ER?
  a) “Person” in an industry “affecting commerce.”
  b) Must have requisite # EEs
     i) Title VII: 15
     ii) ADA: 15
     iii) ADEA: 20
  c) For requisite period of time (20+ weeks within 12 months)

Is this an EE?
  d) Can’t be a student/university relationship

Violation of Title VII?

<table>
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<tr>
<th>Prohibited by Title VII</th>
<th>Outside Scope of Title VII</th>
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<tr>
<td>Intentional discrimination</td>
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<td>Effects, from which intent is presumed</td>
<td>Effects in spite of (See Feeney)</td>
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<td>Acting based on stereotypes</td>
<td>Workforce mirrors the population.</td>
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<tr>
<td>How to reconcile</td>
<td>Don’t have to change society</td>
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How do we handle things that could be seen as in the middle?

The 7th Cir draws the line closer to having less prohibited by Title VII, other circuits go the other way.

Disparate Treatment?
  a) Must be prejudice in action to be disparate treatment. Slack (Title VII); Hazen Paper Co. (ADEA).
     i) “[A] disparate treatment claim cannot succeed unless EE’s protected trait actually played a role in that process and had a determinative influence on the outcome.” Hazen Paper Co.
  b) P carries initial burden of pf for Title VII, ADEA, ADA
     i) P belonged to protected class
        (1) race
        (2) sex
           (a) White males are also protected McDonald (1976). Must show “special circumstances.”
           (b) Joe’s Stone Crab
EMPLOYMENT DISCRIMINATION, Professor Rosenbury Spring, 2004

(3) at least 40yo
   (a) Only need be “substantially younger.”
(4) “qualified individual with a disability”

ii) P applied for job
iii) for which D sought applicants.
iv) P was qualified for job
v) P was nonetheless rejected
vi) D continued to seek applicants w/P’s qualifications
      (1) If D hired someone else, P shows hiree was not from same protected class.
          (a) 7 of 8 courts say not required.

c) Burden of production shifts to D
   i) Legitimate non-discriminatory reason. Hazen.
      (1) Failure means P wins
      (2) Key argument: P was not qualified.
      (3) Sporadic and unsupported arguments may indicate pretext. Sears Roebuck (4th Cir. 2001).
   d) If D satisfies #2, burden of production returns to P to show:
      i) D’s “legitimate” reason is pretext. Ways to show:
         (1) P was in fact better qualified than person chosen for position. Patterson.
         (2) presenting evidence of D’s past treatment of P, including instances of racial harassment which she alleges and D’s failure to train her for an accounting position. Patterson.
         (3) argue that her termination does not accord with RIF criteria supposedly employed. Baeird
         (4) P can adduce evidence that her evaluation under D’s RIP criteria was deliberately falsified or manipulated so as to effect her termination or otherwise adversely alter her employment status. Baeird.
         (5) P can adduce evidence that RIF is more generally pretextual. Baeird.
      ii) Or reason is in addition to discriminatory reason (mixed motive.
      iii) Hicks (mostly ignored): Falsity not enough. “Pretext plus” req’t.
      iv) Reeves: You have to show discriminatory reason. “A P’s pf case, combined with sufficient evidence to find that the ER’s asserted justification is false, may permit the trier of fact to conclude that the ER unlawfully discriminated.” Reeves.
Mixed Motive?

a) Use in “unified theory.”
   i) Don’t offer if case is (1) strong, or (2) polar.

b) P uses MM when argument is weak.

c) Direct evidence not required. Costa.
   i) If reasonable jury could determine there is MM, judge has to put it into the instructions.

d) P alleges:
   i) Notwithstanding illegal animus, also harbored legitimate reasons for its treatment of P.

e) Civil Rights Act of 1991: ct may grant declaratory relief, injunctive relief, and attorney’s fees and costs demonstrated to be directly attributable to the pursuit of the claim, but shall not award damages or issue an order requiring reinstatement, hiring, promotion, or payment of back wages. 42 U.S.C.A. 2000e-5(g)(2)(B).

f) Limited affirmative defense – D avoid liability by proving by a preponderance of the evidence that it would have made the same decision even had it not taken the P’s [protected class] into account.” Price Waterhouse (1989).
   i) Civil Rights Act of 1991: “ER has a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a P. The available remedies include only declaratory relief, certain types of injunctive relief, and attorney’s fees and costs. 42 U.S.C. §2000e-5(g)(2)(B). In order to avail itself of the affirmative defense, the ER must “demonstrat[e] that [it] would have taken the same action in the absence of the impermissible motivating factor.”

<table>
<thead>
<tr>
<th>Individual Disparate Treatment</th>
<th>Systemic Disparate Treatment</th>
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<td>Test for circumstantial evidence</td>
<td>Explicit policy</td>
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<tr>
<td>PF case</td>
<td>Pattern and practice</td>
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<tr>
<td>i) in statutorily protected class</td>
<td>evidence of statistical imbalance unless they can be rebutted, + more?</td>
</tr>
<tr>
<td>ii) applied for/qualified for job</td>
<td>(problems arise when you rely on stats alone).</td>
</tr>
<tr>
<td>iii) position remained open</td>
<td>Employer rebuts by:</td>
</tr>
<tr>
<td>iv) non-protected class member hired.</td>
<td>i) challenge statistics</td>
</tr>
<tr>
<td>ER rebuts w/evidence they were not discriminating.</td>
<td>ii) lack of interest</td>
</tr>
<tr>
<td>i) It was part of AfAc</td>
<td>(Sears)</td>
</tr>
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<td></td>
<td>iii) In spite of, not because of (Feeney)</td>
</tr>
<tr>
<td></td>
<td>Affirmative defense: BFOQ</td>
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</tbody>
</table>
plan!
i) P has to show program does not meet *Weber* test.

<table>
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<tr>
<th>EE shows (2) = pretext and/or disc – motiv factor.</th>
</tr>
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<tbody>
<tr>
<td>P <em>always</em> bears burden of proof. Aff. Def. even w/o discrimination, they would have made the same decision.</td>
</tr>
<tr>
<td><em>Johnson Controls</em>. AfAc stays in individual disp treatment framework even though it seems like a policy.</td>
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**“Because of Sex”**

a) Sex as tool; gender stereotyping

b) “Sex” harassment

i) Actionable

(1) Unwelcome [at work. *Burns*].

(2) Sexual

(3) Gender derogatory

(4) Touching.

(5) NOT b/c sexual orientation.

ii) Sexually Harassing Conduct

(1) Sexual OR derogatory towards gender (i.e. “sex”)?

(2) Demands? If no, not sexual harassment.

   (a) Action based on compliance = QPQ

   (b) No action = HWE

(3) * Sex-related conduct can be voluntary and not okay.

iii) Severe or pervasive harassment

(1) Frequency of discriminatory conduct

(2) Severity

(3) Physically threatening/humiliating offensive.

   (a) Does not have to be psychologically damaging. *Harris*.

   (b) Reasonable person standard. *Harris*.

iv) ER is liable for supervisor harassment under vicarious liability.

(1) Affirmative Defense. *Ellerth*:
(a) ER exercised reasonable care to promptly correct/prevent any sexually harassing behavior, and
(b) P unreasonably failed to use [i] or avoid harm otherwise.

(i) Not available if supervisor’s harassment culminated in tangible employment action.

c) PDA of 1978 amended Title VII to include a new §701(k).

i) Must treat pregnant EE as similarly situated non-preg EE ability/inability to work.
   (1) Does not go on need, just formal equality.

ii) Discriminatory to treat pregnancy -related conditions less favorably than other medical conditions.

iii) PDA does not require spouse benefits. But, if spouses get benefits, they have to be equal. *Newport News Shipbuilding & Dry Dock*.

iv) To have substantive requirement analysis, comparator is:
   (1) various levels of disabilities, or
   (2) “normal” EE: male EE w/a family. *CalFed*.

v) PDA requires ER to ignore EE’s pregnancy, but not her absence from work, unless ER overlooked the comparable absences of non-pregnant EEs. *Troupe*.

vi) “ER cannot take anticipatory action unless it has a good faith basis, supported by sufficiently strong evidence, that the normal inconveniences of an EE’s pregnancy will require special treatment.” *Maldanado v. U.S. Bank*.

vii) “[I]t is a violation of the PDA for an ER to deny a pregnant EE the benefits commonly afforded temporarily disabled workers in similar positions or to discharge a pregnant EE for using those benefits.” *Byrd v. Lakeshore Hospital*.

viii) Congress indeed the PDA to be a “floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise.” *CalFed*.

ix) Only when there are complications or conditions arising out of pregnancy may pregnancy be covered under ADA.

x) FMLA. See s.73-74.

□ **Because of Religion?**

a) Failure to reasonably accommodate religious practices and observances.

i) 42 U.S.C. §2000e(j): “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an ER demonstrates that he is unable to reasonably accommodate to an EE’s or prospective EE’s
religious observance for practice without undue hardship on the conduct of the ER’s business.”

ii) 42 U.S.C. §2000e(m): “An unlawful employment practice is established when the complaining party demonstrates that … religion … was a motivating factor for any employment practice, even though other factors also motivated the practice.”

b) PF case:
   i) Member of protected class
   ii) Qualified of the job in question
   iii) Discharged, and
   iv) The position remained open after his discharge to similarly qualified candidates.
      (1) DC also requires new element: (v.) ER had knowledge of EE’s religious beliefs.
      (2) Shapolia: P must show pf case with: (1) he was subjected to some adverse employment action; (2) that, at the time the employment action was taken, the EE’s job performance was satisfactory; and (3) some additional evidence to support the inference that the employment actions were taken because of a discriminatory motive based upon EE’s failure to hold or follow his or her ER’s religious beliefs.

c) Religious accommodation
   i) EE bona fide religious beliefs conflict with ER’s requirement
   ii) EE informed ER of the belief
   iii) EE disciplined for failure to comply with requirement. Bhatia.

d) Reasonable Accommodation
   i) “Reasonable” does not mean one EE holding other EEs’ beliefs hostage. It equals a balance of some sort. Wilson.
   ii) When ER offers a reasonable accommodation, ER does not have to show that EE’s proposed accommodations would cause an undue hardship. Wilson.
   iii) “Undue burden” is read widely.
      (1) comes in only if ER offered no reasonable accommodation.
      (2) Avoiding other EEs being upset is enough to say undue burden. Wilson.

e) Religious exemption
   i) Is ER “religious” group?
   ii) If ‘yes,’ is the “discrimination” it practices religious in nature?
iii) Ministerial exception applies when “investigating P’s claims would necessarily intrude into Ds’ governance in a manner that would be inherently coercive.” *Combs*.

(1) “The message and the messenger are too closely related.” LAR

(2) Posturing: It matters who brings the case (religious entity, or EE).

□ **Intersectionality**

f) Discrimination can occur at the intersection of two or more traditional protected characteristics.

g) Courts tend to focus separately on the issues of race discrimination and gender discrimination. A few decisions are sympathetic to intersectionality claims.

h) *Degraffenreid*: fear of “falling through the commas.”

i) *Jeffers*

j) ER who doesn’t discriminate against women or Asians as a class, but gives preference to white women over Asian women engages in race discrimination. *Lam.*

□ **Grooming and Dress Codes**

a) Gender-specific differences in dress and grooming codes does not inherently violate Title VII.

i) But provocative clothing requirement may be sexual harassment.

b) *Willingham*: “distinctions in employment practices between men and women on the basis of something other than immutable or protected characteristics do not inhibit employment opportunity in violation of Sec. 703(a). Congress sought only to give all persons equal access to the job market, not to limit an employer’s right to exercise his informed judgment as to how best to run his shop.”

c) Title VII says ER may not control how EE performs in his/her sex, race, etc. *Bryant.*

d) Analysis:

i) What type of employment is this?

ii) Is there a BFOQ (affirmative defense)

(1) If the position is one that requires the use of a gas mask, and strong evidence indicates that persons with beards have difficulty getting an airtight seal on the masks, this will be sufficient to sustain the no-beard polity. *Fitzpatrick v. Atlanta* (11th Cir. 1993).

iii) Under *PW* would any of this be violation of Title VII?

(1) What about if this is a law firm? Violation of Title VII?

iv) Is gender motivating factor?
Sex-based grooming and dress codes do not violate Title VII either because they are de minimis infringements or because they do not discriminate at all. *Craft*. BUT *Craft* was well before *PW* → don’t follow *Craft*.

(2) Normally, when you have gender-specific policy, business necessity does not come in. *BFOQ* comes in here. But, “no beard” is not seen as a gendered policy because it is de minimus.

(3) General physical requirements will most certainly be proven to have an adverse impact on women and perhaps on some ethnic groups. Rarely can such requirements be proved to be related to job performance. *Dothard*.

v) ERs are given a lot of latitude in terms of what limitations they can enforce.

vi) Customer preference doesn’t matter as long as they could perform the job. *Bradley*. Business necessity is not established merely because customers may prefer clean shaven EEs. *Bradley v. Pizzaco of Nebraska* (8th Cir. 1993).

“Because of” National Origin?

a) “the country from which you or your forebears came.” Roosevelt, HR Congressman.

i) OR the perception of where someone came from.

b) Use *McDonnel Douglass*.

i) Race might be easier to prove (also, more precedence)

ii) Unlike race, national original can be a BFOQ.

iii) Present sufficient evidence for trier of fact to conclude that P was the victim of illegal discrimination; don’t have to prove that hiring supervisor knew P’s national origin. *Sears Roebuck* (4th Cir. 2001).


c) Prohibition of discrimination based on ancestry, not discrimination based on alienage. *Espinoza*.

d) DI and DT are applicable. *Espinoza*.

e) Aliens are protected under Title VII. *Espinoza*.

i) Unclear whether includes aliens who can’t legally work in United States.

f) Foreign accent discrimination is national origin discrimination. *Fragante*.

g) ER rules requiring ability to speak English general withstand trial.

i) *Garcia Gloor*: upheld rule requiring bilingual sales personnel to speak only English on the job.
ii) *Spun Steak Co:* upheld ER requirement that EE speak only English at work. Rejected claims of disparate impact and HWE.

**BFOQ?**

a) Applies for disparate treatment case.

b) D has burden of establishing the elements

c) Narrowly and strictly construed

   i) All/substantially all members of excluded class can’t safely /effectively perform job duties which are essential or “reasonably necessary” for the safe and effective operation of the business.

   ii) All/substantially all of excluded class can’t safely and effectively perform the essential or “reasonably necessary” for the safe and effective operation of the business:

      (1) Authenticity: Modeling, ethnic restaurant

      (2) “Sex” sold in a strip club-like establishment.

      (3) Facial discrimination is okay when gender interferes with the actual doing of the job. *Johnson Controls.*

      (4) Not applicable:

         (a) Periphery tasks

         (b) customer or co-worker preference

         (c) Concern for welfare of EE when 3d party not involved. *Dothard* (S.Ct. 1977).

         (d) Societal goals. *Johnson Controls.*


   (1) Can’t be based on stereotypical assumptions.

   (2) If ER can prove that some members of the excluded class present a substantial risk to ER or 3d party AND it’s impractical to reduce the risk through evaluation of fitness, BFOQ allowed even though some qualified members of the class will be excluded. *Criswell.*

iv) Must be “reasonably necessary” to the daily operation of business. Can’t be reasonable alternative to ER’s exclusion of entire class.

d) **Title VII**

   i) Race/color is not allowed

   ii) Distinctions based on pregnancy and childbirth (within “sex”) are permissible BFOQ – safety prong (rarely used): sex/preg must actually interfere.

      (1) Can’t be protecting the fetus. *Johnson Controls.*
**Affirmative Action?**

a) Disparate treatment

b) *Weber* three-part test for okay-ness (from *Johnsohn*):

i) Intended to resolve manifest imbalance.

ii) Can’t be absolute bar to non-minorities and does not require discharge of non-minority. (does not trammel their rights).

iii) Must be temporary.

c) Post-*Johnson*, P’s burden is to show that af.ac. plan is invalid.

d) *Reynolds* found compelling 2-fold need of consideration of race: need for Hispanic supervisors to “sensitize” non-Hispanic police officers and the need for “ambassadors” to the Hispanic community.

e) *Maitland*: b/c not clear that there was ever a violation of Title VII as to the women who benefited by a settlement after such a claim, the male P’s suit in response to the settlement could go forward.

f) Doesn’t matter what type of company or whether-or-not benign discrimination. *Adarand*. Af.ac. program must:

i) Remedy past discrimination

ii) Narrowly (“properly”) tailored

g) *See s.28-29* (more af.ac. cases).

**Systemic Disparate Treatment**

a) P establishes D’s illegal motivation through statistical showing: illegal motive can be proved through employment patterns indicating systemic discrimination. *Int’l Broth. Of Teamsters* (1977).

i) P has initial burden to demonstrate through statistics that there is a pattern of under representation of a protected class in ER’s workforce that can’t be explained as chance.

ii) D burden to prove that legitimate reasons prompted rejection of P:

   (1) show P’s statistics were inaccurate, unreliable, or insignificant, or

   (2) present non-discriminatory explanation

b) Mathematical doctrines of statistical analysis may be used. *Hazelwood*.

i) “Snapshot” v. “applicant flow”

**Disparate Impact?**

a) Applicability

i) Applies under Title VII of the Civil Rights Act of 1964, 42 USCS §§2000e to 2000e-17 (2003), and ADA, 42 USCS §§12111 et seq (2003).
ii) May operate under ADEA, 29 USCS §631-634 (2003), but neither Congress nor the S.Ct. has spoken definitively on this point.

iii) S. Ct. held that DI is NOT available under §1981 or §1983.

b) Disparate-impact theory does not require proof of discriminatory motive. *Hazen Paper Co.*

i) You need to show effect. You can infer the intent from the effect. *Teamsters.*

   (1) D can rebut intent based on effect. Intent does not *always* flow from effect. *Feeney.*

c) P pf case

i) Identify specific practice and present proof of the challenged practice’s impact on P’s class. Types of data:


   (a) Doesn’t establish adverse impact of the selection system ER uses.

   (2) Potential applicant “pool.” *Griggs; Dothard.*

   (a) Commonly used to prove impact of non-testing devices such as educational credentials or physical requirements.

   (3) Actual “flow” data. *Hazelwood (?)*.  

   (a) Relevant population against which to compare hiring was compared to actual applicants available.”

ii) Disparate impact

   (1) we don’t know exactly what this requires

iii) Specific employment practice

   (1) bottom line exception

iv) causal link requirement

d) Defenses:

i) D’s use does not cause impact. §703(k)(1)(B)(ii) → affirmative defense (has burden of persuasion).

ii) Challenge factual basis on which P’s case is predicated

   (1) Typically, where P demonstrates a systemic practice-based case using statistics, D must use statistical studies to counter P’s statistical studies.

iii) Challenge inference of discriminatory intent the statistics raise.

   (1) D can try to rebut by offering nondiscriminatory reasons that explain the statistical picture and rebut the sowing of intent to discriminate on age grounds. *Feeney.*
(2) Lack of interest. *Sears, Roebuck & Co.*

iv) D prove business necessary (see *infra* at note 12)

e) P show alternatives. §703(k)(1)(A)

i) If P has alternative that serves business needs equally well but without the discriminatory effect of the challenged device, establishes challenged devise isn’t necessary, depriving D of “business necessity.” *Dothard.*

ii) D must refuse those alternatives.

iii) *1991 Civil Rights Act:* makes it an unlawful employment practice where the complaining party demonstrates that an identified practice produces an adverse impact on a protected class and that there is an alternative employment practice which produces a less discriminatory impact that the respondent has refused to adopt. 42 U.S.C.A. 2000e-2(k). …it appears that an ER’s prospective refusal to adopt known, lesser discriminatory alternatives constitutes a distinct form of impact liability without regard to D’s motivation or “business necessity.”

## Business Necessity?

a) May only apply for facially neutral application. *Johnson Controls;* only disparate impact.


i) Try to prove D did not cause the impact. §703(k)(1)(B)(ii).

ii) Discriminatory cut-off score is the minimum qualification necessary for successful performance of the job. *Lanning.*

   (1) *Lanning* (not all courts agree w/ *Lanning* analysis).

   (2) Under Civil Rights Act of 1991, discriminatory cutoff score on an entry level employment examination must be shown to measure the minimum qualifications necessary for successful performance of the job in question in order to survive a disparate impact challenge.

iii) Test must be actually related to the job. *Griggs.*

c) *Civil Rights Act of 1991:*

i) P carries initial burden of establishing that identified employment practice in fact operates to exclude persons in a protected class. If P succeeds in proving impact, burden shifts to D to prove that the “challenged practice is job related and consistent with business necessity.” 42 U.S.C.A. 2000e-2(k)(1)(A)(i).

ii) “business necessity” is the standard pre-*Wards Cove.*
iii) Apparently D’s burden to prove “job relatedness” as well as that the device is important to (or essential for) safe and efficient business operations. ➔ Heavy, P-friendly burden.
Violation of ADEA?

a) Only rational basis review (not strict scrutiny).

b) Is EE 40yo or older.

c) Maximum hiring age is proscribed age discrimination when applied to a person over the age of 40, unless the younger age is justified as a BFOQ or is authorized by a statutory exclusion.

d) Mandatory retirement age is a prima facie violation

e) Cline: preferential treatment for older workers.

i) “This more expansive possible understanding does not, however, square with the natural reading of the whole provision prohibiting discrimination, and in fact Congress’s interpretative clues speak almost unanimously to an understanding of discrimination as directed against workers who are older than the ones getting treated better.”

ii) “We see the text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes, as showing that the statute does not mean to stop an ER from favoring an older EE over a younger one.”


g) Direct Evidence case:

i) P establishes D’s motivation by direct evidence

ii) Burden shifts to D to prove that the same decision would have been made for legit reason.

   (1) “Descriptive” references v. “valuative.”

h) Circumstantial Case:

i) P create pf case

   (1) proof of unexplained dt of persons of substantially different ages.

      (a) Can apply even when the “significantly younger” person is within the same class.

ii) D has burden of presenting “legitimate, non-discriminatory reason” for its action.

   (1) Failure results in judgment for P.

   (2) Denial of age motivation isn’t enough.

   (3) It is okay “to take nay action otherwise prohibited … where the differentiation is based on reasonable factors other than age.” §4(f)(1), 29 U.S.C.S. §623(f)(1)(2003).

      (a) “[T]he ADEA does not prohibit ERs from taking actions based on non-age factors, except when those non-age factors are so related to age that they are mere proxies. This reading of the text is also
powerfully supported by the legislative history…” *Smith* (5th Cir. 2003).

(b) RFOA is interpreted as meaning ADEA requires intent. Unlike Title VII, which is remedial, ADEA is not. *Smith*.

(4) Exceptions

(a) Police, firefighters

(b) Bona fide executives

(c) Bona fide EE benefit plan

   (i) Congress intended the exemption from its prohibition of age discrimination to be limited to discrimination in “fringe benefits,” rather than base compensation or other privileges of employment.

(d) Early retirement incentive plan

(5) Defense (Parallel to Title VII)

(a) BFOQ

(b) Seniority system

iii) If D fulfills, burden shifts back to P to present additional evidence of age motivation and to meet ultimate burden of convincing the fact finder that ER’s decision was motivated by age.

(1) Statistics may be presented, but must show “stark pattern.”
**ADA Disparate Treatment**

a) P’s burden:
   
i) P is individual w/disability under ADA
      
      (1) “Qualified individual with a disability” (emphasis added) → P must be an individual with disability who can perform essential job functions w/or w/o reasonable accommodation.

      (a) Is there a corrective measure available?

      (i) If yes, not “disabled” under ADA. *Sutton.*

      (b) AIDS is a disability under ADA and Rehabilitation Act. *Arline.*

   ii) P’s burden to prove disability:
      
      (1) Physical or mental impairment

      (a) Case-by-case determination (factual).

      (b) Exceptions: §§508 and 511.

      (2) That *substantially limits* one or more of the

      (a) “if [disability] totally or significantly restricted in her ability to perform major life activities *in comparison with* the average person in the general population.” 29 CFR §1630.2(j)(1)(i)(ii)(2002).

      (3) Major life activities of … [an] individual

      (a) Reproduction is one. *Bragdon.*

      (4) Record of such an impairment, or

      (5) Being regarded as having such impairment.

      (a) “[I]t is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting. These misperceptions often ‘result from stereotypic assumptions not truly indicative of … individual ability.’” *Sutton.*

   iii) P is qualified for job

      (1) normal qualifications standard

      (2) What are the essential functions?

      (a) Plain language of ADA only requires proof of P’s ability to perform position’s *essential functions.* *Deane* (3d Cir. 1998).

      (b) “The EEOC’s Guidance indicates that ‘the ER’s judgment as to which functions are essential’ and ‘written job descriptions...”
prepared before advertising or interviewing applicants’ are two possible types of evidence for determining the essential functions of a position, but that such evidence is not to be given greater weight simply because it is included in the non-exclusive list set out in 29 C.F.R. §1630.2(n)(3).” Deane

(c) “Moreover, the EEOC Regulations also provide that while ‘inquiry into the essential functions is not intended to second guess an ER’s business judgment with regard to production standards,’ whether a particular function is essential ‘is a factual determination that must be made on a case by case basis [based upon] all relevant evidence.” Deane.

(d) EEOC’s regulations, promulgated under Title I, define the term to mean the “fundamental job duties,” as opposed to the “marginal functions” of the job. Factors considered:

(i) whether the position exists to perform the function,

(ii) the number of EEs available to perform the function,

(iii) and/or whether the function is highly specialized, thus requiring special expertise.

(iv) Other evidence to consider includes (but not limited to):

1. ER’s judgment,

2. Amount of time spent performing the function,

3. The work experience of people previously or currently in the job or similar jobs, and

4. The terms of any collective bargaining agreement. 29 CFR §1630.2(n).

(e) Numerous courts have held that regular and timely attendance at work is an essential job function, and, therefore, a disabled individual who cannot meet that requirement is not “qualified” within the meaning of the ADA or the Rehabilitation Act.

(3) Can P perform essential function(s) w/or w/o accommodation?

(a) Hamlin shows that there’s an affirmative defense that does not exist under Title VII (whether-or-not P is qualified).

(i) “challenged job criterion is essential, and therefore a business necessity,” or

(ii) In particular … “if a disabled individual is challenging a particular job requirement as unessential, ER will bear the burden of proving that the challenged criterion is necessary.

(4) If D can’t make that defense, ultimate burden still rests with P. P wins the point about whether she’s qualified, but there’s still the pf case and the rest of the elements under the framework.
(5) 8th Cir imposed ER burden to “put on some evidence of those essential functions” b/c “most of the information which determines those essential functions lies uniquely with ER.” Benson.

(6) EEOC held that when the health or safety of others is at issue, ER must establish EE poses a “direct threat,” which is an affirmative defense.

iv) Adverse employment action happened b/c EE’s disability (preponderance of evidence). Reed.

v) Circumstances giving rise to an inference of discrimination (i.e. position remained open/someone else was hired with same qualifications but member of non-protected class/other non-protected EE not reprimanded for same conduct, etc.). Something to link adverse action to protected status.

b) D shows legitimate reason
   i) NO BFOQ
      (1) Persons w/disability who with or without reasonable accommodation cannot perform “essential” job functions are not “qualified,” so not covered by ADA.

c) P responds: “pretext!”

☐ P is entitled to reasonable accommodation?

a) P shows
   i) Individual with disability
   ii) Qualified
      (1) reasonable accommodation linked to an essential function
   iii) reasonable accommodation
      (1) Must request the accommodation. Reed.
      (2) “Facially reasonable”; feasible
      (3) “Effective” does not necessarily mean “reasonable.” Barnett.
      (4) Examples listed in §101(9).
      (5) “A reasonable request for an accommodation must in some way consider the difficulty or expense imposed on the one doing the accommodating.” See Vande Zande.

(6) U.S. Airways v. Barnett: To defeat SJ, P needs only show that the accommodation “seems [facially] reasonable … i.e. ordinarily or in the run of cases.”

   (a) P need not prove the absence of undue hardship in the context of proving an accommodation is reasonable”
b) D response:
   i) Affirmative defense: undue hardship
      (1) Violation seniority system is “unreasonable.”
      (2) “Disproportionate.” *Vande Zande.*
      (3) D show “special circumstances (typically case specific) that demonstrate undue hardship in the particular circumstances.” *Barnett.*
         (a) “D is not forced to shoulder the burden of proving undue hardship unless the proposed accommodation has been shown to be reasonable in the usual case or on the facts of the particular case.” *Barnett.*
   ii) Undermine EE burden of reasonableness.
Violation of EPA?

a) Prove
   i) two workers of different sex
   ii) at same work establishment
   iii) receive unequal pay
   iv) “on the basis of sex”
   v) for equal work
      (1) must be “substantive equality”
         (a) factual analysis
         (b) how much equal jobs can differ

b) Defense
   i) Seniority system
   ii) Merit system
   iii) System where earning based on quant/quality of production
   iv) Differential based on anything but sex.
      (1) shift differentials
      (2) job classification or rating system
      (3) temporary reassignment
      (4) temporary or p/t work
      (5) education
      (6) expertise
§1981 Violation?

a) P has initial burden

b) Prove by preponderance of evidence *McDonnell Douglas* prima facie case of discrimination. *Burdine*.
   i) Upon completion, inference of discrimination. *Burdine*.

c) D rebuts
   i) Evidence that rejected/not selected for legitimate, non-discriminatory reason.

d) P retains burden of persuasion of intent to discriminate.

e) 1991 Civil Rights Act: defined the statute to cover discrimination in “performance, modification and termination” as well as “enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.”
   i) Now harassment, compensation, and discharges, as well as discrimination in hiring, transfers, and promotions are within the reach of 1981.

f) *Donaire v. NME Hosp., Inc.*: AC held that §1981 does prohibit discrimination based on foreign ancestry or ethnicity.

g) *Amini v. Oberlin College*: §1981 protects those with a “Middle Eastern” race.
Retaliation?

- a) Included in Title VII, ADEA, and ADA
- b) Not expressly included in §1981, but recent appellate decisions have interpreted-in retaliation claim(s).
- c) Prohibits retaliation even where underlying discrimination claim lacks a reasonable basis. *Breeden*.
- d) Most courts hold *PW*, not §703(m), is controlling in Title VII retaliation actions involving mixed-motives.
- e) ER not required to rehire EE “engaged in such deliberate, unlawful activity against it.” *McDonnell Douglas*.
  - a. Can be general protest or internal complaints.
  - b. Encompasses more types of conduct than the 2d clause:
  - c. No retaliation when “punishment suffered by respondent for complaining to P’s officials did not constitute actionable retaliation, since the incident itself did not violate Title VII and the complaints thus did not constitute protected activity.” *Breeden*.
  - d. P must demonstrate reasonable, good faith belief that the conduct complained of is unlawful. *Breeden*.
    - i. Reasonableness is not based on success of underlying claim.
  - e. “as a matter of law that the cloak of statutory protection does not extend to deliberate attempts to undermine a superior’s ability to perform his job. … when an EE engaged in opposition to a perceived unlawful employment practice participates in conduct which does not further the protest, but rather merely hinders another person’s ability to perform his job, that EE relinquishes statutory protection.” *Jennings*.
- g) “Participation” clause – proscribes retaliation “b/c [an EE or applicant] has made a charge, testified, assisted, or participated … in an investigation, proceeding, or hearing” under the relevant statute.
  - i) There is actionable retaliation when worker fired for filing allegedly false and malicious charge w/EEOC. *Pettway v. American Cast Iron Pipe Co.*
  - ii) Receives greater protection than opposition conduct.
  - iii) Does not require support of reasonable, good faith belief that ER has acted unlawfully.
  - iv) §704’s participation clause entitles Ps to special treatment – exception from otherwise applicable neutral rule.
- **Three Prong Test for Retaliatory Discharge in Violation Of Title VII:**
  a) P has the burden of proving pf case of discrimination based upon opposition to an unlawful employment practice. Establishing:
     i) engaged in statutorily protected expression, (opposition to a seemingly unlawful employment practice);
        (1) P needn’t need to show protesting actual violation of Title VII, just that P *believed* there was a violation of Title VII, ADEA, or ADA.
           (a) example: would the reasonable EE think ER’s conduct was prohibited by aforementioned laws?
              (i) Close case: sexual orientation discrimination.
     ii) suffered an adverse employment action; and
        (1) 3 versions of “adverse action.” *See s.107.*
        (2) Retaliation is actionable if it was reasonably likely to deter EEs from engaging in protected activity. *Ray* agreeing with EEOC.
     iii) causal connection between the statutorily protected expression and the adverse employment action.
     iv) Some courts add (d): ER knowledge of EE’s expression. Others consider ER knowledge as embraced within the causation element.
  b) Burden shifts to D show:
     i) legitimate, nondiscriminatory reason’ for the adverse employment action.
        (1) Disciplining EE for protesting apparently unlawful employment discrimination isn’t legitimate, nondiscriminatory reason.
           (a) Courts have held that disciplining EE w/unreasonable conduct, even though borne out of legitimate protest, does not violate Title VII.
  c) P burden to show that D’s articulated reason was truly pretext for the D’s actual discriminatory motive.”