

# **Part One**

## **Introduction**

### **Chapter 2**

## **Equal Opportunity and the Law**

### **Lecture Outline:**

#### Equal Opportunity Laws Enacted From 1964 - 1991

- Title VII of the 1964 Civil Rights Act

- Executive Orders

- Equal Pay Act of 1963

- Age Discrimination in Employment Act of 1967

- Vocational Rehabilitation Act of 1973

- Pregnancy Discrimination Act of 1978

- Federal Agency Guidelines

- Early Court Decisions Regarding Equal Employment Opportunity

#### The Laws Enacted from 1991 - Present

- The Civil Rights Act of 1991

- The Americans with Disabilities Act

- Uniformed Service Employment and Reemployment Rights Act

- Genetic Information Nondiscrimination Act of 2008

- State and Local EEO Laws

- Religious and Other Types of Discrimination

- Sexual Harassment

#### Defenses against Discrimination Allegations

- The Central Role of Adverse Impact

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- Business Necessity

#### Recruitment

- Word of Mouth

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- Help Wanted Ads

#### Selection Standards

- Educational Requirements

- Tests

- Preference to Relatives

- Height, Weight, and Physical Characteristics

- Arrest Records

- Application Forms

- Discharge Due to Garnishment

#### Sample Discriminatory Promotion, Transfer, & Layoff Practices

- Personal Appearance Regulations and Title VII

#### The EEOC Enforcement Process

- Voluntary Mediation
- Mandatory Arbitration of Discrimination Claims
- Diversity Management
  - Potential Threats to Diversity
  - Some Diversity Benefits
  - Managing Diversity
  - Implementing the Affirmative Action Program
- Reverse Discrimination

**In Brief:**

This chapter gives a history of equal opportunity legislation, outlines defenses against discrimination allegations, gives examples of discriminatory practices, describes the EEOC enforcement process, and suggests proactive programs.

**Interesting Issues:**

Affirmative action programs have come under fire in recent years, even by some members of protected groups. A very critical issue is whether affirmative action represents “a leg up” assistance for those who have been historically discriminated against, or if it becomes a “crutch” that hinders their motivation and ability to compete and perform. While this is a delicate and potentially volatile issue, helping students recognize and understand both sides of the argument will help them understand the depth of these issues.

**Learning Objectives:**

1. Explain the importance of and list the basic features of Title VII of the 1964 Civil Rights Act and at least five other equal employment laws.
2. Describe post-1990 employment laws including Americans with Disabilities Act and how to avoid accusations of sexual harassment at work.
3. Illustrate two defenses you can use in the event of discriminatory practice allegations and cite specific discriminatory personnel management practices in recruitment, selection, promotion, transfer, layoffs, and benefits.
4. List the steps in the EEOC enforcement process.
5. Discuss why diversity management is important and how to install a diversity management program.

**Annotated Outline:**

- I. Equal Opportunity Laws Enacted from 1964 – 1991
  - The Fifth Amendment (ratified in 1791) states, “no person shall be deprived of life, liberty, or property, without due process of the law.” The Thirteenth Amendment (ratified in 1868) outlawed slavery, and courts have held that it bars racial discrimination.
  - A. Title VII of the 1964 Civil Rights Act

1. The act says it is unlawful to fail or refuse to hire or to discharge an individual or otherwise to discriminate against any individual with respect to his/her compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
  2. The act says it is unlawful to limit, segregate, or classify his/her employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his/her status as an employee, because of such individual's race, color, religion, sex, or national origin.
  3. Who does Title VII cover? It covers: a) all public or private employers of 15 or more persons; b) all private and public educational institutions; c) federal, state, and local governments; d) public and private employment agencies; e) labor unions with 15 or more members; and f) joint labor-management committees.
  4. The EEOC (Equal Employment Opportunity Commission) was established by Title VII. It consists of five members (serving five-year terms), appointed by the president with the advice and consent of the Senate. The EEOC investigates job discrimination complaints and may file charges in court.
- B. Executive Orders - Executive Orders by various presidents have expanded the effect of equal employment laws in federal agencies. Johnson's administration (1963-1969) issued Executive Orders 11246 and 11375, which requires contractors to take affirmative action (steps taken for the purpose of eliminating the present effects of past discrimination) to ensure equal employment opportunity.
- C. Equal Pay Act of 1963 - The Equal Pay Act of 1963 (amended in 1972) made it unlawful to discriminate in pay on the basis of sex when jobs involve equal work, equivalent skills, effort and responsibility, and are performed under similar working conditions.
- D. Age Discrimination in Employment Act of 1967 - The Age Discrimination in Employment Act (ADEA) of 1967 made it unlawful to discriminate against employees or applicants for employment who are between 40 and 65 years of age.
- E. Vocational Rehabilitation Act of 1973 - The Vocational Rehabilitation Act of 1973 requires employers with federal contracts over \$2500 to take affirmative action for the employment of handicapped persons.
- F. Pregnancy Discrimination Act of 1978 - The Pregnancy Discrimination Act (PDA) of 1978, an amendment to Title VII of the Civil Rights Act, prohibits sex discrimination based on "pregnancy, childbirth, or related medical conditions."
- G. Federal Agency Guidelines - Federal Agency Guidelines are uniform guidelines issued by federal agencies charged with ensuring compliance with equal employment federal legislation. The guidelines explain "highly recommended" employer procedures regarding matters like employee selection, record keeping, pre-employment inquiries, and affirmative action programs.
- H. Early Court Decisions Regarding Equal Employment Opportunity
1. Griggs v. Duke Power Company was a case heard by the Supreme Court in which the plaintiff argued that his employer's requirement that coal

handlers be high school graduates was unfairly discriminatory. In finding for the plaintiff, the Court ruled that discrimination need not be overt to be illegal, that employment practices must be related to job performance, and that the burden of proof is on the employer to show that hiring standards are job related if they have an unequal impact on members of a protected class.

2. *Albemarle Paper Company v. Moody* was a Supreme Court case in which it was ruled that the validity of job tests must be documented, and that employee performance standards must be unambiguous.

## II. The Laws Enacted from 1991 - Present

### A. The Civil Rights Act of 1991 - The Civil Rights Act (CRA) of 1991 places burden of proof back on employers and permits compensatory and punitive damages.

1. Burden of proof was shifted back to where it was prior to the 1980s with the passage of CRA 1991. Thus, the burden is once again on employers to show that the practice (such as a test) is required as a business necessity. For example, if a rejected applicant demonstrates that an employment practice has a disparate (or “adverse”) impact on a particular group, the employer has the burden of proving that the challenged practice is job related for the position in question.
2. Money Damages – Section 102 of CRA 1991 provides that an employee who is claiming intentional discrimination (disparate treatment) can ask for 1) compensatory damages and 2) punitive damages, if it can be shown the employer engaged in discrimination “with malice or reckless indifference to the federally protected rights of an aggrieved individual.”
3. Mixed Motives – CRA 1991 states: “An unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” Employers cannot avoid liability by proving they would have taken the same action – such as terminating someone – even without the discriminatory motive. Plaintiffs in such so-called “mixed motive” cases recently gained an advantage from a U.S. Supreme Court decision in *Desert Palace, Inc. v. Costa* where the court decided that the plaintiff did not have to provide evidence of explicitly discriminatory conduct but could provide circumstantial evidence.

### B. The Americans with Disabilities Act - The American with Disabilities Act requires employers to make reasonable accommodations for disabled employees, and it prohibits discrimination against disabled persons. AIDS – The EEOC’s position is that the ADA prohibits discriminating against people with HIV/AIDS.

1. Mental Impairments and the ADA – Mental disabilities now account for the greatest number of claims brought under the ADA. “Mental impairment includes any mental or psychological disorder, such as emotional or mental illness.”
2. Qualified Individual – The ADA prohibits discrimination against those who, with or without a reasonable accommodation, can carry out the essential functions of the job.

3. Reasonable Accommodation – If the individual cannot perform the job as currently structured, the employer is required to make a “reasonable accommodation,” unless doing so would present an “undue hardship.”
  4. Traditional Employer Defenses – ADA complaints are flooding the EEOC and the courts. However, 96% of federal court decisions in a recent year were for the employer.
  5. The “New” ADA – In 2008 amendments were made to the ADA. These changes will make it easier for employees to show their disabilities are limiting.
- C. Uniformed Service Employment and Reemployment Rights Act
- D. Genetic Information Nondiscrimination Act of 2008 - The law prohibits discrimination by health insurers and employers based on people’s genetic information. Specifically, it prohibits the intentional acquisition of genetic information about applicants and employees, and imposes strict confidentiality requirements.
- E. State and Local EEO Laws - Typically, such laws further restrict employers’ treatment of job applicants and employees, especially those not covered by federal legislation. State and local equal employment opportunities agencies play a role in the equal employment compliance process.
- F. Religious and Other Types of Discrimination - Religious discrimination involves treating someone unfavorably because of his or her religious beliefs. The law protects not only people who belong to traditional organized religions such as Buddhism, Christianity, Hinduism, Islam, and Judaism, but also others who have sincerely held religious, ethical, or moral beliefs.
- G. Sexual Harassment
1. Sexual harassment on the basis of sex that has the purpose or effect of substantially interfering with a person’s work performance or creating an intimidating, hostile, or offensive work environment is sexual harassment. It includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that takes place under any of the following conditions:
    - a. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment
    - b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting the individual
    - c. Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment
  2. Proving Sexual Harassment - There are 3 main ways an employee can prove sexual harassment.
    - a. Quid Pro Quo - proves that rejecting a supervisor’s advances adversely affected tangible benefits, like raises or promotions.
    - b. Hostile Environment Created by Supervisors - shows that even though there were no direct threats or promises in exchange for sexual advances, advances interfered with performance and created an offensive work environment.
    - c. Hostile Environment Created by Coworkers or Non-employees - An employer is liable for the sexually harassing acts of its employees and in

some cases, customers, if the employer knew or should have known of the harassing conduct.

### III. Defenses against Discrimination Allegations

- A. The Central Role of Adverse Impact - Employers may not institute an employment practice that causes a disparate impact on a particular class of people unless they can show that the practice is job related and necessary.
1. How Can Someone Show Adverse Impact? There are four basic approaches discussed.
  2. Disparate Rejection Rates - The Four Fifths Rule states that “a selection rate for any racial, ethnic, or sex group which is less than 4/5ths or 80% of the rate for the group with the highest rate will generally be regarded as evidence of adverse impact, while a greater than 4/5ths rate will generally not be regarded as evidence of adverse impact. These disparate rejection rates can be demonstrated when there is a discrepancy between rates of rejection of members of a protected group and of others.
  3. The standard deviation rule helps to describe how wide a range there is between the number of minority candidates one would have expected to hire and the number actually hired.
  4. Restricted policy is an approach that means demonstrating that the employer’s policy intentionally or unintentionally excluded members of a protected group.
  5. Population comparisons is an approach that compares 1) the percentage of the protected group and white workers in the organization with 2) the percentage of the corresponding groups in the labor market, where the labor market is usually defined as the U.S. Census data for the Standard Metropolitan Statistical Area.
  6. *McDonnell-Douglas* Test - When an applicant is qualified but rejected, and the employer continues seeking applicants, the Court has determined that a *prima facie* case of disparate treatment has been established under these conditions: the person belongs to a protected class; the person applied and was qualified for the job for which the employer was seeking applicants; despite the qualification, the person was rejected; and that after rejection, the position remained open and the employer continued to seek applications from persons with the individual complainant’s qualifications.
- B. Bona Fide Occupational Qualification (BFOQ) is a defense used to justify an employment practice that may have an adverse impact on members of a protected class. It is a requirement that an employee be of a certain religion, sex, or national origin where that is reasonably necessary to the organization’s normal operation. This is narrowly interpreted by courts.
1. Age as a BFOQ – ADEA does permit disparate treatment in those instances when age is a BFOQ. There is a narrowing of exceptions for BFOQ. FOA (factors other than age) is a defense the employer can use which argues that its actions were “reasonable” based on some factor other than age.

2. Religion as a BFOQ is justified in the case of religious organizations or societies that require employees to share their particular religion.
  3. Gender as a BFOQ is allowed for positions requiring specific physical characteristics necessarily possessed by one sex.
  4. National Origin as a BFOQ – A person's national origin may be a BFOQ.
- C. Business Necessity - Business necessity is a defense created by the courts that requires an employer to show an overriding business purpose for the discriminatory practice and that the practice is therefore acceptable.

#### IV. Recruitment

- A. Word of Mouth - you cannot rely upon word-of-mouth dissemination of information about job opportunities when your workforce is all white or all members of some other class.
- B. Misleading Information - it is unlawful to give false or misleading information to members of any group.
- C. Help Wanted Ads - help wanted 'male' or help wanted 'female' ads are violations unless gender is a bona fide occupational qualification for the job.

#### V. Selection Standards

- A. Educational Requirements - Courts have found education qualifications to be illegal when minority groups are less likely to possess the education qualifications or qualifications are not job related.
- B. Tests - Courts deem tests unlawful if they disproportionately screen out minorities or women and they are not job related.
- C. Preference to Relatives - You should not give preference to relatives of current employees with respect to employment opportunities.
- D. Height, Weight, and Physical Characteristics - Physical requirements such as minimum height are unlawful unless the employee can show their job-related.
- E. Arrest Records - Unless job requires security clearance, do not ask an applicant whether he or she has been arrested or spent time in jail or use an arrest record to disqualify a person automatically.
- F. Application Forms - Employment applications generally shouldn't contain questions about applicant's disabilities, workers compensation history, age, arrest record, or U.S. citizenship.
- G. Discharge Due to Garnishment - Firing a minority member whose salary is garnished is illegal unless you can show some overriding business necessity.

#### VI. Sample Discriminatory Promotion, Transfer, & Layoff Practices

- A. Personal Appearance Regulations and Title VII - employees sometimes file suits against employers dress and appearance codes under title VII. They usually claim sexual discrimination, but sometimes claimed racial or even religious discrimination. The chapter describes court rulings regarding dress, hair, uniforms, tattoos, and body piercings.

#### VII. The EEOC Enforcement Process - even careful employers eventually face employment discrimination claims and have to deal with the EEOC.

- A. Voluntary Mediation - the EEOC refers about 10% of its charges to voluntary mediation mechanism, an informal process in which a neutral third party assist the opposing parties to reach a voluntary negotiated resolution of a charge of discrimination.

- B. Mandatory Arbitration of Discrimination Claims - many employers, to avoid EEO litigation, require applicants and employees to agree to arbitrate such claims. The EEO does not favor mandatory arbitration. However, the U.S. Supreme Court's decisions make it clear that employment discrimination plaintiffs may be compelled to arbitrate their claims under some circumstances.

### VIII. Diversity Management

- A. Potential Threats to Diversity - workforce diversity produces both benefits and problems for employers. Unmanaged, it can produce big aerial behaviors that reduce cooperation. Potential problems include: stereotyping, discrimination, tokenism, and ethnocentrism.

- B. Some Diversity Benefits - the key to driving diversity benefits is properly managing potential problems.

1. Diversity climate is defined as the extent to which employees and organizations said the firm promotes equal opportunity and inclusion.

- C. Managing Diversity - managing diversity means maximizing diversities potential benefits while minimizing the potential problems. Activities that constitute managing diversity include:

1. Providing strong leadership – companies with exemplary reputations in managing diversity typically have CEOs who champion the cause of diversity.
2. Assess the situation – assessing a company's diversity includes equal employment hiring and retention metrics, employee attitude surveys, management employee evaluations, and focus groups.
3. Change culture and management systems.
4. Evaluate the diversity management program.

- D. Implementing the Affirmative Action Program - affirmative action is still a significant workplace issue today. Affirmative action means taking action in recruitment, hiring, promotion, and compensation to eliminate the current effects of past discrimination.

1. Employee resistance – avoiding employee resistance to affirmative action programs is important to show that the program doesn't involve preferential selection standards by providing details on the qualifications of all new hires.
2. How can you tell if the diversity initiatives are effective? Some commonsense questions can be asked:
  - a. Are the women and minorities reporting directly to senior managers?
  - b. Do women and minorities have a fair share of jobs that are traditionally steppingstones to successful careers in the company?
  - c. Do women and minorities have equal access to international assignments?
  - d. Is the employer taking steps to ensure that female and minority candidates will be in the company's career development pipeline?
  - e. Are turnover rates for female and minority managers the same or lower than those for white males?
  - f. Do employees report that they perceive positive behavior changes as a result of diversity efforts?

- IX. Reverse Discrimination - means discrimination against nonminority applicants and employees. Many courts cases address these issues, but until recently, few consistent answers emerged.



**Improving Performance Questions:**

- 2-1:** If you were the HR director at a company, what exactly would you do to avoid such problems in the future?
- 2-2:** Check with the EEOC's website and compile a list of the biggest financial settlements this past year for retaliation claims. About how much was the average claim?

**Discussion Questions:**

- 2-3: What important precedents were set by the *Griggs v. Duke Power Company* case? The *Albemarle Paper Co. v. Moody*?**

*Griggs v. Duke Power Company* was heard by the Supreme Court. The plaintiff argued that his employer's requirement that coal handlers be high school graduates was unfairly discriminatory. In finding for the plaintiff, the Court ruled that discrimination need not be overt to be illegal, that employment practices must be related to job performance, and that the burden of proof is on the employer to show that hiring standards are job related. In *Albemarle Paper Co. v. Moody*, the Supreme Court ruled that the validity of job tests must be documented and that employee performance standards must be unambiguous.

- 2-4: What is adverse impact? How can it be proved?**

Adverse impact is the overall impact of employer practices that result in significantly higher percentages of members of minorities and other protected groups being rejected for employment, placement, or promotion. The complainant need only establish a *prima facie* case showing that the employer's selection procedures did have an adverse impact on a protected minority group. This is done by one of four basic approaches: disparate rejection rates; the restricted policy approach; population comparisons; and the McDonnell-Douglas Test.

- 2-5: What is sexual harassment? How can an employee prove sexual harassment?**

Sexual harassment is harassment on the basis of sex that has the purpose or effect of substantially interfering with a person's work performance or creating an intimidating, hostile, or offensive work environment. An employee can prove sexual harassment in three main ways: 1) quid pro quo – prove that rejecting a supervisor's advances adversely affected tangible benefits; 2) hostile environment created by supervisors; and 3) hostile environment created by co-workers or nonemployees.

- 2-6: What is the difference between disparate treatment and disparate impact?**

The main difference is one of intent. Disparate treatment means that there was an intent to treat different groups differently. Disparate impact does not require intent, but merely to show that an action has a greater adverse effect on one group than another.

## Individual and Group Activities:

**2-7: Working individually or in groups, respond to these three scenarios based on what you learned in Chapter 2. Under what conditions (if any) do you think the following constitute sexual harassment? (a) A female manager fires a male employee because he refuses her request for sexual favors. (b) a male manager refers to female employees as “sweetie” or “baby.” (c) Two male employees are overheard by a third female employee exchanging sexually oriented jokes.**

In answering the questions, the students should keep in mind the three main ways sexual harassment can be proved, as well as the steps the employee should take in alerting management.

**2-8: Working individually or in groups, discuss how you would set up an affirmative action program.**

It is important that students reach a decision of whether to use the good faith effort strategy or the quota strategy. Most experts would suggest the good faith effort strategy is the most legally acceptable approach. The following list of six actions should be demonstrated in the student plans: increasing the minority or female applicant flow; demonstrating top management support for the equal opportunity policy; demonstrating the equal opportunity commitment to the local community; keeping employees informed about the specifics of the affirmative action program; broadening the work skills of incumbent employees; and institutionalizing the equal employment policy to encourage supervisors' support of it.

**2-9: Compare and contrast the issues presented in *Bakke* with more recent court rulings on affirmative action. Working individually or in groups, discuss the current direction of affirmative action.**

The basic questions addressed in *Bakke* focused on when preferential treatment becomes discrimination and under what circumstances discrimination will be temporarily permitted. Neither question was fully answered. Subsequent cases have continued to address these issues and clarify more specifically the scope and intent of affirmative action. For example, in the *Paradise* case, the court ruled that the courts can impose racial quotas to address the most serious cases of racial discrimination. In *Johnson*, the court ruled that the public and private employers may voluntarily adopt hiring and promotion goals to benefit minorities and women. The *Johnson* ruling may limit claims of reverse discrimination by white males.

**2-10: Working individually or in groups, write a one - page paper entitled “What the manager should know about how the EEOC handles a person’s discrimination charge.”**

The students should include the following information in their paper. The EEOC can either accept the charge or refer it to the state or local agency. After it has been filed, the EEOC has 10 days to serve notice on the employer, and then investigate the charge to determine whether there is reasonable cause to believe it is true within 120 days. If charges are

dismissed, the EEOC must issue the charging party a Notice of Right to Sue. The person has 90 days to file suit on his/her own behalf. If the EEOC finds reasonable cause for the charge, it must attempt conciliation. If conciliation is not satisfactory, the EEOC can bring a civil suit in federal district court, or issue a Notice of Right to Sue to the person who filed the charge. Under Title VII, the EEOC has 30 days to work out a conciliation agreement between the parties before bringing suit. If the EEOC is unable to obtain an acceptable conciliation agreement, it may sue the employer in federal district court.

**2-11: Explain the difference between affirmative action and equal employment opportunity?**

Equal employment opportunity aims to ensure that anyone, regardless of race, color, sex, religion, national origin, or age has an equal chance for a job based on his or her qualifications. Affirmative action requires the employer to make an extra effort to hire and promote those in protected groups and includes specific actions designed to eliminate the present effects of past discrimination.

**2-12: Assume you are the manager in a small restaurant; you are responsible for hiring employees, supervising them, and recommending them for promotion. Workings individually or in groups, compile a list of potentially discriminatory management practices you should avoid.**

Acceptable answers include the following:

Ensure that recruitment practices are non-discriminatory, and avoid word-of-mouth dissemination of information about job opportunities when the workforce is substantially white, or all members of some other class. Avoid giving false or misleading information to members of any group or failing to advise them of work opportunities. Avoid advertising classifications that specify gender or age unless it is a bona fide occupational qualification for the job.

Avoid asking pre-employment questions about an applicant's race, color, religion, sex, or national origin.

Do not deny a job to a disabled individual if the person is qualified and able to perform the essential functions of the job. Make reasonable accommodations for candidates that are otherwise qualified but unable to perform an essential function unless doing so would result in a hardship.

Apply tests and performance standards uniformly to all employees and job candidates. Avoid tests if they disproportionately screen out minorities or women and are not job related.

Do not give preference to relatives of current employees if your current employees are substantially non-minority.

Do not establish requirements for physical characteristics unless you can show they are job related.

Do not make pre-employment inquiries about a person's disability, but do ask questions about the person's ability to perform specific essential job functions.

Review job application forms, interview procedures, and job descriptions for illegal questions and statements. Check for questions about health, disabilities, medical histories, or previous workers' compensation claims.

Do not ask applicants whether they have ever been arrested or spent time in jail. However, you can ask about conviction records.

**2-13: Appendix A, PHR and as SPHR knowledge base at the end of this book lists the knowledge someone studying for the HRCI certification exam needs to have in each area of human resources management. In groups of four or five students, do four things; (1) review appendix A; (2) identify the material in this chapter that relates to the required knowledge the appendix lists; (3) write four multiple choice exam questions on this material that you believe would be suitable for inclusion in the HRCI exam; and (4) if time permits, have someone from your team post your team's questions in front of the class, so that students in all teams can answer the exam questions created by the other teams.**

### **Experiential Exercise: “Space Cadet” or Victim?**

**Purpose:** The purpose of this exercise is to provide practice in analyzing and applying knowledge of equal opportunity legislation to a real problem.

**Required Understanding:** Be thoroughly familiar with the material presented in this chapter. In addition, read the preceding “space cadet” case on which this experiential exercise is based.

#### **How to Set Up the Exercise/Instructions:**

- Divide the class into groups.
- Each group should develop answers to the following questions:

**2-14:** Based on what you read in this chapter, on what legal basis could the 61-year-old California attorney claim he was a victim of discrimination?

**2-15:** On what laws and legal concepts did the employer apparently base its termination of this 61-year-old attorney?

**2-16:** Based on what laws or legal concepts could you take the position that it is legal to fire someone for poor performance even though there may be a discriminatory aspect to the termination? (This is not to say that there necessarily was such a discriminatory aspect with this case.)

**2-17:** If you were the judge called on to make a decision on this case, what would your decision be, and why?

The court's decision follows, so please do not read this until you've completed the exercise. In this case, the California State Appeals court held that "the only reasonable inference that can be drawn from the evidence is that [plaintiff] was terminated because he failed to competently perform his job of providing thorough, accurate, and courteous legal advice to hotline callers."

### **Video Case Appendix:**

**Video Title:** Equal Employment (UPS)

#### **Synopsis:**

A former HR director for UPS, now the president of the virtual HR director, give some perspective on what diversity means, and what its value can be to a company. Employees of a wide variety of backgrounds are intrinsically valuable to a company in the varied perspectives that they bring to the table, and can help a company find creative solutions to new problems that it has not encountered before.

#### **Discussion Questions:**

- 2-18:** What kinds of things does Gary Wheeler think a diverse workforce can contribute to a company?
- 2-19:** What typical avenues are open to an employee who feels he or she is being harassed, in order to make sure it is dealt with properly?
- 2-20:** What does Gary Wheeler report is most often the basis of reported claims of harassment, and how are these cases dealt with?
- 2-21:** What else would you do to deal with employees who are hostile to the idea of diversity?
- 2-22:** To what extent do you believe that harassment, such as sexual harassment, is usually primarily a communications problem? Why?
- 2-23:** In this video, Mr. Wheeler focuses mostly on diversity and on sexual harassment. Discuss five other aspects of the equal employment opportunity at work that are also important

### **Application Case: An Accusation of Sexual Harassment in Pro Sports**

**2-24: Do you think Ms. Browne Sanders had the basis for a sexual harassment suit? Why?**

It does appear that Ms. Browne Sanders had the basis for a sexual harassment suit. The timing of her termination should raise serious concerns because Madison Square Garden terminated her employment only one month after she complained to top management about the harassment. Also, the reason for her termination that she had "failed to fulfill professional responsibilities" seems vague and generalized. The Garden also did not present credible witnesses to corroborate the reason for the decision.

**2-25: From what you know of this case, do you think the jury arrived at the correct decision? If not, why not? If so, why?**

The jury did arrive at the appropriate decision given the facts that were presented in this case. The Garden had a responsibility to demonstrate concrete reasons for their termination decision. It does not appear that any specific reasons were shared with the jury.

**2-26: Based on the few facts provided, what steps could Garden management have taken to protect the organization from liability in this matter?**

A number of steps could be taken. First, the Garden should have conducted a thorough investigation and documented the results in a written report. Second, the Garden supplied a very generalized response for the termination. Before terminating an employee for performance, an organization should demonstrate that a number of actions were taken to coach and counsel the employee before termination. Finally, the Garden should have a policy/program in place to show how claims of sexual harassment are addressed including a clause that prohibits any type of retaliation.

**2-27: Aside from the appeal, what would you do now if you were the Garden's top management?**

Student answers will vary but look for answers that incorporate concepts from the chapter and take into account the seriousness of addressing this issue in the future.

**2-28: "The allegations against Madison Square Garden in this case raise ethical questions with regard to employer's actions." Explain whether you agree or disagree with this statement, and why.**

Opinions will vary but make sure students understand the bigger issues.

**Continuing Case: Carter Cleaning Company – A Question of Discrimination**

**2-29: Is it true as Jack Carter claims that virtually all of our workers are women or minorities anyway, so no one can come in here and accuse us of being discriminatory?**

This is not true at all. Employers can be accused of discriminatory practices at any time. In this case, female applicants were being asked questions about childcare that males were not being asked; minority applicants were being asked questions about arrest records and credit histories that non-minorities were not. In addition, the reports of sexual advances towards women by a store manager and an older employee's complaint that he is paid less than younger employees for performing the same job all raise serious issues in terms of discriminatory employment practices. Potential charges include Title VII violations, Equal Pay Act violations, age discrimination, sexual harassment, and disparate treatment.

**2-30: How should Jennifer and her company address the sexual harassment charges and problems?**

The first step would be to document the complaint and initiate an investigation. If the investigation finds that sexual harassment occurred, then take the appropriate corrective action which could include discipline up to and including discharge. In addition, the company should develop a strong policy statement and conduct training with all managers.

**2-31: How should she and her company address the possible problems of age discrimination?**

The company should review the compensation structure and pay rates to determine whether there is discrimination in their pay system with regard to older workers being paid less than younger workers for performing the same work. If there are significant differences, then adjustments should be made to the pay system in order to rectify the problem.

**2-32: Given the fact that each of its stores has only a handful of employees, is her company in fact covered by equal rights legislation?**

Yes – the EEOC enforces equal employment compliance against all but the very smallest of employers. All employees including part-time and temporary workers are counted for purposes of determining whether an employer has a sufficient number of employees. State and local laws prohibit discrimination in most cases where federal legislation does not apply.

**2-33: And finally, aside from the specific problems, what other personnel management matters (application forms, training, and so on) have to be reviewed given the need to bring them into compliance with equal rights laws?**

The company should do several things:

1. Develop an employee handbook which contains policy statements about equal employment opportunity, sexual harassment, and other issues.
2. Develop an employment application which is free from discriminatory questions, as well as a standard interview guide to ensure consistency of “legal” questions from candidate to candidate.
3. Conduct supervisory/management training to ensure that all managers are educated and aware of their responsibilities under EEO laws and regulations.
4. Develop and implement a complaint procedure and establish a management response system that includes an immediate reaction and investigation by senior management.

**Key Terms:**

**Title VII of the 1964 Civil Rights Act** - The section of the act that says an employer cannot discriminate on the basis of race, religion, sex, or national origin with respect to employment.

**Equal Employment Opportunity Commission (EEOC)** - Created by Title VII, is empowered to investigate job discrimination complaints and sue on behalf of complainants.

**Affirmative Action** - Steps that are taken for the purpose of eliminating the present effects of past discrimination.

**Office of Federal Contract Compliance Programs (OFCCP)** - This office is responsible for implementing the executive orders and ensuring compliance of federal contractors.

**Equal Pay Act of 1963** - The act requiring equal pay for equal work, regardless of sex.

**Age Discrimination in Employment Act of 1967** - The act prohibiting arbitrary age discrimination and specifically protecting individuals over 40 years old.

**Vocational Rehabilitation Act of 1973** - The act requiring certain federal contractors to take affirmative action for disabled persons.

**Pregnancy Discrimination Act (PDA)** - An amendment to Title VII of the Civil Rights Act that prohibits sex discrimination based on "pregnancy, childbirth, or related medical conditions."

**Uniform Guidelines** - Guidelines issued by federal agencies charged with ensuring compliance with federal equal employment legislation explaining recommended employer procedures in detail.

**Protected Class** - Persons, such as minorities and women, who are protected by equal opportunity laws, which include Title VII.

**Civil Rights Act of 1991 (CRA 1991)** - This act places the burden of proof back on employers and permits compensatory and punitive damages.

**Mixed Motive Case** - A discrimination allegation case in which the employer argues that the employment action taken was motivated by a non-discriminatory reason.

**Americans with Disabilities Act (ADA)** – This act requires employers to make reasonable accommodation for disabled employees. The act prohibits discrimination against disabled persons.

**Qualified Individuals** - Under the ADA, those who can carry out the essential functions of the job.



**Sexual Harassment** - Harassment on the basis of sex that has the purpose or effect of substantially interfering with a person's work performance or creating an intimidating, hostile, or offensive work environment.

**Federal Violence against Women Act of 1994** - Provides that a person who commits a crime of violence motivated by gender shall be liable to the party injured.

**Adverse Impact** - The overall impact of employer practices that result in significantly higher percentages of members of minorities and other protected groups being rejected for employment, placement, or promotion.

**Disparate Rejection Rates** - A test for adverse impact in which it can be demonstrated that there is a discrepancy between rates of rejection of members of a protected group and of others.

**4/5ths Rule** - States that “a selection rate for any racial, ethnic or sex group which is less than four fifths or 80% of the rate for the group with the highest rate will generally be regarded as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded as evidence of adverse impact.”

**Restricted Policy** - A test for adverse impact involving demonstration that an employer's hiring practices exclude a protected group, whether intentionally or not.

**Bona Fide Occupational Qualification (BFOQ)** - Allows requirements that an employee be of a certain religion, sex, or national origin where that is reasonably necessary to the organization's normal operation specified by the 1964 Civil Rights Act.

**Alternative Dispute Resolution or ADR Program** - Grievance procedure that provides for binding arbitration as the last step

**Diversity** - The variety or multiplicity of demographic features that characterize a company's workforce, particularly in terms of race, sex, culture, national origin, handicap, age, and religion.

**Stereotyping** - Ascribing specific behavioral traits to individuals based on their apparent membership in a group.

**Discrimination** - Taking specific actions toward or against the person based on the person's group.

**Tokenism** - A company appoints a small group of women or minorities to high profile positions, rather than more aggressively seeking full representation for that group.

**Ethnocentrism** - A tendency to view members of other social groups less favorable than one's own.

**Gender-Role Stereotypes** - The tendency to associate women with certain (frequently non-managerial) jobs.

**Managing Diversity** - Means maximizing diversity's potential benefits (greater cultural awareness and broader language skills, for instance) while minimizing the potential barriers (such as prejudices and bias) that can undermine the company's performance.

**Good Faith Effort Strategy** - One of two basic affirmative action plan strategies. This emphasizes identifying and eliminating the obstacles to hiring and promoting women and minorities on the assumption that eliminating these obstacles will result in increased utilization of women and minorities.

**Reverse Discrimination** - The claim that, due to affirmative action quota systems, white males are discriminated against.