

EMPLOYMENT DISCRIMINATION
Law A556 A
Winter 2021
Professor Schnapper

SYLLABUS

Texts

Zimmer, et al., Cases and Materials on Employment Discrimination (9th ed.) ("Text") (The relevant page cites in the 8th edition are in brackets)

Zimmer, et al., Employment Discriminations: 2020 Selected Cases and Statutes ("CS")

Supplementary Course Materials ("SCM")

The syllabus may be revised if the Supreme Court grants certiorari this spring in an employment discrimination case.

Key Sources: More detail than you will need for class, but useful if you practice in this area:

Lindemann and Grossman, Employment Discrimination (reissued from time to time)

Richard T. Seymour, Equal Employment Law Update (issued every six months)

Paul Mollica's web blog:
mmglaw.com/bio/PaulMollica.asp

Jennifer Jill Esmay's "Employment Law Update" (available by subscription; updates several times a week by e-mail)

Washington state law requires that UW develop a policy for accommodation of student absences or significant hardship due to reasons of faith or conscience, or for organized religious activities. The UW's policy, including more information about how to request an accommodation, is available at

[Religious Accommodations Policy
\(https://registrar.washington.edu/staffandfaculty/religious-accommodations-policy/\)](https://registrar.washington.edu/staffandfaculty/religious-accommodations-policy/).

Accommodations must be requested within the first two weeks of this course using the [Religious Accommodations Request form
\(https://registrar.washington.edu/students/religious-accommo](https://registrar.washington.edu/students/religious-accommo)

[dations-request/\)](#)

1. Introduction: Basic anti-discrimination statutes; differences among the statutes; structure of Title VII.

Take a look at these sections of Title VII in the CS:

703(a)-(c)

704(a)

706(b)

706(f)(1)

2. What is facial intentional discrimination?

Text: 299-306 [340-41] (Jespersion, grooming and dress codes, paramour favoritism)

There are three types of discrimination

- facial discrimination ("No Irish need apply")
- covert subjective intent
- discriminatory impact

In Jespersion which side is right? Here is what the casino required

Meet with a consultant to design the employee's look
Makeup—face powder, blush, mascara, lip color
Hair—teased, curled or styled every day; down at all times
Men—clean shaven, short hair

Is the casino's practice gender stereotyping?

If you had another potential client who wanted to work at Harrahs, would you take the case? If you were Harrah's lawyer, would you advise your client to continue this practice?

Can Fox News require female on-air presenters to wear short dresses or short skirts? Can it forbid women who work in the newsroom to wear pants? (This issue arises several times in the 2019 movie Bombshell.)

Could a law firm require female associates to wear makeup or fashion forward clothes if it pays for them? What if it was a law firm in LA with a lot of clients in the film industry? Could it forbid fishnet stockings? Could it require that of secretaries? Could a law firm forbid female associates from wearing lip sparkles? Could an American firm doing business in Saudi Arabia require its female employees to wear a hijab in the office?

A female judge a while back decreed that women lawyers in her courtroom could not wear pants. Is that discrimination on the basis of gender? Would it have been in 1965? Would a ban on short skirts or low cut dresses (by anyone) be intentional discrimination? What about a ban on men wearing kilts, even formal ones?

Suppose the police department requires men, but not women, to have hair no longer than 2 inches. Is that discriminatory? What if the department required women as well as men to get buzz cuts?

Suppose an employer's health plan did not cover prescription contraceptives. Would that constitute facial discrimination on the basis of gender? Would it be intentional discrimination? Would it matter if the employer did this to save money? What if the plan covered Viagra (and similar medications)? What if the plan did not cover Viagra? What if the plan covered spouses, and most of the covered individuals

using prescription contraceptives were spouses of male employees?

The constitution forbids (usually) discrimination on the basis of gender. Could a public school expel students who are pregnant?

A man sues alleging that he was denied a promotion on account of gender. The only evidence is a diary entry by the supervisor who made the decision, which, referring to the woman who got the promotion, reads--"Promote my girlfriend Babette." Who wins and why?

What if Babette does not like the supervisor at all, but only goes out with him in the hopes of more favorable treatment at work? Can Babette sue because she did not like dating the boss and felt she had to put up with him to get a promotion? Could a woman also denied that promotion sue on the ground that she had refused to go out with the boss, who then went to Babette on the rebound?

What if, after a bona fide romantic relationship ends, one of the individuals involved fires the other because they broke up? See *Forrest and Pipkens*, p. 300.

3. What is intentional discrimination?
Text: 10-14 [11-14] (Hazen Paper)
131-33 [146-48] (Feeney)

Would you find that the motive in *Hazen* was age? The company's pension vests after 10 years. Here the plaintiff was 62; do you think the employer would have done that if he was 32?

In Hazen Paper, why do we care if this violates the ADEA if it violates ERISA anyway? What if the motive was both age discrimination and an ERISA violation—does the plaintiff win on his age claim? The jury found both age discrimination and ERISA-discrimination; are those verdict consistent?

In an age discrimination case, can a defendant defend the disputed decision on the ground that its real motive was gender discrimination?

If in Hazen Paper the company fired all workers to keep their pensions from vesting, would that be intentional discrimination on the basis of age?

Would a rule that we fire anyone whose pension is about to vest have a discriminatory effect on employees over 40?

What if the pension vested at age 55 provided the worker also had 10 years experience?

The Court thought this might be enough evidence to prove age discrimination; is that right?

Would the result in Hazen Paper have been different if the pension only vested after 25 years?

Is it age discrimination for an employer to refuse to hire well experienced applicants on the ground that they are over-qualified, e.g. no one with more than 5 years experience?

Do you think there was in fact a discriminatory motive at work in Feeney? Didn't the state know this law was going to favor men over women?

In Feeney, would the state have enacted the statutory preference if 98% of those who benefitted were women? African-American? If not, so what?

Why isn't this statute inherently discriminatory? Does it matter that at the time most of these veterans served the United States armed forces barred women from most positions?

The only Sound Transit light tracks at street level (under the original plan; there are now street level tracks in Bellevue) in the initial phase are in the Rainier Valley. The tracks are elevated in Tukwila, and in tunnels in the rest of Seattle. Do think that is the result of intentional discrimination?

4. Proving intent under McDonnell Douglas: prima facie case, rebuttal and pretext

Text: 14-21 [16-27] (McDonnell Douglas)

This is the first of several units about how to prove the existence of an unlawful motive. As a practical matter this matters primarily because it affects whether a defendant can get summary judgment.

Prima Facie Case and Summary Judgment

Two meanings of prima facie case

- (1) Enough evidence for a McDonnell Douglas PFC of motive
- (2) Colorable evidence of each of the elements of a claim (e.g. had minimum number of employees; exhausted; in retaliation case)

Standards for defeating summary judgment

- (1) Plaintiff must establish a prima facie case (and then more)—easy PFC standard
- (2) Plaintiff must establish a prima facie case (and then more)—very demanding PFC standard
or “direct evidence”
- (3) Plaintiff has a “convincing mosaic” of evidence (sometimes treated as creating a PFC; sometimes sufficient by itself)
- (4) Plaintiff has enough evidence that a reasonable jury could infer discrimination

Demanding PFC standards

- (1) Nearly identical comparator (especially for discipline cases)
- (2) Job went to someone outside the protected group (promotion, hiring, replacement)
- (3) In an age case, replacement was X years younger than the plaintiff.

What plaintiff's evidence a demanding PFC standard means court does **not** consider

- (1) Evidence of pretext
- (2) Biased remarks
- (3) Pattern of discrimination

What are the elements of a prima facie case under McDonnell Douglas?

Why are the elements of a prima facie case probative at all?

Why does it matter whether the plaintiff made out a prima facie case?

Would you infer the existence of discrimination from the facts sufficient to create a prima facie case in McDonnell Douglas? Ever? In some cases? Would you agree to represent a plaintiff, on a contingent fee basis, based on the elements of a prima facie case?

What happens if there is a dispute about whether the plaintiff actually applied?

What happens if the plaintiff testifies that he was qualified for the job, but the employer disputes that?

Would there be any circumstances in which Mr. Green could make out a prima facie case, or prove discrimination, even though the employer proved that

--Green never applied for the job,

--Green was never rejected,

--Green was not qualified for the job,

--The vacancy did not still exist after he applied?

--the official who did not rehire Green did not know he was black

--What if the decision maker states in an affidavit or deposition that "no one told me Green was an African-American"?

--Green was actually white (other than in some sort of affirmative action case)

In other words, is it possible that one of the elements in the McDonnell Douglas list could be absent, and yet discrimination still occurred?

If the employer proves that the person who got the job Green applied for was also African-American, should the case be thrown out? Is there still a prima facie case? Is the defendant entitled to summary judgment? If not, what would Green have to prove at trial? Would you agree to take a case for the plaintiff if those were the facts?

The ADEA forbids discrimination against a person 40 or over on the basis of age. Could a 50 year old plaintiff win such a case if he or she was fired and replaced by a worker who was 49? 45? 51? Could that plaintiff establish a prima facie case under those circumstances?

What should be required to establish a prima facie case that a worker was fired in retaliation for having filed a Title VII charge with EEOC?

In *Postal Service Bd. of Governors v. Atkins*, 460 U.S. 711 (1983), the Supreme Court held that after a bench trial, if the defendant has given a reason for its actions, the court should not bother to address whether there is a prima facie case, but should instead proceed directly to the issue of discrimination vel non. Should courts also apply that rule at the summary judgment stage?

What is needed to establish a prima facie case of discrimination in the choice of sanction, where the plaintiff had admittedly done something wrong, e.g. was late to work?

Suppose in a race discrimination case, the employer gave the following answer for not hiring the plaintiff—would it be sufficient under the

McDonnell Douglas paradigm?

--"The applicant I hired was better qualified."

--"The plaintiff was a Leo."

--"The plaintiff said he would not bribe the cops. Our workers have to do that."

--"The plaintiff was pregnant."

--"I hired my nephew instead."

--"The plaintiff was too aggressive."

There is considerable disagreement between, and even within circuits, about whether a plaintiff cannot survive summary judgment unless he or she establishes a prima facie case. Appellate decisions sometimes hold that a prima facie case is not needed if the plaintiff

--has "direct evidence" of discrimination

--has evidence shows a "convincing mosaic" that there was discrimination

--has enough evidence that a jury could reasonably infer discrimination.

"Prima facie case" sometimes has a different meaning, referring to the need for the plaintiff to have evidence of all the elements of a claim (not about the sufficiency of the evidence as to the motive element). E.g. evidence of

--unlawful motive

--injury

--the employer having a sufficient number of employees to be covered by Title VII

--exhaustion of administrative remedies (under Title VII)

5. Proving intent: Reeves as a paradigm case

Text: 24-36 [27-37]

There are three basic types of evidence that would be considered at summary judgment, and at trial: (1) evidence by plaintiff attacking the employer's proffered reason, (2) other inculpatory evidence offered by plaintiff, (3) exculpatory evidence offered by the defendant.

Attacking the employer's reason; "good faith [but mistaken] belief" doctrine

This is the most common type of proof offered; some cases say it is required

Why did the court of appeals think the evidence was insufficient in Reeves?

Is it sufficient to survive summary judgment that the plaintiff offers substantial evidence that the employer's reason was a pretext?

What was the "pretext plus" doctrine?

What is the rule now?

Suppose the employer gives a reason for the adverse action and the plaintiff proves the reason was incorrect? Is that enough to permit for judgment for the plaintiff? Does it require judgment for the plaintiff? E.g., the employer says it fired the plaintiff because he or she was late to work, but the plaintiff proves that he or she was at work on time.

Suppose the employer says it fired the worker for making bad widgets, but the employee testifies the widgets he or she made were fine?

Smith, a law firm associate, is fired ostensibly because a complaint was filed too later, after the statute of limitations had run. Smith contends that was the fault of Jones, who is not in the protected class. Is that enough to get to trial?

What if the boss was told that \$100 is missing from the petty cash drawer and that Smith used that desk on the day of the theft, and decides on the spot to fire Smith?

Is it sufficient for a plaintiff to offer evidence he or she did not prepare a record the employer said was false?

Does a plaintiff need to do more than show that the employer's reason was incorrect?

Does the plaintiff have any way to survive summary judgment if he or she did make bad widgets?

How did the Court analyze plaintiff's evidence in Reeves regarding each of these employer reasons—

Reeves marked Cooley present on a day she was absent?

Reeves credited workers for a full day's work when they were marked as arriving at 7:00, which is when they needed to be on the production line?

Reeves failed to punish a tardy worker?

If an employer gives several reasons for its action, does an employee have to offer evidence contradicting all of them, or only one of them?

Suppose one of the reasons the employee is given for being fired as a call-center worker is that he wears weird ties?

Once the employer has articulated a reason—plaintiff did X wrong-- what are the various ways a plaintiff can then meet his or her burden?

Suppose when being dismissed Smith is told she is being fired for coming to work late, and later during discovery the supervisor testifies he also fired her for making bad widgets? Is the employer's case stronger or weaker?

Promotions If the employer says it promoted someone else because he or she was better qualified, can the plaintiff get to a jury by offering evidence that he or she was actually better qualified? What if the plaintiff testifies he or she was better qualified?

Smith and Jones both apply to be Dean of the law school. The standard is scholarship and leadership. Smith gets the job; Jones sues and offers evidence that his or her scholarship (Smith had written 2 books, Jones only 1) and leadership is better (only Smith has experience as an assistant dean). Is that enough to get to trial?

Discipline level How do you prove that the level of discipline was discriminatory if the employer does not have established rules regarding the level of punishment for particular types of misconduct?

Smith is fired, allegedly for negligently breaking a \$1,000 machine. Smith admits the negligence, but asserts the level of punishment is discriminatory. Can Smith get to trial by offering proof that Jones, someone outside, the protected class was not fired

--for losing \$1,000 by not filing some form on time to get a government check

--for being late a lot

--for pinching the bottom of a subordinate?

Is the answer the same if Smith and Jones have different supervisors?

When Smith was fired, he or she was told the dismissal was for tardiness. When deposed, the supervisor says there were two reasons; Smith was tardy and he or she made lousy widgets. Is the addition of that second reason helpful to the plaintiff or to the defendant? What if, in an affidavit in support of summary judgment, the supervisor now gives a third reason? In light of that

--if you were plaintiff's counsel, would you ask the supervisor if there were any other reasons than the one he or she gave when the plaintiff was dismissed?

--if you were defense counsel, would you look for additional reasons and put them in the record?

In light of this area of the law, what advice would you give a Human Resources Department about what to say to a worker who is being fired about the reason for the dismissal? Should it give a reason at all?

6. Particularized evidence issues and rules

Text: Plaintiff's evidence: 21-24, 38-39, 46-50 (Ash), 80-82
(biased remarks) [24-27, 43-44, 50-54]
Exculpatory evidence: 86-91 [99-102]

Other Evidence for Plaintiff

Allegedly biased remarks; are these probative? If so, why? How would you persuade a court on summary judgment that they are probative?

What if, in a gender case, the supervisor called the female plaintiff a "bitch"?

We will spend some time talking about the word "bitch," whether and/or when it is a gender biased remark. To litigate a case in which a plaintiff relies on remarks, both sides need to be able to explain why a remark is or is not biased; it is not enough, for example, for the plaintiff (usually) just to point to what was said. There is, perhaps surprisingly, a lot of caselaw about "bitch."

What if, when the boss was legitimately angry at Betty, he said "Betty is a bitch"? And when mad at Bob the boss calls Bob a "son of a bitch"?

What if, in a gender case, the supervisor in question said of the female plaintiff that she was "too aggressive"?

What if, in an age case, the supervisor in question had once said the company needed "new blood" and "fresh thinking"?

What if in a gender case the boss said "Women, can't live with them, can't live without them"?

What if the boss said "time to get to work boys"? If all the workers were black? If some were women?

What if a female boss said "men can be such jerks"?

What if the boss asked a female employee if she was pregnant?
Would you advise an employer not to ask that question?

What if these remarks were 4 years before the claim arose?

Can an employer ask a 60 year old worker about retirement plans?
Would you advise an employer not to ask that question?

Why do we care if Powe Chestnut made an ageist remark, it was Mrs.
Sanderson who fired Reeves.

Other supervisor evidence ("me too evidence")

What is the significance, if any, of discriminatory acts by supervisors
other than the supervisor who allegedly discriminated against the
plaintiff?

What if another supervisor made a discriminatory remark, like "Can
you find me a younger applicant for this job?"?

Employer's own rules

Does it matter if the employer violated its own rules?

Exculpatory evidence

What is the general rule in Reeves about when a moving party's evidence can be considered on a JNOV or summary judgment motion?

In most summary judgment cases, all the affidavits and deposition on which the employer relies are from its own employees. In light of Reeves, can that ever lead to summary judgment? Could the affidavits be relied on to support a JONV motion by the employer?

What if a worker complained to the EEOC, which sent the complaint to the employer, and a month later was fired. Both the official who fired the worker and the official who received the complaint submit affidavits swearing that the recipient never told the official who dismissed the plaintiff?

At summary judgment, how much evidence should the court attach to the following potentially exculpatory evidence:

--the person who fired the plaintiff was the person who originally hired him

--the person who fired the plaintiff was over 40, the claim is age discrimination (Mrs. Sanderson and Powe Chestnut were over 40, probably as old as Reeves)

--the person who fired the plaintiff was a woman, and the claim is gender discrimination against a woman?

--there were many other employees, over 40, who did not get fired.

Motive will also matter in hostile environment cases (e.g. sexual harassment) if a dispute arises about the motive behind a complained of act—e.g., did the boss deliberately touch the plaintiff's arm (or other body part), or was it an accident?

7. Proving intent: discharge and discipline
SCM Elrod, Hughes, Mayberry

These cases will give you a practical sense about how summary judgment cases are litigated and won.

As you read each, think about how as plaintiff's counsel you might in retrospect do a better job developing the plaintiff's evidence, or attacking the defendant's evidence.

If you were a conniving supervisor who wanted to fire Sven because he is Swedish, and you knew that national origin discrimination is illegal, how would you go about doing that?

Elrod

Was the award of JNOV in Elrod correct? Why?

What if the women who accused Elrod were trying to get him fired because of his age?

Why do you think the jury ruled for Elrod?

What could Elrod's attorney have done to strengthen his or client's case?

Was it proper to let Elrod testify that he had not harassed the women?

Was the evidence of age discrimination at the Tampa office probative?

How if at all is Elrod affected by Staub? (We will get to Staub later)

If a plaintiff was fired for alleged sexual harassment, how could he or she prove the dismissal was actually the result of unlawful discrimination?

Hughes

Note how the court analyzes the evidence and concludes there was "no evidence" of discrimination. This is a common defense tactic.

In Hughes, consider each of the types of evidence that the plaintiff offered to defeat summary judgment. Why did the court think each was insufficient? Was it correct? What other evidence could plaintiff's attorney have offered?

--they did not fire a male sergeant whose subordinate left a door open

--there was only a 30 day suspension for a woman who left a door unlocked

--There were 5 other incidents of doors left unlocked and no evidence a supervisor was punished

--Jailers who left doors open were not fired

--Plaintiff was lied to and told there were no other vacancies she could move into

The court said that since another woman whose subordinate left a door unlocked was not fired, the dismissal of the plaintiff could not be based on gender? Is that correct?

Mayberry

Evaluate in a similar way the evidence in Mayberry.

A lot of white with ASMs were not suspended

The plaintiff testified he did nothing wrong, the scrappage was due to the computer

DOL found instances of discrimination in promotion

8. Proving intent: statistics

Text: 100-18 [114-31] (Teamsters, Hazelwood, Wal-Mart)
124 [138] (formula)
skim 118-31[132-45]

[CS: 230-52] (Wal-Mart)

What were the potential defects in the evidence relied on by the plaintiff in Hazelwood? The US showed that Hazelwood's teachers were 2% black, compared to the area workforce that was 15.4% black. What was potentially wrong with that evidence? What other statistical evidence might have been better and why?

What would be the best comparison figure:

Overall employment level in the St. Louis area

Overall employment in the suburbs only

Recent hiring in the whole area

Recent hiring in the suburbs only

Suppose on remand neither side introduces additional evidence--should the government statistics be admitted? If so, how much weight should they be given?

Are the statistics in Teamsters any better than in Hazelwood? Look at n. 22 in Teamsters.

Suppose at the UW the average wage of male faculty is \$95,000, but for women it is \$75,000. Is that probative of wage discrimination against a current female employee who makes \$75,000?

Suppose only 10% of the current workers at the Widget Company are women. Does that provide support for the claim of a recent female applicant that she was rejected because of her gender?

What if 5% of the tellers at the University district branch of Wells Fargo are Asian? How probative is that?

Which is the better comparison figure in a hiring case

--area workforce, or

--applicants for the job in question?

In a hiring discrimination case, which comparison figure would be more probative--the portion of applicants who were minority, or the portion of qualified workers in the population who are minority?

Suppose all 6 anesthesiologists at a hospital were men, and the plaintiff wanted to prove gender discrimination. Could the plaintiff also introduce evidence regarding the percentage of men among all doctors in surgery? All doctors on staff? All doctors with medical privileges?

Are employment discrimination class actions still possible after Wal-Mart? If so, what new issues and problems does Wal-Mart raise?

9. Proving intent: rebutting statistical evidence
Text: 133-40 [148-55] (Sears)
SCM: Celestine

If you had been the district judge in Sears, what would you have done?
If you had been on the court of appeals, would you have reversed?
Think about each distinct reason given by the district court judge.

The defendant had no statistics of its own—how can it win?

What were the various explanations that Sears offered to explain why fewer women were in the higher paid commission positions?

Were they persuasive?

How could EEOC have countered those explanations?

In a case involving an individual claim of discrimination, should the court permit the plaintiff to conduct discovery regarding and to rely on evidence of class-wide discrimination?

Is Celestine correct? What if the plaintiff cannot establish a prima facie case about his or her individual claim? What if the plaintiff established a prima facie case but failed to offer specific evidence that the reason for promoting others was pretext

10. Proving intent: multiple motives

Text: 61-75 [68-77] (Price Waterhouse)
69-70 [77] (1991 Act) **see** section 706(m) and 706(g) (2) (B)
70-80 [77-81] (Desert Palace)
82-87[91-98] Gross v. FBL
429-36 [CS: 16-32] University of Texas v. Nassar

During the 2020 impeachment trial of President Trump, the first question from the Senators was whether it would be an abuse of power if the president had "had more than one motive for his alleged conduct, such as the pursuit of personal political advantage, rooting out corruption and the promotion of national interests."

What is the question Price Waterhouse? Why isn't the case over if the plaintiff proves there was an unlawful motive? What did Price Waterhouse hold? Why does this matter?

A. Can there be more than one but-for cause?

If an employer gives several reasons for an adverse action, does the plaintiff have to prove that all of them are false?

A white applicant who was rejected for admission to the University of Michigan sues challenging the affirmative action plan and alleging that she was rejected because of that plan. What must the defendant prove to keep the plaintiff from getting a decision in the constitutionality of that plan?

What is the relationship of McDonnell Douglas and Price Waterhouse?

After Price Waterhouse, is McDonnell Douglas still good law?

Are mixed motives and McDonnell Douglas two types of violations?

Some courts have suggested that McDonnell Douglas has been modified by Desert Palace--is that right?

Does it matter if a plaintiff has direct evidence?

B. How can a court tell at summary judgment if a case is a mixed motive case?

Should a plaintiff be required to plead a mixed-motive case?

C. In what way did the 1991 Civil Rights Act modify Price Waterhouse?

Is a mixed motive instruction good for the plaintiff or the defendant?

What was Desert Palace all about?

How can a court tell at trial if a case is a mixed motive case?

Does the plaintiff need "direct evidence" in a non-Title VII mixed-motive case?

In light of the 1991 Civil Right Act, what standard should the courts use in an employment discrimination case under a statute other than Title VII?

D. Gross and Nassar

What are the bases for Gross? For Nassar?

Is Price Waterhouse still good law?

Where does this leave statutes other than Title VII and the ADEA?

What if a plaintiff alleges he or she was fired because of race and age—must the age claim be dismissed?

What if a plaintiff was fired by a 5 member committee and the plaintiff has evidence that one member of the committee was biased?

11. Multiple decisionmakers: discriminatory lower-level supervisors and higher level decisions' the "cat's paw" situation

Text: 50-56 [54-61] (Staub)

How can an employer be liable for discrimination if the decisionmaker had no unlawful motive?

If the motives of the lower level supervisors can be the basis for liability, in what circumstances?

How did Mullaly and Korenchuck get Staub fired?

What are the various tactics a biased supervisor might use to get HR to fire someone?

What are the elements of a claim under Staub?

Is the result different if the higher level official, before firing the plaintiff, conducts an independent investigation?

Is the result different if the higher level official, before firing the plaintiff, asks the plaintiff for his or her side of the story?

What if a subordinate made a false charge of sexual harassment against her boss because the subordinate did not like the supervisor's religion?

Suppose the plaintiff was dismissed by a plant foreman because two co-workers said they saw the plaintiff steal tools. If the plaintiff offers evidence that the co-workers were racially motivated in making that false charge, is that enough to win?

What if an employer fires a worker based on a false charge from a bigoted customer?

What if the supervisor and HR both deny that the supervisor ever recommended the firing, and swear the supervisor actually opposed the dismissal?

Suppose that the decision to fire the African-American plaintiff was made by a committee of 5. If the plaintiff proves that one member of the committee belongs to the Ku Klux Klan, is that enough to get to the jury? If not, what else would the plaintiff need?

12. When is the discriminatory action sufficiently adverse?

Text:

56-60 (Minor)

422-29[63-68, 476-84] (Burlington Northern)

Does it matter in determining whether an action is sufficiently adverse whether the plaintiff is asserting a claim under section 703(a) (discrimination) or 704(a) (retaliation)?

What is the section 704(a) standard?

Who decides if the Burlington Northern standard has been met, the court or a jury?

In Burlington Northern, why did the Court hold that the plaintiff's evidence was sufficient?

Would it violate section 703(a) for the law school to assign teaching at 9:30 to women on the basis of gender?

To assign that hour to anyone who contacted EEOC?

Suppose the employer discovers that a worker is Catholic and burns down her house, does that violate Title VII?

What if the employer did that because the worker complained to EEOC?

What if an employer reduces a worker's pay \$1 because he complained to EEOC?

What if the employer cuts the pay by \$1 because it discovers the worker is Swedish?

Is a negative evaluation actionable? Under section 703(a)? Under section 704(a)?

What about assigning worker to an office without a window on the basis of gender?

What about giving the employee less interesting assignments because she is a woman?

What if the employer required someone to start work 30 minutes earlier than the normal schedule because he is Catholic?

What about being assigned to the night shift because the worker complained about discrimination to the EEOC?

Suppose on December 24 the foreman smiles and says "Merry Christmas" to all the whites, but scowls and says "Humbug" to all the non-whites?

What if the boss, when he meets a worker's family at the Mall, is nice to the whites but very nasty to the non-whites?

13. Who is an employer? An employee? An independent contractor?

Text: 263-73 [314-23] (Lerohl)

What factors determine whether an individual is an employee or an independent contractor?

Of the factors in Lerohl, which could an employer manipulate to increase the odds the court would hold an individual is not an employee?

Is Lehrol correctly decided?

Why would an employer want to treat many individuals who work for it as independent contractors?

Is a law firm partner an employee under Title VII?

If an individual was injured on the job, would he or she want to be classified as a worker or not? (think about workers' compensation claims; Byrd v. Blue Ridge Cooperative from back in Civil Procedure)

If a worker who technically is paid by a Temp. agency is sexually harassed on the job where she is working, is the Temp. agency legally responsible? Is the company at which she is working responsible?

Suppose a state has a statute that creates a different standard than Lehrol for determining who is an employee. Would that apply in an employment discrimination case?

14. BFOQ
Text: 141-49 [157-69] (Johnson Controls)
SCM: 30A (Hooters ad)

If the Hooters case had been litigated, who should have won?

Can Hooters refuse to hire waitresses who are over 30? Is this gender discrimination? Is it unlawful age discrimination?

Could an airline hire only young, attractive, female flight attendants?

Could Big Time hire only young, attractive female wait staff?

If you decide to open a restaurant, can you decide to hire only cute male bartenders, as nice looking as Tom Cruise in the movie *Cocktail*?

Could the women's clothing store Forever 21 have hired only employees who were (or looked) 21 or younger?

Can a French restaurant hire only wait staff who are French? Who speak French?

Can a restaurant serving only Asian food hire only Asians to wait tables?

Could Starbucks in some anti-immigrant area hire no one who was (or looked) Hispanic to keep customers happy?

Could the UW hire only campus police officers under 45 because they would relate better to students? (OK, maybe even 45 is too old; how about 35?)

Is gender a BFOQ at a women's gym, e.g. Curves? What about Richard Simmons working there? What about hiring only male staff at the Macho Man Gym?

What are the elements that a defendant must prove to establish a BFOQ? See Western Airlines 142 [158-9].

If, by coincidence, all the women at the University of Washington law school left in the same year, would gender then be a BFOQ?

If workers over 60 on average make 10% fewer widgets than younger workers, can you lay off everyone over 60? Refuse to hire anyone over 60? What if workers over 60 were 25% more likely to make a serious mistake in making a parachute?

Johnson Controls was just trying to prevent birth defects. Why does Title VII bar that? How can the company protect itself from tort suits by workers? Would the company's actions be legal if lead only affected women? Would Title VII preempt state tort claims by women or children born with birth defects as a result of exposure to toxins at the plant?

Does Dothard (p. 141 [157]) mean that a state does not have to employ female guards at a maximum security male prison?

15. Affirmative Action

Text: 151-65 [169-89] (Johnson) (look at n. 5)

Is having women on the faculty a compelling governmental interest at the UW law school or a BFOQ?

If a court found systemic discrimination in hiring against women or minorities, what type of injunctive relief could it order?

What was the affirmative action policy in Johnson?

Exactly what role did gender play in this case

Who was better qualified in Johnson?

Was there a manifest imbalance in Johnson? Did the facts establish a prima facie case of systemic sex discrimination?

What is the Johnson standard for when interests were unduly trammled?

Is gender a BFOQ in Johnson?

Suppose only 10% of craft workers at the UW are women. Is that a manifest imbalance?

If the CEO thinks that discrimination is going on at a plant, what can he or she do?

What steps if any can an employer, e.g.. Microsoft, take to promote diversity in its workforce without triggering the need to comply with the Johnson standard? I.e., what types of affirmative action plans by employers don't trigger that scrutiny, if any? (This is the key advice clients need).

Are diversity positions for 1L students legal under Title VII? Or, perhaps, when would they be legal?

The NFL requires all teams seeking a new head coach to interview a minority candidate. Is that legal under Title VII. (Recall that at

the 2007 Superbowl both head coaches were black).

If it is constitutional to have a racial BFOQ, could it nonetheless violate Title VII? How could Congress ban a practice that is not unconstitutional?

Could the police department under Title VII make assignments on the basis of race? To avoid having an all white precinct in a minority neighborhood? To work under cover infiltrating a gang? The Klan?

In light of recent events like the controversy surrounding the deaths of Michael Brown and Eric Garner, what could a police department legally do in light of Title VII to increase minority hiring?

What if anything can a Fire Department do if fire fighters, given their choice of assignments, self-segregate so that the fire houses in white areas are almost all white?

Can Starbucks set aside 10% of its jobs for immigrants, or is that national origin discrimination?

Could an employer under Title VII refuse to hire aliens?

16. Sexual Orientation

Text: 274 [324] (Boy Scouts), 280-99 (Hively)

SCM: Nichols

Currently awaiting decision by the Supreme Court are appeals regarding whether Title VII forbids discrimination on the basis of sexual orientation (Zarda) and whether it forbids discrimination against transgender individuals (Harris Funeral Homes). When we get to this section, if the Court has decided those cases we will look at the decisions. If it has not, we will look at portions of the briefs or oral arguments. I will circulate those materials a few days before that class.

However those cases are decided, claims about gender stereotyping will still present a different issue, although one that may be hard to distinguish in practice.

Is Nichols right? Isn't sexual orientation discrimination the same as gender-stereotype discrimination? Would homophobia be a defense in this case?

Could an employer fire a man because he wears an earring? Was seen at a gay bar?

Is Nichols consistent with Vickers? Would there be a violation here if Nichols were being harassed because he was, or was perceived to be, gay?

Seattle's anti-discrimination ordinance covers sexual orientation (SCM 14-B). Washington state law does too. In light of the Boy Scouts case, as to which employers for which jobs would the ordinance violate the First Amendment? Is the ordinance valid as to paid Boy Scout employees--typists? janitors? Boy Scout store sales people? What about a conservative church that disapproves of homosexuality?

Could Seattle require a Catholic parochial school to hire people who are (a) gay, or (b) divorced?

Is Title VII constitutional as applied to the Ku Klux Klan?

17. Pregnancy and the PDA
Text: 306-24 [347-58] (Young, Maldonado)
[CS: 51-74 (Young)]

Suppose an employee misses a day of work. She comes in the next day and explains it was morning sickness (which lasted all day; that can happen). She is fired. Is that illegal?

Can an employer fire a woman who regularly comes to work late due to morning sickness?

If an employer usually fires anyone who comes to work late, can it make an exception for a woman who is late due to morning sickness?

Could an employer fire a pregnant female employee because it believed that she did not intend to return to work after her pregnancy?

Can an employer with a self-funded medical insurance plan fire a pregnant woman to avoid having to pay her medical bills?

Is Maldonado correctly decided? What does the plaintiff have to prove at the trial? What does the defendant have to prove?

Can an employer which generally provides only 60 days sick leave provide 90 days sick leave for pregnancy related illness?

Can an employer under the PDA give women (but not men) 90 days paid leave to care for a newborn child?

Can a pro-family employer in hiring prefer pregnant women or mothers of small children, out of a belief that other employers are discriminating against such applicants?

In light of the PDA, is failing to include contraception in medical insurance really gender discrimination?

Could an employer fire a woman for having had an abortion?

UPS v. Young—

Why was this a hard case under the statute?

Did the employer "treat women affected by pregnancy the same . . . as other persons not so affected but similar in their ability?"

What is the legal standard in this case?

What does a plaintiff have to do under this decision to establish a prima facie case?

If the plaintiff does that, what must the employer do?

If the employer meets its burden, what does the plaintiff then have to do?

18. Sexual harassment and other hostile work environments: why is this discrimination within the meaning of Title VII, etc.?
Text: 275-79, 326-31 [325-30, 360-66] (Meritor; Oncale)

Vinson didn't get fired or demoted--why is this discrimination in the terms and conditions of employment?

If, as the district court held, Vinson's relation (assuming it occurred) with Taylor was voluntary, how can this violate Title VII.

Would you admit evidence that purported to show that Taylor had harassed other women? Would it matter if Vinson knew about that harassment?

If in the case there was a dispute about whether the relation was voluntary, would you as a judge admit evidence Vinson wore provocative clothing? What would "provocative" be?

Suppose the boss tells a female worker that he will exempt her from a pending layoff if she provides a sexual favor. She provides the favor, and is not laid off. Can she sue under Title VII? If so, for what? Can a male worker who was laid off sue? How about a female worker?

Suppose the perpetrator in Meritor had also engaged in similar conduct with a male subordinate?

What if the male workers just had pinups on the walls of their offices, and some women objected. Would an employer have to make the male workers take down the pinups? Does a federal law requiring that violate the First Amendment?

In "The Devil Wears Prada," was the environment at Runway Magazine a violation of Title VII?

What if A and B, after dating for a while, break up, and thereafter A is very mean to B at work?

What if the boss slaps the bottoms of all workers, male and female?

In Oncale, how can there be a Title VII violation if the harasser is not gay? What does a plaintiff have to prove? How can this be sexual harassment if the harasser is not gay? Suppose the workers are also abusive to new female workers, but in a non-sexual manner. Could they also sue? Would this bar Oncale's suit? Suppose the court finds that the abusers in Oncale were gay--does that affect the outcome? How?

Which of the following compliments would it be inappropriate for a male faculty member to give to a female student? Would it matter if the student was merely flattered?

--are you dressed up for an on-campus interview?

--nice scarf?

--nice pin?

--nice dress?

--nice Halston?

--nice shoes?

--nice hair?

Is the standard of what would be inappropriate different for a fellow student? If so, why?

Consider the following possible practices which might be engaged in by a law firm partner in dealing with a female associate. Which would support a claim of unlawful harassment? Which should the firm forbid?

--ask an associate out at all

--asks the associate out repeatedly

--dating a summer associate (Michelle Obama went out with Barak when he was a summer associate and she was a regular associate at the same firm)

--tells the associate repeatedly she is wearing a nice dress

--mentions that another associate looks nice

--mentions that he likes to dine at Hooters

--tells dumb blond jokes

--uses the F word when angry

--calls her a "bitch" when he is angry

--talks about whom he is dating

--says he doesn't think some women make good lawyers

--keeps a copy of Playboy on his desk?

Would telling dirty jokes to both male and female associates support a claim of harassment? Would it be admissible evidence? How many dirty jokes would be enough to create a hostile work environment?

If you were drafting a company anti-harassment policy, what would you tell employees that they could not do?

Types of Gender-Based Harassment

- (1) Targeted and presumptively unwelcome sexual acts—bottom pinch
- (2) Quid pro quo demands
- (3) Targeted remarks or acts that only count if declared unwelcome (asking on date, assuming both single)
- (4) Acts or remarks that are non-targeted but inherently sexual in nature (offensive remarks made regardless of who is around to hear them)
- (5) Misogynistic remarks
- (6) Facially neutral but gender motivated remarks—e.g. “you idiot”
- (7) Discrimination in pay, promotions, etc.
- (8) Harassment of others known to the plaintiff while employed

19. Sexual harassment: when is it bad enough to be illegal?

Text: 331-37 [366-74] (Harris)

SCM: Duncan v. General Motors Corp.

If you were on the jury, would you find the harassment created a hostile work environment in Harris? In Duncan?

Is the harassment in these cases sexual or misogynistic?

In Harris does it matter if

--Hardy was just joking

--a reasonable person would have known he was joking

--others thought Hardy was harmless

--Hardy was mean to men too

--Hardy was gay

Of what significance, if any, is the fact that Hardy apologized?

Do you think Hardy wanted a sexual relationship with Harris?

Suppose in a case of alleged harassment of a female worker by a co-worker the only acts of harassment are bottom pinches. How many pinches in a year would be sufficient to create a hostile work environment? How many stolen kisses in a year? Is the number different if the harasser is the victim's boss?

Suppose a partner on two occasions three months apart pats the associate on her bottom. If you were a juror, would you find for the plaintiff on those facts? If you were a judge, would you let that case go to the jury if that were all the evidence that the plaintiff had?

Suppose the partner repeatedly compliments the associate's clothes and asks her out--despite her request that he stop doing so. Could this alone create a hostile work environment?

Suppose, in a racial harassment case, a white foreman once used the N word when he was angry at the African-American plaintiff. Would you as a juror find a hostile work environment on those facts? If you were the judge, would you let that case go to the jury?

Would you have quit if you were Harris?

Would you have quit if you were Duncan, or waited to see if GM would fix the problem?

20. Sexual harassment: scope of the prohibition
SCM: Report on Governor Lowry

If this case had gone to trial and you were on the jury, would you have found for the plaintiff or the defendant?

If you were the judge, would you let this case go to a jury?

Which of the incidents alleged Albright would, if true, support her claim of sexual harassment? How serious is each on a scale of 1 to 10?

--towel incident

--"stunning" remark in the car

--touching her neck and asks if it bothered her

--pat on knee or leg, squeeze ankle or calf

--suggest all move in together

--jealous if she had a boyfriend

--Spokane hotel room incident

--"control self" remark

--"Suzanne with the beautiful legs"

--November 1994 party incident

Does it matter what Lowry's intent was?

If Albright had come to you asking advice about what to do about Lowry, and told the story described in the memo, what would you have advised her?

Did Fennessey respond appropriately? If not, what should she have done differently?
(Theiler is now a federal Magistrate Judge)

21. Sexual harassment: scope of employer liability
Text: 337-45 [374-82] (Ellerth)

What is the basic standard for liability when the harasser is a supervisor?

Suppose in a supervisor harassment case the employee complains but the employer mistakenly finds no harassment occurred, and then more harassment occurs. Is the employer liable? Same result if the harasser was a co-worker?

What if someone else complained about that supervisor, and the employer mistakenly found no harassment?

What if in a harassment case the employer unearths the harassment and fires the harasser. Is the employer immune from liability?

Suppose that the employee explains that she didn't complain about being harassed by her supervisor because she was afraid she would be fired if she did?

What if the employee does not file any internal complaint, but does (necessarily) file a charge with EEOC prior to suit, and the employer responds to the charge by denying that the harassment had occurred?

What if the employer requires that harassment complaints be in writing and signed, not anonymous?

The employee complains orally, and the employer does nothing because it was not in writing and signed?

The employee would have complained if she could do so orally or anonymously, but given the rules does not complain at all?

What if the company personnel manual says "Sexual harassment is forbidden."? Is that enough under Ellerth?

Under Ellerth, was summary judgment proper in Meritor since the victim had not complained?

Must the victim complain before the harassment gets bad enough to be illegal? Suppose the boss tells one dirty joke, the victim does not complain, then he gropes her. Does Ellerth bar that claim?

Who should decide if an employer did enough to meet the Ellerth standard--a judge or a jury? why?

What should Human Resources do if the asserted victim asks it to keep her complaint confidential?

What should an employer do in a "he said, she said" case where the employer is not sure whether the harassment occurred?

If you had a client who was being sexually harassed by her boss, would you advise her to complain or to quietly look for another job?

22. Sexual harassment: more on reasonable care; employer liability--what is a tangible employment action?

Text: 355-66 (EEOC v. Management Hospitality, 666 F. 3d 422)

SCM: Lutkewitte

345-55 Vance v. Ball State U., [CS: 78-96, 133 S.Ct. 2434]

What is a tangible employment action?

Is a constructive discharge a tangible employment action?

Does Staub affect that issue? Look closely at the language in Nassar.

Who is a supervisor under Ellerth? What if the Dean's secretary is harassed by a Visiting Scholar? By an Assistant Dean? By the UW President?

What is the relationship between whether a harasser was a supervisor under Ellerth and whether the biased actor was a supervisor under Staub?

With regard to a faculty member at the law school, who is a Faragher-Ellerth supervisor?

Suppose, in retaliation for denial of sexual favors, the law firm partner assigns an associate to work on a separate case? Stops asking her to the lunch he has at his club each Friday with attorneys from the firm?

Is assignment to the night shift a tangible employment action? Transfer to another office away from the alleged harasser?

What did the employer do wrong in Management Hospitality?

Would the employer have been liable if no victims had every complained?

23. Constructive discharge

Take another look at Duncan in SCM, Harris in the text Pennsylvania State Police v. Suders, 542 U.S. 134, 147 Green v. Brennan, 136 S.Ct. 1769

Should constructive discharge be actionable at all? Why?

Courts generally think workers should stay on the job and sue rather than quit. How could it ever be reasonable for an employee to quit and then ask for back pay?

Does it matter whether the discriminatory official was trying to get the victim to quit?

Should someone be able to quit and claim constructive discharge if he or she did not complain before quitting? Should a plaintiff be allowed to assert a constructive discharge claim if she did not, before quitting, complain to her employer about the actions in question? Is it irrelevant that she did not complain?

If a client of yours was about to quit, would you advise him or her to first complain?

Would you have quit in Harris?

If you were a judge, would you let these cases go to the jury?

Would you as a juror have found they were constructively discharged?

If you went to work at a law firm after graduation, and were assigned to do secretarial work (at a law associate salary) because of your gender, would you quit? Why? Would those facts meet the constructive discharge standard?

If you worked at a law firm and a partner pinched your bottom at office Christmas party once a year, and the firm would not act to stop it--how long would you stay before you quit? Or would you quit at all?

Plaintiffs in sexual harassment cases often quit before they complain to their employers. Why? Is the existence of a hostile work environment sufficient to constitute a constructive discharge? If not, which hostile environment cases are bad enough?

24. Retaliation

Text: 407-22 [453-82] (Clark; Laughlin, Crawford, Thompson,
Brush)

SCM: Jordan,

Look again at Burlington Northern

-What conduct is protected?

--What is the difference between the participation clause and
the opposition clause?

-What forms of retaliation are unlawful?

-Who should decide if the Burlington Northern standard is met--a
judge or a jury? why?

In Clark v. Breeden:

--why wasn't the complaint of sexual harassment protected?

--was that right

--since the charge and suit are protected, why was the action
dismissed?

If 10 bottom pinches create a hostile environment

--how many are enough to complain about

--after how many does the employer have to do something under Ellerth?

--Would it matter if the plaintiff believed off color jokes were going to continue into the future and she wanted to prevent that?

--Could a woman be fired because she complained about a "dumb blond" joke? Would it matter whether she was blond?

Crawford

What happened here?

Why is answering a question protected?

Would it always be protected if she described something that was a gender based remark?

Is filing a complaint with an employer's anti-harassment person protected under the participation clause? Why does this matter?

Laughlin

Why wasn't this protected?

Would the result have been the same if a related Title VII charge were pending at the EEOC?

If a related Title VII suit was pending?

Can a harassment victim be fired for slapping a worker who pinched her bottom?

Can a female worker be fired for violating a rule against asking men how much they earn, if she asked because she suspected wage discrimination?

Can a worker be fired for lying in an EEOC charge? For lying at a Title VII trial?

Can a worker be fired if, in support of a sexual harassment claim at trial, he confesses he engaged in the alleged harassment?

Brush

Is action by a manager (e.g. at HR) to prevent discrimination protected activity if the manager is doing his or her job?

Who is denied protection under Brush?

Thompson

Thompson never engaged in protected activity, so why is he protected?

Why didn't Regaldo just sue?

To whom does Thompson apply?

Why were there two distinct issues in this case?

Are the standards under the two issues the same?

Who else can sue on this theory

--someone Regaldo is dating

--her roommate

--someone she friended on Facebook

What if an employer decides to fire an entire department because most of the workers are women--can the dismissed men sue?

25. Discriminatory impact: basic principles and justification
Text: 167-72[191-97] (Griggs, etc.)
183 [217] (1991 Civil Rights Act)

Is it really a good idea to have a disparate impact rule? Won't this just lead to quotas?

Why did the Supreme Court in Griggs think discriminatory motive was not required in a Title VII case?

What is the basic standard in Griggs?

How was discriminatory impact proven in Griggs? See n. 6.

What weren't the practices at issue in Griggs valid? Was there some way the employer might have established business necessity?

How does the standard for disparate impact cases under the 1991 Civil Rights Act differ from proof of intent?

--why do statistics matter?

--What does a defendant have to do in response to sufficient statistics?

--What if the defendant's practice failed to pick better workers?

--what if the plaintiff shows that there was some other selection method that had no disparate impact and that worked as well?

Is it per se illegal to require blacks previously excluded on the basis of race from a job to meet a job requirement, however otherwise legitimate, that whites did not have to meet to get the job?

Could Starbucks require baristas to have college degrees? High school degrees?

Could Boeing require production line workers to pass a math test?

26. Discriminatory impact: proving adverse impact
Text: 172-203 [197-205, 217-36] (Wards Cove, Watson, Teal,
Dothard)

(Look at the 1991 Act again)

Did anyone in the class ever work in an Alaska cannery?

Why was the evidence in Wards Cove insufficient to prove adverse impact?
How could the plaintiff have solved this problem? Does the 1991 Civil
Rights Act affect the result?

In what way if any did the 1991 Civil Rights Act alter the holding
in Wards Cove regarding how to prove disparate impact?

How could a plaintiff prove disparate impact as to each of the practices
in Wards Cove:

--not posting jobs at the cannery

--English language requirement

--not promoting from within

--nepotism

--rehire preference

Was the location of the offices that did the hiring for non-cannery jobs a violation?

How was discriminatory impact proven in Dothard? Would there have been a better way?

Is there any reason to think that people under 5'2" or 120 pounds might not want to work as prison guards?

Does a "no spouse" rule have a disparate impact on women? How could a plaintiff show that it did?

Under Teal can the bottom line ever bar a finding of adverse impact?

How should a court determine whether there is an adverse impact where the test scores are going to be used to create a rank order list?

27. Discriminatory impact: justifications

Text: 1870-82, 203-24 [205-09, 212-16, 239-69, 299-301] (El, Albemarle, Smith, Meachem, Ricci)

It is important to distinguish three different methods of establishing validity

--content validity (something the worker actually does on the job, e.g. welding a good joint)

--construct validity (a skill the worker needs, e.g. speaking a particular foreign language)

--criterion validity (something that happens to correlate with being good at the job, but is neither a job task nor a useful skill)

What was wrong with the high school degree requirement in Griggs?

What was wrong with the height/weight rules in Dothard?

Could a prison use a strength test to hire guards? Could a police department? If so, what would be a reasonable level of strength, e.g. in bench press ability?

Did the court get the right answer in E1? What type of evidence could a plaintiff offer in reply?

Albemarle

What type of validation was being asserted here?

What was wrong with the validation study?

Could a law firm hire on the basis of law school GPA if it had an adverse impact? LSAT score? Undergraduate GPA? IF so, what type of validation would it be using?

Could an espresso café have a high school degree requirement for the position of barista?

Can Boeing require that people hired into a craft training program have a high school degree?

Which of these, if any, could refuse to hire someone with a felony conviction:

--Lowe's

--a public school

--a bank

What does Ricci tell us about the third step, regarding alternatives?

In light of *Ricci* again, what steps can an employer take to comply with the disparate impact rule without violating *Ricci*?

Age Discrimination

What occurred in Smith?

Look at Smith and Meachem. How do ADEA disparate impact claims differ from those under Title VII?

How if at all does the Meacham v. Smith standard differ from the Title VII standard?

28. Religion: forbidden discrimination; exemption

Text: 381-82 [405-08]

Look at section 702(a) and 703(e) (2)

SCM: Pime,

World Vision

There are several exemptions from Title VII related to religion. If the Catholic church was sued for refusing to hire women as priests, which exemption would it invoke?

In Pime was the discrimination legal under Title VII? If so under what theory?

--BFOQ (majority)

--No prima facie case (Posner)

--religiously controlled institution

Could a private university subject to Title VII insist that it would only hire a Muslim to teach Muslim theology?

Would World Vision come out differently if some workers did not have to be Christians, e.g. the janitor?

Can a hospital that is a separate corporation that is run by the Catholic Church hire only Catholics

Could a Jewish Community Center hire only Jews? Would being Jewish be a BFOQ to be the director?

What is the right standard in the World Vision situation?

29. Religion: required accommodation

Text: 369-81[403-05, 408-18] (EEOC v. Abercrombie and Fitch, Wilson)

SCM: Brown v. Polk County

[CA 100-112 EEOC v. Abercrombie and Fitch]

The prohibition against religious discrimination includes in some circumstances adverse action taken because of conduct by the employee which the employer knew was motivated by religion, like praying or wearing a cross. or wearing a cross.

Abercrombie and Fitch

Can this be religious discrimination if no one knows that she is Muslim?

How can it be a failure to accommodate if she never asked for accommodation?

Would it be a violation of Title VII if the plaintiff was not a Muslim, but just liked scarves?

What if she was a Muslim, but like scarves for non-religious reasons?

What does the employer have to suspect? Know?

Can Abercrombie refuse to hire a woman who wears a hijab? Would letting her wear the headscarf be an undue burden on the employer?

In Wilson, what result if the D Ct held that Wilson's religious vows did require her to openly wear the button?

In Brown, can't the employer bar prayer at the office? Bar religious recruitment at the office?

Was it proper for the court to decide whether Brown's vow required that her button be visible?

What if at a faculty meeting attended by some rich alumni, the Dean asked the faculty to join her in praying for greater alumni donations and more jobs for our graduates, and a faculty member walked out. Could the faculty member be punished for that (assume the alumni thought it was rude and cut his or her contributions)?

30. Religion: "exemptions"

Text: 382-96 [418-27] [Hosanna-Tabor v. EEOC, 132 S.Ct. 694]
SCM: Porth

In H-T, do any of the Title VII exemptions apply?

Why can't Perich complain to EEOC and be protected??

What about

--a lay teacher at the H-T school?

--a teacher in a Catholic parochial school (does it matter if the teacher is a lapsed Catholic? A Protestant? A Muslim?)

--the Bishop's press secretary?

--a choir director?

--what if Perich (the plaintiff in H-T) claimed that she was fired on the basis of sex?

What if in Hosanna Tabor the school did not pay minimum wages? Paid women less on the basis of gender? Fired a worker for testifying in a Title VII case?

Does Title VII apply to sexual harassment of a priest or nun? If it so applies, is it constitutional?

The Supreme Court has granted certiorari in two cases applying H-T.
We will discuss those if time permits.

Is Porth correct? Is religious discrimination in hiring by parochial schools protected by the First Amendment. What if it would only hire Christians? Or Christians and Jews? For all such schools? For all jobs? Was there any significance to the fact that this was a new policy? Why do you think the school changed the policy? (Advice from anyone who attended a parochial school will be helpful) Are the teachers in this case "ministers" under H-T?

31. Title VII Charge: Timeliness and scope

Text: 523-38, 540-42[599-614, 617-18] (Almond v. Unified School District, 665 F. 3d 1174]

SCM: EEOC intake questionnaire

Holowecki, Hulteen

CS: 400-02 Lilly Ledbetter Act

Under Holowecki, is filling out an Intake Questionnaire enough to meet the charge filing deadline?

Under Hulteen, since the discrimination is leading to a lower pension now, why don't the plaintiffs win?

Suppose the plaintiff is fired, but she appeals to company headquarters and asks for reconsideration. Does the charge filing period begin to run when she is first dismissed, or only after Headquarters rejects the appeal?

Why was the charge deficient in Almond?

Suppose the plaintiff files a charge of sexual harassment, and is then fired, allegedly in retaliation. Does she have to file a second charge about the retaliation?

32. Arbitration Agreements

Text: 609-31 [704-26] [Pyett, Hergenreder) [Hergenreder
v. Bickford, 656 F. 3d 411]
SCM: Armendariz,

33. Back pay and compensatory and punitive damages
Text 643-68 [654-703] (Ford, McKennon, Turic, Kolstad)

DIFFERENCES AMONG ANTI-DISCRIMINATION MEASURES

- (1) Type of discrimination covered
- (2) Availability or not of justifications for intentional discrimination
- (3) Whether discriminatory effect is covered
- (4) What employers are covered, e.g. by size, going government business, the government, etc.
- (5) Agency standard for employer liability
- (6) Personal liability of discriminatory supervisor
- (7) Can the government enforce the statute
- (8) Anti-retaliation protection, availability and scope
- (9) Prerequisites to filing suit
- (10) Availability of administrative enforcement procedures
- (11) Limitations period and how it is tolled
- (12) Availability of jury trial
- (13) Availability of remedies, especially compensatory and punitive damages
- (14) Res judicata effect of administrative proceeding
- (15) 11th Amendment problems

ANTI-DISCRIMINATION STATUTES, ETC.

Title VII of the 1964 Civil Rights Act (race, national origin, religion, gender)

Pregnancy Discrimination Act

1991 Civil Rights Act

42 U.S.C. § 1981--race, ethnicity

Fourteenth Amendment and 42 U.S.C. § 1983

Age Discrimination in Employment Act

Equal Pay Act--gender (same job)

Americans With Disabilities Act

Americans With Disabilities Amendments Act

Section 504 of the Rehabilitation Act of 1973

Immigration Reform and Control Act

Title IX of the Education Act Amendments (gender)

Title VI of the 1964 Civil Rights Act (race and national origin)

Executive Order 11246 (race and national origin)

Washington State Anti-Discrimination Law

Intentional infliction of emotional distress (especially for sexual harassment)

Seattle Fair Employment Practices Ordinance

Anti-discrimination provisions of collective bargaining agreements

Anti-discrimination provision of employment contracts--e.g. employee handbook

Genetic Information Non-Discrimination Act