Chapter 2

Diversity in the Workplace

A Legal Perspective

Some might argue that "diversity in the workplace" is a concept created by the federal legislature. Whether the American workplace would have evolved to its current level of diversity without government intervention is an interesting question, but there is no doubt that federal laws prohibiting discrimination and harassment in the workplace based on certain characteristics at least aided some of the social change that has occurred in this country over the past half century. In fact, until the federal government required businesses and organizations to become more diverse by enacting legislation—including executive orders, laws, and judicial decisions—prohibiting employment discrimination and harassment, there was almost no incentive to hire a diverse staff. The first federal laws regarding employment pertained to labor unions and child labor, but over time as labor unions became less common, federal laws were enacted by the legislature to protect employees in the workplace. After reading this chapter, readers should have a comprehensive understanding of US legislation related to diversity in organizations. Imagine if these laws requiring fair workplace treatment had never been passed. Would our society have changed and become more inclusive the way it has on its own?

Workplace discrimination and harassment law has evolved to include prohibitions against various types of conduct based on certain characteristics. In the nearly 50 years since the enactment of the prohibition of unlawful discrimination, common beliefs surrounding discrimination law have emerged. Whereas most people in today's society are aware that certain forms of discrimination and harassment in the workplace violate the law, they are often surprised to find that many types of discrimination and harassment—while impolite, boorish, or crude—are not illegal, and that in many cases an employee has no legal recourse for being mistreated.

Many parts of the law are simple and easy to understand. For example, a person cannot be treated differently or poorly in the workplace based on his or her age, as long as the employee is over 40. The analysis for such an "age-based" claim is not much more complicated than that. However, many parts of discrimination and harassment law are very difficult to digest and comprehend.

For example, not only was the Americans with Disabilities Act (ADA) of 1990 difficult for employers and employees to understand, but very few attorneys could

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explain all its nuances; the federal courts have struggled for years to determine the ADA's proper scope and interpret its difficult language. The federal legislature's response to the confusion, at least in part, was to pass the Americans with Disabilities Act and Amendments Act (ADAAA) of 2008, but it will still take years to determine the scope of the acts. For that reason, in this essay I spend more time on some issues than on others. The cases chosen as examples for this essay are often the seminal cases in each category but are sometimes just among the most interesting. The cases represent, in some way, the foundation of some particular piece of the law and sometimes the surprising and interesting claims and findings that result. In addition, I have also included a brief outline for cases and federal acts, called "historical perspective," to give the reader a better framework of the evolution of the law when applicable to the larger protected class categories.

The demographics of the American workforce, and how an employer can run his or her business, changed with the passage of Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, or national origin in employment-related matters.[1] Title VII is the most sweeping and important civil rights legislation ever enacted in this country. The act applies to employers with 15 or more employees, because, it is assumed, that companies of that size are likely to engage in interstate commerce and therefore be subject to federal regulation due to the Commerce Clause of the United States Constitution. The Commerce Clause states that the federal government can regulate interstate commerce. Therefore, if an employer has more than 15 employees, it likely engages in interstate commerce and is therefore compelled to comply with Title VII and other federal employment laws.

With the passage of Title VII, the U.S. Congress intended to eliminate both employment discrimination as well as the broader economic and social effects of discrimination. However, gathering enough votes to pass Title VII was a difficult task. The notes and legislative history of the act show that it was "sold" to skeptical members of congress and the public as a sound economic policy, not as an important social or moral policy. According to congressional leaders at the time, "The failure of our society to extend job opportunities to the Negro is an economic waste. The purchasing power of the country is not being fully developed."[2]

Title VII outlaws discrimination in hiring, promoting, and the general treatment of employees. In addition, the law has since been expanded to in some instances include protection for vendors and patrons of businesses. When Title VII was first proposed, it included protection against discrimination based on race, national origin, color of skin, and religion. It did not originally include protection against gender-based discrimination.

In an attempt to kill Title VII, Representative Howard W. Smith from Virginia included a ban on gender discrimination. Smith assumed that the inclusion would encourage fellow representatives to oppose the legislation. Congress passed Title VII despite the amendment, and gender became a part of the law. Women's groups such as the National Women's Party had unsuccessfully lobbied for the inclusion of gender in Title VII, and Smith, in an attempt to kill the law, ironically accomplished what they could not.

ADMINISTRATION OF THE LAW

Title VII is administered by the Equal Employment Opportunity Commission (EEOC), an independent executive agency consisting of five presidentially appointed members who serve five-year terms. Violations of Title VII are brought to the EEOC through agency investigation and individual complaints. A complaint or "charge" must be filed with the EEOC within 180 days after the occurrence of the alleged unlawful employment practice, unless there is a state or local organization operating under a similar state or local statute, in which case the claim can be placed with that organization.

If the claim is filed with a state or local agency, an EEOC claim may be filed up to 300 days after the alleged discrimination occurs, or 30 days after the local proceedings end, whichever occurs first. The investigating organization determines whether the charge has merit, or is "meritorious." If the charge is deemed meritorious, the EEOC attempts conciliation with the offending organization. If the charge is deemed nonmeritorious or no conciliation has been reached within 180 days, the EEOC notifies the person who filed the complaint in a "right to sue" letter. The charging party then has 90 days after receiving the letter to bring a civil action in federal court under Title VII.

AMENDMENTS TO TITLE VII

Title VII was expanded in 1967 with the Age Discrimination in Employment Act (ADEA), 29 United States Code, Sections 621–634; in 1974 with the Vietnam Veterans Readjustment Assistance Act of 1974, 38 United States Code, Section 2011; in 1978 with the Pregnancy Discrimination Act; and in 1990 with the ADA, 42 United States Code, Section 12101. The ADA was amended by the ADA Amendments Act of 2008.

Today there are eight "protected classes." The protected classes comprise characteristics for which the United States Supreme Court and the United States Congress have determined employees have suffered a disproportionate share of discrimination as a result of that characteristic. An employee who is able to demonstrate discrimination or harassment as a result of some protected class is therefore entitled to bring a federal lawsuit against an employer. However, before an individual may file a lawsuit in federal court, he or she must first file a claim with the EEOC.

THE PROTECTED CLASSES

Race

Title VII does not specifically define race, and distinguishing among races is a difficult task. In general when filling out forms, people choose their race based on the categories found on federal or state employment applications. Some of the general categories are familiar to most Americans: Caucasian/White, Asian, African American/Black, Pacific Islander/Native Hawaiian, American Indian/Alaskan Native. For the purposes of Title VII and employment discrimination, an employer may not treat an employee or applicant differently or poorly on the basis of race, generally based on those federal categories.

Historical Perspective

- ***Dred Scott v. Sandford***[3] (1857): United States Supreme Court decides 7–2 that African descendants are not and cannot be citizens of the United States even if they live in nonslave states.
- **Emancipation Proclamation/Thirteenth Amendment** (1863/1868): Effectively abolishes slavery in the United States.
- **Fourteenth Amendment to the United States Constitution** (1868): Post-Civil War amendment overturns Dred Scott allowing African descendants full citizenship.
- ***Plessy v. Ferguson***[4] (1896): Declares "separate but equal" public accommodations for blacks and whites constitutional.
- **Executive Order 8802** (1941): Prohibits discrimination based on race for federal employers, primarily national defense; represents the first workplace antidiscrimination law in the United States.
- ***Brown v. Board of Education***[5] (1954): Overturns "separate but equal" doctrine and declares that all public accommodations—including schools and trains—must be accessible to all people regardless of race.

- **Title VII of the Civil Rights Act of 1964**: Prohibits discrimination and ultimately harassment in the workplace on the basis of race, color, national origin, gender, and religion.
- ***Loving v. Virginia***[6] (1967): Decriminalizes mixed-race marriage.
- ***Griggs v. Duke Power Co.*** (1971): Creates "disparate impact" theory (even where an employer is not motivated by discriminatory intent. Title VII prohibits an employer from using a facially neutral employment practice that has an unjustified adverse impact on members of a protected class) for race cases.
- ***Ricci v. DeStefano***[7] (2009): Called into question, the "disparate impact" theory developed in a case where a test given to firefighters seeking a promotion effectively excluded applicants of color since they almost universally scored low on the exam. The Supreme Court determined there was no evidence that the test was itself discriminatory, even if it seemingly disparately impacted applicants based on race and national origin.

Griggs v. Duke Power Co.

An early case entitled *Griggs v. Duke Power Co.*[8] illustrates how Title VII can be applied in the workplace. It also illustrates how employers may try to circumvent the act. *Griggs,* a North Carolina power company required employees to have a high school diploma or to pass a standardized general intelligence test as a condition of employment or transfer to jobs that were categorized as more demanding than general labor. Traditionally, African American employees were not promoted beyond the general labor class of jobs. The company argued that the intelligence test was required for all employees regardless of race and therefore the company's policy did not violate Title VII. The United States Supreme Court determined that even though the test requirements were neutral at face value in terms of race, the requirements were not related to a "legitimate business purpose" and had an unfair or "disparate" impact on African Americans. In essence, the court held that the power company was unable to demonstrate how compliance with the requirements translated to successful performance of the jobs. As a result, the court ruled that the requirements were a violation of Title VII.

National Origin

National origin is a large and somewhat general category that includes a person's country of birth, ethnicity, ancestry, or culture. Although race and national origin may seem to be the same, they are in fact different. There are many people of the same race but from different cultures, ethnicities, and countries. For example, not all Americans are Caucasians, and not all Hispanics were born in Mexico. An employer cannot treat an employee or applicant differently or poorly based on his or her country of birth, ethnicity, ancestry, or culture.

Fragante v. Honolulu

In *Fragante v. Honolulu,*[9] a Filipino applicant was rejected despite good qualifications and scores on a preemployment exam. The applicant spoke English with a thick Filipino accent. The position required the clerk to deal with 330 angry, English-speaking customers per day by telephone. The applicant sued claiming national origin discrimination. The federal appeals court ultimately held that the requirement that clerks be able to communicate effectively in English was necessary to the job and thus was a bonafide occupational qualification that satisfied a legitimate business purpose under Title VII. Therefore, the city's rejection of the applicant was not a violation of Title VII.

Color of Skin

Color of skin can be distinguished from race and national origin. Two people may be from the same country and of the same race, but may still have different colors of skin. Title VII makes it illegal for an employer to treat an employee or applicant differently or poorly based on his or her color of skin—regardless of the color. Some people struggle with this category because this classification does not apply to only one color of skin; it applies to all colors of skin.

Equal Employment Opportunity Commission v. Trailways, Inc.

In *Equal Employment Opportunity Commission v. Trailways, Inc.*,[10] an African American employee filed a discrimination charge with the EEOC based on color of skin and race alleging that his employer's prohibition of beards had a disparate impact on African Americans who suffer from a disease known as pseudofolliculitis barbae (PFB). For people with PFB, shaving can cause serious physical consequences including infection and facial scarring. The EEOC found for the employee and brought the lawsuit against the company claiming that PFB is a condition unique to African Americans and based on their color of skin, and that therefore the company's policy had a disparate impact on African American employees. The court found for the EEOC and held that the evidence demonstrated that the 25 percent of the male African American workforce who suffer from the condition were effectively excluded from the company's job market as a class because of their color of skin and this racial trait.

Religion

Religion could be considered the first protected class given the role religious freedom played in the early stages of the founding of the United States. According to Title VII, the religion category includes all aspects of religious observance and practice, as well as belief. Title VII defines belief broadly to include almost any belief system, or lack of belief in any particular traditional belief system, including agnosticism and atheism. In the employment context, an employer may not treat an employee or applicant differently or poorly because of his or her beliefs. In addition, the act requires that an employer accommodate an employee's or applicant's observance of his or her religious beliefs when reasonable. An accommodation is reasonable when it does not cause undue hardship on the employer's business.

Historical Perspective

- **Establishment Clause of the First Amendment of the United States Constitution**: Dictates that Congress shall make no law respecting the establishment of a religion. The clause prohibits: (1) the establishment of a national religion by Congress, or (2) the preference of one religion over another or the support of a religious idea with no identifiable secular purpose.
- **Free Exercise Clause of the First Amendment of the United States Constitution**: Establishes that Congress can make no law prohibiting the free practice of religion.
- **Title VII of the Civil Rights Act of 1964**: Prohibits discrimination and ultimately harassment in the workplace on the basis of race, color, national origin, gender, and religion.
- ***Corporation of the Presiding Bishopric of the Church of Jesus Christ of Latter-Day Saints v. Amos*** (1987): Creates exemption from Title VII for religious organizations in dealing with employees.

- ***Hosanna Tabor Lutheran School vs. EEOC*** (2012): Extended the exemption set forth in *Amos* to apply to any position, secular or religious, and any protected class, not just religion.
- ***Board of Education of Kiryas Joel Village School District v. Grumet***[11] (1994): Clarifies the concept that government should not prefer one religion to another, or religion to irreligion.

Corporation of the Presiding Bishopric of the Church of Jesus Christ of Latter-Day Saints v. Amos

In *Corporation of the Presiding Bishopric of the Church of Jesus Christ of Latter-Day Saints v. Amos,*[12] two individuals fired from their jobs with church-owned corporations for failure to live by certain church standards brought an action for religious discrimination. In *Amos,* the United States Supreme Court upheld a provision exempting religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion. The holding of the *Amos* case means that churches can discriminate on the basis of religion in favor of their own members.

Hosanna-Tabor Lutheran School vs. EEOC

In Hosanna-Tabor Lutheran School vs. EEOC,[13] a religious school fired a narcoleptic instructor for missing work due to her condition. The instructor taught both religious and secular subjects. The school failed to participate in the ADAAA's interactive process, and admittedly fired the instructor because her condition interfered with her work. *Hosanna-Tabor* extended the Title VII exemption for religious organizations set forth in *Amos* to include religious and secular positions and every protected class. *Hosanna-Tabor* stands for the idea that government cannot interfere with religions, and means that a religious school, organization, or business can discriminate against its employees based on race, gender, religion or any other protected class.

Age

The Age Discrimination in Employment Act (ADEA) of 1967 prohibits employers from discriminating against employees based on age. The act applies only to workers age 40 and over. The ADEA's protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training. Further, it is illegal to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age-discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA. The ADEA applies to employers with 20 or more employees, including state and local governments; employment agencies and labor organizations; and the federal government.

Historical Perspective

- **Age Discrimination in Employment Act of 1967**: Adds age (workers 40 and over) as a protected class to Title VII.
- **Older Workers Benefit Protection Act of 1990**: Primarily intended to amend the ADEA to clarify the protections given to older individuals in regard to employee benefit plans.
- ***General Dynamics Land Systems, Inc. v. Cline*** (2004): Reinforces the principle that the age-based protected class applies only to people over 40. Any age claim filed by an employee under 40 will be dismissed.

General Dynamics Land Systems, Inc. v. Cline

In *General Dynamics Land Systems, Inc. v. Cline,*[14] the United States Supreme Court upheld an amended collective bargaining agreement that eliminated the company's obligation to provide health benefits to retired employees, except for current workers at least 50 years old. Workers under 40 sued under Title VII. The court held that workers under 40 did not have a claim, holding that Title VII is not designed to stop an employer from favoring an older employee over a younger one.

Veterans

In the employment context, this protection applies only to Vietnam veterans and disabled veterans.[15] The statutes that have been enacted likely protect only those two groups of veterans, since those groups have had the most difficulty assimilating into the workforce. Of course, in the future the courts could expand the class to include a wider scope of veterans. There are certain veterans' preference laws, and other protections that apply to all veterans, but for the purposes of discrimination and harassment, the class extends only to those two groups of veterans.

The Uniform Services Employment and Reemployment Rights Act of 1994 (USERRA) expands the scope of employment protections to veterans who leave the workplace to undertake service in the military and certain types of service in the National Disaster Medical System. USERRA is more limited than Title VII and has not, as of the publication of this chapter, been incorporated into Title VII. It does, however, provide all veterans with recourse should they be subjected to discrimination in reemployment upon return from duty.

Historical Perspective

- **Vietnam Veterans' Readjustment Assistance Act of 1974**: The act is a direct response to the difficulty Vietnam veterans face in obtaining and retaining jobs.
- Since 1990 several pieces of legislation—with the goal of expanding the scope of the 1974 Act to other veterans, particularly Gulf War and Iraq War veterans—have failed.
- **Additions to FMLA** (2008): FMLA is expanded to include additional time off protections for Iraq War veterans and families dealing with injured veterans or veterans called to duty. FMLA can be used to care for an injured veteran, or a veteran on active duty or preparing for active duty. This extension applies to veterans and their nuclear family members.

United States v. Board of Trustees of Illinois State University

In *United States v. Board of Trustees of Illinois State University,*[16] the federal court held that a hiring program adopted to circumvent a lawful veterans' preference program violated Title VII. Under the program, veterans were given preference points on an employment exam that allowed many to be hired. The majority of the veterans who applied for and received jobs were white males. The university attempted to alter the system to promote the hiring of more women and minorities. The federal court held that the university's attempt to alter the system amounted to discrimination against white males and that the veterans' preference was lawful. This case illustrates a virtual exception to Title VII. In this case, despite the fact that the veterans' preference law created a disparate impact on women and minorities, the court held that that preference was lawful.

Disability

In 1990, the Americans with Disabilities Act (ADA) became the single most important employment law of its generation. The ADA includes protection from discrimination based on a disability as well as requirements for employers and those offering other public facilities regarding access and accommodations for disabled employees, vendors, and patrons. The ADA prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations.

The ADA Amendments Act of 2008 (ADAAA), a federal act that was passed to expand the scope of those who are considered disabled, retains the ADA's basic definition of "disability" as a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. "Impairment" is defined as a diagnosable physiological, mental, or psychological disorder or condition. "Substantially limits" is defined as limited more than the average person based on the nature and severity of the condition and the duration of the condition.

The ADAAA explicitly overturned two controversial Supreme Court decisions: *Sutton v. United Air Lines*, and *Toyota Motor Mfg., KY, Inc. v. Williams* that interpreted the ADA in a way that made it difficult to prove that an impairment is a "disability." In light of this, the ADAAA broadens the scope of coverage under both the ADA and Section 503 of the Rehabilitation Act. The statute contains a nonexhaustive list of "major life activities" that adds additional activities to those currently listed in the ADA and Section 503 regulations, and a nonexhaustive list of "major bodily functions." The list of major life activities now includes, but is not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Major bodily functions include, but are not limited to, functions of the immune system; normal cell growth; and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

If an employee is substantially limited in one or more of the major life activities, he or she may qualify as disabled. If the employee qualifies as disabled, he or she is eligible for protection under the three primary functions of the ADA: disability discrimination, reasonable accommodation, and access.

DISABILITY DISCRIMINATION The definition of discrimination based on disability is broader in scope than the other protected classes. An employee has a claim for discrimination if he or she (1) has a current disability, (2) has a record or history of a disability, or (3) is regarded as or perceived to be disabled. For example, an employee may be subjected to discrimination for a medical condition that he or she used to suffer from but has successfully treated or overcome. Mental and emotional disabilities and other medical conditions that are associated with social taboos generally fall into this category. Likewise, an employee may suffer discrimination based on a perceived disability. As with other protected classes, an employer may not discriminate against an employee, applicant, vendor, or patron based on a disability.

REASONABLE ACCOMMODATION If a qualified (disabled) individual is able to perform the essential functions of his or her job, with or without an accommodation, but there are barriers owing to disability, the employee may request an accommodation from his or her employer.

Accommodations provided by employers range from a customized piece of equipment such as telecommunications devices for the deaf (TDD) or Braille machines, to raised or lowered desks, flexible schedules, or similar accommodations. An accommodation can come in any form as long as it is reasonable and not unduly burdensome for the employer. Unduly burdensome accommodations include those that are very costly and/or fundamentally alter the nature or operation of the employer's business. An employer may also deny an accommodation request that is a direct threat to the safety and health of employees.

All businesses should have a comprehensive procedure in place for dealing with accommodation requests. Employers should also beware that owing to the broad scope of disability discrimination, it is never appropriate for them to approach an employee about a perceived disability or unilaterally to recommend some type of accommodation. Individuals with disabilities must be the ones who request accommodations. Once an employee requests an accommodation or identifies that he or she is having difficulty performing the functions of the job owing to some medical condition, the ADA requires the employer to try to accommodate that employee.

ACCESS The ADA drastically altered the American business landscape with new accessibility requirements far broader than those imposed by the Rehabilitation Act of 1973. The ADA includes strict requirements for businesses, universities, sports stadiums, and virtually any other public place with regard to ramps, door width, parking, and accessible restrooms and facilities. The ADA takes the original economic philosophy of Title VII—particularly that the purchasing power of a large group of Americans is not being utilized—and extends it from the workplace to the marketplace, capitalizing on the "purchasing power" of disabled persons.

Historical Perspective

- **Rehabilitation Act of 1973**: Provides discrimination protection on the basis of disability in some federal and state jobs; requires access in some federal and state buildings.
- **American's with Disabilities Act of 1990**: Requires all public accommodations to be accessible, adds disability as a protected class to Title VII, and sets forth rules for reasonable accommodations for disabled employees.
- ***Lanman v. Johnson County*** (2004): Creates a harassment or "hostile work environment" claim for employees who qualify as disabled.
- **ADAAA of 2008**: Increases the scope of who may qualify as disabled.

Lanman v. Johnson County

In *Lanman v. Johnson County,*[17] decided in December 2004, a deputy sheriff sued the employing county alleging there was a hostile work environment in violation of the ADA after she had been called "crazy" and "nuts" and been asked "are you off your medication" and several other questions regarding her mental health. The court ruled that although an action could be brought under the ADA, the jokes and comments directed toward her did not fit within the "perceived disability" category of the ADA, since the comments were more likely a sign of personality conflicts and simple rude behavior and not evidence that her employer regarded her as "substantially limited in one or more major life activities." Simply rude or boorish behavior, while obviously not recommended in the workplace, is not illegal.

PGA Tour, Inc. v. Martin

In *PGA Tour, Inc. v. Martin,*[18] the United States Supreme Court ruled that allowing golfer Casey Martin to ride in a golf cart owing to his disability was a reasonable accommodation, since it did not fundamentally alter the nature of the event. The Court's analysis included a discussion about the nature of the competition and the potential advantage gained by a cart user.

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,*[19] the United States Supreme Court held that an assembly-line worker was not substantially limited in the major life activity of performing manual tasks owing to her carpal tunnel syndrome. Although her condition affected her ability to do her job, it did not restrict her from engaging in activities that are central to most people's daily lives, and therefore she did not qualify as disabled. To some people's surprise, this case makes clear that although an employee may be unable to do a particular job, that inability does not necessarily mean that he or she is substantially limited in any major life activity.

Sex/Gender

This category includes protection based on being male or female; in addition, it protects against pregnancy discrimination and sexual harassment.

GENDER DISCRIMINATION Women scored their first victory against workplace discrimination with the passage of the Equal Pay Act of 1963, a year before the passage of Title VII. However, the Equal Pay Act turned out to be a small victory, since most claims won by women or men were limited in terms of how a claim was filed and how much a victorious employee could recover. Both of those issues were addressed in two subsequent acts. The Civil Rights Act of 1991 allowed a victorious claimant to a trial by jury in a Title VII case and emotional distress damages. The Lilly Ledbetter Fair Pay Act of 2009 extended the statute of limitations for filing an equal pay complaint to each instance of improper conduct by the employer.

PREGNANCY DISCRIMINATION Pregnancy discrimination was added in 1978 and protects women from being treated differently or poorly based on pregnancy, childbirth, or related medical conditions. In essence, an employer must treat a pregnant woman like anyone else who may need temporary accommodations for medical reasons.

SEXUAL HARASSMENT Sexual harassment evolved as a subcategory of gender discrimination. Prohibitions against sexual harassment, and the ADA, have had the greatest impact on the American workplace. Sexual harassment comes in two forms: *quid pro quo* and hostile work environment.

Quid Pro Quo Sexual Harassment *Quid pro quo* is a Latin term that means "this for that." *Quid pro quo* sexual harassment occurs when a supervisor promises or confers benefits in return for sexual favors, or when a supervisor adversely affects an employee's status based on the employee's rejection of the sexual advances. For a situation to constitute *quid pro quo* sexual harassment, the perpetrator must maintain a position of power over the victim, and the victim must suffer some tangible employment action as a result of the harassment. An employer cannot

promote, or demote, an employee based on his or her acceptance or rejection of sexual advances. Conditioning employment status on the acceptance of sexual advances is a violation of Title VII.

Hostile Work Environment Sexual Harassment Hostile work environment sexual harassment has less to do with job status and more to do with the job environment. An employee may make a claim for hostile work environment based on sexual jokes, comments, e-mails, or pictures in the workplace. Because hostile work environment sexual harassment is about the work environment, the relative employment positions of the perpetrator and victim are irrelevant. A supervisor can harass a subordinate, a subordinate can harass a supervisor, and coworkers of equal status can harass each other. In fact, since the focus of these claims is on the environment, a visitor, vendor, or patron of a business can potentially assert a harassment claim if he or she is subjected to a hostile work environment. To prevail on a sexual harassment claim, a claimant must demonstrate each of the following:

1. ***He or she has been subjected to conduct that is sexual in nature.*** Employers who are trying to prevent this kind of conduct should not have difficulty defining "sexual in nature." Common sense dictates the difference between a sexual and a nonsexual pat on the back or comment about a coworker's appearance. Items or conduct of a sexual nature found in the workplace can be visual, physical, or verbal. Examples of visual materials might include photographs, calendars, e-mails, Web sites, and gestures that are sexual in nature. Examples of physical conduct include any touching, petting, patting, or grabbing that is sexual in nature. Examples of verbal conduct include jokes, comments, and stories that are sexual in nature. Cautious employers will attempt to keep any items or conduct that might be construed as sexual in nature out of the workplace.
2. ***The sexual conduct must be severe and/or pervasive.*** The law states that the sexual conduct must alter the work environment to the point that the victim can no longer remain in the workplace. Pervasive conduct is ongoing, widespread, or repetitive to the point that it has created a hostile environment. The mildest sexual jokes and comments can become pervasive over time to create a hostile work environment. In contrast, one incident can constitute hostile work environment harassment if it is severe enough. To be considered substantially severe, one incident almost always has to include sexual touching of some type. Regardless of the conduct, if it is relatively minor and has not altered the environment to the point that the victim can no longer come to work, the conduct will not rise to the level of sexual harassment.
3. ***The sexual conduct must be unwelcome and/or unwanted.*** Sexual conduct is not inherently unlawful. In fact, it is unlawful only when it is unwelcome or unwanted. The problem, of course, is that supervisors and coworkers often do not know when someone is going to be offended by a joke or comment. To prevail, a claimant must have in some way demonstrated his or her disapproval of the sexual conduct. A claimant may manifest unwelcomeness in a variety of ways, including telling the joke teller that his or her jokes are offensive, not participating, walking away, or reporting the conduct to a supervisor. The best rule to adopt is that since it is impossible to know how someone will react to sexual conduct, it is better to prohibit the conduct in the workplace altogether.

Gender is no longer relevant to sexual harassment insofar as anyone can harass or be harassed. According to the law, a man can sexually harass another man just as he can sexually harass a woman. Likewise, a woman can sexually harass a man or another woman.

When discussing sexual harassment, or any kind of harassment including racial, religious, or any other unlawful discrimination based on a protected class, it is important to remember that a party's intent is irrelevant. It is never an adequate defense to say "I was trying to be funny" or

"I was trying to be friendly." The only relevant factor is how the affected person perceives the joke or comment. Since it is impossible to predict how people will respond to sexual or racial jokes or comments, such topics are better left out of the workplace.

Historical Perspective

- **Nineteenth Amendment to the United States Constitution** (1920): Grants women the right to vote.
- **Equal Pay Act of 1963:** Requires equal pay for equal work, and renders gender irrelevant in terms of pay.
- **Title VII of the Civil Rights Act of 1964**: Prohibits workplace discrimination based on gender but does not specifically set forth a claim for sexual harassment.
- **Pregnancy Discrimination Act** (1978): Requires that a woman be treated in the same way as a man who is out of work temporarily.
- **The Civil Rights Act of 1991**: Allows a claimant to a trial by jury in a Title VII case and emotional distress damages.
- ***Ellison v. Brady*** (1991): Creates "reasonable woman" standard for analysis of sexual harassment claims.
- **Family and Medical Leave Act** (1993): Has an unintended negative impact on women since it replaces most maternity policies and is generally unpaid leave.
- ***Burlington Industries, Inc. v. Ellerth*** (1998): Clarifies the existence of an independent "hostile work environment" sexual harassment claim.
- ***Oncale v. Sundowner Offshore Services, Inc.*** (1998): Renders gender irrelevant to a sexual harassment claim.
- **The Lilly Ledbetter Fair Pay Act of 2009**: Strengthens the Equal Pay Act by extending the statute of limitations.

Burlington Industries, Inc. v. Ellerth

In *Burlington Industries, Inc. v. Ellerth,*[20] the United States Supreme Court distinguished between "quid pro quo" and "hostile work environment" sexual harassment when it ruled that a female employee who had been subject to a supervisor's sexual advances even though no tangible employment action had yet resulted may still have a hostile work environment claim. In today's workplace most supervisors are aware that soliciting sexual favors in exchange for job status is inappropriate and illegal, thereby making hostile environment cases much more prevalent.

Ellison v. Brady

In *Ellison v. Brady,*[21] a federal appeals court established a "reasonable woman" standard, stating that the focus should be on the perspective of the victim. In *Ellison,* an employee was frightened by her coworker's subtle advances and strange love notes. The court held that a reasonable woman could have had a similar reaction and found that her perception was therefore reasonable. Other courts have extended the standard of reasonableness to all parties, male or female, claiming sexual harassment. Courts now generally call the standard the "reasonable person, similarly situated" standard. The standard evaluates the reasonableness of a person's claim based on who the claimant is, and how other, similarly situated people might react in the same situation. Thus, the standard prevents any outrageous, bad-faith claims from progressing in the courts.

Oncale v. Sundowner Offshore Services, Inc.

In *Oncale v. Sundowner Offshore Services, Inc.*,[22] the United States Supreme Court stated that same-gender sexual harassment qualifies under Title VII. In *Oncale*, a heterosexual male employee worked on an all-male crew on an oil platform in the Gulf of Mexico. The employee was subjected to humiliating sex-related actions by several male coworkers. The court held that the gender of the harassers and the harassed was irrelevant under Title VII and that the employee could bring an action under Title VII.

Sexual Orientation

At the time of writing this chapter, sexual orientation is not yet a federally protected class under Title VII. However, in the early summer of 2009 President Barack Obama extended benefits to some gay federal employees, and based on case law and trends such as an increasing number of jurisdictions recognizing and legalizing gay marriage and/or civil unions, it is very possible that sexual orientation will emerge in the next few years as an additional protected class under Title VII. Several states, and numerous municipalities, corporations, universities, and other organizations in the United States not only recognize equal benefits for same-sex couples, but many also include sexual orientation as a protected class in their state and city law, or corporation, university, and organization policy. This classification in particular has rapidly changed over the past several years and appears to be headed for protected status.

Historical Perspective

- ***Bowers v. Hardwick***[23] (1986): United States Supreme Court upholds a Georgia statute criminalizing sodomy (oral and anal sex) between consenting adults.
- ***Lawrence v. Texas***[24] (2003): United States Supreme Court directly overturns *Bowers*, holding that such laws are unconstitutional.
- **Vermont Legislature** in 2009 becomes the first to legalize gay marriage through statute. To that point, only state courts had found laws prohibiting gay marriage to be unconstitutional. Vermont is the first legislature to enact law legalizing the practice.
- **President Barack Obama** in 2009 extends domestic partner benefits to some federal employees, citing that gay federal employees have long been denied basic employment rights.

In sum, any other classifications such as marital status, political affiliation, and weight are not protected classes. This means that an employer may discriminate against employees based on political affiliation, and the employees have no recourse in a federal or state court. Of course, such behavior by the employer will nevertheless likely affect the business negatively, such as through bad publicity or by word of mouth.

ADVICE FOR MANAGERS

Have a Title VII Policy and Procedure

Employers have a relatively simple and powerful defense against any Title VII claim. Developing a thorough, well-articulated equal opportunity policy, in conjunction with a complaint and investigation procedure, is the most important step a company can take to protect itself from any Title VII charge. The company or organization should require supervisors to adhere strictly

to its policies and procedures and provide periodic training for supervisors and subordinates. A company's ability to demonstrate that it has a policy that it follows and that it trains employees regularly will protect employers from losing most Title VII cases.

Be Clear about the "Legitimate Business Purpose" Concept

Of course, nothing can prevent an employee from making an internal complaint or filing a complaint with the EEOC. Almost every company with more than 15 employees will at some point be asked to respond to a charge of unlawful discrimination or harassment. A company's first defense is that the company has a policy in place, the company followed the policy, and the employees were aware of the policy. A company may also defend itself with the "legitimate business purpose" concept. A company can do almost anything, including discriminate based on a protected class, if it can show it did so for a legitimate business purpose or out of business necessity.

For example, a construction company will not be required to hire a disabled person who cannot lift more than 25 pounds if the essential functions of the job include regularly lifting more than 25 pounds. In such a case the company is discriminating by not hiring the applicant based on his or her disability; however, the company has a legitimate business purpose for doing so. But again, companies must beware: What constitutes a "legitimate business purpose" and "essential functions of the job" are hotly contested issues. A company can get itself into trouble with definitions that are either too broad or too narrow in scope.

Develop Objective Job Criteria

Perhaps most important, a company can act in accord with the intent and language of Title VII by making all its hiring and firing decisions based on objective job criteria. How an employee performs his or her job should be the only factor in determining that employee's status. Companies should be blind to race, religion, gender, disability, or any other protected category. New hires, promotions, demotions, and terminations should be made without regard to any of the characteristics identified in the protected classes.

Do Not Retaliate

Title VII includes a provision that protects any employee from retaliation for lodging a complaint of discrimination or harassment. An employee cannot be demoted or terminated for filing a complaint or lawsuit. To be protected, the employee need not prevail on his or her complaint but rather must demonstrate a reasonable, good-faith belief that the complaint was valid. Under this provision, a company can find itself in trouble even if it wins a discrimination or harassment claim. Imagine a scenario in which an employee complains that he or she is being sexually harassed. The company immediately responds by investigating the claim, disciplining the alleged harassers, and preventing another such incident. Or, imagine that the company conducts an investigation and finds that the allegations are not serious enough to warrant any action or discipline. In other words, in either case, the company does exactly what it is supposed to do. However, another problem arises if the complaint creates hard feelings that lead to a negative reaction. Imagine that one of the alleged harassers is a supervisor and that this person is so upset about the complaint that he or she scales back the complaining employee's job duties until the employee is fired six weeks later. Under these circumstances, the company may have a hard time defending itself against a retaliation claim.

ADVICE FOR EMPLOYEES

Follow Policies and Procedures

Employees have rights under Title VII, but they also have responsibilities. To prevail on a legal complaint or charge of discrimination or harassment, an employee must show that he or she at least generally followed all policies and procedures. This principle is important for two reasons. First, part of any analysis into a discrimination or harassment complaint is determining whether the employee followed the company's complaint procedure. Second, being a cooperative and productive employee makes it difficult for an employer to demonstrate a legitimate, nondiscriminatory reason for any discriminatory conduct.

Most companies have written policies and procedures in an employee handbook or other official company documents. Most employees also receive policy and procedure information and training at an orientation. If employees perform their job and follow any complaint guidelines, they increase their chances with any charge or complaint.

Behave Reasonably

Employees have a simple way to avoid being the subject of a Title VII allegation and to respond appropriately to unwanted conduct: Behave reasonably and professionally. It is not that difficult to determine when jokes or comments contain content that is "sexual in nature." Likewise, employees engaging in conversations pertaining to protected class issues should be respectful. Title VII is not intended to be a code of conduct that prohibits certain topics of discussion; it is intended to prevent members of protected classes from being treated differently or poorly based on protected-class status in the employment context. Realistically, employees will engage in personal conversations with each other on a wide variety of topics.

Although many lawyers would recommend to their corporate clients that all issues subject to Title VII protections not be discussed at all in the workplace, such a hope is, of course, not realistic; what managers should insist on, however, is that all organizational members be respectful in their discourse and avoid jokes, derogatory terms, and stereotypes. Likewise, an employee who is offended by a joke, comment, or other conduct should immediately report it to a supervisor or speak to the instigator. A little common sense and consideration is the best approach to any difficult workplace scenario.

A WORD ABOUT AFFIRMATIVE ACTION

Affirmative action is not a component of Title VII and does not generally affect the private sector. It does, however, affect government organizations and universities. One could argue that Title VII and affirmative action are opposites. Traditionally, affirmative action included preferences and quotas in interviewing and hiring, whereas Title VII outlawed differentiating between those who are part of a protected class and those who are not. By 2005 the two were more in harmony. Affirmative action currently requires government employers and state actors to actively recruit and reach out to minority candidates but does not allow quotas or preferences.[25]

THE FUTURE OF TITLE VII

There are many examples in the media of businesses and organizations that seem to struggle with managing a diverse workforce and have repeatedly dealt with Title VII claims; there are also many organizations that are flourishing under the law. However, the companies or organizations involved are not necessarily obvious ones.

For example, the Oakland Raiders football team is known for its commitment to excellence, rabid fans, and colorful collection of players. Not as well known, however, is the fact that for more than 40 years, the Oakland Raiders have pioneered workplace diversity. The Raiders were the first to draft an African American quarterback in the first round of the amateur draft (Eldridge Dickey); the first to employ a Hispanic American quarterback (Tom Flores); and the first to hire a Hispanic American head coach (Tom Flores). Further, the team was the first in the NFL in the modern era to hire an African American head coach (Art Shell) and the first to boast a female chief executive officer (Amy Trask). The Raiders were also the first US sports franchise to launch a separate alternative-language (Spanish) Web site and have since added German- and Mandarin-language sections to its Web site for its German and Chinese fans. The Raiders lead by example in the National Football League, and thousands of other organizations do likewise in their own business sectors.

The Raiders' approach is smart and effective because the American workplace is going to become only more diverse as the country's demographics continue to change. It is more important than ever for employers to understand when their or their employees' conduct is unlawful and how to protect themselves from the unwanted cost and scrutiny of a Title VII lawsuit. Accomplishing these goals is challenging, in part because employment discrimination law is fluid. Not only do the relevance and application of the various protected classes change over time, the categories themselves change.

For example, prior to September 11, 2001, the protection against discrimination based on Middle Eastern or Muslim national origin or religion was rarely an issue. In the post 9/11 world, national origin litigation has become more prevalent, and relevant, as people of Middle Eastern descent have lately been discriminated against more frequently. However Title VII changes in the future, it will continue to be an important law that protects employees from discriminatory workplace conduct and therefore fosters workplace diversity.

FEDERAL ACTS RELATING TO WORKPLACE DIVERSITY

Emancipation Proclamation (1863)

Issued by President Abraham Lincoln; freed the slaves in those territories still rebelling against the Union; allowed blacks the opportunity to work for wages.

Executive Order 8802 (1941)

Signed by President Franklin D. Roosevelt on the eve of World War II; prohibits government contractors from engaging in employment discrimination based on race, color, or national origin.

Equal Pay Act of 1963

Requires that men and women be given equal pay for equal work in the same establishment. Although the jobs need not be identical, they must be substantially equal; it is job content, not job titles, that determines whether jobs are substantially equal.

Title VII of the Civil Rights Act of 1964

Prohibits employment discrimination based on race, color, religion, gender, or national origin. Enforced by the Commerce Clause of the US Constitution and limited to employers with 15 or more employees, state or federal employers, or companies receiving state or federal money.

Executive Orders for Affirmative Action (EO 11246 in 1965 and 11375 in 1967)

Issued by President Lyndon Johnson; requires government contractors to "take affirmative action" toward prospective minority employees in all aspects of hiring and employment. Contractors must take specific measures to ensure equality in hiring and must document these efforts. Amended in 1967 to cover discrimination on the basis of gender.

The Age Discrimination in Employment Act (ADEA) of 1967

Incorporated as part of Title VII; protects individuals who are 40 or older from employment discrimination based on age. The ADEA's protections apply to both employees and job applicants.

Rehabilitation Act of 1973

Prohibits discrimination against qualified individuals with disabilities who work in the federal government.

Vietnam Veterans Readjustment Assistance Act of 1974

Requires covered federal government contractors and subcontractors to take affirmative action to employ and advance in employment-specified categories of veterans protected by the act and prohibits discrimination against such veterans.

Pregnancy Discrimination Act of 1978

An amendment to Title VII; maintains that discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination. Women who are pregnant or affected by related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations.

Older Workers Benefit Protection Act of 1990

An amendment to the Age Discrimination in Employment Act of 1967; established to safeguard older workers' employee benefits from age discrimination. Allows reductions in benefits based on age as long as the employer's costs of providing benefits to older workers are the same as their costs for providing benefits to younger workers.

Americans with Disabilities Act of 1990

Prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, and job training. Covers employers with 15 or more employees, including state and local governments; also applies to employment agencies and to labor organizations.

Civil Rights Act of 1991

An amendment to Title VII of the Civil Rights Act of 1964. Provides monetary damages in cases of intentional employment discrimination; allows for jury trials; extends coverage of act to US citizens working abroad for US companies.

Family and Medical Leave Act of 1993

Allows employees to receive up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons: (1) for the birth and care of the newborn child of the employee; (2) for placement with the employee of a son or daughter for adoption or foster care; (3) to care for an

immediate family member (spouse, child, or parent) with a serious health condition; or (4) to take medical leave when the employee is unable to work because of a serious health condition.

Lilly Ledbetter Fair Pay Act 2009

Extends the statute of limitations for filing an equal pay complaint to each instance of improper conduct by the employer.

Americans with Disabilities Act Amendments Act 2009

Revises the definition of "disability" to more broadly encompass impairments that substantially limit a major life activity; expands the scope of those who are considered disabled.

Sources: United States Equal Employment Opportunity Commission, www.eeoc.gov; and United States Department of Labor, www.dol.gov.

7. 129 US 2658 (2009).