EMPLOYMENT DISCRIMINATION LAW BEFORE THE MODERN ERA

- Employment at Will: Employer was free to refuse to hire and free to discharge an employee for any reason. An employee was free to leave his employment at any time for any reason.
- Employment at will is the basic default rule.
- Fair Labor Standards Act (FLSA) Congress created a minimum wage and has prohibited the employment of children.
- OSHA past legislation on working conditions.
- ERISA Employment Retirement Income Security Act provides protection for pension plans and related benefits.

- Hierarchy of Authority
  Constitution -> T7 -> Cts -> EEOC
  Practical consideration: Flip cts and EEOC, not everything comes in front of the cts

Potential Sources of Unconscious Discrimination
- Qualifications (gender)
- Search Process (ask friends or neighbors)
- Comfort (should it matter?)
- Subconscious

A. The Constitution
  14th Amendment §1:
  No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the US; nor shall nay state deprive any person of life, liberty, or property, w/out due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

Kerr v. Enoch Pratt Free Library of Baltimore City
- HELD: A public institution, owned and supported by the state may not exclude persons on the basis of race.
- Government, as an employer can not discriminate on the basis of race.
- Discrimination as but, for: If you change the individuals race and the result is different, then its causation.
- SC view that racial classifications are subject to "strict scrutiny"
- Strict scrutiny is strict in theory but fatal in fact.
- Extensive state regulation of a private entity does not make it a state actor. While the mere acquiescence of a state official in action of a private party is not sufficient to establish state action, the willful participation of a private entity with the state or its agents will be enough.
- Ct uses NIXON test: Whether the committees are classified as reps of the state to such an extent and in such a sense that the great restraints of the Const set limits to their actions.
Kerr applies on its face only to states but has been consistently interpreted to apply to any non federal public body.

B. Federal Civil Rights Legislation and Executive Action
   ▶ Slaughter-House Cases:
      Constrained constitutional bases for civil rights legislation in the narrowest possible way.
      -P&I from 14th only encompassed those rights which grew directly out of the relationship between the citizen and the national government, and did NOT include fundamental individual rights.
   ▶ US v. Cruikshank:
      14th consisted only of restrictions on the states and did not add anything to the rights which one citizen has under the constitution against another.
      -14th could not reach private action.

   ▶ Civil Rights Act of 1866
      -Provided that all citizens, w/out regard to color, were entitled in every state to the same rights to contract, sue, give evidence, and to take, hold and convey property, and to the equal benefits of all laws for the security of persons and property as was enjoyed by white citizens.

   ▶ Hodges v. US:
      -Whites drove black laborers out of their jobs by threats of violence.
      -SC held that since the attempt to protect the employment rights of the black workers was directed against private action, 14th provided no basis for protection.

C. Federal Labor Statutes
   ▶ May have protected against discrimination by a union but provided no recourse against an employer who discriminated w/out union involvement or against a union for discrimination in its membership policies.
   ▶ NLRA National Labor Relations Act (1935) and the Railway Labor Act (1934) provided legal protection for union organizing and established a federally monitored system for workplace elections to determine whether a union should be established as the officially recognized bargaining agent for employees in the bargaining unit.
   ▶ Unions are unincorporated private associations not bound by the strictures of the 14th.
   ▶ The anomaly of a private association using powers conferred on it by federal law to discriminate on the basis of race led to the Court created “fair representation” doctrine.

Steele v. Louisville & Nashville RR (1944)
   ▶ Union which admitted only whites had become the exclusive bargaining rep for firemen employed by the RR.
Blacks were bound by the agreements made by the union.

The Union negotiated w/ the RR to restrict the rights and opportunities available to black workers.

The black firemen sued the union for an injunction against the enforcement of the discriminatory agreements.

SC found that the RLA imposes a duty on the representing union to equally protect the interest of all members of the craft.

By granting the bargaining power must also inherit a duty

Adverse impact of agreement ok as long as it was not solely based on race.

Union can't discriminate b/c its power to be the exclusive bargaining unit came directly from Congress

Union didn't have to become the bargaining unit but once they did, they have a duty to represent all equally.

Brotherhood of RR Trainmen v. Howard (1952)

Black workers sued b/c all white union and employer had agreed to abolish their jobs.

Blacks were not members of or represented by the white union. They had their own.

SC held that the federal act prohibits bargaining agents from using their position to ... discriminate.

Unions can't discriminate against non-members

DISSENT: No fed law that says private parties can't discriminate

Conley v. Gibson (1957)

Steele doctrine of fair representation was extended to apply to a union's failure to protect black employees in the bargaining unit from unilateral action by the employer.

RR eliminated 45 jobs held by blacks, in violation of a contract w/ the union.

The union refused to process grievances by black employees or take action.

Unions can't decline to protect black workers as a group from unilateral discrimination.

Humphrey v. Moore

A union operating under the NLRA has the same responsibility and duty of fair representation as that imposed on unions by the RLA.

D. State Law

Statutes either:

1. expressed a public policy against discrimination in employment, but contained no remedial provisions; and
2. Defined prohibited employment practices and provided an enforcement mechanism.
Railway Mail Assn v. Corsi (1945)
- Union w/ discriminatory membership policy charged that the statute prohibiting it violated due process by denying the group the right to select its own membership.
- SC held there was no constitutional basis for the contention that a state cannot protect workers from discriminatory exclusion.

II. TITLE 7
Title VII of the Civil Rights Act of 1964 prohibits employers, unions and employment agencies from discriminating with respect to a broadly defined class of employment related decisions on the bases of race, color, religion, national origin and sex.

A. Covered Entities
1. Employers
Title 7 prohibits employers, employment agencies and unions from engaging in discriminatory employment practices.
Employer is defined as:
A person engaged in an industry affecting commerce who has at least fifteen employees for twenty weeks during the current or preceding calendar year.
EEOC v. Rinella & Rinella
- HELD: Courts must examining the totality of a firm's arrangements to determine whether an employer-employee relationship exists for T7 purposes.
- P(employee) worked for D and engaged in various activities in opposition of alleged unlawful employment practices of D.
- P publically alleged that D discriminated on the basis of sex in its health insurance benefits.
- P was fired b/c of her participation in these activities.
- D contends they are title 7 does not apply to them b/c they do not have the requisite # of employees.
- CT holds that it is stupid to think that T7 does not apply to “professionals”
- Employee and professional for the purposes of T7 are synonymous.
- Ct examines whether an employer-employee relationship exists and finds it does.
- D has authority to hire and fire these “professionals”, has control over compensation.

2. Employment Agencies
Greenfield v. Field Enterprises
- HELD: A newspaper that publishes classified ads is not an employment agency as defined by T7.
- Are newspapers employment agencies when they place these ads.
- Ct doesn't think so.
Are the newspapers agents of the employment agencies when they place the adds.

No, the agency has to be employed in the same business as the employer.

Are the newspapers agents of the employer? Yes, if the employer is the one who placed the add.

If the newspaper isn't an employment agency, then it's not liable.

What's wrong w/ arguing self specific law adds.

3. Labor Organizations

Local 293

Held: Congress intended to exempt small local labor organizations from T7.

Under what circumstances should an Intl be held liable for the discriminatory practices of its affiliated local?

- In the absence of any statutory language, the court could not discern any Congressional intent to hold Intl unions under any special standard of liability for the failings of their locals w/ regard to civil rights.
- Intl could only be vicariously liable for the discriminatory practices of a local union w/ which it enjoyed an agency relationship.

4. Individuals v. Employees

Alexander v. Rush North Shore Medical Center

Held: Independent contractors are not protected by T7.

Q: Whether an independent contractor can sue

Whether a self employed physician with staff privileges at a hospital may bring a Title VII action alleging that the hospital's revocation of his privileges constituted unlawful discrim.

Common law test to determine whether he is an employee or an independent contractor:

1. Extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work
2. The kind of occupation and nature of skill required, including whether skills are obtained in the workplace
3. Responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations
4. Method and form of payment and benefits
5. Length of job commitment and/or expectations

Employer's right to control is the most important when determining whether an individual is an employee or an
Should an unpaid intern or worker count as an employee for title 7 purposes?

Should an unpaid intern be able to sue for issues unrelated to salary

Held: P must prove the existence of an employment relationship in order to maintain a T7 action against D and independent contractors are NOT protected by T7.

Hishon v. King & Spalding

T7 applies to selection of partners in a partnership

Once a contractual relationship of employment is established, the provisions of T7 attach and govern certain aspects of that relationship.

The benefit of partnership, though not a contractual right of employment, may qualify as a “privilege” of employment under T7.

Partnership consideration is a term, condition, or privilege of an associate's employment and accordingly that partnership consideration must be w/out regard to sex.

The benefit a P is denied need not be employment to fall w/in T7 protection; only need to be a term, condition, or privilege.

When Congress wanted to grant employers immunity, it expressly did so.

Exemptions:

EEOC v. Mississippi College

B. Intentional Discrimination Against the Individual: Disparate Treatment

1. The Conceptual Framework
  ▶ Congress didn't define discrimination in T7
  ▶ 3 Part Structure from McDonnel Douglas v. Green
    1. P has burden of proving by the preponderance of the ev a PFC of discrim.
    2. If P succeeds in proving the pfc, the burden shifts to D to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.
    3. IF D carries the burden, P has an opportunity to prove by a preponderance of the ev that the legitimate reasons offered by D were not its true reasons, but were a Pretext for discrimination.

The Prima Facie Case:
  ▶ Any set of facts that is sufficient to suggest/yield an inference of discrimination
  ▶ From the inference, we get a mandatory rebuttable presumption of
discrimination

- The MRPD often creates confusion
- Why MRPD? B/c pfc convinces us and it requires the employer to answer. If D fails to answer, he loses.
- From McDonnel Douglas, suggested that once we quantify the pfc, any set of facts that looks worse than MDD, necessarily creates a pfc.
- Problem: Cases that don't look as bad as MDD may support a pfc.
- Makes more sense not to quantify and accept that pfc creates an inference

a. Texas Dept of Community Affairs v. Burdine (p58)

LNR:
- Ultimate burden of persuading the trier of fact that the D intentionally discriminated against the P remains at all time w/ P.
- Burden for D is to provide ev of a LNR
- D has burden of production, P has burden of persuasion
- P must then show that the proffered reason was not the true reason for the employment decision and was in fact a pretext for discrimination.
- In response to a LNR, P must prove it was a pretext

Question: Why does only the burden of production shift to D?

Pretext:
- Two prongs:
  1. Falsity
  2. Discrimination is a better reason why it occurred.
- Prong 2 is little more than a recapitulation of the burden of proof in T7, conditions for finding for P

Falsity:
- 3 thoughts on Falsity:
  1. Pretext (falsity) only. Proof of falsity means P wins.
  2. Proof of falsity is evidence of pretext and let factfinder decide.
  3. Pretext alone was insufficient to support inference of discrimination.

Notes:
- The PFC
- Direct Ev as a Substitute for the PFC
- D's Explanation
- Proof of Pretext
- Pretext and Statistical Ev

b. St. Mary's v. Hicks(p71)

Made a mockery of MDD
- Majority held that pfc was weak, presumption of discrim was unimportant after D provided a LNR
- LNR has now become the focus of the analysis w/ pretext 2nd.
- Proof of falsity is as much as we expect P to prove
Implications:
- pfc and presumption are viewed as mere procedural devices that force D to present evidence
- Holding turns pretext stage into a rebuttal stage
- False positives

Before st. mary's: must prove discrim more likely than not the reason
MDD always pointed to discrim when no other reason prevalent, Hicks
assumes not discrim even after proof of falsity
Majority assumes proof of falsity is easy: however, proving the absence is more difficult than proving an affirmative assertion.

c. Foster v. Dalton (p91)

- Employee P was denied promotion to in house job
- D preferred to hire in house, D changed qualifications and hired a friend
- Held: Cronyism is not a violation of T7
- LNR of cronyism was left to infer

d. Reeves v. Sanderson Plumbing (p97)

- Exception where proof of falsity wasn't enough
- If proof of falsity doesn't get you to a jury, it flies in the face of MDD

Proof of Causation

a. Price Waterhouse v. Hopkins (p107)

- P wasn't 'feminine' enough and denied promotion
- Mixed motives for decision: sex based AND bad interpersonal skills
- How do you apply T7 when you don't know the proper cause
- 5 ways of viewing the issue:
  1. DC's position: D gave credence to the comments that were made. Comments were based on sex stereotyping. This yielded a T7 violation. However, no equitable relief if D can show by clear and convincing ev that they would have made the same decision anyway. “But for”. If they can prove that there was another reason, then we have a T7 violation w/ no liability. Doesn't make sense. We'd like to have liability flowing from the violation.
  2. Ct. App: If D could have shown by clear and convincing that it would have made the same decision w/out the stereotyping, D wins and there's NO violation. Takes position that w/out damages, there's no violation. T7 isn't about perfectly fair conditions in the workplace. It's whether a person has been affected by discrimination in the workplace.
  3. SC Plurality: What decision qualifies as 'the' decision in this case b/c no majority. Do we take plurality decision as the law? If D considers
gender, shift the burden of persuasion to the D and make them prove the same decision would have been made and don't require clear and convincing evidence. It's improper to use gender stereotype to choose partner. P's case should be so strong that burden should shift and D should defend itself.

4. O'Connor's Concurrence: Must show gender was a substantial factor. Mere use of gender doesn't show violation of T7. If you can show that it was a substantial factor, then I'll allow for a burden shift. Direct and substantial proof that an impermissible motive was relied upon in making the decision at issue. Burden should only shift where there's direct evidence.

5. Dissent: MDD test. Instead of going through burdens and shifting, use the old test, prong 2. P wins if its more likely than not that discrim called the action. The ultimate burden of persuasion should remain w/ P at all times. The adoption of a rule that shifts the burden in limited circumstances will cause confusion in the courts.

- ***Moves from a justification from doing it, to actually proving you would have done the same thing. Ct has yet to consider this crucial distinction. Crucial b/c D can make any argument why they Could have turned her down from partner. Who cares. I want to know why they DID turn her down from partner. Ct says they have to do this but don't really enforce it. Ct could have done this if they had endorsed the district court's decision.

- Must convince jury they would have denied her anyway, not could have denied her anyway.

- Effects of Civil Rights Act of 1991:
  Motivating Factor Test:
  - Did an impermissible reason motivate the decision?
    - If yes - P gets costs
    - If it's but for, get full liability for t7 violation
  When do you tell a jury that they can find for P
  Must the impermissible reason be THE factor, or just A factor?
  Ask: What caused her not to get partnership? I dunno.
  Given all the factors, we can't really be sure.
  Do we think that sex more likely than not motivated the decision.

- A mixed motives case is really a Prong 2 case from MDD w/ direct ev.
- Mixed motives case is stronger than a falsity case b/c at least you have real reasons.
- The only thing that distinguishes prong 1 from prong 2 is the amount of direct ev.
- The more ev you have, the more likely it will be a mixed motive case.
- Why do we care? B/c of the jury instructions: more likely to find for P in
mixed motive case.

b. Causation and the Civil Rights Act of 1991  (p133)

c. McKennon v. Nashville Banner Publishing  (p137)

- **HELD:** After acquired ev of misconduct that would have resulted in discharge does not preclude employees from relief under the ADEA
- Is an employee barred from relief when, after their discharge, the employer discovers evidence of wrongdoing that, in any event, would have led to the employee's termination on lawful and legit grounds.
- It would not be in accord w/ T7 if after acquired ev of wrongdoing barred all relief.
- Proving the same decision could have been justified is not the same as proving the same decision would have been made.
- Ct rejected unclean hands defense where a private suit serves important public policy

**Remedy:**
- Neither reinstatement nor front pay is an appropriate remedy
- Must find proper measure of back pay
- Calculation of backpay should be from the date of the unlawful discharge to the date the new info was discovered.
- Concern that employers will “search” for a reason after the employee was fired.
- Employer must establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had know of it at the time of discharge.
- **Query:** W/out proof that the employer has discharged employees in the past for comparable misconduct, how could an employer establish that it would have terminated P for the subsequently discovered misconduct?

- **Possible criteria:**
  1. The misconduct was criminal in nature
  2. Employee's behavior compromised the integrity of the employer's business (divulgence of trade secrets, security, confidential info)
  3. Nature of the conduct was such that the adverse action appears reasonable and justified.
- **Note:** Misconduct occurring after the termination is irrelevant

d. Findings of Fact and Appellate Review

Rule 52(a) FRCP requires the district judge, in actions tried w/out a jury, to make separate findings of fact and conclusions of law in support of her judgment. Findings of fact shall not be set aside unless clearly erroneous.
In 1991, the Title 7 added compensatory and punitive damages to the remedies and allows a jury trial if damages are claimed by P. A verdict will not be set aside unless reasonable minds could not have reached the verdict rendered.

D's Case

- If P fails to show sufficient proof to establish a prima facie case, the appropriate defense response is a motion for summary judgment or, if at trial, for judgment as a matter of law.
- Where P is able to establish a PFC under MDD, D must come forward with admissible evidence showing a LNR for the employment decision. Although the employer does not have the burden of proving that its motivation was legit, emp will put on all available ev to show that it did not discriminate.

Affirmative defense: BFOQ

Race is not listed as a BFOQ
- How narrowly or broadly should we read the BFOQ?
- How necessary is the trait or is it just preferable?

a. General Rebuttal

b. Intl Union, et al. v. Johnson Controls (p147)
- HELD: The safety exception under the BFOQ defense to T7 is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job.
- Issue: May an employer exclude a fertile female employee from certain jobs b/c of its concern for the health of the fetus the woman might conceive?
- TC & AP
  - Granted a business necessity defense:
    1. Whether there is a substantial health risk to the fetus
    2. Whether the transmission of the hazard to the fetus occurs only through women
    3. Whether there is a less discriminatory alternative equally capable of preventing the health hazard to the fetus.
  - Balance interests of the employer, the employee and the unborn child in a manner consistent w/ T7.

REASONING:
- D explicitly discriminates against women on the basis of their sex.
- Just b/c the asserted reason was ostensibly benign does not mean it was not sex based discrimination.
- D classifies on the basis of gender and childbearing capacity rather than
fertility alone.

- Pregnancy Discrimination Act (PDA) adds to title 7 discrimination b/c of or on the basis of pregnancy, childbirth, or related medical conditions.
- Only possible defense is BFOQ

**BFOQ ANALYSIS**

An employer may discriminate on the basis of sex, religion, or national origin in those certain instances where those are a BFOQ reasonably necessary to the normal operation of business or enterprise.

- Must be an objective, verifiable requirement, and must concern job-related skills and aptitudes.
- Safety exception to the BFOQ: allows discrim on basis of sex only in narrow circumstances of safety concerns
- Danger to a woman herself does NOT justify discrimination
- In order to qualify as a BFOQ, a job qualification must relate to the “essence” or the “central mission of the employer’s business”
- Third party safety concerns are only proper when they go to the core of the employee’s job performance (ex: flight attendant)
- Sex or pregnancy must actually interfere w/ the employee's ability to perform the job
- Unless pregnant employees differ from others in their ability or inability to work they must be treated the same as other employees for all employment related purposes.

**HELD:** Even under BFOQ, an employer is prohibited from discriminating against a woman b/c of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job. Decisions about the welfare of future children must be left to the parents, NOT the employer who hired the parents.

*Is this a disparate impact or disparate treatment policy?*  
Depends what the policy is. Does it impact them or is it aimed at impacting them. Why does that matter?  
There are different defenses for each.  
-DI: Business necessity  
-DT: BFOQ

**TORT Liability**

- W/out negligence, can't prove tort liability. If employers are mandated by fed to allow women to work, then fed law pre-empts state tort law.

**CONCURRENCE:**

1. White & Kennedy
Scope of BFOQ should allow cases of sex specific fetal protection policies

Isn't so clear that compliance will preempt tort liability

Prior cases show that avoidance of substantial safety risks to third parties is inherently part of both an employee's ability to perform a job and an employer's "normal operation" of its business

Employer should be able to prohibit pregnant women from working in dangerous areas

c. Wilson v. Southwest Airlines (p162)

- HELD: Customer preference gives rise to a bona fide occupational qualification for the sex of an employee only where it is reasonably necessary for the essence or primary function of the business.

- Whether femininity (sex appeal) is a BFOQ for the jobs of flight attendant and ticket agent. Client Contact issues.

- D refused to hire males. Claimed sexy image and sex was a BFOQ

- Being female is NOT a qualification required to perform successfully the jobs of flight attendant and ticket agent.

- Sex-linked job functions are only tangential, SW ability to perform would not be jeopardized by hiring males.

- Failed to prove business necessity requirement: where an established customer preference for one sex is so strong that the business would be undermined if employees of the opposite sex were hired.

- Test if of business necessity not convenience

- Sex discrim would be permitted where sex was rationally related to an end which the employer has a right to achieve - production, profit, or business reputation.

- Potential loss of profits or loss of competitive advantage following a shift to non discrim hiring does not establish business necessity.

- BFOQ for sex must be denied where sex is merely useful for attracting customers of the opposite sex, but where hiring both sexes will not alter or undermine the essential function of the employer's business.

Uses 2 part test:

- Is it a requirement for one sex

- Is the requirement reasonably necessary to the essence of the business

d. Hooters (169)

- Argues that it would destroy the essence of their concept.

e. BFOQ exceptions:

1. Authenticity

   - Where it is necessary for the purpose of authenticity or
genuineness, sex will be a bfoq - actor or actress, Chinese people in a Chinese restaurant

2. Privacy
   - Customer desires related to personal privacy and modesty.
     (Female nurses, etc)

3. Safety
   - Safety of employee and those to be served (prison guard)

Sexual Harassment
   What constitutes actionable harassment and under what circumstances should an employer be held responsible for acts of harassment undertaken by either its supervisory or non-supervisory personnel?

- Why is sexual harassment sex discrimination under T7?
- Arguments why it isn't:
  1. Terms & conditions of employment weren't effected.
  2. Not motivated by gender - only harasses the pretty ones
  3. Women weren't fired b/c of it, convinced they had to act

- 2 types of SH:
  1. Hostile Work Environment
     - All other actionable harassment that doesn't fit qpq
     - Alteration of working conditions that fundamentally change the terms and conditions of the job.
     - Actions that cause you to quit, constructive discharge
  2. Quid Pro Quo
     - Requires that actual detrimental action be taken
     - Unfulfilled threats are just HWE.

a. Meritor Savings Bank v. Vinson (p175)
   - HELD: Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct has the purpose or effect of creating an intimidating, hostile, or offensive working environment.
   - Began as both QPQ and HWE
   - Claim: Her boss had required her to engage in sex to keep her job
   - It becomes a HWE case when ct declines to completely believe her.
   - This was the case that recognized HWE as a type of harassment

- D claims that nothing happened, but how is her dress remotely
relevant to nothing happening?

Notes:
   i.  Severe and Pervasive
   ii.  Hostile/Abusive Environment

b.  Burlington Industries v. Ellerth  (p187)
   
   c.  Faragher  (197)
       
       Discrimination by Unions
       -  What role may or must unions play in opposing employer
discrimination?

a.  Goodman v. Lukens Steel Company
   -  HELD: A union that intentionally avoids asserting discrimination claims
      is liable under T7.
   -  employers (P) sued employer and union for racial discrimination
   -  TC found union guilty of discrim practices, specifically in failing to
      challenge discriminatory discharges of probationary employees, failing
      and refusing to assert instances of racial discrim, and in tolerating and
      encouraging racial harassment.
   -  TC held: A union which intentionally avoids asserting discrimination
      claims, either so as not to antagonize the employer and thus improve its
      chances of success on other issues, or in deference to the perceived desires
      of its white membership, is liable under Title 7.
   -  Affirmed
   -  Even w/out intent, refusing to deal w/ race based claims can be a T7
      violation

Concurrence/Dissent
   -  Not enough support of intentional discrimination
   -  Union had other reasons for not processing grievances
   -  No proof that this had a disparate impact on blacks
   -  Unions provided a LNR for their actions
   -  Unions actions were of “business necessity”

Retaliation
   -  We have protection against formal and informal opposition. We
      would rather T7 be enforced informally in the workplace. We
      protect b/c we rather you ask and inquire instead of making a lot of
      baseless “formal” claims.
   -  No actions in terms, conditions, etc. for inquiring
a. Payne v. McLemore's Wholesale & Retail
   ▶ HELD: When an employee reasonably believes that discrimination exists, opposition to that discrimination is protected by federal statute even if the employee turns out to be mistaken as to the facts.
   ▶ D failed to rehire P b/c of his participation in a boycott, an activity protected by Title 7
   ▶ DC held P proved pfc of discrimination. D's reason that P wasn't rehired b/c he didn't re-apply was found to be merely contextual.
   ▶ Judgment affirmed.
   ▶ The boycott an picketing were protected activities under T7 - they were in opposition to an unlawful employment practice.
   ▶ P has initial burden of establishing a pfc:
     1. Statutorily protected expression (Participation in a boycott)
     2. Adverse employment action (failed to rehire)
     3. Causal link between the protected expression and the adverse action.
   Burden then shifts to D to prove LNR
   P must then show LNR is pre-textual
   ▶ Note: It is not required to prove the actual existence of unlawful employment practices; it is sufficient to establish a pfc if P has a Reasonable Belief that D had engaged in unlawful employment practices.
     ▶ If P had to prove unlawful practice, that would chill the legitimate assertion of employee rights. Designed to bring practices to attention of employer w/out filing formal grievance.
   ▶ Balancing Test to determine whether P's Opposition is Protected:
     Employee conduct must be reasonable in light of the circumstances, and the employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare.
     It is D's burden to show that the form of P's opposition was unprotected.
     ▶ Even if the conduct itself may be covered by T7, the method may not be
   Dissent:
     ▶ Standard should NOT be that of reasonable belief. This deprives employers of their property rights in violation of the due process clause.

C. Non Intentional Discrimination
   Disparate Impact exists in a situation where criteria are used that are not directly related to the job and those criteria have a disproportionate impact on historically unfavored groups.
   ▶ The Conceptual Framework

a. Griggs v. Duke Power
HELD: Practices, procedures, or tests neutral on their face, an even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior discriminatory employment practices.

Griggs created the DI theory of discrimination.

T7 proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.

Issue: Whether an employer is prohibited by T7 from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when:

1. Neither standard is shown to be significantly related to successful job performance.
2. Both requirements operate to disqualify blacks at a substantially higher rate than white applicants, and
3. The jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.

Should the employer have the right to decide how they hire people?

Suggests that you can't take the more intelligent employees by testing if there's a DI of the test.

What about qualifications that are preferred?

TC held: T7 was intended to be prospective only and the impact of prior inequities was beyond the scope of the act.

AP held: A subjective test of the employer's intent should govern and in this case there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements.

Objective of T7 was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.

Under T7, practices, procedures or tests neutral on their face, and even intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices.

Although Congress did not intend to guarantee a job to every minority regardless of qualifications, Congress did intend to remove artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

T7 also prohibits practices that are fair in form but discriminatory in operation.

Must examine business necessity - If an employment practices which has a DI cannot be shown to be related to job performance, it is prohibited.

In this case, evidence shows that white employees who did not take the test perform satisfactorily, therefore, no business necessity.

Tests must measure the person for the job, not the person in the abstract.

Intent doesn't matter; Good intent or the absence of discriminatory intent does not redeem employment procedures or testing mechanisms that
operate as barriers for minorities and are unrelated to measuring job capability

- Must examine consequences of employment practices, not just motivation.
- Employer has burden of showing that requirements have a relationship to the employment. IN effect, this burden is burden of persuasion, not just production.
- However, SC reversed burden shifting and held that burden of persuasion remains w/ P.

SECTION 105:

A. To establish unlawful employment practice based on DI:
   1. P shows that D uses a practice that causes a DI, AND D fails to demonstrate business necessity. OR
   2. P offers an alternative emp practice and D refuses to adopt it

B. -P must demonstrate that each challenged practices cause a DI
   -If D proves no DI, then D is not required to show business necessity

Wards Cove V. Antonio (231)
- Ct adopted 3 part test for DI, tried to replicate Burdine model - proof of DI only shifts the burden of production to business necessity and only shifts the burden of production, not persuasion.
- Claimed business necessity as an LNR
- Problem: Business necessity may look more like a BFOQ than an LNR
- 1991 Civil Rights Act overruled Wards Cove
- It reversed the notions of business necessity to the time before Wards Cove
- See Roadmap, p69.

b. Disparate Impact and the Civil Rights act of 1991

I. P's Case

a. Connecticut v. Teal
   - Issue: Whether an employer sued for violation of T7 may assert a “bottom line" theory of defense?
   - Held: The “bottom line" does not preclude P from establishing a pfc, nor does it provide D w/ a defense.
   - HELD: The fact that the "bottom line" result of a discriminatory promotional process is an appropriate racial balance is not a defense to a T7 violation.
   - Facts:
     -P employees of D
     -P's failed a test that was one step of the promotional process.
     -P claims this test had a DI on blacks and was not job related
-P applied an affirmative action program to possible promotion candidates
-In the end, a higher % of blacks were promoted than whites.
-D claims this "bottom line" is favorable to blacks and not discriminatory

- TC held for D, and found that although the exam showed a pfc of adverse impact on minorities, the end result reflected no such adverse impact.
- AP reversed: Where an identifiable pass/fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process, that barrier must be shown to be job related. (SC affirmed)
- T7 speaks in terms and limitations and classifications that would deprive any individual of employment opportunities.
- Focus is on the barriers to opportunity, not the end result.
- Must examine protection of the INDIVIDUAL employee, not just the minority class.
- D is trying to justify discriminatory treatment of P by their favorable treatment of other members of P's racial group.
- A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.

DISSENT:
- This decision blurs the distinction between disparate treatment and disparate impact
- DI of an employer's practices on a racial group violate T7
- In previous cases of DI, ct considers whether employer's practices have a DI on the GROUP, NOT just P.
- Disparate Treatment cases focus on the way in which an individual has been treated, BUT disparate Impact cases focus on a protected GROUP.
- DI cases consider whether the Total Selection Process have an adverse impact
- Here, the Total process has no adverse impact
- There can be no violation of T7 on the basis of DI in the absence of DI on a Group.

- 4/5's rule: A passing rate for members of a protected group of less than 80% of the passing rate for the highest scoring group generally will create a pfc of DI.

b. EEOC v. Joe's Stone Crab
- Hiring practices consisted of word of mouth
- No women applied b/c of reputation of not hiring women
- D claimed necessity of atmosphere
- Was this Disparate Treatment or Disparate Impact? EEOC asserts its both
- SC: Considers holding in Connecticut v. Teal
- Simply b/c there's a disparity between the labor pool and hires does not necessarily mean discrim has occurred.
- Past unlawful employment practices may effect new numbers. What effect should this have?
The Defenses

a. Fitzpatrick v. City of Atlanta
   - HELD: Employers may engage in practices that have a disparate impact on a protected minority if necessary to meet an important business goal and if there are not less discriminatory alternatives.
   - P has burden of providing a less discriminatory alternative, to overcome necessity defense.

b. Zamlen v. City of Cleveland (p275)
   - HELD: T7 forbids the use of employment tests that are discriminatory in effect unless the employer meets the burden of showing that any given requirement has a manifest relationship to the employment in question.

c. Notes:
   - Unintentional discrimination makes a difference when looking at the effects.
   - 3 Ways in using/validating Tests:
     1. Criterion-Related Validation
        - Testing for skills related to the job but don't track the job precisely
        - See Albermarle Paper v. Moody
          - Used the test on all entry level workers. Tried to validate it by explaining that those who did better on the test are better workers.
          - Problem: Hard to determine who the better workers are.
          - Extremely difficult to validate the test on your current workforce.
        - W/ criterion related tests: Want to test, hire, wait, and then determine who the better workers are and whether there is in fact a correlation w/ performance on test and work performance.
        - Query: Just b/c your best workers have certain characteristics, should you be able to test incoming applicants by those characteristics?
          - Not if you don't know why those w/ the characteristics are the best workers.
     - Content Validation
       - Directly measures abilities directly related to the job.
       - Do you have to test ALL of the necessary characteristics of the job?
     - Construct Validation
       - Bona Fide Seniority Systems
a. Intl Brotherhood of Teamsters v. US (p285)
   ▪ Bona Fide seniority systems qualify under T7
   ▪ Need a seniority system put in place not to discriminate
   ▪ P's black and Hispanic claim discrimination by union & employer, Pattern & Practice
   ▪ Line driving was better and more lucrative
   ▪ Distinguished between pre-act and post-act discrimination
   ▪ Pre-act is factored into the seniority system, post act is not
   ▪ Pure and simple formalism
   ▪ BF seniority systems are legit - we can live with the effects of past pre-act discrimination
   ▪ Post act has to be corrected.
   ▪ Try to put people in the place where they would have been if not for the discrimination

   Results:
   ▪ BF seniority systems are ok
   ▪ You can continue w/ system even if it continues to perpetuate pre-act discrimination as long as you fix post-act discrim
   ▪ Value in the company being able to keep their seniority system
   ▪ A seniority system put in place to discriminate is not ok, but what does that look like?
   ▪ When is a seniority system really a seniority system?

Note Case:
   CA Brewers v. Bryant
   ▪ Must work 45 weeks in one year to qualify as someone having seniority
   ▪ If you worked 44 weeks/year for 10 years, you had less seniority that a person who worked for 1 year for 45 weeks.
   ▪ No black had ever qualified as a permanent worker so as to gain seniority
   ▪ This system had been in place far before T7

D. Intentional Discrimination against a class: Pattern or Practice
   ▪ Doesn't really fit in as disparate treatment or disparate impact
   ▪ Class claim v. individual claim
   ▪ This is solely a class claim
   ▪ Description of type of evidence you need to prove
   ▪ Intentional discrimination against a class

   ▪ HELD: When gross statistical disparities exist between the composition of a work force and that of the general population, this alone may constitute prima facie proof of a pattern or practice of discrimination.
• Limits the labor market pool to the qualified potential workers in the geographic area.
• What numbers do we compare when examining discriminatory practices?
• DC compared number hired to number of black students
• CtApp compared percent of black teachers hired to percent of black teachers in all of St. Louis
• Ct failed to consider other factors that would effect the ratios (location, etc.)
• The labor pool should be the pool post T7

b. EEOC v. Olson's Dairy Queen (p310)
• HELD: The most direct route to proof of racial discrimination in hiring is proof of disparity between the percentage of blacks among those applying for a particular position and the percentage of blacks among those hired.

c. Ottaviani v. Univ of NY (p316)
• HELD: To support a disparate treatment claim, it must be established not only that discriminatory intent was present but that the unlawful discrimination was a regular procedure or policy.
• Problem: Faculty rank should not be considered b/c it should have been factored into other factors.

III. SPECIAL PROBLEMS

1. Religion and the Duty to Accommodate
   • Does the reasonable accommodation create an undue hardship for the employer?
     • P must prove a legitimate belief or tradition
     • P must prove belief is sincerely held
     • Is there a connection between religious and political beliefs? How do we distinguish? How do we protect one w/out protecting the other?

   a. Trans World Airlines v. Hardison (p330)
      • Note: Employer could not take this into consideration in hiring
      • Ct held that accommodations weren't reasonable b/c they resulted in undue hardship to employer.
      • SEE Fitzpatrick: Think of undue hardship in the context of reasonable, less discriminate alternative
      • Bright line rule: If it costs something, then undue hardship

   b. Tooley v. Martin-Marietta Corp. (p344)
      • Should an employer be able to refuse an accommodation based on
the fear that if everyone was accommodated in that way, they wouldn't be able to do business?
- Ct followed a qualitative analysis

c. Thornton v. Caldor (note case)
- SC: We can't stop w/ reasonable accommodation. We must ask what qualifies as a reasonable accommodation that's not an undue hardship.
- Does this blur the 2 prongs?

National Origin

a. Espinoza v. Farah Manufacturing
- national origin v. Alienage
- Can't discriminate on race but can consider alien status
- Dissent: If T7 is meant to protect people 'not from here' then it should protect against alien discrimination as well.

Race and Color

a. McDonald v. Santa Fe Trail Transportation (p358)
- Whites are covered under T7.
- Can't really prove thru patter or practice

Sex
- Sex Based:
  - Kanowitz (360)
    - No conventional wisdom about sex discrimination that's different than wisdom from other discrimination
    - Cts should have a freer hand to interpret b/c congress did a bad job explaining it.

a. Sex-Plus

i. Phillips v. Martin Marietta (p362)
- Treating Similarly situate people of different sexes is discrimination
- Is BFOQ a factor? See concurrence

ii. Willingham v. Macon Telegraph Publishing
- Male w/ long hair was denied employment
- Why don't we follow Phillips?
- In this case, there's no fundamental right at stake. Having long hair isn't as important as hiring women w/ kids
- Query: T7 doesn't distinguish between serious v. non serious rights
Arguably, Willingham is no longer good law.
Sex stereotyping is unacceptable.
Based on Price Waterhouse - if this was sex stereotyping, it ought not survive.

iii. Newport News Shipbuilding v. EEOC (P371)
- Denied ins coverage of pregnancy
- Then included coverage but only to female workers, not spouse of male workers.
- Claim: Females have ‘full' coverage while men have less than full coverage b/c of less coverage afforded to their spouse.
- Pregnancy discrimination that harms men.
- Held: Sex discrim b/c male employees aren't being treated as comprehensively as women employees.
- Dissent: nothing discriminatory about denying coverage to spouses. Should focus on coverage to employees.
- Why does Newport look like Phillips?

- Is there any possibility that we should examine NPN more broadly and decide it doesn't qualify as sex discrimination?
  - Argument: Reason why PDA exist, isn't to protect males' w/ female spouses, but rather to protect women employees
- If no DI, then probably on discrim
- What about maternity leave?
  - We can't discriminate on the basis of pregnancy, and we can't hurt female employees or male employees w/ female spouses, but does that mean we can't give extra benefits on the basis of pregnancy?

Pregnancy Discrimination:
Is this sex plus discrimination:
  Yes?: Sex + Babies
  No?: Sex + something ostensibly neutral and pregnancy isn't.
- To a degree, the reason why we know that sex plus is sex discrimination is the ability to take similarly situated people w/ different treatment.
- If this isn't possible, and all of the harm falls on one gender, is it even sex discrimination?

iv. Guerra
- Should any law that protects pregnancy be treated the same as any other T7 law?
- Employer may argue that he is discriminating by providing for leave, but only doing that b/c law forces him to do so.
v. FMLA  (p384)

b. Sexual Harassment
i. Oncale v. Sundowner Offshore Services  (p387)
   ▶ HELD: Workplace harassment can violate T7 even if the harasser and harassed employee are of the same sex.

c. Sex-Linked Factors

d. Sexual Preference Discrimination

i. DeSantis v. Pacific Telephone
   ▶ Homosexuals brought action under T7
   ▶ P claims that discrimination on the basis of sex includes sexual orientation.
   ▶ P claims Discrim against homosexuals disproportionately effects men and this DI brings it under protection of T7
   ▶ However, sexual orientation is not currently covered
   ▶ Ct refuses to bootstrap sexual orientation into T7 by means of DI argument
   ▶ If would achieve by judicial "construction" what Congress did not do and has consistently refused to do on many occasions

IV. REMEDIES

▶ Monetary Relief
   ▶ Injunctive Relief: Tell employer to stop
   ▶ Back Pay: Pay one would have received if one had not been subject of discrimination. Includes payment up until day of judgement.
   ▶ Front pay: Measure of money paid from date of judgment forward. In lieu of reinstatement
   ▶ Atty Fees: Right is so important that people will bring claims w/out having to worry about the fees. Provides incentives to atty to take marginal cases.

▶ Red Circling: Allow the employee to carry a pay rate until he attains a job in the progression w/ a higher wage rate. If he should have been allowed the job and promoted, but is required to start at entry level, cts can assign the higher pay rate until he works his way up.

a. Backpay
• Purpose: To induce employer to do right. If no back pay, employer doesn't have sufficient incentive to do right.
• To make P whole. Trying to remove the impact of the discrimination.
• Bad Faith: In and of itself is not sufficient to cut off back pay as a remedy.
• What should employer have to show to cut off the back pay remedy?
• Only in those situations where employer can show employee has engaged in bad behavior is denial of back pay appropriate.
• When can courts properly deny back pay:
  1. Good faith compliance w/ state law that results in the discrimination (ex: pregnancy benefits)
  2. When allowing back pay may conflict w/ national policy.

i. Albemarle Paper v. Moody  (539)
   • HELD: Back pay should be awarded in T7 actions even if the discrimination was neither deliberate nor in bad faith.

ii. Ford v. EEOC  (P549)
   • Issue: Whether an employer charged w/ discrimination in hiring can toll the continuing accrual of backpay liability simply by unconditionally offering the claimant the job previously denied, or whether the employer also must offer seniority retroactive to the date of the alleged discrimination.
   • Held: When a claimant rejects the offer of the job originally sought, he considers the ongoing injury to have been ended by availability of better opportunity elsewhere.
   • Held: The rejection of an employer's unconditional job offer ends the accrual of potential backpay liability.
   • However, we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination.

DISSENT:
• Holding is inconsistent w/ Albemarle's directive that, “given a finding of unlawful discrim, backpay should be denied only for reasons which would not
frustrate the central statutory purposes of eradicating discrimination.

- Employers can terminate backpay liability by making offers workers can't reasonably accept.
- Even if P's had accepted the offer, they would not have been made whole.
- Ct relies on situations not presented - takes what if case into consideration instead of ruling just on the situation at hand.

iii. Griffin v. Michigan Dept of Corrections (p569)

- What monetary compensation and compensatory promotions are required to place a female employee who has been discriminated against in the same position as if she had not been discriminated against.
- For advancements that come simply w/ longevity, cts have uniformly assumed that such advancement would occur, in the absence of specific disqualifying information.
- Ideally, ct could determine what would be the progression of an average worker w/ the basic qualifications possessed by the injured party. Burden of proof would be on D to prove that P would have performed more poorly than the average and burden of proof on P to show she would have performed better than that average.
- If promotions would not have accrued to an average member, the burden would be on P to demonstrate that but for discrimination, she would have attained additional advancement.

b. Frontpay

- Backpay that extends beyond the date of the ruling.
- Even more speculative than backpay
- Should only be used where reinstatement is not feasible or appropriate, since it does not put the victim in his rightful place.
- How long should it last? Almost impossible to determine
- One position: Last as long as necessary to get the person up to their earning capacity but for the discrimination.

c. Damages (p575)

- Before 1991, one could not recover $ for HWE
- Under 102: compensatory and punitive damages allowed
for unlawful and intentional discrimination. Non intentional doesn't trigger these - no need to punish.

- Problems: When courts can't distinguish between outright discrimination and disparate impact (Joe's Crab), it becomes a problem.

i. Right of Recovery

ii. Compensatory Damages

- don't include backpay, frontpay, or others in 106.g
- Mental distress: How much distress needed to trigger damages? How do we prove it?
- How do you compare Harris, which requires no psych review, w/ Patterson and other cases that suggest the need for severe effects of emotional damage to get recovery?
  - In Harris, don't need psycho damage for a hwe
  - don't need it to prove, but must prove both to get damages.

iii. Title 7 Damage Caps

- Cap on the sum, applies to the party, not the claim
- Cap is tied to the size of the employer: 50K to 300K
- Unlimited amounts fro backpay and frontpay
- If we start w/ the idea that T7 is a contract action in and of itself, argue that compensatory and punitive damages are extra add ons.
- Philosophical reasons to cap: At some pont you may say just leave. If worst thing is being fired, this is for emotional distress of being fired, which couldn't possibly be worth that much money over and above the other equitable relief.

iv. Punitive Damages

- Must be intentional, reckless disregard or malice
- Standard is NOT egregiousness, rather it is reckless disregard w/ malice
- What type of intentional discrimination is engaged in w/out malice or w/out reckless disregard?

A. Kolstad v. American Dental Association

- Punitive damages limited to cases in which the employer has engaged in intentional discrimination and has done so w/ malice or reckless indifference of the federally protected rights of P.
- Before the question of punitive damages can go to the jury, the evidence of D's culpability must exceed what is needed
to show intentional discrimination.

Would it be proper for a judge to allow a punitive damage instruction in a mixed motives pretext case if the judge believes that D has proved it would have made the decision either way?

d. Tax Consequences of Monetary Relief
   - Under the code, Congress has made clear that all awards are taxable to the extent that they don't include punitive damages or physical injury. Emotional distress is taxable.
   - Mental distress is largely speculative
   - Almost everything you can recover under T7 (except for puni) will be taxed.

2. Injunctive Relief

a. Franks v. Bowman Transportation
   - Issue: Whether identifiable applicants who were denied employment b/c of race after the effective date and in violation of T7 may be awarded seniority status retroactive to the dates of their employment applications?
   - D argued that seniority relief would harm "innocent" employees and frustrate the central "make whole" objective of T7
   - Where racial discrim is concerned, the DC has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past.
   - Denial of seniority relief is only permissible for reasons which would not frustrate the central statutory purpose of eradicating discrimination.
   - TC denied b/c it presupposes a vacancy, qualification, and performance by every member of the class - This is an improper reason for denying seniority relief. Retroactive seniority may only be denied when P's re-apply and D proves they wouldn't have been hired anyway.
   - See also: FORD v. EEOC, Substantially similar jobs

CONCURRENCE:
   - Instead of giving seniority, should give P's more money - comparable to benefit seniority

DISSENT:
   - Retroactive seniority at the expense of wholly innocent employees isn't equitable.
   - Benefit type seniority is less harmful to employer and innocent employees than competitive type seniority.
   - Cts should be able to weigh the competing equities and decide accordingly.
Congress gave the lower courts the power to weigh the competing equities and the higher courts should not take that away. When you remove the equitable analysis, you remove the DC’s ability to do equity. Employers will only stop discriminating if they're forced to give a remedy harmful to them.

Cts NOW treat retroactive seniority, like back pay, as a remedy to be denied only for the most compelling reasons. Retroactive seniority may not be denied merely b/c of an adverse impact on the interests of other employees.

b. Locke v. Kansas City Power (p610)
- What do you do when one discriminated against, but for the discrim, would be at level 3 now? Do you let him skip level 2?
- AP held that P must serve a probationary period before being promoted to level 3.
- If the probationary period is a uniform requirement impose on ALL employees for valid business purposes, the P should also be subject to it.
- Requirements: P must be able to perform the work, can only promote him if its reasonably likely that he would eventually attain this position anyway, ct can refuse promotion if there’s a business necessity to work at lower levels first.
- Back Pay Issue: Must determine back pay on whether or not, and when, the promotion would have been given.

Constructive Discharge:

c. Derr v. Gulf Oil Corp (p621)
- Constructively discharged - demoted her instead of promoting her
- Ct holds demotion wasn't enough - could sue for lack of promotion but not constructive discharge
- Back pay would end at day she quit if found not to be constructive discharge.
- A finding of constructive discharge depends upon whether a reasonable person would view the working conditions as intolerable, NOT upon the subjective view of the employee-claimant.
- To the extent that the employer denies a conscious design to force the employee to resign, we note that an employer's subjective intent is irrelevant; the employer must be held to have intended those consequences it could reasonably have foreseen.
- Must decide whether the manner of discrimination rendered the work conditions intolerable
- Standard:
  -Whether the employer, by its illegal discriminatory acts,
has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign.

- Problem: Is the court's objective test for constructive discharge fair to the victim of discrimination who is more emotionally vulnerable than the hypothetical reasonable person?
- Minority view:
  - Requires that the employer intended the result and the actions were an effort to force the P to quit, or at least it was reasonably foreseeable by the employer that would result.

V. THE EQUAL PAY ACT
- Based on the notion that people should be paid the same amount for the same amount of work w/out regard to their gender.
- Problem: Sex segregated lines of work
- Exceptions (Defenses to discrepancies):
  1. Merit system
  2. Seniority System
  3. Quantity or quality of work
  4. For any other factor other than sex (very vague)
- How does the content of the exception interact w/ equal work
- What qualifies as equal work?

a. Brennan v. Prince William Hospital (743)
  - Does the EPA require that nurses and aides pay be equalized.
  - Substantially similar duties.
  - Must increased the pay of those paid less, can't decrease the pay of those paid more.
  - Different duties v. extra duties
  - Qualitatively: does performance of extra duties make the job different?
  - Quantitatively: Should jobs w/ extra duties be viewed as more valuable to the employer?
  - How does the organization value the extra duties?
    - How are people paid who have those extra duties as their primary duties?

b. Kouba v. Allstate Ins. (p747)
  - Salary is based on ability, education, experience and prior salary
  - Problem: Females had lower prior salary b/c of past discrimination.
  - Basing their new wage on their old pay incorporated discrimination
  - Allstate may offer a defense only if it is decided that this is sex based (under EPA, not T7)
  - Note: Disparate impact does not factor in when dealing w/ EPA
  - Held: That D's use of prior salary is not expressly disallowed even though it may perpetuate past discrimination.
On remand, ct must consider WHY past salary was considered.
If lower court finds that its sex discrimination, they must examine d's reasoning. If they decide it is a factor other then sex, they don't need to look at justifications.

c. County of Washington v. Gunther (755)

What happens when jobs aren't substantially equal but payment for job are due to sex discrimination?
Does the fact that the jobs are different mean that T7 doesn't apply?
How much ev do we need to prove that jobs were structured in a way to intentionally pay women less?
Dissent: Point of Bennett is to take structure of EPA and move it into T7 so that only time you can bring a sex based differential case is when you have equal work. Can't have discrim w/out equal work

BENNETT AMENDMENT:
• May differentiate wages upon sex if such differentiation is authorized by the provisions of the EPA.

VI. AGE DISCRIMINATION

1. Overview (766)
ADEA: Age Discrimination in Employment Act
• Exclusive Federal statutory remedy for age discrimination in employment
• Defines employers as private business organizations that are engaged in commerce and have at least 20 employees.
• ADEA only prohibits discrimination and the basis of age and only as to persons 40 or older
• ADEA contains anti-discrimination provisions as well as prohibitions against retaliation and discriminatory advertising.
• Legislative history of ADEA indicates that Congress intended for liquidated damages to be punitive in nature.
• A violation is willful if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.
• Does the pretext analysis from T7 transfer to the ADEA?
• Should we look at Price Waterhouse and 107?
• Mixed Motives?

2. Substantive Provisions
a. Trans World Airlines v. Thurston (769)
• Issue: Does the ADEA require TWA to afford this same "privilege of employment" to those captains disqualified b/c
of their age?

- What constitutes a “willful” violation, which entitles P to “liquidate” or double damages?
- Held: May not deny opportunities b/c of age
- Held: TWA's violation was not willful and P is not entitled to liquidated damages.
- MDD test is inapplicable where P presents direct evidence of discrimination.
- Any seniority system that includes the challenged practice is NOT “bona fide” under the statute. A seniority system may not require or permit the involuntary retirement of a protected individual b/c of his age.
- Even if decision is rational, it may still be in violation of the ADEA.

- Procedural Requirements

- Defenses:
  1. BFOQ
     - Problem: Is there something a 59 year old can do that a 60 year old can't?
     - Ct suggests that BFOQ is different in this context than in sex discrimination.
     - The use of age is proxy for something else.
     - There's a characteristic that we have a right to require, but we can't really test, so we claim that age is well correlated to that factor so we use age as a proxy.
     - This loosening of a standard - cts seem to suggest that age discrimination is a bit more rational and we shouldn't view it in the same way as sex discrimination.
     - Problems:
       - How many characteristics are there that age is a GOOD proxy for?
       - How good does the proxy need to be?
       - Why not just force the employer to test specifically for that characteristic?
  2. BF Seniority System
  3. Good Cause

VII. DISABILITY BASED DISCRIMINATION
A. The ADA
1. Overview (793)
   - Prohibits discrimination in public services, public accommodations and telecommunications services, as well as employment.
   - Prohibits covered entities from:
     1. Discriminating against
     2. A disabled individual
     3. Who is otherwise qualified for the position
     4. B/c of that individual's disability
   - Adopts T7 burdens and standards of proof
   - Requires Reasonable Accommodation so long as it does not place an undue hardship on the employer.
   - Person is disabled if they have or are regarded as having a physical or mental impairment that substantially limits a major life activity.
   - A disability is:
     1. A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
     2. A record of such impairment; or
     3. Being regarded as having such impairment.
   - A disabled individual is “otherwise qualified” for the position in question if they:
     1. Can perform the essential job functions
     2. W/ or w/out the assistance of a reasonable accommodation
     3. And does not pose a direct threat to the health and safety of others in the workplace.
   - Is the style of discrimination we prohibit under the ADA substantially similar to types of discrim we prohibit under other employment statutes?

The Meaning of “Disability"
   a. Bragdon v. Abbott (795)
      - Must prove substantial life activity - having children?
      - Does this impair that activity?
      - Does it matter if it's a ‘choice’?
      - Why need to perform in the hospital? Not much ev to support, not any safer than in the office
        1. Whether this is true, that it is safer to perform in hospital? Whether those guidelines are sufficient.
        Ct suggested that its possible that the policies involved were not authoritative and should not have been used to prevent dentist refusal.

      2. Whether or not making P go to the hospital was merely a way
of not getting the cavity filled?
Ct gave it back to Ct App: Have you determined that the dentist was wrong?

Ct App affirmed decision.
If you are a direct threat, you don't qualify. When is the case we can prove that you are/are not a direct threat?

b. Notes:
- Physical or Mental Impairment
- Substantially Limits
- Mitigating Factors
- Major Life Activities

c. Toyota Motor Mfg v. Williams (supp 55)
d. US Airways v. Barnett (supp 66)
  - Does reasonable accommodation demand trump over a seniority system?
  - What role should the seniority system play in determining reasonable accommodation?
  - Seniority systems get deference - specifically mentioned in ADEA and T7, generally believe that any discriminatory effects don't trump seniority systems. However ADA is silent to seniority systems.
  - The court acts like there's a bona fide seniority system in the ADA and suggest we should protect these systems as strongly as we do under the ADEA and T7.
  - Conflict between interests of disabled worker who seeks reassignment into a vacant position as a reasonable accommodation and other employees who have right to bid for the job thru their seniority system.
  - Ct: Breaking seniority system is generally unreasonable on its face and SC won't trump seniority system rules.

DISSENT:
- This is a preference, not a reasonable accommodation.
- They're allowing for some forms of discrimination to occur.
- We seem to bend over backwards to tov the promotion system an awful lot of credit.
- See Cal v. Bryan

- What type of accommodation needs to be offered to be reasonable?
- It doesn't have to be the accommodation that P requests, so long as its reasonable
If the reason the employer chooses that accommodation to get the person to quit, that's unacceptable.

In Barnett, Ct decides that reasonable accommodation is a subjective issue.

Reasonable on its face, and then examine if there's an undue hardship

e. Chevron v. Echezabo?
   ▶ Direct harm to others defense was used by the employer to refuse a job to P when harm would go to P rather than anyone else.
   ▶ P had a kidney ailment that would get worse b/c of exposure to chemicals in use at D's facility.
   ▶ A reasonable accommodation would not have prevented.
   ▶ Ct: Direct threat defense worked in this situation. Wasn't merely the fact that P would be direct threat to others, but that P was a direct threat to himself was enough, and he was covered.
   ▶ ***See Johnson Controls: Different issues, but same idea of why in JC could one harm oneself, and as being P's decision, but here, we let employer decide. Can the 2 decisions be rectified?

The Meaning of “Qualified Individual” (811)

a. See Note Cases

b. Bragdon v. Abbott (814)

Dual Duty of Nondiscrimination

• Should the mixed motives notion from T7 apply to the ADA?
  • Mixed motives: Price Waterhouse or s107
  • Why should mixed motives apply or not apply?
  • Same analysis as ADEA
• Should an employer be able to choose a disabled employee over another disabled employee b/c it is less costly/expensive?
• Cts suggest no b/c such a selection suggests the possibility of an inference of disability discrimination.
• Compare to ADEA: same as selecting a 45 yr old instead of a 60 yr old.

a. Antidiscrimination Mandate (820)

b. Duty to Accommodate (824)

Defenses

a. Job relatedness and Business Necessity (830)
EEOC v. Exxon
- no one who had been treated for substance abuse could work in certain jobs
- Q: Does this particular rule based on a stereotype of recovering substance abusers?
- Arguably, yes: they're more likely to relapse and cause damage.

b. Bona Fide Insurance Plans (831)
- You can have an insurance plan that yields a differential impact on an employee that is allowable under the ADA
- If it yields substantially higher costs to someone with a disability, it could be a problem.
- Is the plan non-inclusive to deter disabled from working there?

Special Provisions Concerning Drug Testing and Other Medical Exams (834)
- May be appropriate if it is for the purpose of determining whether an employee can perform the functions of the job.
- Not allowed to screen out disabled applicants
- When testing appropriate: To determine what a reasonable accommodation for the person would be.
- Is this always appropriate? An employer might use the test to provide an unreasonable accommodation to make employee leave.

Procedural and Remedial Issues (837)

B. The Rehabilitation Act of 1973 (839)

VIII. AFFIRMATIVE ACTION
- Problem:
- Nepotism, cronyism in itself is not explicit discrimination. However, it may create an un-integrated workplace.
- Someone has been unable to garner the 'necessary' credentials to be qualified for a particular job.
  Ex: only hire people who went to school X, but school doesn't take blacks. How are those issues resolved?
1. AA doesn't mean looking for the person who was previously discriminated against, it means changing how you define who a qualified person is. Look at more broadly what constitutes qualifications. Any change that alters the status quo of how an employer runs his business w/ the goal of adding people w/ a particular characteristic to his workforce.

Expanding the pool does not necessarily mean lowering the quality of the person you select.

What is the legal basis for engaging in AA in discrimination law:

1. For every harm there is a remedy.
   Harm is past discrimination. If it's about integrating the workplace, and not just ending discrim, there should be a remedy.
   a. Remedy to the Victim
   b. Remedy the Employer discrimination

AA fits w/ the goals of T7, but when does it go too far?

Legal arguments against:
1. Legal remedies should be for the victims
   Any remedy not aimed at a specific victim is inappropriate.

2. T7 and the constitution state that race and gender should not be used in decision making and AA flies in the face of this.

1. Should a court be allowed to order an employer to do something that is not directly driven by damage to a specific plaintiff?

2. Should cts be allowed or expected to encourage or influence employer behavior by using AA and T7 remedies generally?

What power should cts have?

-Rank Order: city of Cleveland
-Pool from qualified individuals, pick on other characteristics

Depending on the style of hiring, AA could have very different effects:

1. Rank Order: AA may look like it re-orders the rank order. Which may appear to mean that AA re-orders the meritocracy.

2. Pooling: If AA has an impact on the pool itself, and allowed a different set of people in the final pool, it may not appear that AA
has that much of an effect at all. As long as everyone in the pool is well qualified, it's unclear that it really matters.

**** Can a court require that an employer create a pool of highly qualified workers, then require that employer to pick randomly from the pool as a way of achieving racial/gender/religious balance?

This has been advocated as a way of dealing with AA in law school (and other) admissions.

Racial balance may suggest the presence of discrimination.
When can courts require racial balance?
When can courts require AA under Title 7?
When can employers voluntarily enact AA plans under Title 7? Under the constitution?

a. Local 28 Sheet Metal Workers v. EEOC (845)

Court Ordered AA

- Whether the remedial provision of Title 7 entitles the court to order race-conscious relief that may benefit individuals who are not identified as victims of discrimination?
- Should we be able to require the union to change practices to become integrated? Can we do this under Title 7?

- Union's position is that it controlled labor in that area and that was its own exclusive domain. View the union like a family. In the process, union excluded most non-whites from most jobs. Union worked on NYC government projects. As a result, a government entity was using a union which refused to employ non-whites. Union had engaged in many discriminatory practices for a long time.
- TC: found that union would not integrate without encouragement and required AA. Why?
  1. Ct required AA as Union's part to require compliance in T7??
  2. To impose the racial balance the court believed could be obtained in the absence of discrimination.

- Ct ordered Union to end discriminatory practices and create a racial balance - bring in non-whites. Ct gave Union 7 years to do this.
- Plan required extensive recruitment of non-whites, supervision of apprenticeship program to ensure no discrim.

- This is Race Based: Supposed to attract black and Hispanic employees.
- Ct gave 4 more years to meet non-white membership goal and set in place specific criteria:
1. One non-white for every white
2. One apprentice for every 4 journeymen (so that the program would word)

- Union argued this was unfair and unlawful for TC to order this remedy under T7. Is this true?
- Section 706.g of T7 suggests that a ct CAN enforce/require AA, if it's the case that D is charged w/ an unlawful employment practice and is continued to engage in. Is this appropriate?
- Cts have the right to enjoin employers, and order certain remedies, but does this go too far?
- Holding the employer in contempt is clearly allowed.

Problem:
- 706.g clearly allows AA,
- 703.j: States that T7 does not require preferential treatment on the basis of race/gender etc.
- Is the ct requiring the employer do something that he is not required to do under T7?
- Can the ct go further and get into issues and areas where the union is not required to act?

Dissent:
- Wanted to limit the remedy to prudent victims of discrimination. T7 is remedial
- Look at victims, and engage in AA in respect to those individuals
- Ex: Require the union train those individuals and engage in AA w/ them, but only to those who were actually harmed

Majority:
- Ct can order remedies to deal w/ the problem at hand
- Problem is a recalcitrant union that refuses to end discrim unless someone monitors
- This plan solves that. This is an employer centered approach.
- Does T7 allow this approach? Should it?

- If T7 allows for an employer to be enjoined from doing something, it seems that one could focus on that entity and that entity could be the focus of the remedy instead of the particular victim

1. Who gets help from the cts AA remedy?
   - Victims don't get help.
   - Some who will be helped are not victims of the discrimination being rectified.
   - It's possible that those who were discriminated against have already found other jobs

2. Who gets harmed by the cts AA remedy?
   - Those who were hurt are not past victims.
Some who will e harmed are not necessarily those who benefitted from the discrimination
Look at seniority systems: We bump someone who has not been hurt above those
Ct says ok b/c dealing w/ recalcitrant union

- Is it ok to shift the remedy from the 1964 victims to the minority applicants in 86.
- Conversely, can we shift the ill gotten gains from the white union member in the past to those whites applying in 86?
- Law from this case:
- In this case, where you have a recalcitrant union, you can focus on the union, and put into place a AA plan that allows some harm to come to current applicants and some benefits to go to those who were not actual victims.

b. Weber

- Employer had racially unbalanced workforce.
- Stemmed from rule requiring experience, but blacks can't get experience b/c of union.
- Employer made plan to train employees in house, (those who didn't have experience)
- Way of integrating workers at the plant, b/c if left to the union, it won't happen.
- This plan was voluntary in that no court had ordered it.
- Ct suggests ths
  1. No equal protection issue b/c there was no state action
  2. It does not relate to what a judge can order under T7 (What are judges allowed to do)
  3. The only question is voluntary AA, and whether T7 forbids this. (what is prohibited)

Does this stmt bar any race based AA? 
Race is specifically being used in a particular plan.
Half of spots in training program must be reserved for blacks until workforce is racially balanced.

- How do you get around this: Can't treat whites and blacks differently.
- T7's goal is to integrate the work place. So if it has the correct policy aim is it ok?
- Ct just says: You can't be serious: integration is good.

How far does Weber go? There's no line. Does Weber remain good law?

- If our current court looked at this and said absolutely no discrimination, Weber would be wrong.
- A voluntary AA program that uses race is just as suspect that uses race to
aid non minorities under the statute.

Ct has yet to overrule Weber. Would the ct conclude that Weber was wrong? And that AA breaches T7?

Dissent:

- You can't discriminate for or against anyone even to fix past discrimination in hiring.
- You may be able to give money to people, but no more.
- What does employer have to do to engage in voluntary AA (according to dissent)?

Does employer have to admit liability?
According to dissent, yes. and then it still can't engage in voluntary AA program.

What would the majority have decided, had the plan yielded layoffs or displacement?
Weber didn't have these effects.

c. City of Richmond v. Croson (890)

- Concerns 14th amendment; Limitations on voluntary AA programs
- B/c of 14th equal protection to all and the use of race based measures to ameliorate the effects of past discrimination. Same as non discrimination clause of T7
- Problem: B/c those being helped are not those who were harmed in the past
- Justification for the plan must be that you're trying to fix a certain type of discrimination.
- Ct required specific discrimination in the construction industry in Richmond and whether the plan was necessary to remedy THAT PARTICULAR discrimination.
- Ct didn't have to admit that it discriminated
- Ct required specific ev of particular victims who would testify that they were discriminated against OR people who would testify that they discriminated, or else program is inappropriate

Issues in respect to state action

- How do we translate this problem in to the employment context?
- How do we uses this style of decision making in Weber?
- Would we say Weber had not demonstrated specific discrimination?
- Societal discrimination? Which can not be fixed by this program?
- Or is the union discrim the specific discrim we're trying to fix?

Concern:
Looking at Weber: What is the appropriate solution?
Possible solution: Could the employer have merely eliminated its requirement of prior experience?
If workers had challenged that rule, presumably under disparate impact, and whether the rule was reasonably necessary to function of employer's business?
Ct could have agreed experience was necessary and then discrim would have been perpetuated. Only way to fix it would be then to sue Union for discriminatory practices.
Would have taken more time. And may very well have had limited results unless Ct require the Union engage in AA. Instead of that, employer engages in voluntary AA that has a faster effect on integrating the work place.

Which solution is preferable?

- Under general principles of T7, employer's voluntary AA would have been preferable route.
- Ct w/ a Crosen mentality would have taken position that even though preferable, its still unlawful
- That's how Crosen may impact AA under T7 even though Crosen deals w/ 14th and state action.
- Crosen must apply to Gov employers who want to engage in voluntary AA

So where are we in AA?

- Any attempt to integrate the work force or an attempt to target those w/ a specific characteristic as workers in the workforce.
- Actual use of race in the program. Are these programs allowable?
- Instinctively yes, b/c meet T7's remedial purposes, but
  1. Worried about those that were harmed
  2. Worried about race based b/c of T7