Employment Discrimination Outline

Is it a lawsuit against a church?
- Free Exercise Clause

Title VII
- Does employer have 15+ employees?
  - Race, color, sex, religion, national origin
    o Does not include age
    o Santa Fe: applies to discrimination against whites, too
  - Does not require employers to take affirmative steps to increase # of minorities

Must also look at state statutes.

Is policy facially neutral?
- NO → Use disparate treatment
- YES → Use disparate impact

DISPARATE TREATMENT
- Must show that there is not a facially neutral policy (there must be a facially discriminatory policy). If there is a facially neutral policy, try disparate impact.
- Must show discriminatory intent
  o Unconscious stereotyping is not enough for intent to discriminate
  o Direct evidence
    ▪ Racist statements
      ▪ Slack: blacks are better at cleaning/should stay in their place
    ▪ Discriminatory hiring policy
    ▪ Use Slack test or
      ▪ Did the protected trait actually motivate the employer’s decision?
        o Employer can fire older employee if reason is pension and not age
    ▪ Price Waterhouse
  o Circumstantial evidence
    ▪ Slack: white women w/ less seniority were excused from cleaning/black woman brought over from another dept to clean
    ▪ Craft: no discrimination against female newsanchor advised about how a female anchor should dress, etc when: 1 other female had not been criticized/several males were criticized/comments based on individual weaknesses rather than gender stereotypes
    ▪ Use McDonnell Douglass or
    ▪ Price Waterhouse
  o Unconscious stereotyping is not enough.
Intentional discrimination does NOT have to involve hatred of the protected group. Joe’s Stone Crab

INDIVIDUAL

Is there direct evidence of discriminatory intent?

Yes → Use Slack or PW
- Price Waterhouse Mixed Motive Framework
  
No → Use McDonnell or PW
- **McDonnell Burden-Shifting Framework**
  
  For Title VII, §1981, and ADEA claims
  
  JI always has BOP to show by POE that discrimination motivated the employment decision
  
  1. JI had burden of production: PF case
     - i. Is JI a member of a group protected by the statute?
     - ii. Did JI apply and was JI qualified for a job for which employer was seeking applicants?
     - iii. Was JI rejected?
     - iv. Did the position remain open and did employer continue to seek applicants from persons of JI’s qualifications, or did employer hire someone not of JI’s protected class?
     - If JI makes PF case, rebuttable presumption of discrimination rises.
     - Bryant: discrimination can be based on non-white stereotypes
       - JI, light-skinned black woman, wore a suit and blond hair; coworkers were more Afrocentric. JI was called a «wannabe,” left out of meetings, passed up for promotion, fired, replaced w/ dark-skinned black woman w/ dreadlocks.
  
  2. Burden of production shifts to ∆ to rebut w/ evidence of a legitimate, nondiscriminatory reason.
     - ∆ only has to put forth evidence of a reason; ∆ does not have to prove it was motivated by the reason
     - If ∆ puts forth evidence of a legitimate reason, the presumption of discrimination raised by the PF case drops.
     - If ∆ fails, judgment for JI
     - Reason can be illegal (pension) IF employer applied the reason equally to members of all races.
     - McD: unlawful conduct (car stalling), IF employer refused to hire ALL people who participated in the conduct
     - Personal reasons are OK (Jerk) but watch out b/c can be motivated by racism
     - Patterson: white person better qualified
     - If ∆ argues that discrimination was pursuant to a legitimate affirmative action program, switch to Weber framework.
       - Pretext is now irrelevant: do not switch back to McDonnell Douglas: finish with the Weber framework.
3. Burden shifts back to JI to show this reason is a pretext for \( \Delta \)'s discriminatory motive (finish McDonnell framework) or that the nondiscriminatory reason was not the only motivator, and \( \Delta \) was also motivated by discrimination (switch to Price Waterhouse framework)

- Direct or circumstantial evidence

  - Circumstantial evidence (Patterson)
    - \( \Delta \) did not follow its employment policies
    - \( \Delta \) does not have any employment policies
    - JI was better qualified

  - Example of circ evidence when proffered reason is inappropriate conduct, Hicks: JI was only supervisor disciplined for violations committed by his subordinates/similar and more serious violations by others were disregarded/boss created verbal confrontation in order to provoke JI to threaten him

  - Hollins: grooming policy of neat and well-groomed required advance approval for new hairstyles. Employer disapproved of black JI’s hairstyles. PRETEXT b/c 5 white women w/ identical hairstyles were not reprimanded/white women wore shag hairstyles, which were more dangerous than JI’s hairstyle of corn rows/white women could wear ponytails but JI was criticized for it.

  - Bryang: pretext: JI was deliberately excluded from the meetings \( \Delta \) claims she missed

- Reeves (US SC): evidence of pretext is usually enough to get to a jury. Pretext-plus rule of Hicks is wrong. Reeves did not specify when more than pretext is needed. This is where the circuits differ.

  - 2d Cir: If \( \Delta \)'s reason is pretext, sometimes requires that JI also show that discrimination was the real reason.
    - \( \Delta \)'s false explanation can do this
      - In most cases, you can assume that if the reason is not true, there is discrimination.
    - Other circ evidence can also prove intentional discrimination. Look at:
      - Strength of JI’s PF case
      - Any other evidence that supports \( \Delta \)'s case
  
  - No pretext found:
    - Hicks: race not real reason if: blacks are on hiring board/some black employees not disciplined/# of black employees remained constant
    - Reeves: comments made some time before employment decision was made are not direct evidence of intent to discriminate in that decision.

- Price Waterhouse Mixed Motive Framework
o Direct evidence: Do NOT start with McDonnell Douglas
o Circumstantial evidence: start with McDonnell Douglas, and switch to PW, or argue PW in the alternative
o If can't get damages.
  o When to use PW:
    • If can’t show pretext, or pretext evidence is weak.
      • Ex: if employer has a strong legitimate reason, such as JI got in a fist fight (Costa)
    • Note: Employers don’t want to ask for a mixed motive instruction b/c admits they had a bad motive.
  o JI can argue in the alternative: argue McDonnell, then say even if Δ's reason is legitimate, it is not the only reason, and then argue PW.
  1. JI must show by POE that protected trait was a motivating factor
    • does not have to be the only factor
    • stereotyping is not enough. But stereotyped remarks are evidence that gender played a role.
  2. Burden shifts to Δ to show by POE that it would have reached the same decision even in the absence of the protected trait.
    • This is employer’s affirmative defense under Title VII.
    • Deminimus or volitional
      • Deminimus: it is too minimal
      • Volitional: he didn’t have to wear it

SYSTEMIC: patterns and practices of discrimination
  - PF case easier to prove here than w/ individual disp treat, b/c stats alone might be enough
    o Rebutting PF case is harder w/ systemic (good faith inadequate)
  - Is there a formal policy?
    o If not, proceed to Teamsters framework:
  1. JI’s PF case: Was there a pattern or practice of disparate treatment?
    o JI must show that discrimination was standard operating procedure
      • Isolated incidents not enough
    o Use statistical proof (this is all that is needed)
      • Must compare racial composition at employer to racial composition in the relevant labor market.
      • No evidence of specific instances necessary
      • Testimony evidence helpful if available
      • Example:
        • Look at applicant pool statistics:
          o How many women apply (more than are hired?)
            • Sears: 61% of applicant pool is women
How many women are hired: what % of total hires
  - Only 27% of commission jobs went to women
- Look at requirements for the job
- Look at stats w/in this workplace
  - 9% minorities; only 1% of drivers are minorities
  - 80% of minorities had low-$ jobs; 39% of whites had low-$ jobs
- Look at the rest of the work force for this job and see what % of this type of employee are women; compare to employer’s %
  - Hazelwood: county schools had 1.4% black teachers; city schools had 15.4% black teachers
  - What is relevant labor pool? Make arguments.
- Timing
  - Teamsters: all blacks were hired after litigation started
- NOTE: if employer is small, it is harder to get probative statistics (2 out of 6 not very useful).
  - Must show causal nexus b/tw specific employment practice identified and the statistical disparity shown.
    - Joe’s Stone Crab: reputation is not an employment practice.
- 2. Δ’s rebuttal: Was the pattern a product of pre-Title VII hiring?
  - Hazelwood: % of black teachers went up after Title VII became effective, to 3.7%
  - Statistical evidence not required for rebuttal
  - Claim of good faith/hired the best-qualified is inadequate
  - Hazelwood: can argue that blacks aren’t interested
    - But are they not interested b/c they know they won’t be hired?
  - This is harder than in an individual disparate treatment case

DEFENSES to disparate treatment cases (for individual AND systemic)
- 3 ways to defend:
  - Challenge the factual basis of Ι’s PF case
    - Deny that a formal policy exists, or
    - Challenge the facts on which Ι’s case is based (use statistics to counter Ι’s statistics),
    - Etc
  - Challenge the inference of discriminatory intent the statistics raise
    - Lack of interest by Ιs; can’t prove intent to discriminate
      - Sears: no discriminatory intent b/c women were not interested in the higher paying jobs.
        - Rebut: women ARE interested b/c they applied. Argue that Sears was acting on stereotypes.
    - In spite of, not because of
Feeney: law that was a preference of veterans over non-veterans, not men over women; no intent to discriminate against women
  - BUT, you can also argue that gender was a motivating factor. Perhaps Feeney was wrongly decided.
  - Admit the discrimination but assert a recognized defense (see below):
    - Word-of-mouth
      - If can’t make the argument that JIs weren’t interested
      - Rebut: word-of-mouth is used b/c it selects members of a specific group: circ evidence of intent to discriminate.
        - If all employees are men, then women are out of the loop.
    - Deminimus
      - It is too minor
    - Volitional
      - He didn’t have to wear the earring
  - **Bona Fide Occupational Qualifications (BFOQ)**
    - Under Title VII
      - “it shall not be an unlawful employment practice for an employer to hire and employ employees...on the basis of religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”
      - TEST: (Johnson Controls)
        - Discrimination must be reasonably necessary to the normal operation of the particular business
        - The qualification must be related to the job
          - Reproductive potential of women does not prevent them from making batteries.
          - Safety of women is not related to driving a cab
          - Airline police requiring women to weigh less than men not a bfoq, Frank v United Airlines
      - Does not apply to race
        - Some circuits apply BFOQ to race
      - Only applies if there is a facially neutral policy
      - Examples:
        - Dothard: prison can require guards in contact positions to be the same gender as inmates, for safety reasons. But danger to the woman herself does not justify discrimination; women must decide if she wants the job.
          - Rebut: this bfoq reinforces stereotypes, which Title VII intends to eliminate
        - Rosenfeld: does the job require sexual characteristics? (wet nurse)
        - Healey: gender is a BFOQ for child therapists
- **Craft**: female newsanchor told how to dress properly, wear makeup, not discrimination b/c appearance is related to company’s success b/c is on tv.

- **Joe’s Stone Crab**: old world dining style: having all men does not relate to the essence of the job: serving food.

  - Under the ADEA:
    - **Western Air**: age is a BFOQ for flight engineers (health reasons)
    - **Johnson**: age is NOT a BFOQ for firefighters

- **Voluntary Affirmative Action** (by private OR public employers): **Title VII**
  - Not an affirmative defense; burden is still on **J. Johnson**.
  - TEST: (Weber)
    - **J** has BOP of showing that plan is invalid
    - 1. Plan must be undertaken to further an AA plan designed to eliminate employer work force imbalances (a manifest imbalance) in traditionally segregated job categories.
      - PF case not required; only a manifest imbalance must be shown.
        - Compare % of minority workers to relevant local labor pool
          - **Johnson**: women are 36% labor market; 22% at this place
            - 0% of women were skilled craft workers
        - Policy: so Δ doesn’t have to admit they discriminated; encourages voluntary affirmative action plans.
        - Weber: upheld plan reserving 50% o jobs for blacks until % of blacks in the jobs resembled the $ of blacks in the local labor force
          - Is minority qualified? Interested?
    - 2. Plan must not unnecessarily trammel the rights of majority employees or create an absolute bar to their employment.
      - Many factors are preferred to quotas.
      - **Johnson**: rights not trammled b/c you aren’t promoted. Must be fired or demoted in order for rights to be trammelled.
    - 3. Plan must be temporary.
      - Is plan intended to *attain* a balanced work force, not to *maintain* one?
      - Is there an end date or a plan to reevaluate?
    - Note: if plan has no goals/standards and is guided by whims, probably discriminatory. Township of Piscataway.
    - Note: AA based on stereotype, rather than intended to correct racial imbalance, not allowed.
      - Ferrill: struck down AA plan that race-matched telemarketers’ jobs.
Government sponsored Affirmative Action: Equal Protection Clause

- Note: If employer is public, JI can bring Title VII or EP claim
- Adarand
- Race
  - All classifications, invidious or benign, imposed by federal, state, or local government actor, get strict scrutiny review
    - 1. Plan must serve a compelling government interest.
      - Remedying past discrimination by employer is compelling
        - Must prove the past discrimination
      - Remedying past societal discrimination is NOT compelling
      - Attaining a diverse student body is compelling
        - Grutter, Gratz
        - Diversity may be a compelling interest in areas beyond higher ed: workforce, military (but hasn’t happened yet)
    - 2. Plan must be narrowly tailored to serve that interest.
      - Is the plan the least restrictive means of achieving that interest?
      - Is the plan overinclusive or underinclusive?
      - Individualized consideration instead of quota
        - Grutter used individualized consideration
        - Gratz used 20 point system = not allowed
        - What Johnson would argue: if it was individualized, he would have won b/c he was better qualified
- Gender
  - Intermediate scrutiny:
    - 1. Plan must serve important government objectives
    - 2. Plan must be substantially related to achievement of those objectives.

JI's REBUTTAL to defenses:
- Rebuttal to lack of interest defense
  - Did employer recruit by ads in newspapers read mostly by men?
- Rebuttal to word-of-mouth defense
  - If employees are men, then women are out of the loop

DISPARATE IMPACT (is always systemic)
- Do not have to show intent
- There must be a facially neutral policy
  - This is a disparate impact case b/c the policy on its face is neutral: it says no men can have beards; it doesn’t say no black men can have beards. The policy says nothing about race. But, the policy has a disparate impact on
black men b/c 50% of black men have this condition and 25% have it so severely that they can’t shave. Bradley
  o If there is a facially discriminatory policy, try disparate treatment.
- TEST (Civil Rights Act of 1991, and Griggs)
  o CRA controls; it confirmed Griggs. CRA also codified the alternative employment practice part of Wards Cove.
  o 1. JI’s PF case
    ▪ a. Must show disparate impact (no guidance. Use statistics)
      • Look for a statistical disparity b/tw proportion of minority in the available labor pool and the proportion of the minority hired by the employer
      • Dothard: height/weight requirements for correctional counselor position exclude 41% of women but 1% of men
      • Bradley: Domino’s no-beard policy had a disparate impact on black males b/c 50% have a skin disease and can’t shave
      • Rogers: policy that says no braids does not discriminate b/c applies to both genders and all races.
        o Volitional arg: she doesn’t have to wear braids
        o Ct should have found disparate impact b/c more women/blacks wear braids than men/whites
    ▪ b. Must show specific, facially-neutral employment practice
      • Bottom line exception: If it is impossible to separate the employer’s practices and identify a specific practice, the entire employment process can be analyzed as one employment practice, with bottom-line statistics to show impact.
        o Ex of these statistics: who was hired using this practice?
    ▪ c. Must show that employer uses the practice, and it causes the impact
      • Only a causal link is required; not but for
        o Dothard:
  o 2. Δ must show business necessity (Griggs)
    ▪ Court 1:
      • Must show business necessity (1 thing): does employment practice relate to job performance?
        o Griggs: High school degree requirement not related b/c employees w/o the degree perform satisfactorily.
        o Griggs: intelligence test not related b/c the test is not related to job performance, and blacks have inferior education in schools and don’t do as well on the test.
    ▪ Court 2, Lanning, majority: courts must show (2 things):
      • a. Practice must be job related for the position in question
b. *Business necessity*: cutoff score must test only the “minimum qualifications necessary” = likely to be able to do the job
   o Maximizing operations (higher aerobic performance) not enough for business necessity
   o Bradley: no biz necessity for customer preference b/c essence of job is delivering pizzas; not looking nice

3. JI can show that an alternative practice is available
   - JI must show: alternative practice does not have the undesirable discriminatory effect, serves the employer’s interest, and the employer refused to adopt this practice.
   - Dothard: strength test instead of height/weight requirements
   - Fitzpatrick: WRT requirement that firefighters be clean shaven so their masks will fit properly, allowing shadow beards or only shaving where the mask goes are not comparably effective alternative practices b/c aren’t as safe

- \( \Delta \) rebuttal options
  o Show no causation
  o Use statistics to show that JI’s data is flawed
  o De minimus
  o Volitional: he didn’t have to wear it
  o BFOQ
  o Biz necessity (see above)

- Grooming and dress codes: very unsettled area of the law

**ADA: DISABILITY AND THE DUTY OF REASONABLE ACCOMMODATION**

MERGE into ADA below

- ADA: If a disabled individual can perform essential functions with reasonable accommodation, the employer has a duty to provide those accommodations.
  o Exception: If the accommodation would impose undue hardship on the operation of the business. An undue hardship requires significant difficulty or expense.
    - Look at:
      * Employer’s assets
      * Benefits of the accommodation to the disabled worker
    - Altering a seniority policy is usually an undue hardship
      * But JI gets a chance to show special circumstances that make an exception from the seniority system a reasonable accommodation in the particular case.
        - Timely and regular attendance is an essential job function

- Framework
  - 1. JI's PF case:
    - a. Accommodation is reasonable b/c it is efficacious
      * employer not required to allow employee to work unsupervised at home b/c productivity would go down
• employer does not have to provide access to a particular sink when an equivalent sink is available nearby. PUT CASES!
  ▪ b. Accommodation is reasonable b/c it is proportional to costs
    o 2. Δ can show:
      ▪ The costs are actually excessive in relation to either the benefits of the accommodation, or to the employer’s financial survival or health.
- Pregnancy not an impairment; but can try and argue that it is a temporary disability

**Title VII COMBINATION CASES (Intersectionality)**
- Use this claim if Δ would fall through the cracks of Title VII (if Δ hired black men and white women, black woman would fall through the cracks).
- Use appropriate framework: McD, Slack, or PW
  o McD: For step 4 of Δ’s PF case in a race-and-gender discrimination claim, if Δ is a black woman, she must show that the position was filled by a non-black man (white woman not enough)
  o McD: For the pretext stage: anti-black comments have nothing to do with gender discrimination so not probative in a race-and-gender claim.
  o Jeffers: black employer’s comment “I can’t come in here in an acting position and start promoting a lot of blacks” is direct evidence of intent to discriminate on the basis of race, but not gender, so can’t be used in a race-and-gender claim.
  o Lam: evidence that committee member had bias against women and Asians counts as intent to discriminate against women and Asians.
- **Policy**
  o Reasons against combining Title VII categories into a single claim:
    ▪ Title VII did not intend to make new classes (like black women), b/c it would create a super remedy; there should be no remedy beyond what the statute allows. Slippery slope: don’t want people getting a quadruple remedy. Degraffenreid
  o Reasons for combining Title VII categories into a single claim:
    ▪ There are different stereotypes for combinations of traits (such as black woman)
    ▪ Danger of the double negative: employer can win major minority points by hiring someone with 2 strikes against them (such as black woman) and killing 2 minority categories with one stone.
- **Strategy**
  o With combining Title VII groups into a single claim,
    ▪ It is easier to show the PF case: that Δ hired a non-black-woman is easier to show than that Δ hired a non-black or a non-woman.
    ▪ It is harder to prove the ultimate question (discriminatory animus against the combination)

**DISCRIMINATORY HARASSMENT**
- Race, sex, religious, ethnic groups, older workers, disabled workers
- Sexual harassment is DISPARATE TREATMENT

Possible claims under Title VII:
- **Hostile Work Environment** (Meritor, Ellerth)
  - Use if there are unfulfilled threats, but workplace conditions are altered.
  - 1. Is there conduct
    - Sexual conduct/comments about sexual activity
      - Meritor: had sex so wouldn’t lose job, followed into bathroom at work, fondled in front of employees, raped
      - Harris: ask to get coins from pocket, bend over to pick things up, insinuate that slept w/ someone to get hired, made sexual innuendos.
      - Ellerth: supervisor made comments about JI’s breasts/told her to loosen up/said he could make her life very easy or very hard at work/said wasn’t sure about promoting her b/c she isn’t “loose” enough/said he didn’t have time for her unless she would tell him what she is wearing/shorter skirts would make her job a lot easier
    - Conduct/comments relating to gender
      - Harris: “you’re a dumb ass woman”
  - 2. that is unwelcome
    - JI has burden of proving by POE
    - Can look at JI’s conduct but only conduct at work. Burns.
      - Decision to pose nude outside work not relevant
    - Note: if they work at Hooters, Hooters has a strong argument that the conduct is welcome, b/c it is notorious for objectifying women.
  - 3. and abusive = severe OR pervasive
    - i. Would a reasonable person find it abusive?
    - ii. Did ∆ subjectively find it abusive?
    - Harris considerations: (not required)
      - Did it seriously affect an employee’s psychological well-being or lead JI to suffer injury?
      - Did it detract from employee’s job performance, discourage employees from remaining on the job, or keep them from advancing their careers?
    - Offensive comments alone: probably not enough if isolated.
      - If commonplace, continuing or ongoing, more likely to amount to harassment.

- **Quid Pro Quo** (Meritor, Ellerth)
  - Use if demands (threats) are made, and they are carried out: action based on compliance or lack thereof.
    - Can assume unwelcomeness and severity from the threat
    - Did JI comply with threats? Yes → can’t use QPQ; try HWE
  - Framework
    - Were terms of employment altered?
    - B/c of compliance or failure to comply w/ threats?
Vicarious Liability (Ellerth): 2 ways
- Vicarious liability: Is supervisor the perpetrator?
  1. JI must make out a sexual harassment claim
     - HWE or QPQ
  2. Was there a tangible employment action?
     - Yes → Employer liable
     - No →
     - JI has affirmative defense, must prove by POE:
       i. JI exercised reasonable care to prevent and promptly correct sexually harassing behavior, AND
       ii. JI unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer or to avoid harm otherwise.
- Negligence theory: Is co-worker or customer the perpetrator?
  - Did employer know or should he have known?

Same-sex harassment
- There is no Title VII claim for discrimination b/c of sexuality (straight/gay); only b/c of sex (man/woman)
  - DeSantis, citing Holloway, said “because of sex” only applies to traditional meaning of sex and does not include sexual orientation.

- USE harassment framework
- PW: discrimination on the basis of stereotypes about appropriate gender roles and behavior.
- Different approaches to “because of” sex
  - Oncale, US 1998:
    1. discrimination can be by someone of the same gender
    2. if the harassment is “because of sex”
       - conduct is “because of sex” if it is motivated by sexual desire (but this is hard to prove in same-sex situations)
         - Do NOT have to show differential treatment
       - conduct is “because of sex” if it is general hostility toward 1 sex
         - same-sex OR mixed-sex workplace
           - mixed sex: need comparative evidence of how members of each sex were treated
           - Do NOT have to show differential treatment
       - look at social context
       - when 2 male supervisors subjected male JI to sex-related, humiliating actions, physically assaulted him in a sexual manner, and threatened to rape him.
         - Do not need to show that JI was treated worse than other women; it is enough to show he was treated worse than other men.
  - Rene, 9th Cir, 2002:
    - “because of sex” includes conduct of a sexual nature, regardless of who it is directed to, or why
• sexual orientation is irrelevant
• conduct that targets body parts clearly linked to JI’s sexuality
• Here: conduct that Rene alleged was b/c of his homosexuality was found to be b/c of his sex:
  o Blowing kisses, whistling, call him sweetheart and doll, made him look at gay porn, hugged, caressed, grabbed crotch, poked anus
  o Note: Ct focuses on the physical conduct, so it is unclear if the verbal conduct alone would constitute sexual harassment.

  o Ct split
    ▪ 9th Cir: Rene
    ▪ Ct 2: Oncale
    ▪ Ct 2: More limited reading of Oncale: JI must be treated differently b/c he is male; not b/c he is homosexual.
  o Arguments
    ▪ Sexual orientation should be covered under Title VII b/c it is a biological difference (born that way), just like a penis or a vagina
    ▪ From DeSantis: they didn’t work there b/c traditional meaning of “sex” didn’t include “sexual orientation,” but maybe they would work after Rene:
      • Disparate impact claim b/c discrimination against homosexuals affects more men than women b/c higher incidence of homosexuality in males, OR b/c it is easier for lesbians to pass as straight than for gay men to pass as straight. Sneed’s dissent in DeSantis.
      • Different employment criteria: female can have male partners but male can’t have male partners. (did not work b/c criteria was same-sex partner, so only works if females can have same-sex partner but males can’t, or vice versa)
      • EEOC says no discrimination b/c of the race of one’s friends. Only works if “sex” includes “sexual orientation”
      • Stereotype.
    ▪ Tanner: OR statute similar to Title VII construed to include sexual orientation under “sex.” Denial of insurance benefits to domestic partners discriminated on the basis of sexual orientation b/c homosexuals can’t marry (disparate impact).
      • BUT no violation of the statute found b/c another OR statute requires subterfuge to discriminate
        o Some states have statutes that ban discrimination based on sexual orientation
        o Some cities and counties have ordinances

**EQUAL PAY ACT: equal pay for equal work**
- JI's PF case: show that Δ workers of the opposite sex:
In the same establishment
- If at different locations, look at Brennan v Goose Creek factors:
  - Central control for hiring, salary, records
  - If employees move b/tw locations
  - If duties and working conditions are similar
- Are receiving unequal pay
  - Look at pay rate: per hour or sale
- On the basis of sex
- For equal work
  - J must show work is substantially equal
    - In skill, effort and responsibility
    - In working conditions
  - Look for a common core of tasks
  - “Comparable not enough”
    - → But then try Title VII
- Δ has 4 statutory defenses (Δ has burden of persuasion)
  - Seniority system
  - Merit system
  - System that measures earnings by quantity or quality of production
  - Differential based on any factor other than sex
    - But not one that would violate Title VII’s disparate treatment test. Manhart.
    - These are ok: temporary reassignment, temp or part-time employment, edu, experience, shift differentials
- Liquidated damages allowed (not under Title VII)
  - If you want liquidated damages, add EPA claim
- Equal work; Title VII is equal workers
- If EPA fails (b/c work is similar or comparable), try Title VII

PREGNANCY DISCRIMINATION ACT (PDA)
- An amendment to Title VII
- “because of sex” and “on the basis of sex” includes b/c of or on the basis of pregnancy, childbirth, or related medical conditions.
- Does employer have 15+ employees?
- Does employer have a facially discriminatory policy?
  - Can “not being pregnant” be justified as a BFOQ?
  - No
    - If employer denies that pregnancy has anything to do with the adverse employment decision, try individual disparate treatment
- Does employer offer disability leave?
  - No → employer does not have to offer pregnancy leave
  - Yes → employer might have to offer pregnancy leave
    - Disparate treatment claim: McD
    - Disparate impact claim: pregnant/nonpregnant or women/men
    - Cases
• Newport News: policy that didn’t give spouses of male employees pregnancy benefits discriminates against male employees
• Troupe:
  o Discharge of pregnant employee to avoid paying maternity leave not enough for PDA claim; employer can treat pregnant employee just as bad as sick, nonpregnant employee
  o Tardiness and fact that no one expected her to return after maternity leave look like non-pregnancy related reasons
  o Arg: Troupe could have won if she found one nonpregnant employee who had not been fired when about to begin a similar leave. ALSO if handbook does not say that misconduct disqualifies you from disability leave.
• Maldonado
  o Employer can’t take anticipatory action w/o a good faith basis supported by sufficiently strong evidence that the pregnancy will require special treatment.
  o Employer liable for firing pregnant employee whose due date was summer, a busy time.
    ▪ Δ arg: distinction is b/tw employees and spouses, not males and females

Family and Medical Leave Act (FMLA), 1993
- Does employer have 50+ employees?
- Requires up to 12 weeks of unpaid leave for certain purposes
  o Birth, adoption
- Entitlement to leave expires 12 months after birth or adoption.

RELIGION DISCRIMINATION: Title VII
- Title VII religion clause does NOT apply to religious entities
  o Is it a religious entity?
    ▪ Test: is the institution primarily secular, or primarily religious?
      Take into account ownership and affiliation, purpose, faculty, student body, student activities, and curriculum.
  o No? → Try BFOQ defense
- Disparate treatment: Fired b/c of religion: use McD/Van Koten
- Reasonable accommodation: Wilson
- Van Koten, 7th, 1998:
  o McDonnell Douglass
    ▪ Employee misconduct (profane refusal to follow procedures) is a legitimate, nondiscriminatory reason to fire.
- Not enough evidence to show pretext: fired after he said Halloween is the holiest day, used astrology charts at the office, ate vegetarian meals, never used term “Wiccian” at work.
  - Wilson, 8th, 1995
    - JI must prove PF case:
      1. Employee has a bona fide religious belief that conflicts w/ an employment requirement
        - wearing abortion button does not count when JI did not say she was a living witness
      2. Employee informed the employer of this belief
      3. Employee was disciplined for failing to comply w/ the conflicting employment requirement
    - Δ can rebut by showing:
      1. Δ offered JI a reasonable accommodation, OR
        - Reasonable =
          - Balances religious belief w/ employer’s interest in the workplace
            - Religion should not always trump employer policies
            - Δ not required to select an employee’s proposal of reasonable accommodation
          - Here: reasonable: wear button in cubicle, cover button at work, or wear a button w/o a photo
      2. Δ did not offer a reasonable accommodation b/c would have imposed an undue hardship
        - $, production decrease, other employees’ interests
        - here, allowing her to wear button would not have worked b/c employees were disrupted, upset, felt harassed
        - NOTE: Wilson also could have brought a disparate treatment case: fired b/c of her religion
    - Is it a lawsuit against a church?
      - The ministerial exception might apply, depending on the circuit
        - Free Exercise Clause of 1st Amendment says ct does not have jurisdiction to hear a Title VII employment discrimination suit (here, pregnancy) brought against a church, by a member of its clergy. Combs.

NATIONAL ORIGIN Discrimination: Title VII
- National origin = the country from which a person or her ancestors came. Citizenship is irrelevant. Espinoza, US, 1973.
- There is NO Title VII claim for alienage discrimination.
- Disparate treatment and disparate impact claims are available. Espinoza.
- Sears, 4th Cir, 2001
  - McD disparate treatment framework
    - Belief that JI was investigated for sexual harassment in the past is legitimate and nondiscriminatory
- Pretext b/c Sears offered different reasons at different times: lying; made a comment about the accent
  - Accents: possible BFOQ defense: ability to communicate effectively w/ the public.

**ADEA: Age Discrimination in Employment Act**
- Disparate treatment claim available
  - ADEA not violated when fired on basis of employee’s pension status, which is correlated w/ age, but not directly based on age.
  - 1 yr age difference might not be enough to show discrimination
  - McDonnell Douglass framework
- NO disparate impact claim available. Smith.
  - ADEA not intended to remedy age-disparate effects that arise from the application of employment plans or practices that are not based on age.
  - Purpose of ADEA is to protect older workers.
  - JI-police officer has no disparate impact claim against employer who has a facially neutral pay plan based on tenure, that has the result of giving higher pay increases to employees under age 40.
    - But JI does have disparate treatment claim
- Argue: ADEA should include a disparate impact claim b/c when ADEA was adopted, Cts had not yet developed the disparate impact theory for Title VII, and Title VII and ADEA are very similar in text.
- PUT Cline:
  - A significant departure from SC’s anti-discrimination holdings
  - Rosenbury thinks 5th Cir will be affirmed

**AMERICANS W/ DISABILITIES ACT (ADA)**
- No discrimination on the basis of disability by anyone who operates a place of public accommodation
- DISPARATE IMPACT. Hernandez.
- NOTE: If employer knows employee has a disability, bring a disparate treatment case, instead of the following frameworks.

**Framework**
- 1. JI must prove she is an individual w/ a disability (Abbott)
  - Actual, OR Regarded as:
    - A. Physical or mental impairment (factual issue)
      - Abbott used DHHS definition
        - any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting 1+ of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; OR
        - any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities
- Can also look at what EEOC does not include
  - physical characteristics: weight, height, eye color, that are in the normal range and are not the result of a physiological disorder
  - personality traits, illiteracy, economic disadvantages, temporary physical conditions, advanced age, illegal drug use, alcohol use
  - Pregnancy
  - Common obesity
- Asymptomatic HIV is an impairment
  o B. that substantially limits (factual issue)
    - Totally or significantly restricts ability to perform major life activities in comparison w/ the average person in the general population.
      - Factors: nature and severity of impairment, duration of impairment, permanent or long term impact
    - HIV substantially limits reproduction b/c of $ costs of healthcare, and risk of infecting partner and child
    - Must look at corrected state (with contact lenses). Sutton, US 1999
  o C. 1+ major life activities of an individual (law issue)
    - JI chooses what life activity to show is impaired
    - Can be public or private. Abbott.
    - Abbott looked at Rehabilitation Act: caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working.
      - Reproduction b/c is similar to these
  - 2. JI must prove she is qualified (Deane, Hamlin)
    o A. JI has the requisite skill, experience, education and other job-related requirements of the job.
    o B. JI can, w/ or w/o reasonable accommodation, perform the essential functions of the job.
      - JI must identify a function that J claims is essential
      - JI must bring forth evidence that the function is not essential (burden of production)
      - Factors in determining if essential:
        o Job description
        o Employer’s judgment
        o Time spent performing the function
        o Work experience of people previously or currently in the job or similar jobs
        o The terms of any collective bargaining agreement
      - i. If JI can perform essential functions without reasonable accommodation, is qualified.
      - ii. If JI can perform essential functions with reasonable accommodation, is qualified.
C. Δ has affirmative defense and can prove the function is essential (Deane, Hamlin)
  ▪ Ct or jury decides if the function is essential.
    • Deane looked at Labor Dept regulation, testimony from former employees, etc.
- THEN use McDonnell Douglass disparate treatment framework, OR Reasonable Accommodation framework, below:
  o Note: if employer knows of disability, try disparate treatment
- McDonnell Douglass disparate treatment framework:
  o 1. Disability
  o 2. Qualified
  o 3. JI must show there was an adverse employment action
  o 4. JI must show there are circs giving rise to an inference of discrimination (job stayed open, etc)
  o 5. Burden shifts to Δ to give legitimate reason
  o 6. Burden shifts to JI to show pretext
    ▪ Reeves: pretext enough
    ▪ Other cts: must also show discrimination was the real reason
- Reasonable Accommodation framework (Reed)
  o 1. Disability
  o 2. Qualified
    ▪ JI must show reasonable accommodation would effectively enable her to perform the essential functions of her job.
  o 3. JI must prove Δ could provide a reasonable accommodation.
    ▪ A. JI must show she requested the accommodation
    ▪ B. JI must show that her requested accommodation is facially reasonable/at least feasible under the circumstances.
      • Vande Zande: employer is not required to let the worker work alone, unsupervised, at home b/c productivity would go down
      • Vande Zande: employer does not have to make conditions absolutely identical for disabled and nondisabled. Does not have to provide access to a particular sink when an equivalent sink is available nearby.
  o 4. Δ has affirmative defense: has burden to show that proposed accommodation would impose an undue hardship.
    ▪ Undue hardship factors (Vande Zande)
      • Employer’s assets
      • Benefits of the accommodation to the disabled worker.
    ▪ Or can undermine JI’s burden of showing reasonableness by showing the accommodation is NOT reasonable/feasible.
    ▪ Barnett: altering a seniority policy is usually an undue hardship
      • But JI gets opp to explain why an exception would be a reasonable accommodation in this case.

RETALIATION
- Attach this claim to the primary claim if you can
- Title VII and ADEA
- Employer cannot discriminate against employee for:
  o (1) opposing any unlawful employment practice, OR
    ▪ JI must show a reasonable, good faith belief that the practice is unlawful. Breeden.
      ▪ Ct decides if belief is reasonable. Breeden.
  o (2) participating in proceeding/filing charges
- Framework (Jennings)
  o 1. JI must make PF case of discrimination based on opposition to an unlawful employment practice.
    ▪ A. JI was engaged in statutorily protected expression
      • i. opposition to a seemingly unlawful employment practice, OR
      • ii. Participating in a proceeding.
      • JI must show she reasonably believed that the action was unlawful, but does not have to show it is actually unlawful
        o Breeden: no one could believe that simple teasing/isolated comments was unlawful
    ▪ B. JI suffered an adverse employment action
      • Ct 1: AEA = treatment that is reasonably likely to deter the protective act (reasonably likely that employees in the future will not engage in statutorily protected expression)
      • Ct 2: AEA must materially affect the terms and conditions of employment
      • Ct 2: AEA must go to ultimate hiring decisions (hiring, firing, demotion)
    ▪ C. JI must show there was a causal connection b/tw the statutorily protected expression and the AEA
      • Breeden: no causal connection if JI did not notify employer of lawsuit until after the AEA occurred
  o 2. Burden shifts to ∆ to show a legitimate nondiscriminatory reason for the AEA
    ▪ Disloyalty not enough unless employee’s conduct is unreasonable
      • The mere fact that employer sees conduct as unreasonable does not make it unreasonable
        o Deliberate attempts to undermine a supervisor’s ability to perform his job is unreasonable
          ▪ By not telling supervisor about salary report and surprising him w/ it at Board meeting, this was a conscious effort to hamper supervisor’s ability to perform his job.

Procedure
- FRCP and litigation strategy
  o First, employer will try to get case dismissed under Rule 12(b)(6)
If that doesn’t work, after discovery, employer can move for summary judgment under Rule 56
  - (1) No evidence of a prima facie case, OR
  - (2) Not enough evidence to establish the question of fact
  - Show employee is not qualified, etc
  - Summary judgment is often granted, b/c employ discrim cases often involve inferences from circumstantial evidence
  - Granted if no evidence is developed during discovery by which it could be inferred that the employer’s proffered reason was pretext
  - Note: there is a lot of debate over when summary judgment should be granted

Judgment as a matter of law under Rule 50:
  - after JI presents evidence, judge can say there is no way a reasonable juror could decide Δ was not motivated by discrimination. This is very rare.

PUT Paper notes from April 14!

Make argument lists!!! For all situations. From the cases. Go back through all pages of class notes and put scenarios, arguments, fact situations, strategy etc!