

## I. Theories of Statutory Interpretation

### A. Methods used to Interpret Statutes

1. Legislative Intent
2. Legislative Purpose
  - a. What was the legislature trying to accomplish? What problem were they trying to solve and what harm were they trying to prevent?
  - b. If we know the answers to these questions, then we adopt the interpretation that logically follows this purpose.
  - c. Debate as to whether transcripts of legislative sessions (debates) should be taken into account.
3. Plain Meaning/Language- dictionary definitions of words, how words are used commonly.
4. Some S.C. justices believe in static interpretation- what was intended at time statute was enacted, what its plain meaning covers etc. Others believe in interpreting it with regard to evolutionary changes that occur over time, because legislatures cannot foresee all the different permutations that arise with an issue.

## II. Theories of Discrimination

### A. Disparate Treatment

1. Definition- P claims that the protected trait actually motivated the employer's decision.
2. Prima Facie Case (in hiring)- raises an inference of discrimination
  - a. **Elements** (*McDonnell Douglas*)
    - (1) P must be in a protected class
    - (2) Must have applied for job
    - (3) Must have been qualified for job
    - (4) After P was rejected, position remained open
  - b. P does not have to show that she was more qualified than other applicants
  - c. P does not need to prove that position was given to someone who was not in the same protected class
    - (1) Although this may be relevant to an ultimate finding of no intentional discrimination, especially within the pretext analysis.
    - (2) Reasoning
      - (a) sometimes the person may be hired after the charge was filed.
      - (b) a person may not be prejudiced against all women or all black people, but women or blacks that act a certain way.
3. Defenses
  - a. **Legitimate non-discriminatory reason**- If P establishes a prima

facie case, burden shifts to D who can use evidence of a legitimate reason for not hiring P as a defense.

- (1) *Burdine*- D bears only the burden of explaining clearly the nondiscriminatory reasons for its actions.
- (2) The ultimate burden of persuasion lies at all times with P.
- (3) Pretext- If D does show some reason for not hiring P, burden shifts back to P to show that D's reason was mere *pretext*- a fabricated justification.

b. **BFOQ** Title VII **\_703(e)** and ADEA **\_4(f)** - discrimination on the basis of sex, religion, national origin, or age is permitted if the employer can show that it is a bona fide occupational qualification.

- (1) Test for BFOQ - D must establish that all or substantially all members of the excluded class cannot safely or effectively perform job duties that are essential for the safe and effective operation of business. Higher standard than business necessity.
- (2) Authenticity- e.g. hiring Chinese cooks for a Chinese restaurant is a BFOQ.
- (3) Privacy- such as female nurses at a female only nursing home.
- (4) Health and Safety - If they cannot perform job without risk to customers or fellow employees, it is a BFOQ defense.
  - (a) *Dothard v. Rawlinson*- Prison refused to hire women guards in the male portion of the prison, this was a BFOQ because a woman guard may **cause risks to security**. Decided before Johnson Controls,
  - (b) *International Union v. Johnson Controls*- D prohibited women who were capable of becoming pregnant from working in the battery manufacturing process because the exposure to lead was risky to the health of fetuses. Ct ruled that the safety exception under the **BFOQ defense is limited to instances in which sex or pregnancy actually interferes with employee's ability to perform the job**.
  - (c) *Western Airlines v. Criswell*- Policy of not flight engineers above age 60. **No BFOQ defense to exclude an entire group based on safety, must screen capabilities of individual employees**.
- (5) Customer Preference-
  - (a) *Wilson v. Southwest Airlines*- Airline refused to hire males as flight attendants or ticket agents, stating customer preference. **Ct held that customer**

**preference gives rise to a BFOQ only where it is reasonably necessary for the essence or primary function of the business** (such as stripping). Here, no discrimination because female stewardesses was not the essence of airline's business.

- (6) Must relate to Essence of Job or Primary Function of Business
  - (a) *Chambers v. Omaha Girls Club*- Single pregnant woman was fired because she was negative role model to teenage girls she worked with. Ct said it was a BFOQ because it went to the essence of the job- providing moral direction to young girls.
  - (b) *Maldonado v. US Bank*- Bank teller fired after getting pregnant because employer assumed she wouldn't be able to cover shifts during the summer, which is what she was hired to do. Not BFOQ, does not relate to the essence or primary function of business.
- c. BFOQ not applicable to race discrimination
- d. **Cost**- extra cost of higher members of a certain group is not a defense unless it threatens the survival of employer's business (maybe- dicta in Johnson Controls).
- e. **JMOL** against P could be justified if (*Reeves*):
  - (1) The record conclusively revealed some other, non-discriminatory reason for employer's decision or
  - (2) P has a weak issue of fact as to whether Ds reason was untrue and there was abundant independent evidence that no discrimination had occurred.
- f. **Mixed Motive**
  - (1) Applies where an employer had more than one reason for the adverse employment action; one may be discriminatory and the other(s) not.
  - (2) *Price Waterhouse v. Hopkins*- The employer may avoid liability if it can show by a preponderance of the evidence that it would have made the same decision without the discriminatory motive. In order for P to prevail, must show by direct evidence that discriminatory motive played a substantial role in the decision.
  - (3) **1991 Amendments to Title VII**- changed the formula for mixed motive cases.
    - (a) Even if the employer succeeds in proving that they would have taken the same action without the discriminatory motive, P may get declaratory relief, injunctive relief, and attorneys fees because D acted

unlawfully. P cannot recover damages or get reinstated/hired. This satisfies Title VII goal of deterrence.

- (b) **P just has to prove discrimination was a motive**, *not* a substantial motive, by direct or circumstantial evidence.
- (c) 1991 amendments *did not change* ADEA or ADA, so Price Waterhouse formula still applies to ADEA and ADA mixed motive cases.

g. **After-acquired evidence**

- (1) **General rule** (*McKennon v. Nashville*)- after acquired evidence will not bar recovery. But if the employer establishes that the wrongdoing was so severe that the employee would have been fired on those grounds alone, than P will not be able to get the remedies of reinstatement or front pay.
- (2) P can get backpay from the date of the unlawful discharge to the date the new info was discovered. Probably can still get compensatory and possibly punitive damages under Title VII.
- (3) D must prove that the wrongdoing was of such severity that it would in fact have terminated P on those grounds alone if D had known of the wrongdoing at time of the discharge.

4. What P must ultimately prove

a. **Pretext-plus**

- (1) *St. Mary's v. Hicks*- While proving D's reason is pretext may lead to a strong inference of discrimination, it is not determinate. A fact-finder may find their own legitimate non-discriminatory reason from the record. Ultimate burden of persuasion that there was intentional discrimination still lies with P.
- (2) Some courts interpreted this to mean P needs to prove something more than pretext. Not enough to prove prima facie case, must have additional evidence. Some said "direct" evidence as opposed to "circumstantial" evidence. Supreme court overruled this (see below).

- b. **No need for pretext-plus** *Reeves v. Sanderson Plumbing*- Prima facie case plus proof of pretext can be enough in themselves to carry the burden of persuasion and survive a motion for JMOL.

B. Disparate Impact- **703(k)**

1. Definition- Disparate impact occurs when an employer or its agents enforce a facially neutral employment practice that disproportionately affects a protected class (first adopted in *Griggs v. Duke Power*).
  - a. Eleven yrs after *Griggs*, Ct cites **\_ 703(a)(2)** as basis for disparate impact: *unlawful employment practice to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities...*
  - b. 1991 Amendments **\_ 703(k)**: *P must demonstrate that an employer uses a particular employment practice that cause a disparate impact on the basis of . . . and the employer fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.*
2. What P must Prove
  - a. P must establish a prima facie case by showing that an identified employment practice operates to exclude persons in a protected class.
  - b. **Multiple Employment Practices §703(k)(1)(B)**:
    - (1) P must prove that each particular employment practice has a disparate impact.
    - (2) *Except*, if P can prove that the decision-making process is not capable of separation for analysis, P can analyze the decision-making process as one employment practice.
  - c. **Alternative Practice \_ 703(k)(1)(A)(ii)**
    - (1) If P cannot show that the contested practice is not consistent with business necessity
    - (2) then P can show that there is an alternative practice/test that would suffice and that would not have a disparate impact.  
Unresolved issues:
      - (a) Must the alternative practice be equally effective?  
Ward's Cove said so, but 1991 Act overruled.
      - (b) Procedurally, how must this be raised? The language seems to suggest it should be raised during court proceedings, not before suit.
    - (3) D must refuse to adopt this alternative for P to be awarded damages.
3. Phases of DI cases
  - a. **Phase 1**: Must be sufficient evidence to show widespread discrimination of a group of people.
  - b. **Phase 2**: If so, determination of damages must be done on an individual by individual basis, but burden of proof is on employer- individuals come in with a presumption of discrimination.
4. Types of Employment Practices
  - a. **Objective**- tests, height/weight requirements, education

- (1) *Dothard v. Rawlinson*- Prison guards were required to be over 5'2" and 120lbs. Standards exclude 41% of female population, but less than 1% of male population. No showing by D that the requirements were per se surrogates for measuring strength, thus, D's business necessity defense failed.
- b. **Subjective-** interviews, word of mouth
  - (1) *Watson v. Fort Worth Bank*- Disparate impact analysis does apply to subjective criteria. An employer's *undisciplined* system of subjective decision making may have the same effects as a system with intentional discrimination.

5. Evidence

- a. **Use of statistics**
  - (1) *Teamsters v. US*- Court validates use of statistics to prove discrimination. Usefulness depends on all of the surrounding facts and circumstances. Sometimes needs to be supplemented by other evidence.
  - (2) *Hazelwood v. US*-
    - (a) Rule: When **gross statistical disparities** exist between the composition of a work force and that of the general population, this alone may constitute a prima facie proof of a pattern or practice of discrimination.
    - (b) Here, ct ruled that the proper comparison was between the racial composition of D's teaching staff and the racial composition of the qualified school teacher population in the relevant labor market.
- b. **Snapshot Demographic comparisons-** While a significant imbalance in an employer's workforce compared to the available workforce within that geographical area creates an inference of discrimination, P must still show that the imbalance is *because of* the challenged devise.
- c. **Applicant Pool** approach- analyzes whether persons within the potential applicant pool possess the challenged credential at rates which differ along class lines.
  - (1) *Griggs v. Duke Power*- The impact of a high school diploma requirement was established by proving that the percentage of blacks in North Carolina who possessed diplomas was significantly lower than the percentage of whites who possessed diplomas.
- d. **Applicant Flow** approach- The percentage of applicants, by ethnic or gender class, who pass the test or have the credential, and thus are promoted or employed, are compared. P must prove that the difference is significant.

- e. **4/5 or 80%** approach- EEOC guidelines state that a procedure (such as an employment test) has a significant adverse impact on a group if the selection rate for that group is less than 80% of the of the selection rate for the group with the highest rate.
- f. **Improper use of statistics** *Ward's Cove v. Antonio*- A cannery in Alaska where the cannery workers were all nonwhite and the noncannery workers were white. Appellate ct compared percentages of noncannery workers with cannery workers to find DI. S.C. reversed saying this is not a proper use of statistics; must compare to the qualified applicant pool or applicant flow. This part of opinion is not controversial.

6. Defenses

- a. Job related *and* consistent with business necessity
  - (1) *Wards Cove* said employer didn't need to prove business necessity, but congress overruled this with 1991 amendments.
  - (2) **Standard**- Employer must demonstrate that the procedure measures the minimum qualifications necessary for successful performance of the job in question.
    - (a) *Lanning v. SE Penn. Trans. Authority* (standard adopted here)- Requirement of running 1 1/2 miles in 12 minutes. Upon remand ct found that the run did constitute the minimum qualifications of being a police officer.
- b. **"Bottom Line" is NOT a defense**
  - (1) *Connecticut v. Teal*-
    - (a) Rule: The fact that the "bottom line" result of a discriminatory practice is an appropriate racial balance is not a defense, because Title VII was designed to protect individuals from discrimination.
    - (b) Facts: Tests used in applicant process disproportionately barred blacks from being hired and promoted. But employer engaged in affirmative action to hire a proportionate amount of blacks and whites. The "bottom line" result was more favorable to blacks. But it affected individual blacks from getting hired, and no attempt to show business necessity.

7. Statutes and applicability of DI

- a. **Title VII**- Applicable
- b. **ADEA**- Cts are split on whether it is applicable, and S.C. hasn't decided.
- c. **ADA**- Applicable
  - (1) 102 medical exams must be job related and consistent with business necessity.
- d. 1981- not applicable

### C. Retaliation

1. Rule ( \_ 704(a) of Title VII and \_ 4(d) of ADEA)- It is an unlawful employment for an employer to discriminate against an employee or an applicant because she:
  - a. **Opposition Clause**- Opposed an unlawful employment practice
    - (1) Issues: What forms of opposition are protected?  
Reasonable or honest belief of discrimination?
  - b. **Participation Clause**- Made a charge, testified, assisted, or participated in any investigation, proceeding, or hearing.
2. Elements
  - a. That there is discrimination = adverse employment action
  - b. Against an employee
  - c. Because of that person's protected activity
3. What qualifies as adverse employment action: 3 views
  - a. **Restrictive**- Ultimate employment decisions (e.g. firing, demotions)
  - b. **Expansive** (EEOC/9th Circuit)- Any action that might deter a reasonable employee from engaging in that protected activity
  - c. **Intermediate** (majority view)- Something that is material and substantial. Unclear as to what this means.
4. Link between employee's action and retaliation- There must be a reason to believing there is a link between the protected activity and the adverse employment action.
  - a. Inference can be established by proving:
    - (1) Ds knowledge of Ps involvement
    - (2) Close time between activity and adverse action.
5. No need for finding of unlawful practice- employee can persuade court that she was a victim of retaliation for raising issues of or participating in a charge of discrimination, even if the allegations end up being unfounded.
6. But must have reasonable belief- although it doesn't matter if allegations end up being unfounded, P must have had a reasonable belief that employer's conduct was unlawful to be protected from retaliation.

### III. Title VII

#### A. Entities subject to Title VII

1. 701(b)- Employers and their agents
  - a. An employer must be a "person" in an industry affecting "commerce."
    - (1) 701(a)- Person is almost any entity, including state/local governments.
  - b. Must have 15 or more employees
  - c. Employer does not include federal government, Indian tribes, or Bona Fide membership clubs.

- (1) However, Title VII does protect federal employees, it is just enforced differently.
  2. Employment agencies
  3. Labor Unions
  4. Religious entities exceptions
    - a. 703(a)- Does not apply with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of the religious entity's activities.
    - b. 703(e)(2)- Not unlawful for a religious entities to hire employees of a particular religion.
    - c. Constitution- may be permissible for a church to discriminate on other grounds because if federal government interfered it would impede their 1<sup>st</sup> Amendment free exercise rights, and would involve excessive entanglement between government and religion.
- B. Persons Protected by Title VII
1. Employees- any individual where the employer has the right to control the time, means, and manner of the work to be performed.
    - a. Does not include:
      - (1) Independent contractors
      - (2) Partners/Shareholders
      - (3) Aliens employed outside the US, 702
      - (4) Employees in foreign countries where prohibited by local law, 702
      - (5) Elected officials, their personal staff, and policy advisors 701
      - (6) Employees of religious entities, 702
- C. Protected Classes
1. In general 703(1) protects those discriminated on the basis of:
    - a. Race
    - b. Sex
    - c. Religion
    - d. National Origin
  2. Race Discrimination
    - a. **Whites protected** from race discrimination (*McDonald v. Santa Fe Trail Transportation*).
    - b. Race can never be a BFOQ
    - c. Dark-skinned black may state a claim of discrimination in favor of light-skinned black (or vice versa).
    - d. **Native American exception**- A business near an Indian reservation may give preference to an Native American over a non-Native American, but not preference to one tribe over another.
  3. Sex Discrimination

- a. **Sex-plus theory-** sex-plus claims are based on discrimination against women not simply because of their gender but also because of other factors such as their weight, marital, or parental status.
- (1) Only applies to DT cases
  - (2) Test for sex-plus discrimination:
    - (a) Immutability- grooming standards are mutable, so no protection.
    - (b) Fundamental Right- Because child bearing is a fundamental right, it is protected even though it is mutable.
  - (3) *Phillips v. Martin Marietta Corp.*- Employer refused to hire mothers with preschool age children, but not the fathers. This constitutes sex discrimination.
- b. **Benefits**
- (1) *City of LA v. Manhart*- Employer took more \$\$ out of female employees paychecks for pension plans because females live longer than males. Ct held that this is sex discrimination.
  - (2) *Erickson v. Bartell Drug*- Employee challenged employer's lack of contraception coverage in plan that covered all other prescriptions. Because contraceptives are a health care need specific to women, court agreed that this was sex discrimination.
- c. **Grooming Standards**
- (1) An employer can fire you if you aren't following grooming code (e.g. man growing hair out in violation of code, even when women can grow their hair out, is not discrimination on basis of sex).
  - (2) *Kraft v. Metro Media*- Employer can enact a grooming code based on how a "stereotypical" woman should look, unless such standards are applied unequally on women and men. It is okay to have different standards of dress for women and men.
  - (3) But an employer cannot fire you if you comply with code, but still don't look "masculine" or "feminine" enough.
  - (4) Employer takes a risk in having an acceptable grooming code, because it could be used as circumstantial evidence in *Price Waterhouse* type cases.
- d. **Pregnancy Discrimination Act (PDA) \_701(k)**- discrimination on the basis of sex includes pregnancy, childbirth, or related medical purpose.
- (1) **DT** usually, but courts say there is room for DI on basis of pregnancy.

- (2) According to Title VII, pregnant women should be treated the “same” as all other employees.
    - (a) *Troupe v. May Dept Stores* - Pregnant woman got fired for coming into work late because of excessive morning sickness. Ct says not violation of Title VII, because it does not require employers to treat employees well- if a male was coming into work late all the time, he would be fired too.
    - (b) Feminist debate- would it be better to treat pregnant women specially rather than the same as other employees?
  - (3) **Health plans** must provide same benefits to women and men
    - (a) *Newport News v. EEOC*- Health plan provided pregnancy benefits for its female employees but less favorable pregnancy benefits for the spouses of male employees. This is discrimination on the basis of sex, must provide equal benefits for all employees. Here, married male employees received less benefits than married female employees.
  - (4) **Abortion**- It is illegal to discriminate against someone for having an abortion, because it is a “related medical purpose.” (6<sup>th</sup> Circ)
  - (5) **Infertility**- Not based on pregnancy or sex, because it could happen to both women and men, so not protected.
  - (6) **Intention to become pregnant**- is discrimination on basis of sex.
- e. **Family Medical Leave Act (1993)**
- (1) **\_101** - Must be employed for one year to be eligible
  - (2) **\_101** - Only applies to employers with 50 or more employees at “work site.”
  - (3) **\_102** - Entitled to leave of up to 12 weeks without pay for:
    - (a) birth of child
    - (b) placement of adopted child with employee
    - (c) care for family member with a serious health condition.
    - (d) disabling condition due to pregnancy
  - (4) **\_104** - No loss of benefits (including medical benefits)
  - (5) **\_104** - Protected from discrimination when leave is up-entitled to return to former job or equivalent
  - (6) **\_105** - No retaliation allowed
    - (a) for taking benefits of rights under FMLA

- (b) for filing charge, assisting, testifying, giving info in connection in any inquiry or proceeding relating to any right under act.
- (7) Under PDA, can fire someone because she is unable to perform her job due to pregnancy. But if she asks for leave and is denied, there is a violation under FMLA.
- f. **Equal Pay Act** (adopted before Title VII)- No discrimination on the basis of sex by paying **higher wages** to members of the opposite sex **in such establishment** for **equal work** on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under **similar working conditions**.
  - (1) Elements
    - (a) **Establishment**
      - i) Most courts say where an employer maintains centralized control and administration of separate job sites, it will generally be deemed a single establishment under the EPA.
      - ii) Some courts say it is a distinct physical location.
    - (b) **Different wages**
      - i) Employee can just compare wages of one other employee of opposite sex, but not vary persuasive.
    - (c) **Equal work**
      - i) Does not have to be identical work
      - ii) but requirement of substantially “equal” narrows scope of EPA.
      - iii) *Strag v. Bd. of Trustees*- math and biology teachers were held to be an improper comparison because they had different skills and responsibilities.
    - (d) **Similar working conditions**
  - (2) Affirmative defenses
    - (a) Seniority system
    - (b) Merit system
    - (c) measured by quantity or quality of production
    - (d) **based on any factor other than sex** (most important)
      - i) Past salary *Kouba v. Allstate (9th Circ)*- An employer cannot use a factor which causes a wage differential between male and female employees absent an acceptable business

reason. Sort of DI analysis- prior salary was a facially neutral measurement but cause female employees to be paid less than male employees.

- ii) *Hodgson v. Robert Hall*- mens department hired exclusively men and women's dept. hired exclusively women. Salesmen were paid higher incentive wages. But the fact that the men's department produced more income was held to be a factor other than sex so okay.
  - iii) Market Demand- cts disagree as to whether this can justify a sex-based wage differential.
  - iv) Salary retention/red circling- where a employer transfers an employee from a higher paid skilled job to a less demanding position but continues to pay same salary; considered to be a legitimate defense.
- (3) Bennett Amendment to Title VII \_703(h)- affirmative defenses of EPA apply to Title VII as well (for equal pay discrimination). This is so there is no conflict.
- (4) Some things may fall under Title VII and not EPA because not all elements are met. Bennett only applied to defenses of EPA.
- (a) *County of WA v. Gunther*- A female prison guard claimed that the difference between her rate of pay and that of male guards was sex discrimination. Male guards supervised more than 10 times as many prisoners. Ct held that a claim of discriminatory undercompensation under Title VII is not barred because employee did not perform equal work. **Only EPA affirmative defenses are applicable to Title VII under \_703(h) not EPA elements.**
  - (b) Still have to prove discriminatory intent under Title VII.
4. Sex Harassment- violates Title VII because it is discrimination based on sex which alters the "terms and conditions" of the job. Two types:
- a. **Quid Pro Quo**- Occurs whenever an individual explicitly or implicitly conditions a job, a job benefit, or the absence of a job detriment upon an employee's acceptance of sexual conduct.
    - (1) Elements:

- (a) Employer conditioned job benefits on Ps performance of sex favors
  - (b) Totality of conduct leads to conclusion employment was at stake
  - (c) Reasonable person in Ps position would believe she was the subject of harassment.
- b. **Hostile Work Environment-** must be sex harassment sufficiently severe or pervasive to alter the terms and conditions of the work environment such that it creates an intimidating, hostile, or offensive working environment (*Meritor Savings Bank*).
  - (1) Voluntary v. welcome- *Meritor* ct said didn't matter whether or not Ps conduct was "voluntary" the issue is whether or not employer's conduct was unwelcome.
  - (2) Evidence such as Ps dress, conduct, past sexual relations may be admissible because it could be important in determining whether conduct was welcome. Up to ct to decide based on value of evidence v. considerations for Ps privacy.
  - (3) Objective and subjective elements- P must believe and a reasonable person must believe that conduct is abusive (*Harris v. Forklift Systems*).
  - (4) Reasonable victim standard- the reasonable person is a reasonable person in victim's position- e.g. a reasonable "woman" (*Ellis v. Brady*).
  - (5) Totality of the circumstances- Whether an environment is hostile or abusive can be determined only by looking at all the circumstances (*Meritor*).
  - (6) Sufficiently severe or pervasive
    - (a) Mere utterances that offend P is not enough.
    - (b) The more pervasive the less severe it needs to be and vice versa.
- c. **Retaliation**
  - (1) *Breedon-* Grand Canyon statement, P claimed that it created a hostile work environment and that she was retaliated against for complaining. While P doesn't have to show practice was unlawful, must show that she *reasonably believed* it was unlawful. Ct said no reasonable person would believe that the utterance created a hostile work environment.
- d. **Same-sex harassment**
  - (1) *Oncala-* A man working on an oil platform was sexually harassed by his male co-workers. Ct held that same-sex harassment does violate Title VII, but must show that the

harassment is discrimination because of sex. Harassment does not have to be motivated by sexual desire.

- (a) Examples it uses: woman who harasses other women and the evidence shows that she has a general hostility towards women.
- (b) Can do a comparative analysis of how the harasser treated both sexes in the workplace.

e. **Harassment based on gender/sex stereotypes**

- (1) *Price Waterhouse*- held that there can be sex discrimination based on a person's non-conformity to sex stereotypes. D had to prove that P's interpersonal skills alone, apart from the sex stereotyping (that she didn't dress femininely enough and was too aggressive), were the basis for the denial of partnership.

f. **Equal opportunity harasser**- If the harasser sexually harrasses both males and females (the bisexual harasser), it is not discrimination on the basis of sex.

g. **No protection against discrimination because of sexual orientation**- but *Oncale* and *Price Waterhouse* may provide for ways around this.

h. **Employer Liability**

- (1) Tangible employment action by supervisor- employer is *strictly liable* when a supervisor takes a tangible employment action against a subordinate based on illegal sexual harassment.
  - (a) Tangible employment action = significant change in employment status, such as hiring, firing, failing to promote, or reassignment with significantly different responsibilities.
  - (b) Problem- what if there is a threat, but no tangible employment action? *Burlington v. Ellerth* uses the words tangible employment action rather than quid pro quo- does this alter the sex harassment scheme?
- (2) Supervisor creates a hostile work environment- Employer is *strictly liable* but subject to an *affirmative defense*:
  - (a) Employer took reasonable care to prevent or promptly correct the harassing behavior *and*
  - (b) P unreasonably failed to take advantage of preventative or corrective opportunities or otherwise avoid harm.
- (3) Harassment by co-worker- employer is liable if it acted *negligently* with respect to the harassment. Elements:
  - (a) actual or constructive knowledge of the harassment *and*

- (b) failure to take prompt and appropriate corrective action.
- 5. Racial and Ethnic Harassment- analogous to sex harassment.
- 6. Religious Discrimination
  - a. **Definition of Religion** \_701(j)- includes all aspects of religious observance and practice, as well as belief. The beliefs must be sincerely held. EEOC- Employee does not have to show that he is affiliated with a particular religion.
  - b. **Reasonable Accommodation** \_701(j)- Employer must make *reasonable accommodations* for the religious needs of its employees, unless there would be *undue hardship*.
  - c. **Burden of Proof**
    - (1) Prima Facie case
      - (a) P had a bona fide belief that compliance with an employment requirement is contrary to his religious faith *or* that employer forced P to participate in religious activities contrary to his own religious belief or atheism.
      - (b) P informed employer or employer had notice about the conflict
      - (c) His employment status was negatively impacted because of his refusal to comply with the requirement.
    - (2) Burden shifts to D
      - (a) D made good faith effort to accommodate Ps religious beliefs *or*
      - (b) D was unable to do so without undue hardship.
        - i) Requiring employer to bear more than a de minimus cost would be undue hardship (*TWA v. Hardison*).
  - d. *Astoria Bd of Educ. v. Philbrook*- As long as the employer came up with a reasonable accommodation, that suffices. The fact that an employee may have had other accommodations in mind that he would prefer does not mean that the employer needs to show that these alternatives would cause an undue burden.
  - e. *TWA v. Hardison*- P wanted Saturdays off to observe the Sabbath. Normally employer would have to accommodate Ps religious observance, but there was a seniority rule based on a collective bargaining agreement, and P did not have enough seniority to get Saturdays off. **\_703(h) Seniority rules do not violate Title VII unless adopted for a discriminatory purpose.**
- 7. National Origin Discrimination
  - a. **Definition of National Origin**- The country from which a person's forebears come from.

- b. Title VII does not protect from citizenship discrimination (*Espinoza v. Farrah Manufacturing*). Employer can discriminate based on a person's alien status.
  - (1) *but* IRCA (Immigration Reform and Control Act)- prohibits discrimination against *lawful* aliens
- c. **English-only requirements-** *Garcia v. Spun Steak*- Ct recognizes that there may be a D.I. on those with only limited or no English speaking skills, but otherwise ct finds language to be analogous to grooming codes- it is a mutable characteristic that people can change. People can learn to speak English, and speaking Spanish on the job is a privilege. Not allowing Spanish to be spoken on the job doesn't violate any rights.
- d. **Foreign Accents-** Cts are split. When the accent is really heavy, may be considered legitimate to discriminate due to business necessity.
- e. **Native American Preference Exception-** *Hoffman Plastics*- Businesses on or near reservation can give preference to Native Americans, but cannot prefer one tribe member over another, because this is national origin discrimination (ct says tribes are nations within the meaning of Title VII).
  - (1) *But* § 701(b) says that an Indian Tribe is not an employer within the meaning of Title VII, so if the Indian Tribe had run the business itself, it would not be subject to Title VII and could discriminate on any basis.

#### D. Enforcement Procedures

1. General Procedure § 705
  - a. An employee must first exhaust remedies through state agencies.
  - b. Agency must be given 60 days to do what it needs to do.
  - c. After 60 days, complaint must be filed with EEOC
    - (1) within 300 days after the discriminatory occurrence or
    - (2) Within 30 days after notice that the state agency has terminated its jurisdiction, whichever is *earlier*
  - d. If there is no state deferral agency, the EEOC claim must be filed within 180 days.
  - e. EEOC investigates the charge
  - f. EEOC decides whether there is reasonable cause to believe charge
    - (1) If no, they dismiss the case. Charging party can then bring suit if she desires.
    - (2) If yes, EEOC tries to conciliate/get settlement. EEOC has power to settle case over the objection of the charging party.

- (3) EEOC can also decide that the case is so important that they must sue.
  - (4) Or, if case doesn't settle, EEOC can issue a "right to sue" letter and party can file the suit in court.
  - g. Ps lawyer can ask EEOC for right to sue letter without the EEOC investigating or attempting to conciliate.
2. EEOC
- a. In General
    - (1) Independent agency (not part of any department)
    - (2) Five members (only three can be from each party) appointed by President / confirmed by Senate
    - (3) Staggered five-year terms of office (one member's term expires each year)
    - (4) President can only replace a member when his term expires *except* for cause
  - b. Powers
    - (1) Investigates claims
    - (2) Files suits
    - (3) No authority to hold hearings (*except* for federal employees)
    - (4) No authority to issue orders
    - (5) No authority to issue binding regulations, but does issue interpretive guidelines.

#### IV.   1981

- A. Protected Class- Doesn't discuss race in statute; says all persons should have the same rights to make and enforce contracts as white citizens. Courts have interpreted this to only cover race and national origin discrimination.
- B. Interpretation of Race
  - 1. St. Francis College v. Al Khazraji- Iraqi P, Ds say he is Caucasian and barred from claiming discrimination under   1981. Ct looks to dictionary definitions of race at time statute was enacted (1866). Interprets broadly- not so broad to include religion per se or national origin per se, but a Jew could claim race discrimination.
- C. Differences between   1981 and Title VII
  - 1. SOL is longer in   1981 (4 years)
  - 2. No requisite of administrative exhaustion before filing claim
  - 3. No minimum # of employees
  - 4. No limitation/cap on compensatory and punitive damages
  - 5. May apply to aliens: language "all persons" should have same rights as "white citizens."
  - 6. Applies only to intentional discrimination
  - 7. No S.C. decision about mixed motive under   1981

## V. ADEA

### A. In General

1. Applies to employers, labor organizations, and employment agencies
2. Protects employees 40 years old and over.
3. Prohibits discrimination against employees 40 years or older on the basis of age.
4. Procedure of enforcement is the same as Title VII. EEOC can issue substantive regulations.
5. Usually DT. Courts are split as to whether DI can be applied.
6. Purpose- to promote employment of older people based on ability, not age. To eliminate harmful stereotypes that older people are less productive.

### B. Differences between Title VII and ADEA

1. 4(a)(3)- reduction in pay rate is unlawful
2. 4(f)- BFOQ defense similar to that of Title VII, except it says “or where the differentiation is based on reasonable factors other than age”- RFOA defense.
3. 1991 amendments did not touch ADEA, so *Price Waterhouse* formula for mixed motive cases still applies; employer not liable if it can prove it would have fired P anyway based on a non-discriminatory factor.

### C. Only Applies to Discrimination Against Older People

1. *General Dynamics v. Cline*- Ct said that age meant “relative age.” ADEA meant to prevent younger workers being preferred over older workers. So a 40 year-old can not claim discrimination on the basis of age when a 56 year old is given preference.

### D. Disparate Treatment Cases/Rules

1. *O'Connor v. Consolidated Coin Caterers*-
  - a. **An employee who is fired and replaced by an individual who is also within the age group protected by the ADEA can still establish a prima facie case of age discrimination.**
  - b. Reasoning: the fact that a replacement is substantially younger than P is a far more reliable indicator of age discrimination than is the fact that P was replaced by someone outside the protected class.
  - c. P must have evidence adequate to create an inference of age discrimination- the replacement must be significantly rather than insignificantly younger.
2. **Proxy: Age-related factors**
  - a. *Hazen v. Biggins*- **No disparate tx under the ADEA when the factor motivating the employer is some feature other than the employee’s age, even if it is age related.**

- (1) P was fired in order to keep his pension plan from vesting. In this case, it vested after 10 years of employment, which may be correlated with age but is not directly based on age.
  - (2) Ct differentiated this situation from pension plans that vest when an employee reaches a certain age.
  - b. *Sperling v. Hoffman-La Roche*- Downsizing case. Ct differentiated between factors based on age and those analytically distinct from age such as firing those with:
    - (1) higher salaries
    - (2) ample retirement benefits
    - (3) age-related disabilities
- E. Waiver of ADEA Statutory Rights under OWBPA
- 1. Definition- The Older Worker Benefit Protection Act (OWBPA) amends the ADEA to require that no purported waiver of rights to sue for age discrimination shall be valid unless that waiver is "knowing and voluntary." For a waiver to be considered knowing and voluntary under the law and to be valid it must:
    - a. Be written in a manner calculated to be understood by the average worker
    - b. Specifically refer to the rights or claims arising under the ADEA
    - c. Not waive rights or claims that arise after the date of the waiver in exchange for consideration beyond what employee is already entitled to
    - d. Have a written advisory to consult an attorney
    - e. Give employee 21 days to consider the agreement (or 45 days if part of exit incentive or termination program).
    - f. Give employee 7 days to revoke the agreement
  - 2. Such an agreement does not bar EEOC action.

## VI. ADA

### A. Prohibits

- 1. Discriminating against; \_102(b)
  - a. **Requires employer to make reasonable accommodations** for persons with disabilities; **\_101(5), \_102(b)(5)**
    - (1) Examples- Restructuring job requirements, facilities, work schedules.
    - (2) Reassignment- \_101(9)(b) recognizes reassignment to a vacant position as reasonable accommodation.
      - (a) Disabled employee is protected if she is able to perform the essential functions of an available alternative position (with or w/o reasonable accommodation), even if she is no longer able to

perform the essential functions of her current position.

- (3) Seniority system
  - (a) There is no provision in ADA protecting this unlike Title VII.
  - (b) *US Airways v. Barnett*- plurality opinion said employer does not have to provide reasonable accommodation where it would affect the rights of other employee
  - (c) but that P can show special circumstances that the requested accommodation is reasonable based on particular facts
    - i) e.g. seniority rule is not part of collective bargaining agreement
    - ii) employer has right to change seniority system unilaterally
  - (d) O'Connor concurring- seniority system trumps reasonable accommodation if and only if it gives legally enforceable rights to employees.

**b. That do not impose an undue hardship; 101(10)**

- (1) Undue hardship = significant difficulty or expense
  - (a) This is unlike *TWA v. Hardison*- standard for religious discrimination. That says that requiring employer to bear de minimus extra cost is undue hardship. Much more of a duty to accommodate here than for religious discrimination
  - (2) Objective standard
    - (a) Consider D's financial resources
    - (b) Cost v. benefit of having employee

c. 102(b)(4)- Includes denying jobs or benefits to a qualified individual because of that person's association with a disabled person.

- d. 102(b)(6)- includes Griggs DI analysis
  - (1) bars using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities
  - (2) *unless* it is job related and consistent with business necessity.

**2. Individuals with a disability; 3(2)**

- a. **Has had or is regarded as having**
  - (1) Regarded as having-

- (a) employer mistakenly believes that P has an impairment that substantially limits one or more major life activities (even if such impairment would not be disability under ADA) or
  - (b) employer mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities
  - (c) Reasonable mistakes are actionable unless
    - i) D can prove that it did not rely on stereotyped views of Ps perceived condition and
    - ii) P was responsible for employer's mistaken belief or failed to notify D of his actual condition.
- b. **physical or mental impairment**
- (1) EEOC- Individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.
  - (2) Must be permanent or long-term
    - (a) Pregnancy is excluded
  - (3) Must measure physical impairment after mitigating measures are taken
    - (a) For example, a person who wears glasses which completely corrects a vision impairment does not have a physical impairment within the meaning of the ADA (*Sutton v. United Airlines*).
    - (b) EEOC says determination of a disability must be made without regard to mitigating factors.
    - (c) But EEOC only has authority to issue regulations over Title I of ADA, which does not include a definition of disability. So S.C. did not follow EEOC guidelines.
    - (d) S.C. says statute unambiguously requires regarding mitigating factors because:
      - i) "substantially limits" is in the present tense
      - ii) disability must be determined on individual basis
      - iii) statute refers to 43,000,000 Americans with disabilities- congress could not possibly have meant all Americans who wear glasses.
    - (e) *Dissent in Sutton*- concern that under the majority opinion, a person with a prosthetic limb would not be considered a person with a disability unless that

person is limited from performing major life activities.

- (4) Whether a person has an disability must be decided on an individual basis (e.g. Not a question of whether carpal tunnel syndrome is a disability, but whether this person with C.T.S. is substantially unable to perform major life activities).

c. **that substantially limits**

d. **a major life activity**

- (1) Something significantly important to daily life must be substantially affected.
- (2) Examples- caring for oneself, performing manual tasks, walking, seeing, hearing, reproduction, sexual relations (9<sup>th</sup> circ).
- (3) S.C. has not directly decided whether working constitutes a major life activity. S.C. has said that if it were, must show an inability to work in a broad class of jobs rather than a specific job (*Sutton v. UA*).
- (a) *Toyota v. Williams*- P with carpal tunnel syndrome, ct of appeals said P had a disability b/c she was substantially limited in her ability to perform manual tasks at work. S.C. said this was wrong, focus should be on whether P could perform tasks that are essential to most people's lives. .

e. Disability does not have to have present effects- asymptomatic HIV status considered to be disability (*Bragdon v. Abbott*).

### 3. Who is otherwise qualified for the position; **\_101(8)**

a. **Can perform the essential job functions**

b. **with or without the assistance of reasonable accommodation**

c. **and does not impose a direct threat** to the health and safety of others in the workplace

- (1) \_103(b)- A direct threat is a significant risk to the health or safety of others in the workplace that cannot be eliminated by reasonable accommodation.
- (2) This includes a threat to oneself according to EEOC (which has regulatory powers under ADA) and S.C (*Cheveron USA v. Echazabal*).
- (3) Evidence of Direct threat- *Bragdon v. Abbott*
- (a) Ct said HIV constituted a disability because it substantially limits reproductive ability, which the ct said was a major life activity.
- (b) Dentist argued that even though P was a person with a disability (HIV), he doesn't have to provide services because P constitutes a direct threat.

- (c) Dentist had strong belief that this would put him at risk, and had supporting evidence of studies by researchers that said there was a risk.
    - (d) Ct said this not enough, said opinion of public health authorities should be given “special weight” and according to them, the risk was very small.
  - 4. Because of that individual’s disability
  - 5. Also prohibits discrimination based on association with a person with a disability.
- B. Defenses
  - 1. Job related and consistent with business necessity
  - 2. No BFOQ defense
  - 3. Undue hardship for accommodation
  - 4. Direct threat
- C. Medical Exams under ADA
  - 1. Pre-employment inquiries- Employer may not include inquiries as to disabilities per se but:
    - a. May ask about ability to do the job
    - b. If disability is obvious, may ask what kind of accommodation may be required to enable applicant to perform the job.
  - 2. Offer of Employment- once an offer has been made
    - a. employer may condition an offer of employment on a medical exam
    - b. *or* employer can ask questions about medical conditions
    - c. so long as employer requires the same from all applicants
  - 3. Once employed- medical exams are allowed so long as they are job related and consistent with business necessity.
  - 4. Drug addiction
    - a. **\_104(a)**- qualified individual with a disability excludes any employee or applicant who is currently engaging in the illegal use of drugs.
    - b. **\_104(b)(1)**- If applicant/employee has been successfully rehabilitated, than may qualify as an individual with a disability.
      - (1) Must have undergone a supervised drug rehabilitation program.
      - (2) Must no longer be using.
    - c. *Collings v. Longview*-
      - (1) Defined “currently engaging” to mean illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct.
      - (2) Ps had just used a couple weeks before being discharged. At time of discharge, they were drug free and in a

rehabilitation program. Ct still found that they were currently engaging in drug use.

5. Alcoholism- is considered to be a disability

D. SSDI

1. Provides benefits for those who cannot work because of a disability
2. Cleveland v. Policy Mgmt- Ct held that person could have both an SSDI claim and an ADA claim.
  - a. P must explain why the SSDI claim is consistent with the ADA claim
  - b. Social Security Act does not account for the possibility of reasonable accommodation
  - c. So, an ADA suit claiming that P can perform her job with reasonable accommodation is consistent with an SSDI claim the she could not perform her job w/o it.

VII. FEHA

A. Entities Subject to FEHA

1. Employers with 5 or more employees
2. In harassment cases, employers with 1 or more employees are subject.
3. Employees can be held personally liable (unlike Title VII).

B. Prohibits

1. Discrimination against individuals based on all categories in Title VII *plus*
  - a. **Sexual orientation**
  - b. **Marital status** (but employer can reasonably regulate spouses working in same department/facility).
  - c. **Ancestry**
  - d. **Medical Condition**
  - e. **Disability** (physical and mental)
  - f. **Age**
  - g. **Gender Identity**

C. Differences between FEHA and federal statutes

1. Pregnancy Discrimination
  - a. Reasonable accommodation required
    - (1) Employers cannot refuse to temporarily transfer a pregnant woman to less hazardous or strenuous positions
    - (2) But, employers are not required to create additional jobs, do not have to discharge or transfer other employees, or promote when not qualified to do the job.
  - b. Pregnancy can be treated as a temporary disability where an employer has a temporary disability plan with benefits.

- c. Cannot discriminate against a pregnant woman by refusing to select her for a training program leading to promotion.
  - (1) But employee must be able to complete program 3 months prior to the date of pregnancy leave.
- d. Requires employer to give pregnancy leave for a reasonable time not to exceed 4 months.

2. Age Discrimination

- a. Termination on the basis of salary may be found to be age discrimination if it adversely impacts older workers.
- b. DI analysis applies to age discrimination, unlike ADEA (where cts are split).

3. Religion

- a. Excludes religious organizations from the definition of employer like Title VII.

4. Disability

- a. Impairment must “limit” ability to perform major life activity rather than “substantially” limit.
- b. Includes working as a major life activity, whether the focus is on a particular job or a broad class of jobs.
- c. Disability determined w/o regard to mitigating devices (Suttons would have prevailed under this law).
- d. Medical condition used to be defined very narrowly to include only cancer. Now includes genetic characteristics.
- e. Employee does not have to be “qualified” in order for duty to accommodate to arise (??).

D. Enforcement

1. Two Agencies:

a. **Department of FEH**

- (1) Receives complaints
- (2) Investigates and conciliates
- (3) Gives right to sue letters
- (4) Files accusations with commission (if finds there is a case, no conciliation, and employee does not sue in courts)

b. **FEH Commission**

- (1) Holds a hearing. Employee is represented by department or own lawyer if he wishes.
- (2) Commission decides whether to dismiss or give remedies.
  - (a) Includes all remedies available under Title VII.
  - (b) All but Front and Back pay awards are subject to cap of 150,000.
  - (c) In a private suit, damages are not subject to caps.

VIII. Affirmative Action

- A. Validity of Affirmative Action Plans
  - 1. § 703(j) states that employers are not *required* to grant preferential treatment to any individual or group protected under Title VII. This implies that they are not *prohibited* from doing so.
  - 2. *United Steelworkers v. Weber* **Three-prong test**- An affirmative action plan is valid only if
    - a. The purpose is to remedy patterns of discrimination
    - b. It does not unduly trammel the interests of applicants and employees that are not beneficiaries of the plan
    - c. It is temporary- on in place so long as it is necessary to eradicate the past discrimination.
  - 3. *Taxman*- Ensuring diversity is not a valid reason for having an affirmative action plan. Must be remedial in order to not violate discrimination statutes.
  
- IX. Arbitration
  - A. Federal Arbitration Act (FAA)
    - 1. Applies to all Ks evidencing interstate transactions
    - 2. This is interpreted expansively, encourages dispute resolution through arbitration
  
  - B. Applicability to anti-discrimination statutes
    - 1. Gilmer- first S.C. decision to hold that discrimination claims can be subjected to compulsory and mandatory discrimination.
    - 2. However, arbitration agreement does not preclude EEOC from suing on behalf of an individual (*EEOC v. Waffle House*).
    - 3. Arguments against arbitration in anti-discrimination cases:
      - a. Not appealable
      - b. Costs- employee may have to pay up front
      - c. Arbitral bias- if arbitrator awards punitive damages, will he be hired again by employers?
      - d. No discovery
      - e. May not be able to have class actions if every individual is subjected to mandatory arbitration
  
- X. Remedies
  - A. Purpose
    - 1. **Make whole**- place victim in position that he would have been in had there been no discrimination.
    - 2. **Deterrence**
  
  - B. Types of Remedies
    - 1. Back Pay
      - a. Backpay = Salary + benefits

- b. Almost always recoverable: Cts have very little discretion to deny it. Can only deny it if would frustrate the purpose of the statutes-deterrence and making person whole (*Albemarle Paper Co v. Moody*).
  - c. Limitations:
    - (1) Can only get back pay for up to two years before filing EEOC charge
    - (2) **Subject to mitigation**
      - (a) must make reasonable effort to seek comparable job.
      - (b) An *unconditional* offer of reinstatement cuts off back pay. Employer cannot condition offer (e.g. we will reinstate you if you drop the lawsuit).
    - (3) Failure to mitigate is an affirmative defense. Employer must show:
      - (a) there were positions available in the geographical area that were substantially equivalent to the job
      - (b) P did not exercise reasonable diligence in seeking out such positions.
    - (4) **After-acquired evidence**- Only available from time when unlawfully fired to when time of discovery of reasons to lawfully fire.
  - d. Ps are entitled to prejudgement interest on back pay awards.
2. Reinstatement
- a. This relief is given *unless*
    - (1) There is hostility/animosity between employee and employer
    - (2) It would result in bumping another employee out of a job
  - b. Retroactive seniority status- should be awarded if necessary to give complete relief to P (*Franks v. Bowman Transportation*).
    - (1) Does not matter whether this would be “unfair” to other employees
    - (2) But bumping another employee out of a job is not allowed.
3. Front Pay
- a. Only available when reinstatement is not appropriate
  - b. Ct forecasts future lost wages for the time employee would presumptively be w/o comparable work.
  - c. Cts evaluate:
    - (1) opportunity of comparable employment opportunities
    - (2) P’s age, life expectancy, and health
    - (3) likelihood of termination for valid business reasons
    - (4) Ps diligence in mitigating damages
4. Attorneys Fees

- a. Available under Title VII and ADA. Also available under ADEA and EPA under Fair Labor Standards Act.
  - b. Under ADEA and EPA- available to P only.
  - c. Under Title VII and ADA-
    - (1) Prevailing P ordinarily must be awarded attorneys fees in all but special circumstances (such as extreme good faith by D and questionable conduct by P).
    - (2) Prevailing D is entitled to attorneys fees only if Ps action was *frivolous, unreasonable, or without foundation*. Rarely is this standard met, even if Ps case lacks merit.
  - d. Provides recovery for them even in mixed motive cases
5. Compensatory and Punitive damages
- a. Prior to 1991- only available under \_1981
  - b. Civil Rights Act of 1991- now available under Title VII and ADA
    - (1) only in disparate treatment cases not involving mixed motives
    - (2) subject to caps (which do not apply to \_1981):
      - (a) between 14-101 employees = 50,000
      - (b) between 100-201 = 100,000
      - (c) between 200-502 = 200,000
      - (d) more than 500 = 300,000
  - c. Compensatory damages = future pecuniary damages, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life.
    - (1) *Pollard v. E.I.*- Issue was whether future pecuniary losses referred to front pay awards, thereby subjecting such awards to caps. Ct said no. The whole purpose of 1991 act was to provide employees with rights they didn't previously have. So no caps on front pay awards.
  - d. Punitive damages may be recovered if P establishes that D acted with malice or reckless indifference to the federally protected rights of P.
    - (1) employer does not need to be aware that it is violating law
    - (2) but must suspect that it is in a "guilty" way.
6. Liquidated Damages
- a. Additional amount awarded that is equal to the back pay award.
  - b. Available under EPA and ADEA
    - (1) Under ADEA, must be evidence that supports a finding of willful violation- employer knew of violation or showed reckless disregard.
    - (2) Under EPA, P does not have to show that employer acted willfully, but ct has the discretion to reduce all or part of liquidated damages if the employer proves that it acted in good faith.

	B-Pay	F-Pay	Reinstatement/ Instatement	Retroactive Seniority	Atty Fees	Compensatory and Punitive	Liquidated Damages
<i>Title VII</i>	–	–	–	–	–	– <i>caps apply</i>	
<i>ADA</i>	–	–	–	–	–	– <i>caps apply depending on # of employees</i>	
<i>ADEA</i>	–	–	–	–	–		–
<i>CRA '66</i>	–	–	–	–	–	–	
<i>EPA</i>	–	–	–	–	–		–
<i>FEHA (from Commission)</i>	–	–	–	–	–	– <i>\$150,000 cap, to be paid to general fund</i>	
<i>FEHA (from Court)</i>	–	–	–	–	–	–	