by sexual desire to support an inference of discrimination based on sex
      3. Comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace
   3. Evidentiary Routes applied here (victim is not gay in this case)
      1. Cannot prove that the harassers are gay (court cannot presume they are)
      2. No direct comparator evidence because no women were on the rig
         1. Argues corporate female workers have filed claims and were treated seriously where his claim was not
         2. In this claim, something conspicuously absent is sex stereotype, gender and sexualized nature of the acts
         3. Option for tort action, but cannot sue ER, only individuals
      3. Hypothetically, if there is a woman on the rig subject to the same conduct, direct comparator evidence exists, but resembles equal opportunity harasser
         1. There would be limited claim here, no differing treatment based on sex
4. Sexual Harassment of Sexual Minorities: *Rene v. MGM Grand* (**Outlier among circuits**)
   1. Majority of circuits have held that homosexuality as a motivating animus for harassment generally does not establish a Title VII harassment claim
      1. Courts more willing to recognize sex stereotyping claims that deal with harassment (*Price Waterhouse* sex discrimination)
   2. Court states that physical conduct of a sexual nature can establish a harassment claim, even in a same-sex workforce
      1. This was not an evidentiary route established by SCOTUS in *Oncale*
      2. Because conduct was sexualized in nature, court holds that victim only needed to show that he suffered discrimination in comparison to other men
   3. Interprets Title VII admonishment of “discrimination because of sex” as the victim being treated differently-and disadvantageously-based on offensive sexual conduct (sex)
      1. Interpretation essentially establishes that anyone treated worse is being discriminated against, gender comparators are irrelevant
   4. **Majority of circuits have not used sex stereotyping analysis with gay EE’s, No bootstrapping Title VII protection of discrimination based on sex to homosexuals** 
      1. Title VII does not prohibit this type of discrimination under congressional intent of statutory language, nor has SCOTUS held otherwise
5. Discrimination Based on Gender Expression or Gender Identity: *Smith v. City of Salem*
   1. Majority Approach (*Ulane v. Eastern Airlines*)
      1. Title VII does not protect transsexuals because sex change operations do not create biological males or females, victims of “gender identity,” not “sex”
      2. Employment actions based on transsexuality is not discrimination on the basis of sex, because under Title VII, the term sex refers to biological males or females
   2. The 6th Circuit case departs from the majority reasoning in *Ulane*
      1. Focuses on the sex stereotyping based on a person’s gender non-conforming behavior for cases involving gender expression and identity (transsexuals)
      2. Sex stereotyping analysis is pursuant to *Price Waterhouse*, barring gender discrimination based on sex stereotypes
   3. Discrimination against a plaintiff who is a transsexual, and therefore fails to act and/or identify with his or her gender, is no different from the *Price Waterhouse* 
      1. Where sex discrimination is established from a tangible employment action based upon a woman not acting as a stereotypical woman should act, sex stereotyping based on a persons’ gender non-conforming behavior is impermissible discrimination irrespective of the cause of the behavior
      2. Labels such as “transsexual” are not fatal to sex discrimination claims where the victim suffers discrimination because of gender non-conformity
   4. Not all transgendered will technically be protected under this reasoning
      1. If a woman works in an environment where it is not expected for her to be feminine (counter to the stereotype), no sex stereotype, sex discrimination claim
      2. ER is not asking her to act like a stereotypical woman, so no actionable claim for discrimination based on traditional sex stereotypes
6. *Schroer v. Billington* (DC District Court)
   1. Court ruled in favor of Schroer's argument that sex discrimination under Title VII includes discrimination because of gender identity
      1. Failure to hire is based on "sex" if it is because an employee does not conform to the psychological or behavioral stereotypes of his or her birth sex
      2. "Sex" (as in Title VII "sex discrimination") includes gender identity
   2. Court held that the discrimination on the basis of gender identity is literally discrimination on the basis of sex and it is also discrimination on the basis of failing to conform to sex stereotypes, both prohibited by Title VII
      1. The library refused to hire Schroer because she was changing her physical sex through surgery, thus it falls within the literal definition of "because of . . . sex"
      2. Analogizes to Title VII protection for protection in religious conversion
      3. Essentially, gender identity is a component of Title VII “sex discrimination”
   3. Acknowledged that it was difficult to separate sex stereotype motivation from the motivation that it was Schroer's transgendered condition which made her a bad candidate, which several courts have held is not protected by Title VII
      1. Still held that Schroer is entitled to a claim for sex stereotyping (*Price WH*), and is also entitled to judgment based on the language of the statute itself.

*E. Religion*

1. Introduction
   1. Prohibiting employment discrimination on the basis of religion Is clearly consistent with the basic concept of religious freedom in the 1st amendment
      1. Religion is based on matters of choice rather than immutable characteristic
   2. Codified in Title VII; 701(j)
      1. “Religion” includes all aspects of religious observance and practice as well as belief, unless an ER demonstrates that he is unable to **reasonably accommodate** to an EE’s or prospective EE’s religious observance or practice **without undue hardship** on the conduct of the ER’s business
   3. Religion includes all aspects of religious observance and practice, as well as belief
      1. Includes moral or ethical belief as to what is right or wrong which are sincerely held with the strength of traditional religious views
      2. Fact that no religious group espouses such beliefs or the fact that the religious group to which the EE professes to belong may not accept such belief will not determine whether the belief is a religious belief of the EE (?)
   4. Balancing Act between permitting religious diversity (1st amendment right) without establishing any one workplace religion
      1. Religious harassment claims exist; same framework as sex discrimination
2. Establishing a Religious Discrimination PFC: *EEOC v. Abercrombie*
   1. How to Establish a PFC for Religious Discrimination under Title VII
      1. Plaintiff must show that he had a bona fide religious belief that conflicted with an employment requirement;
      2. That plaintiff informed ER of this belief; and
      3. Plaintiff was disciplined for failing to comply with the conflicting requirement of employment
   2. ER Defenses to Plaintiff’s PFC
      1. ER must make good faith effort to reasonably accommodate; or
      2. Cannot reasonably accommodate an EE’s religious observance or practice without **undue hardship** on the conduct of the ER’s business
   3. Reasonable Accommodation
      1. Determination of reasonable accommodation requirement must be determined under the particular factual context of an individual case
      2. Reasonable accommodation does not always eliminate the religion-work conflict, there may be situations where the only reasonable accommodation is to eliminate the religious conflict altogether (question for the jury)
      3. When ER offers an effective compromise to eliminate religious conflict, EE’s correlative duty to make a good faith attempt to satisfy religious needs through means offered by the ER is triggered
      4. Here it is still a genuine issue whether offering 3 alternative styles of dress constitutes a reasonable accommodation; unclear of the dictates of the religion, but seems as if options were not enough to accommodate the religious belief (assuming they were sincere)
   4. Undue Hardship
      1. To require an ER to bear more than a **de minimis cost** (more than functionally non-existent) is an undue hardship
         1. De minimis cost entails not only monetary concerns, but also the ER’s burden in conducting its business
         2. Accommodations are required, but if there is more than a de minimis cost, not a required accommodation
      2. Circumstances under which a particular accommodation may cause undue hardship must be made in the particular factual context of each case
         1. Loss of sales is potential undue hardship, but must look at the resources of the company to make that determination – the larger it is, the less likely that a slight loss of sale will be an undue hardship
      3. Here, Hollister contended that exemption from the Look policy interferes with enforcement of the policy, and damages the brand and company
         1. Court found that ER failed to meet burden, under summary judgment, that they suffered more than a de minimis hardship had they further accommodated the plaintiff
3. Application: *Trans World Airlines v. Hardison*
   1. Reasonable Accommodation
      1. Seniority System for scheduling represents a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off
      2. Absent a discriminatory purpose, seniority systems cannot be an unlawful employment practice, even if the system has some discriminatory consequences (Title VII, 703(h))
      3. Title VII focuses on eliminating discrimination against both majorities and minorities, and circumventing the seniority system would have denied rights under the CBA to other workers based on *their* different religious beliefs
   2. Undue Hardship
      1. To required ER to bear more than a de minimis cost in order to give the EE Saturdays off for religious worship is an undue hardship
      2. To require the ER to bear additional costs when no such costs are incurred to give other EEs the days off that they want would involve unequal treatment of EEs on the basis of their religion
      3. While incurring extra costs to secure a replacement for the plaintiff might remove necessity of compelling another EE to work involuntary in his place, it does not change that the privilege of having Saturdays off were allocated based on religion
4. Application: *Ansonia Bd. Of Education v. Philbrook* 
   1. Reasonable Accommodation
      1. ER meets its obligation under 701(j) when it demonstrates that it has offered a reasonable accommodation to the EE
         1. Where the ER has already reasonably accommodate the EE’s religious needs, the statutory inquiry is at an end
         2. ER need not further show that each of the EE’s alternative accommodation would result in undue hardship
      2. Requiring an EE to take unpaid leave for religious practice that exceeds amount allowed by the CBA would generally be viewed as reasonable accommodation
         1. No duty on an ER to accommodate at all costs
         2. Unpaid leave is merely a loss of income for the period EE is not at work, and has no direct effect upon employment opportunities or job status
      3. Unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes **except** religious ones
         1. Unreasonable discrimination based on religion
   2. Here, the provision for additional paid leave for personal business (beyond what is already provided for religious and other reasons) is in dispute
      1. Provision sets aside certain amounts of days off for religious and specific secular practices; EEs may take additional paid leave for personal business for situations that are not already established under the CBA – meant for emergencies
      2. School argues that it defines an additional leave for limited purpose
      3. EE argues that the necessary personal leave is not so limited, and that it may be used for a wide range of secular purposes in addition to those specifically mentioned in the CBA, but not for similar religious purposes
   3. This must be examined via casual inquiry into past and present administration of the personal business leave provisions
      1. If people were allowed additional paid leave for secular reasons (that should not have been granted because separate limits were previously established), but he was not allowed additional leave for religious purposes, claim exists
5. BFOQ Defense for Religious Discrimination
   1. Not unlawful employment practice for an ER to discriminate on the basis of religion where religion is a BFOQ reasonably necessary to the normal operation of that particular business or enterprise
   2. Classic case where BFOQ defense applies are those where a religious institution limits employment to individuals who are members of the religious order
      1. Churches usually have the defense, schools associated with churches sometimes have a defense, social services associated with churches are less likely exempt
      2. Ex. University decision to deny tenure to a Jewish professor on the ground that being a Jesuit was a BFOQ in the Philosophy department even though it was not supported, controlled or managed by the Society of Jesus
   3. Some courts are willing to examine critically whether employment must be limited to persons of the same religious order
      1. Ex: Adherence to the protestant faith was not a BFOQ for a teaching position at private schools that were not controlled or supported by a religious organization, even though the school charter required teachers to create a protestant presence
6. Harassment because of Religion
   1. Courts have generally applied the analytical framework, burden-shifting, and other rules developed in the sexual harassment cases to claims of religious harassment
      1. Harassment was unwelcome
      2. Harassment was because of religion
      3. Harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere
         1. When a person vested with managerial responsibilities embarks upon a course of conduct calculated to demean an EE before his fellows because of the EE’s professed religious views, such activity necessarily will have effect of altering conditions of employment
      4. Harassment was imputable to the ER
   2. Non-Adherence Claims (Reverse Religious Discrimination)
      1. ER has no legal obligation to suppress any and all religious expression merely because it annoys a single EE
         1. Ex. Co-worker’s posting of religious messages in her own cubicle, which a fellow EE found in appropriate and distraction was not actionable harassment
      2. QPQ religious harassment exists where the ER could be found liable for a supervisor’s attempt to require that an EE engage in particular religious practices as a condition of keeping her job
         1. In public employment, religious harassment claims can be based on 1st amendment free expression, as well as Title VII

*F. National Origin*

1. Introduction
   1. National origin discrimination includes (but is not limited to) denial of equal employment opportunity because of:
      1. Individual’s or ancestor’s country of origin
      2. Individual’s or ancestor’s place of origin (e.g. Palestine)
      3. Performance of national origin (e.g. Attending a mosque or temple)
   2. Title VII national origin violations include discrimination based on:
      1. Marriage to or association with persons of a national origin group;
      2. Membership in, or association with an organization identified with or seeking to promote the interest of a national origin group;
      3. Attendance or participation in schools, churches, temples, or mosques, generally used by persons of a national group
      4. An individual’s name or spouses name is associated with a national origin group
   3. Generally, the theories, defenses and analysis discussed under disparate impact and disparate treatment are equally applicable to national origin discrimination cases
      1. Intersection between national origin and race; e.g. Latinos, Asians, etc…
2. National Origin and BFOQ
   1. Neither race nor color is included in Title VII’s BFOQ exception
      1. Discrimination is permitted where religion sex, or national origin is a BFOQ reasonably necessary to the normal operation of that particular business or enterprise
   2. Ex. Owner of a pizzeria would probably seek as a chef a person of Italian origin because pizza is something he believes people of Italian national origin are able to make better than others – and is reasonably necessary to the operation of his particular business
3. Harassment because of National Origin
   1. Harassment bc of national origin incorporates the hostile work environment doctrine
      1. Includes ethnic slurs and other verbal or physical conduct relating to an individual’s national origin
      2. People still have the right to be prejudiced in the workplace, as long as such prejudice did not evidence itself in discrimination (*National Cash Register*)
   2. Harassment is established when the conduct has the purpose or effect of
      1. Creating an intimidating, hostile or offensive working environment;
      2. Unreasonably interfering with an individual’s work performance; or
      3. Otherwise adversely affecting an individual’s employment opportunities
   3. *Ellerth/Faragher* affirmative defenses to vicarious liability for ERs applies to harassment by supervisors on the basis of national origin as well
4. English Proficiency as a Job Requirement
   1. ER that requires its EE to be able to speak English well as a condition of employment **may** be open to a claim of discrimination based on national origin
      1. Potential disparate impact claims exists to non-English speaking EEs (as opposed to bilingual EEs) discriminated against due to their English proficiency
   2. If the non-English speaking EE establishes a PFC for discrimination based on the job requirement requiring English proficiency, ER must prove that the job requirement is related for the position in question and is a business necessity
5. English-Only Requirements for Bilingual EEs: *Pacheco v. NY Presbyterian Hospital* (DT)
   1. In the absence of direct evidence of discrimination, plaintiff must satisfy the three-part burden-shifting test (disparate treatment – *McDonnell Douglass*)
      1. Focus on whether the (limited) “English-only practice” was enacted to discriminate based on EEs race and national origin (individual DT)
   2. Did the ER’s language-restrictive policy reflects an intent to discriminate based on EEs race or national origin
      1. Consider if there is any evidence that the ER, in addition to adopting an English-only policy, exhibited any other forms of racial or ethnic hostility
      2. EEOC guidelines state that an ER may have a rule requiring that EEs speak only in English at certain times where the ER can show that the rule is justified by business necessity
      3. Strength of EEs PFC is not evaluated on a broad analysis of English-only policies made in the workplace, these are individual, case-by-case determinations
   3. EE fails here because he cannot offer enough evidence to dispute the Employer’s LNR for the English-only practice followed in the workplace
      1. Limited English-only practice was not a blanket prohibition against any non-English conversation by EEs at the workplace
         1. No evidence that any EEs were barred from speaking Spanish during breaks or when not near patients
      2. Plaintiff admits he spoke Spanish to his colleagues every day and on occasion, was asked to help communicated with Spanish-speaking patients
         1. Undercuts any claim of bias against Hispanic EEs
         2. Fact that EEs were encourage to speak Spanish when necessary makes even more credible justification for a limited English-only rule
      3. No evidence that any supervisor made any discriminatory comments, or selectively enforced the practice of speaking English only near patients
         1. No differentiation of enforcement among the EEs or on the basis of any foreign language spoken in front of the patients
   4. ERs LNR for the limited English-only practice (valid business reasons)
      1. Patients complained about feeling ridiculed by EEs who were not speaking English in the presence, and ER had a goal of treating all patients with respect
      2. Easier for supervisors, who did not speak Spanish, to properly evaluate the EEs if they did not speak Spanish around them while working
   5. Court have regularly upheld limited “English-only practices” for bilingual EEs
      1. To promote communication among EEs and supervisors
      2. As a means of facilitating customer relations
6. ERs Business Necessity for an “English-only” policy: *EEOC v. Sephora* (DI)
   1. Courts split on whether an ER’s English-only policy automatically establishes DI PFC
      1. If the policy does not automatically establish a PFC, can still be established by showing that the policy has a significant adverse impact on a protected group
      2. Establish that it is a burdensome term and condition of employment
   2. If a PFC is established, burden shifts to the ER to demonstrate that the policy is job related for the position in question and consistent with business necessity
      1. EEOC guidelines permits a certain-times, “English-only” rule/policy where the ER can show that the rule is justified by business necessity
   3. If a customer preference is sufficiently related to job performance then it qualifies as a business necessity (otherwise, preference is not a valid defense to discrimination of EEs)
      1. This requirement prevents ERs from using customers’ intolerance as a business necessity justification for a polity that has a disparate impact on protected class
      2. ERs need not demonstrate that a particular percentage of customers’ opinions corroborate its business judgment in limiting certain EE behaviors
   4. Sephora maintains that its requirement for Speaking English in the presence of customers when on the sale floor is job related for sales and staff consistent with its business needs of politeness and approachability as components of customer service
      1. Helpfulness, politeness, and approachability are central to the job of sales EEs at a retail establishment, and are separate from customer prejudices
      2. Promoting politeness to customers is a valid business necessity for requiring sales EEs to speak English to customers; Does not rest on customer preference
7. EEOC Guidelines: Where business necessity justifies limited “English-Only” rules
   1. Communications with customers coworkers or supervisors who only speak English
   2. Situation in which workers must speak a common language to promote safety
   3. Co-op work assignments where the English-only rule is needed to promote efficiency
   4. To enable a supervisor who only speaks English to monitor the performance of an EE whose job duties require communication with coworkers or customers
8. Revised EEOC Guidelines for “English-only” Policies
   1. **When applied at all times**: Rue requiring EEs to speak only English at all times in the workplace is a burdensome term and condition of employment
      1. EEOC assumes such a rule violates Title VII
      2. Creates an atmosphere of inferiority, isolation and intimidation based on national origin which could result in discriminatory working environment
      3. Disadvantages an individual’s employment opportunities on the basis of national origin by limiting them from speaking what they are most comfortable with
   2. **When applied only at certain times**: ER may be allowed to have a rule requiring that EEs speak only in English at certain times
      1. ER must show that the rule is justified by business necessity
   3. **Notice of the Rule**: If an ER believes it has a business necessity for a speak-English-only rule at certain times, the ER should inform its EEs of the general circumstances when speaking only in English is required, and of the consequences of such violations
      1. Also suggests that ERs evaluate the English proficiency of its workers before deciding to implement an “English-only” policy
      2. Common that individuals whose primary language is not English, to inadvertently change from speaking English to the other language

*F(2). Citizenship (National Origin)*

1. Categorization of the American Population
   1. Citizens: born or naturalized
   2. Non-citizens: lawfully entered w/ valid work authorizations
   3. Non-citizens: lawfully entered w/o valid work authorization (student visas)
   4. Undocumented persons: permanent resident or migrant w/o legal authorization
2. Immigration Reform and Control Act (IRCA)
   1. IRCA prohibits a covered ER from discriminating against US citizens or other protected individuals (excluding unauthorized workers) on basis of citizenship in hiring, discharging, recruiting, or referrals
      1. Only applies to ERs with 4 or more employees
      2. Places increased pressure on ER for enforcement of immigration law
      3. Penalties could be incurred for hiring undocumented workers
   2. Prohibitions on ERs
      1. National origin discrimination
         1. ERs are only allowed to ask if an individual is lawfully authorized to work, other probing questions (green cards, etc…) are discriminatory
         2. After EEs are hired, they generally have to fill out an I-9 and the necessary paperwork to prove citizenship, so ERs will know w/o having to ask
      2. Citizenship Discrimination
         1. ERs cannot make distinctions in employment (or hiring?) between citizens and non-citizens with lawful work authorization
      3. Document Abuse
         1. ER requesting an EE or applicant to produce a specific document (or more than required), to establish employment eligibility, or rejecting valid documents or those that reasonably appear genuine on their face.
      4. Intimidation, Coercion, or Retaliation
   3. Prohibitions on EEs
      1. EEs are not allowed to use fraudulent papers or identification to obtain work
      2. EEs are not penalized for working w/o legal authorization
         1. If companies accept them without asking for any legal paperwork, the EE is protected; responsibility of ER to ask for paperwork
   4. IRCA Looks to curtail the number of undocumented immigrants entering the US by reducing their opportunities for employment, and to secure national borders
      1. Are you covered?
      2. What remedies are available?
      3. What latitude does the ER have in discovery to phish for immigration status?
3. IRCA, Undocumented Workers, and Title VII
   1. No retaliation claim: *Egbuna v. Time Life* (circuits treat this differently, 9th is harsh)
      1. Retaliation claims require EEs to establish their eligibility to work in the United States under IRCA to establish a PFC for disparate treatment under Title VII
         1. Lacking a “green card” or other papers makes you unqualified to work
      2. Even if EE can prove that disparate treatment was based upon retaliatory animus, it is irrelevant because he was not authorized to be working there in the first place
   2. IRCA forecloses remedies (non-Title VII): *Hoffman Plastics v. NLRB*
      1. Suit is brought under the NLRB concerning violations of labor standards within a unionized workplace
      2. ER was guilty of violating the NLRAct, but no back pay awarded to illegal aliens for any period following termination because they were not authorized to work
         1. No back pay for work not actually performed, for wages that could not lawfully have been earned, and for a job obtained through criminal fraud
      3. Policy goals of the IRCA outweighed those of the NLRA and forecloses any back pay award to undocumented immigrants
   3. Immigration status in Title VII cases: *Rivera v. Nibco*
      1. Magistrate bars discovery of the EEs immigration status, because on balance, allowing ERs to obtain such information would chill plaintiffs' willingness and ability to bring discrimination claims
         1. *Hoffman* does not apply to Title VII cases, it is controlling for NLRAct
   4. Despite the decision in *Hoffman*, undocumented workers are still covered under Title VII and it is illegal for ERs to discriminate against them (*Hoffman* limited to remedies)
      1. EEOC will not, on its own initiative, inquire into a worker's immigration status
      2. EEOC will not consider an individual's immigration status when examining the underlying merits of a charge

*G. Age Discrimination (ADEA)*

1. Introduction
   1. ADEA protects workers who are at least 40 years old against discrimination based on age
      1. Unlike Title VII, the ADEA is a One-way discrimination claim, can only claim discrimination for being over 40, no claims for under-40 discrimination
   2. Remedies differ for the ADEA compared to Title VII
      1. No compensatory or punitive damages
      2. ADEA provides liquidated damages instead
   3. Most ADEA cases are brought under disparate treatment
      1. Age Discrimination PFC
         1. EE within the age group protected under the ADEA (40 and over)
         2. Suffered an adverse employment action or disposition
         3. Qualified for the position either lost or not gained
         4. Younger person than the plaintiff was selected over the plaintiff
      2. DT analysis then continues with ER having to establish a LNR, and then the EE having an opportunity to prove that the LNR was pre-text for age discrimination
   4. Affirmative defenses (LNR) for age discrimination
      1. Not unlawful for an ER to discriminate based on age where age is a BFOQ reasonably necessary to the normal operation of the particular business; nor
      2. Where the differentiation is based on reasonable factors other than age
2. ADEA Statutory Guidelines
   1. It shall be unlawful for an ER, based on an EEs age, to
      1. Fail or refuse to hire, discharge, or otherwise discriminate against an individual with regards to his compensation, terms, condition, or privileges of employment
      2. Limit, segregate, or classify EEs in a way that would deprive (or tend to) any individual of employment opportunities, or adversely affect his status as an EE
   2. ADEA uses a “but for” standard (*Gross*), where Title VII uses **motivating** **standards**
      1. Ex. But for EEs age, the adverse employment action would not have happened
      2. Basically ADEA approach to mixed motive analysis, but for causation
      3. But for establishes pre-text post LNR
3. Standards for liability and liquidated damages under ADEA: *Hazen Paper v. Biggins* 
   1. **No disparate treatment under the ADEA when the ER’s motivating factor is some feature other than the EE’s age; even if motivating factor is correlated with age** 
      1. ADEA commands that ERs are to evaluate older EEs on their merits, not age
      2. ER cannot rely on age as a proxy for an EEs remaining characteristics (such as productivity), but must instead evaluate those other characteristics directly and without consideration of the EEs age
   2. Evaluate whether LNR is a pretext only, pretext maybe, or pretext plus (mixed motive)
      1. Where an LNR is only pretext for age discrimination, may support liability itself
      2. Where it is pretext maybe/plus, inferring age-motivation from the implausibility of the ERs explanation may be problematic where there are other unsavory motives; such as the pension interference here
   3. ER does not violate the ADEA just by interfering with an older EEs pension benefits that would have bested by virtue of EEs years of service
      1. Age and years of service are distinct, and an ER can take account of one while ignoring the other, so decisions on yrs of service not necessarily age-based
      2. This case focused on the ER interfering with the vesting pension, did not focus on stereotyped characteristics of old people in firing the EE
   4. Conversely, ERs who target EEs with a particular pension status, assuming that those EEs are likely to be older, has a potential ADEA discrimination claim
4. Legitimate factors supporting an ADEA claim: *Sperling v. Hoffman-LaRoche* 
   1. Following *Hazen Paper*, adverse employment actions based on distinct factors that only happen to correlate highly with age do not state an ADEA claim (e.g. pension vesting)
      1. Relatively high salary
      2. Replaced by younger persons
      3. Ample retirement benefits
      4. Age-related disability (allowed to make decision based on health, vigor, etc…)
      5. Proximity to voluntary requirement
      6. Perceived as over-qualified/experienced (not a degenerative stereotype)
   2. Factors that are more closely tied to the age-based stereotypes that the ADEA was intended to eradicate state a claim for age discrimination
      1. Perceived as less productive and/or creative
      2. Perceived as having limited skills and/or ability to acquire skills
      3. Perceived as no longer fitting into the corporation
5. Disparate Impact under the ADEA: *Meachem v. Knolls Atomic Power Laboratory* 
   1. Though disparate treatment is the overwhelming method for ADEA claims, disparate impact is available under the ADEA, but defense is different
      1. ER defense: Employment practice/rule is based on reasonable factors besides age
      2. Certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group
   2. Business necessity defense is not used in ADEA disparate impact (only Title VII)

*H. Disability (ADA)*

1. Introduction to the ADA
   1. In order to bring an ADA claim, EE must establish a disability or be regarded as having a disability; Title VII allows anyone to bring a claim
   2. Establishes a much stronger reasonable accommodation provision
2. **Does the individual have a *disability*?**
   1. Physical or mental impairment that **substantially limits one or** **major life activities** of such an individual (or records of such an impairment); OR
      1. Ameliorative effects of mitigating measures are **not** **considered** in the determination of an impairment that substantially limits a MLA
         1. Medication, equipment, low-vision devices (not ordinary glasses or contacts), prosthetics, hearing aids, mobility devices, etc…
      2. Ameliorative effects of the mitigating measures of **ordinary glasses or contacts shall be considered** in determining if an impairment substantially limits a MLA
         1. No qualifying disability if you see fine w/ glasses
      3. MLAs include, but are not limited to, caring for oneself, manual tasks, seeing, hearing, eating, walking, sleeping, lifting, standing, speaking, thinking, breathing, learning, reading, concentrating, communicating, working, bending, etc…
         1. If mitigating measures are making you worse (A-typical cancer that does not substantially limit you); the non-ameliorative (side) effects of chemo can be considered a disability
      4. Definition of disability is construed in favor of broad coverage, so if it is a borderline case, include it
   2. Regarded as having such an impairment
      1. EE was discriminated against under the ADA because of an actual or perceived physical or mental impairment, whether or not the perceived or actual impairment limits a major life activity
      2. Does not cover impairment that are transitory and minor (less then 6 mo.)
      3. Discrimination claim exists for example, being fired because you were regarded as disabled, but ER is not required to reasonably accommodate an EE that is not actually disabled
3. **Is the individual qualified?**
   1. Individual who, with or without **reasonable accommodation**, can perform the essential functions of the employment position that the EE has or desires
      1. Making existing facilities used by EES readily accessible and usable by individuals with disabilities; and
      2. Job restructuring, modifying work schedules, reassignment to vacant positions, acquisition or modification of equipment, modifying examinations, qualified readers/interpreters, etc…
4. **Did the ER *discriminate* against the qualified individual due to disability?**
   1. Limiting, segregating or classifying a job applicant or EE in a way that adversely affects opportunities or status in job application procedures, hiring, advancement, discharge, compensation, training, and other terms, conditions, and privileges of employment
5. **Did the ER deny a reasonable accommodation to the qualified individual for an actual disability (not a “regarded as” disability) that would not have imposed an *undue hardship* on the ER?**
   1. Action requiring significant difficulty or expense when considering:
      1. Nature and cost of accommodation
      2. Overall financial resources of the facility involved in providing reasonable accommodations; number of people employed at the facility, effect on expenses, operation, and resources
      3. Overall financial resources of the covered entity (the ER), the overall size of business of a covered entity with respect to number of employees, number, type, and location of its facilities; and
      4. Type of operation of the covered entity, including structure and function of its workplace, fiscal relationship of the facility to the covered entity
   2. Seniority systems will typically trump reasonable accommodations, unless EE can draw the inference that the seniority system is not truly established, nor a controlling policy
      1. Under uniform rules that states it will hire the “most qualified applicant” is easier to establish a reasonable accommodation for a disabled, because more discretion falls on to the ER due to increasingly subjective qualifications
      2. Under a seniority system, rank and file is black and white

**IV. Implementing Equality: Affirmative Action**

1. Introduction
   1. Defining Affirmative Action: US Commission on Civil Rights
      1. Any measure beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination, or to prevent discrimination from recurring the future
      2. Where Title VII focuses on making the EE whole and deter similar behavior in the future, this definition is very similar
   2. Affirmative action is a traditional title VII remedy for specific claims
      1. Strict quotas (generally illegal)
      2. Preference systems for minorities or women
      3. Self-examination plans with expected goals
      4. Outreach plans
      5. Commitments to not discriminate
   3. Reasons to install Affirmative Action programs
      1. Insulate from potential discrimination suits
      2. PR and EE relations/retention
      3. Diverse customer base/benefits
      4. Eligibility for federal contracts
2. Ways to Implement Affirmative Action Programs
   1. Court ordered remedy for proven discrimination (706(g))
      1. If the court find that ER has intentionally engaged in unlawful employment practices, court may order affirmative actions programs to the extent appropriate
      2. Proven discrimination by the ER has been established
         1. Ex. Systemic disparate treatment (*Hazelwood*)
   2. Court approved consent decrees resolving litigation
      1. ER goes beyond agreeing to no longer discriminate, agrees to put plans in place to remedy the discrimination
      2. Typically occurs out of settlement of systemic class action suits
   3. Voluntary Affirmative Action Programs
      1. Programs either implemented unilaterally by the ER, or agreed upon by the ER and union through a CBA
      2. No established proof of discrimination as of yet, perhaps prompted to insulate ER from future litigation
3. Challenges to Affirmative Action Programs
   1. Argument that the court’s powers are limited under 706(g), cannot put affirmative action programs in place in order to aid those who were never subjected to actual discrimination
      1. Court disagrees, it is not limited in this manner
   2. Discrimination in violation of Title VII
      1. Majority groups (primarily white males) argue that these plans independently discriminate against them in violation of Title VII
      2. Usually stem from individual disparate treatment cases
   3. Denial of equal protection in violation of the constitution
      1. Public employers cannot violate the EPC; courts can violate the EPC
      2. Scrutiny is the same as in any other context (race: strict, gender: intermediate)
4. AA and Title VII Equality Principle: *United Steelworkers v. Weber* 
   1. Three-prong test to determine whether voluntarily adopted affirmative action plan survives a challenge under Title VII:
      1. Purpose of plan must be to remedy traditional patterns of discrimination
         1. Evaluating the imbalance, but for the traditional discrimination, what would the composition of the workplace be
         2. Makeup of the relevant labor market for the ERs industry is key
         3. Generally do not evaluate on those who already possess skills, but focus on who could attain those skills, and make it possible to receive training
      2. Plan must not unduly trammel the interest of applicants and employees who are not beneficiaries of the plan
         1. No quota system; plan can attain balance, not maintain balance
         2. Cannot comprehensively block majority groups (primarily white males)
         3. Must afford certain opportunities to all groups
      3. Plan must be temporary
         1. Must be in effect only as long as it is necessary to eliminate the traditional patterns of discrimination in the work place
   2. Majority holding popularly viewed as incorrect
      1. Court holds that this voluntary AA plans is constitutional even though it is clearly discriminating upon race (but for plan, he gets spot in the program)
         1. *Statutory interpretation*: Title VII does not require ERs to implement voluntary AA programs, so majority reads this to say ERs are **permitted**
         2. *Spirit of the Act*: Eradicating discrimination against the negro was the basis for Title VII, and it would be ironic if Title VII stood in the way of helping blacks
      2. Plan at issue is a voluntary AA plan that reserved 50% of spots in training programs to blacks, with the remaining spaces allocated by seniority
         1. But for this plan, EE (white male) would have been admitted to the training program on basis of his seniority
         2. EE argues based on 703(a), (d) that it is illegal to discriminate under Title VII on the basis of race that adversely affects employment status
   3. Dissent is very persuasive
      1. *Statutory interpretation*: There is no reason for saying anything beyond that ERs are not required to implement voluntary AA programs bc the language of Title VII clearly establishes that there shall be no discrimination based on race
      2. *Spirit of the Act*: It is not to resolve the plight of the negro, rather to provide equal opportunity for each applicant regardless of race; color blindness
5. Legitimacy of AA under Title VII: *Johnson v. Transportation Agency of Santa Clara* 
   1. EEs basic claim for discrimination is that sex is one of the factors that is considered in hiring the woman and not him
      1. The nexus between hiring and discrimination is less clear, but EE does know that sex did play a role in the process, but unsure if it was determinative, or if the female would have gotten the job anyways (she was qualified)
   2. Decision broadens the holding in *Weber*
      1. *Weber* designed to remedy discrimination against blacks in specific unions or job categories
      2. Here, any unfair imbalance of the workplace composition between identifiable groups (in this case, gender) allows implementation of voluntary AA programs
         1. Generalizing standards for which plans can be installed
         2. Lack of specified focus, as gender is only one of many factors
   3. Majority holds it meets the 3-prong test
      1. Traditional pattern of discrimination
         1. Recognized conspicuous imbalance in job categories traditionally segregated by race and sex
      2. Not unfairly trammeling on EE
         1. Sex is not the only hiring consideration, there are no quotas that are required to be filled by women
         2. Still maintains future opportunities for promotion, keeps his old job
         3. Fact that there is a long-term goal is irrelevant, there was no blind hiring, and there was clear instruction not to hire solely on statistic
      3. Plan must be temporary
         1. The long term goal is what they want to attain, and even though they have no short term goals this is fair
         2. ER seeking only to attain a balance in the workplace, and not trammeling on anyone to do it
   4. *Rici* was recently passed, where whites were victim of racial discrimination when they were denied promotion due to their race
      1. Court has not faced cases challenging constitutionality of affirmative action programs after *Rici*, but analysis could change moving forward