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Teaching Notes – Employment Discrimination

Richard J. Hunter., Jr[1], John H. Shannon[2], Henry J. Amoroso[3]

[1] Professor of Legal Studies, Seton Hall University; Adjunct Professor of Legal Studies, Collins College of Business, University of Tulsa
[2] Professor of Legal Studies, Seton Hall University
[3] Associate Professor of Legal Studies, Seton Hall University

Abstract
This article, the third in the series of Teaching Notes on topics in a traditional Legal Environment of Business class, deals with employment law and employment discrimination. Specifically, the article discusses four major pieces of legislation: The Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Age Discrimination Act of 1967, and the Americans with Disabilities Act of 1980, as well as the Lilly Ledbetter Fair Pay Act of 2009, which was enacted as a result of a decision of the United States Supreme Court. The article outlines the major provisions of each of these statutes, cites to major cases decided by federal courts, and describes any exceptions and exemptions. In addition, the article discusses job testing, bona fide occupational qualifications, and sexual harassment in the workplace. The article will offer suggestions to managers and employers in order to avoid the "pitfalls" of non-compliance with the obligations imposed by each of these important statutes and administrative regulations.

Keywords: Employment Law, Employment Discrimination, Job Testing, Sexual Harassment, Reasonable Accommodations, Undue Hardship

1. Introduction

Employment law is largely based on a scheme of statutory laws enacted by Congress to deal with specific issues or circumstances that may arise in the employment context. This article, third in the series of Teaching Notes in a Legal Environment of Business course, discusses these major statutes and administrative regulations that provide employees with protections from unlawful acts or from discrimination in their workplaces.

2. The Equal Pay Act (EPA) of 1963

The U.S. Supreme Court explained in *Corning Glass Works v. Brennan* (1974, p. 195):

> "Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry-the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman, even though his duties are the same."

Enacted as part of President John F. Kennedy's "New Frontier" legislative agenda, the EPA, more specifically, Section 206(d)(1), prohibits "employer[s] ... [from] discriminat[ing] … on the basis of sex by paying wages to employees [...] at a rate less than the rate [paid] to employees of the opposite sex [...] for equal work on jobs [requiring] equal skill, effort, and responsibility, and which are performed under similar working conditions[.]" To establish a *prima facie* case under the EPA (Sullivan, 1978), an employee must show that:

1. *Different* (lower) wages are paid to employees of the opposite sex;
2. The employees *perform substantially equal work on jobs requiring equal skill (50%), effort (15%), and responsibility (20%)*; and
3. The jobs are performed under similar *working conditions (15%)* (see Burns & Burns, 1973; Elisburg, 1978).

As the statute indicates, the EPA provides that the employer may not pay lower wages to an employee of one gender than it pays to an employee of the other gender within the same establishment for substantially equal work at jobs that require substantially equal skill, effort, and responsibility, and that are performed under similar working conditions under what is called the "Kress Test."

There are several recognized exemptions under the EPA, including bone fide seniority systems; merit systems; systems which earnings by quantity or quality (piecework); or any system or factor "other than sex" (Gaffney, 1985) – for example, where wages are paid according to a formula based on "revenues produced." The EPA is often the basis of a "pay equity" complaint in tandem with provisions of the Title VII of the Civil Rights Act of 1964, discussed below.

2.1. A Further Development: The Lilly Ledbetter Fair Pay Act (2009)

The Lilly Ledbetter Fair Pay Act was the first piece of legislation signed into law by President Barack Obama in January of 2009 (Grossman, 2009) shortly after President Obama was sworn into office. The Act enables an employee to bring suit more easily for wage discrimination under Title VII of the Civil Rights Act of 1964 by making an act of discrimination illegal *each time it occurs*, for example, with each paycheck received, as opposed to when the discriminatory decision was initially made. The Act was passed in response to a 2007 Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.* (2007) [hereinafter *Ledbetter*] relating to the statute of limitations for filing an equal-pay lawsuit.

Lilly Ledbetter was employed by Goodyear Tire Company in Gadson, Alabama from 1979-1998. In 1998, Ledbetter received an "anonymous note" in her locker at Goodyear. The note contained Ledbetter's salary information in comparison to that of her male counterparts. Ledbetter sued Goodyear under Title VII of the Civil Rights Act of 1964, alleging gender discrimination. In the trial that followed, Ledbetter discovered that she was making less than *all* of her male co-workers, even those with less seniority and those who had received lower performance reviews than Ledbetter had received.

Goodyear argued that Ledbetter's salary was directly related to poor performance reviews rather than any gender discrimination. The trial court ruled in Ledbetter's favor, awarding her $3 million in damages, which was reduced to $360,000 due to a Title VII damage cap. However, Goodyear appealed the decision - arguing that under Title VII, all discrimination complaints must be filed within 180 days of the alleged discriminatory act. Thus, only the most recent salary review was subject to challenge. The U.S. Circuit Court of Appeals for the Eleventh Circuit ruled in favor of Goodyear and dismissed Ledbetter's complaint, finding that no act of discrimination had occurred within the 180 day review period. The decision in the Eleventh Circuit was not consistent with decisions in several Courts of Appeal, which had followed the precedent of the "paycheck accrual rule."

According to the "accrual rule," the statute of limitation would not bar a suit based discrimination claim as long as one paycheck reflecting the alleged discriminatory pay was received during the 180 day statute of limitations. The decision of the Eleventh Circuit was appealed to the United States Supreme Court. The Supreme Court likewise focused on the question whether Ledbetter had a right to sue under Title VII since she had not filed her

claim with the EEOC within 180 days of the *initial* discriminatory act. The Supreme Court determined that the *charging period* is triggered by a discrete unlawful employment practice. As the Supreme Court explained, "a new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination" (*Ledbetter*, 2007, p. 628). The five-justice majority consisting of Justices Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, and Chief Justice John G. Roberts Jr., found that Ledbetter did not file a timely claim because the *discrete act of discrimination*—the alleged discriminatory salary decision which led to the pay inequity—occurred outside of the 180-day filing period. In a dissenting opinion written by Associate Justice Rath Bader Ginsburg, joined by Justices Stevens, Souter, and Breyer, the four-justice minority, however, argued that it was often impossible to ascertain when the discrete act of discrimination first takes place since, salary information is often confidential and it would not be to the advantage of an employer to reveal such information. For that reason, the minority argued that the required discrete act of discrimination was renewed with the receipt of every paycheck resulting from the initial salary determination.

The Congress responded to the Supreme Court's decision with the passage of the Lilly Ledbetter Fair Pay Act, which amended Title VII of the Civil Right Act of 1964. According to the law, a discriminatory decision is illegal each time the act occurs – such as with receipt of a paycheck—and not when the initial pay decision is made. Section 2 of the Act states that the Supreme Court's *Ledbetter* decision "undermines…statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress" and "ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended" (Lilly Ledbetter Fair Pay Act, 2009, § 2).

3. The Civil Rights Act of 1964

The Civil Rights Act of 1964 was landmark legislation in the United States (see Brown, 2014), outlawing major forms of discrimination based on five categories "in places of public accommodations, in federally assisted programs, in employment, in schools, and with respect to voting rights" (Chambers, 2008): race, creed, color, national origin, and sex.

President Kennedy's vision for a new civil right bill included provisions to ban all forms of discrimination in public accommodations, while most importantly to the President, the Act would empower the United States Attorney General and the Department of Justice to join in lawsuits against state governments which operated or encouraged the formation of segregated schools. Loevy (1990) states that the "brutal police treatment of civil rights demonstrators in Birmingham, Alabama, forced President Kennedy to send a strong civil rights bill to Congress in June of 1963" (see also Andrews & Gaby, 2015).

3.1. Title VII

Title VII banned discrimination by employers on the basis of race, religion, color, sex, or national origin in the employment sphere. It also added protections for individuals "associated with other races," such as parties involved in an interracial marriage. Employers were prohibited from discriminating in any phase of employment including hiring, recruiting, pay, termination, and promotions. However, the Act provided for certain limited "bona fide occupational qualifications" or exceptions under the Act.

Interestingly, the prohibition on sex discrimination found in Title VII was added by Rep. Howard Smith, Chairman of the House Rules Committee, who strongly *opposed* the legislation, in order to "kill" the entire bill. Smith's amendment to add the word "sex" to the bill was passed by vote of 168 to 133 (see Brown, 2014).

The inclusion of the term "sex" in the bill under these confusing circumstances led to the comments of Justice William Rehnquist who explained in *Meritor Savings Bank v. Vinson* (1986), "The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives...

the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'"

Precisely because of unanswered questions generated by the Act itself, the Supreme Court has often been called upon to decide cases relating to sex discrimination. These cases may be summarized as follows:

- *Cleveland Bd. of Ed. v. LaFleur* (1974): The Court found that Ohio public schools' mandatory maternity leave rules for pregnant teachers violate constitutional guarantees of due process.
- *Meritor Savings Bank v. Vinson* (1986): The Court found that a claim of "hostile environment" sexual harassment is a form of sex discrimination that may be brought under Title VII of the Civil Rights Act of 1964.
- *Johnson v. Transportation Agency* (1987): The Court decided that a county transportation agency appropriately took into account an employee's sex as one factor in determining whether she should be promoted.
- *Franklin v. Gwinnett County Public Schools* (1992): The Court ruled that students who had been subjected to sexual harassment in public schools may sue for monetary damages.
- *Oncale v. Sundowner Offshore Serv., Inc*. (1998): The Court held that sex discrimination consisting of same-sex sexual harassment can form the basis for a valid claim under Title VII of the Civil Rights Act of 1964.
- *Burlington Industries, Inc. v. Ellerth* (1998): The Court held that an employee who refuses unwelcome and threatening sexual advances of a supervisor (but suffers no real job consequences) may recover against the employer without showing the employer is at fault for the supervisor's actions.
- *Faragher v. City of Boca Raton* (1998): The Court decided that an employer may be liable for sexual harassment caused by a supervisor, but liability depends on the reasonableness of the employer's conduct, as well as the reasonableness of the plaintiff victim's conduct.

Applications of the Civil Right Act of 1964 (and other federal laws dealing with employment discrimination) include:

- Job Advertisements (see Burn et al., 2020)
- Recruitment (Stoilkovska, Ilieva, & Gjakovski, 2015)
- Application & Hiring
- Job Referrals
- Job Assignments & Promotions
- Pay & Benefits
- Discipline & Discharge (Sincoff, Slonaker, & Wendt, 2006)
- Employment References

3.2. Job Testing

One of the most historically significant issues raised with regard to Title VII has been the use of "job testing," which has the effect of discriminating against a perspective or current employee. In 2007, the U.S. Equal Employment Opportunity Commission (EEOC) (2007) wrote:

> "Employers often use tests and other selection procedures to screen applicants for hire and employees for promotion. There are many different types of tests and selection procedures, including cognitive tests, personality tests, medical examinations, credit checks, and criminal background checks."
> "The use of tests and other selection procedures can be a very effective means of determining which applicants or employees are most qualified for a particular job. However, use of these tools can violate the federal anti-discrimination laws if an employer intentionally uses them to discriminate based on race, color, sex, national origin, religion, disability, or age (40 or older).

> Use of tests and other selection procedures can also violate the federal anti-discrimination laws if they disproportionately exclude people in a particular group by race, sex, or another covered basis, unless the employer can justify the test or procedure under the law."

The EEOC (2007) notes "examples of employment tests and other selection procedures, many of which can be administered online, include the following:

- Cognitive tests assess reasoning, memory, perceptual speed and accuracy, and skills in arithmetic and reading comprehension, as well as knowledge of a particular function or job;
- Physical ability tests measure the physical ability to perform a particular task or the strength of specific muscle groups, as well as strength and stamina in general;
- Sample job tasks (e.g., performance tests, simulations, work samples, and realistic job previews) assess performance and aptitude on particular tasks;
- Medical inquiries and physical examinations, including psychological tests, assess physical or mental health;
- Personality tests and integrity tests assess the degree to which a person has certain traits or dispositions (e.g., dependability, cooperativeness, safety) or aim to predict the likelihood that a person will engage in certain conduct (e.g., theft, absenteeism);
- Criminal background checks provide information on arrest and conviction history;
- Credit checks provide information on credit and financial history;
- Performance appraisals reflect a supervisor's assessment of an individual's performance; and
- English proficiency tests determine English fluency."

Title VII of the Act was intended to eliminate "artificial, arbitrary, and unnecessary" barriers to employment that operate to discriminate on the basis of criteria not related to job performance. Such testing would be prohibited, notwithstanding the employer's lack of discriminatory intent in requiring the particular test.

The Age Discrimination in Employment Act (ADEA) (Hunter, Shannon, & Amoroso, 2018; Hunter, Shannon, & Amoroso, 2019), discussed below, "prohibits disparate treatment discrimination," i.e., intentional discrimination based on age. For example, in the context of job testing, the ADEA forbids an employer from giving a physical agility test solely to applicants over age 50, based on a belief that they are less physically able to perform a particular job, but not testing younger applicants. The ADEA also prohibits employers from using ostensibly neutral tests or allegedly objective selection procedures that have a discriminatory impact on persons based on age (40 or older), unless the challenged employment action is based on a reasonable factor "other than age" (*Smith v. City of Jackson*, 2005). Thus, if a test or other selection procedure has a disparate impact based on age, the employer must show that the test or device chosen was a reasonable one" (see Jones, 1987).

If an employer requires a prospective employee to take a test or meet certain educational or other requirements (such as possessing a high school or college diploma) before making a decision about hiring, work assignments, or job promotions, the United States Supreme Court held in *Griggs v. Duke Power Co.* (1971) that the "test" may not exclude people of a particular race, color, religion, sex (including pregnancy), or national origin, or individuals with disabilities, unless the employer can show that the test or a company's employment requirements were necessary and related to "successful job performance." In short, the Act does not preclude the use of testing or measuring procedures, but it does proscribe giving them controlling force unless they are demonstrably a *reasonable measure of job performance.*

In providing practical assistance to entities who continue to use "job testing" in their selection processes, the EEOC (2007) established "Employer Best Practices for Testing and Selection" which notes:

- "Employers should administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age (40 or older), or disability.

- Employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used. The test or selection procedure must be job-related and its results appropriate for the employer's purpose. While a test vendor's documentation supporting the validity of a test may be helpful, the employer is still responsible for ensuring that its tests are valid under UGESP.
- If a selection procedure screens out a protected group, the employer should determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure. For example, if the selection procedure is a test, the employer should determine whether another test would predict job performance but not disproportionately exclude the protected group.
- To ensure that a test or selection procedure remains predictive of success in a job, employers should keep abreast of changes in job requirements and should update the test specifications or selection procedures accordingly.
- Employers should ensure that tests and selection procedures are not adopted casually by managers who know little about these processes. A test or selection procedure can be an effective management tool, but no test or selection procedure should be implemented without an understanding of its effectiveness and limitations for the organization, its appropriateness for a specific job, and whether it can be appropriately administered and scored."

3.3. Exceptions or Bona Fide Occupational Qualifications (BFOQs)

Both Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA) contain a BFOQ defense.
The BFOQ provision of Title VII provides that:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise…
> United States Code Title 29 (Labor), Chapter 14 (age discrimination in employment), section 623 (prohibition of age discrimination) establishes that:
> "It shall not be unlawful for an employer, employment agency, or labor organization (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located."

Examples of bona fide occupational qualifications under the ADEA or Title VII are mandatory retirement ages for bus drivers and airline pilots, which are justified on the basis of "public safety" considerations. Further, in the field of advertising, a manufacturer of men's clothing may lawfully advertise for male models. Religious affiliation may also be considered as a BFOQ. For example, a "religious school" (operated by a church, a "religious organization," or non-profit) may lawfully require that members of its faculty be members of a particular denomination, and may lawfully bar from employment anyone who is not a member. An educational institution such as a high school or grammar school (Smith, 2020) or a college or university operated by a religious group or religious order may lawfully require such positions as president, chaplain, and its teaching faculty to be a member of that particular faith, under what is termed a "ministerial exception" (Ferris, 2021). However, membership in a particular faith would generally not be considered a BFOQ for occupations such as secretarial and janitorial positions under current court precedents.

While religion, sex, or national origin may be considered a bona fide occupational qualification in narrow contexts, "*race can never be a BFOQ"* (Kissinger, 1995, p. 1431, citing *Knight v. Nassau County Civil Service Commission* (1981); 42 U.S.C. Section 2000e-2(e)(1)).

3.4. Sexual Harassment in the Workplace (see Roscigno, 2019)

There are two types of sexual harassment: one form of sexual harassment is known as "quid pro quo" (something for something) (Toke, 2023), and a second form of sexual harassment classified as creating a "hostile environment" (Thomas, 2021). The common thread in the two classifications involves the legal requirement that the act of harassment must be unwelcome and/or pervasive.

In a "quid pro quo" sexual harassment, the harasser is normally one who is in a position of power or authority, i.e., a supervisor or manager. The victim is usually an individual who feels that he or she must perform or respond to a sexual advance in order to gain something in return. Under "hostile environment" sexual harassment, the victim must show a general pattern of conduct by the offender that leads to deterioration in the work environment of the victim.

Legal Match (2023) states: "Some examples of scenarios for which an employer may be held liable for sexual harassment can include the following:

- When an employer is viewed as the proxy of their employees, such as the CEO of a corporation;
- If an employer does not take reasonable steps to prevent the occurrence and continuance of a hostile work environment.
- When there is evidence that the employer themselves has committed a form of sexual harassment; especially, if it is "quid pro quo" sexual harassment; and/or
- If the employer has direct authority over an employee or an employee's supervisor and does not instruct that employee or supervisor to stop their unwanted sexual behavior."

"On the other hand, an employer will most likely not be liable for a claim involving sexual harassment if they took reasonable steps to stop it and it is between parties who are under the direction of other supervisors at the company" (Legal Match, 2023). If a supervisor's harassment results in a hostile work environment, the employer can avoid liability if it can prove that: 1) it reasonably tried to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

The employer may be liable for harassment by non-supervisory employees or non-employees over whom it has control such as independent contractors or even customers on the premises, if the employer "knew, or should have known" about the harassment and failed to take prompt and appropriate corrective action.

In *Oncale v. Sundowner Offshore Services, Inc.* **(**1998**),** the U.S. Supreme Court held that sexual harassment by persons of one sex against persons of the same sex is actionable under Title VII (Paetzold, 1999). The plaintiff, Oncale, was employed as a "roustabout" as one of an eight-man crew on an offshore oil rig. He claimed that he was forcibly subjected to sex-related, humiliating actions against him by certain coworkers. [The case describes the actions in graphic detail.] Oncale eventually quit and stated that he did so in order to avoid being raped or forced to have sex. In an opinion of the District Court affirmed by the Fifth Circuit Court of Appeals, the District Court held that a male has no cause of action under Title VII for harassment by male co-workers.

The United States Supreme Court reversed the decision of the Fifth Circuit and held that nothing in Title VII necessarily barred a claim of sex discrimination merely because the plaintiff and the defendant are of the same sex. The Supreme Court held that "only the plaintiff's sex is relevant in determining whether a Title VII violation has occurred. The sex of the perpetrator could be the same as, or different from, the sex of the plaintiff. Title VII outcomes are determined by whether a chance in the terms or conditions of the plaintiff's employment has occurred because of his or her sex" (Paetzold, 1999, p. 253, quoting *Oncale).* The Court rejected the notion that coverage of same-sex harassment would turn Title VII into a "general civility code" for the workplace

(*Oncale*, p. 80). A plaintiff is still obligated to prove that the conduct at issue was "discrimination because of his or her sex," stated the Court. In addition, the Court noted that Title VII does not reach ordinary socializing, but rather forbids only behavior "so objectively offensive as to alter the conditions' of the victim's employment" (*Oncale*, p. 81).

Justice Scalia, who authored the opinion of the Court, added: "Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive" (*Oncale*, p. 82)

3.5. How Bostock Further Changes the Equation (Shannon & Hunter, 2020)

In three cases that reached the United States Supreme Court, an employer allegedly fired a long-time employee simply for being homosexual or transgender. Clayton County, Georgia, fired Gerald Bostock for conduct "unbecoming" a county employee shortly after he began participating in a gay recreational softball league. Altitude Express fired Donald Zarda days after he mentioned being gay. And R. G. & G. R. Harris Funeral Homes fired Aimee Stephens, who presented as a male when she was hired, after she informed her employer that she planned to "live and work full-time as a woman." Each employee sued, alleging sex discrimination under Title VII of the Civil Rights Act of 1964. The Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay and so Mr. Bostock's suit could be dismissed as a matter of law. The Second and Sixth Circuits, however, allowed the claims of Mr. Zarda and Ms. Stephens, respectively, to proceed (*Bostock v. Clayton County, Georgia*, 2020, p. 1734).

In *Bostock v. Clayton County, Georgia* (2020), a historic case decided by the United States Supreme Court on Monday, June 15, 2020, the Supreme Court in a 6-3 decision ruled that Title VII of the Civil Rights Act of 1964 protects gay, lesbian, and transgender people from discrimination in employment "on the basis of sex," one of the protected categories under the Act (Weiss, 2020).

The United States Supreme Court had been asked to decide two discreet questions in *Bostock* and two companion cases, *Altitude Express Incorporated v. Zarda* and *Harris v. EEOC* (Valenti, 2021):

> *"Does Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination "because of … sex," encompass discrimination based on an individual's sexual orientation?"*
>
> *"Does Title VII of the Civil Rights Act of 1964 prohibit discrimination against transgender employee based on (1) their status as transgender or (2) sex stereotyping?"*

To the surprise of many pundits, Justice Neil Gorsuch, a Trump appointee to the Court, authored the 6-3 majority opinion and answered these two questions in the affirmative (see Neidig, 2020). Justice Gorsuch wrote for the Court: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. … Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids" (*Bostock*, p. 1337). Gorsuch added:

> "An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex" (*Bostock*, p. 1741).

Justice Gorsuch's majority opinion concludes with a "pure expression of textualism" (Poindexter, 2020):

> "In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law" (*Bostock*, p. 1754).

Justices Samuel Alito, Brett Kavanaugh, and Clarence Thomas dissented. “The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous,” Alito wrote in the dissent. “Even as understood today, the concept of discrimination because of ‘sex’ is different from discrimination because of ‘sexual orientation’ or ‘gender identity’”
(*Bostock*, p. 1755).

Justice Kavanaugh wrote in a separate dissent that the Court was rewriting the law to include gender identity and sexual orientation—a job that belongs to Congress, and not to courts.

> “Like many cases in this Court, this case boils down to one fundamental question: Who decides? Title VII of the Civil Rights Act of 1964 prohibits employment discrimination “because of ” an individual’s “race, color, religion, sex, or national origin.” The question here is whether Title VII should be expanded to prohibit employment discrimination because of sexual orientation. Under the Constitution’s separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court” (*Bostock*, p. 1823).

And then Justice Kavanaugh seemed to “want to have it both ways” by making a rather “bizarre” statement.” Justice Kavanaugh acknowledged that the decision represents an “important victory achieved today by gay and lesbian Americans.” Justice Kavanaugh wrote:

> “Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit — battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today’s result” (*Bostock*, p. 1837)

Justice Alito raised the possibility of a future controversy and added that employers who have religious objections to employing LGBT people also might be able to raise those claims in a different case (see, e.g., Junker, 2019).

4. The Age Discrimination in Employment Act (ADEA) (Hunter, Shannon, & Amoroso, 2018; Hunter, Shannon, & Amoroso, 2019)

The Age Discrimination in Employment Act of 1967 is a statute that prohibits employment discrimination against any person at least 40 years of age in the United States (see Willis, 2020; Kenton, 2022). When enacted in 1967, the ADEA cited the frequent practice of using “arbitrary age limits” in making staffing decisions. The intent of the Act, found in the Congressional statement of findings and purpose, is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

Willis (2020, p. 73) stated: “A plaintiff must establish a prima facie case for age discrimination by showing: he or she is over the age of forty; is qualified for the position; suffered damages as a result of an adverse employment decision; and was replaced by a younger person.”

The ADEA was signed into law by President Lyndon B. Johnson as part of his “civil rights” legislative agenda. The ADEA prevents age discrimination and provides equal employment opportunity under conditions that were not explicitly covered in Title VII of the Civil Rights Act of 1964. The ADEA also applies to the standards for pensions and benefits provided by employers, and requires that information concerning the needs of older workers be provided to the general public by the EEOC.
The ADEA includes a broad ban against age discrimination and specifically prohibits (U.S. Code Section 623):

- *Employers* from discrimination with respect to “compensation, terms, conditions, or privileges of employment, because of such individual’s age.”

In addition, Section 623:

- Makes it unlawful for an *employer* to "limit, segregate, or classify" employees in any way which would "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [his] status as an employee because of such individual's age";
- Makes it unlawful for an *employer* to "reduce the wage rate of any employee:
- Makes it unlawful for an *employment agency* to "fail or refuse to refer for employment, or otherwise discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age";
- Makes it unlawful for a *labor organization* to "exclude or expel from membership, or otherwise to discriminate against, any individual because of his age" or to "limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age";
- Makes it unlawful for an employer, labor organization, or employment agency to "print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age" (see also Burn et al., 2020).

In 1978, Congress amended the original statute in order to extend the ADEA's protections to workers to 70 years of age, replacing the Act's initial upper age limit of 65. Pursuant to the Age Discrimination in Employment Amendments of 1986, the Congress then removed the upper age limit eligible, although several recognized exceptions remained.

Since 1986, the ADEA has effectively prohibited mandatory retirement in most employment sectors, with phased elimination of mandatory retirement for certain "tenured workers," such as college professors (Novotny, 1981), which was eliminated in 1993 (see Fitzgerald, 2018).

4.1. Exemptions and Exceptions

An age limit may be legally specified in the circumstance where age has been shown to be a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." Willis (2020, p. 74) notes: "The ADEA covers most professions; however, there are a wide range of exemptions available to employers, including carveouts for executives, high policy makers, judges, commercial airline pilots, firefighters, and law enforcement officers, just to name a few. These exemptions enable businesses to impose mandatory retirement, despite the fact that age is an arbitrary factor."

In practice, BFOQs for age are limited to the obvious (for example, casting a young actor to play a young character in a movie) or when public safety is at stake (for example, in the case of age limits for airline pilots and bus drivers). Tully (1977, p. 511) stated: "Courts have been more lenient in sustaining a finding of BFOQ exception where the job places the employee in a special relationship to the public at large (citing *Airlines Pilots Ass'n v. Quesada*, 1961; *McIlvaine v. Pennsylvania State Police*, 1971)."

Mandatory retirement based on age may also be permitted for corporate executives over age 65 in high policy-making positions who are entitled to a pension over a minimum yearly amount (see Tully, 1977). As Willis (2020, p. 74) states: "The exemption for bona fide executives and high policymakers allows for compulsory retirement of any employee who has attained 65 years of age and who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position."

Section 623(f)(2) of ADEA provides: "It shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of … any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual…."

In more general terms, Willis (2020, p. 104) provides an apt summary of the policy debate on the efficacy and importance of the ADEA:

> "Individual assessments are needed in order to reduce discrimination in mandatory retirement policies that are still in place. Previous studies have shown that individual assessments are a more effective predictor than age as a way to measure the ability of a person to perform a job. Policies regarding exceptions to the ban on mandatory retirement need to be amended in order to limit discriminatory practices and protect the elderly. Retirement policy also needs to be addressed in consideration of the needs of changing demographics. Occupational assessments for employees of certain professions must be implemented to reduce discrimination in a world where people are living and working longer in order to effectively accomplish the aims of the ADEA."

However, a significant limitation on the rights of an individual to successfully litigate a case of age discrimination was created in *Gross v. FBL Financial Services* (2009), where the United States Supreme Court ruled that a plaintiff must prove by a preponderance of evidence that age was the "but for" cause of any adverse employment action (see Van Ostrand, 2009; Eyer, 2021).

5. The Americans with Disabilities Act (ADA) (Bowman, 2011; Hunter & Shannon, 2017)

The ADA is a wide-ranging statute that broadly prohibits discrimination based on disability (see Essex-Sorlie, 1994). Rosenthal (2006, p. 895) stated:

> "When President George H. Bush signed the Americans with Disabilities Act (ADA) into law, he hailed it as a landmark piece of legislation that would open many 'once-closed' doors for individuals with disabilities. One of the ADA's most noticeable features is that in addition to prohibiting employers from firing and failing to hire individuals with disabilities, it places an affirmative obligation on employers to accommodate an employee's or a candidate's disability…."

The ADA generally applies to "public accommodations." According to the ADA National Network (2023): "A public accommodation is a private entity that owns, operates, leases, or leases to, a place of public accommodation. Places of public accommodation may include a wide range of entities, such as restaurants, hotels, theaters, doctors' offices, pharmacies, retail stores, museums, libraries, parks, private schools, and day care centers. Private clubs and religious organizations are exempt from the ADA's title III requirements for public accommodations."

The term "disability" is defined by the ADA as "... a physical or mental impairment that substantially limits a major life activity" (Jones, 2006) The determination whether any particular condition is considered a disability is made on a case by case basis. Certain specific conditions are excluded from the definition of a disability, such as current substance abuse (from the use of illegal drugs) and visual impairment that is correctable by prescription lenses. The Department of Justice, Civil Rights Division (U.S. Department of Justice (ADA.gov), 2023) noted:

> "People with OUD [Opioid Use Disorder] typically have a disability because they have a drug addiction that substantially limits one or more of their major life activities. Drug addiction is considered a physical or mental impairment under the ADA. Drug addiction occurs when the repeated use of drugs causes clinically significant impairment, such as health problems and or an inability to meet major responsibilities at work, school, or home. People with OUD may therefore experience a substantial limitation of one or more major life activities, such as caring for oneself, learning, concentrating, thinking, communicating, working, or the operation of

> major bodily functions, including neurological and brain functions. The ADA also protects individuals who are in recovery, but who would be limited in a major life activity in the absence of treatment and/or services to support recovery" (see SAMHSA, 2023).

The ADA states that a *covered entity* shall not discriminate against *a qualified individual with a disability* (see Bangerter & Kleiner, 2005; Anderson, 2006). The ADA applies to job application procedures, hiring, advancement and discharge of employees, workers' compensation, job training, and other terms, conditions, and privileges of employment. The term *covered entity* can refer to an employment agency, labor organization, or joint labor-management committee, and is generally an employer engaged in interstate commerce with 15 or more employees. Discrimination may include limiting or classifying a job applicant or employee in an adverse way; denying employment opportunities to individuals who otherwise qualify for employment; not making reasonable accommodations to the known physical or mental limitations or relating to learning disabilities of disabled employees (see Leslie, Rumrill, McMahon, & Cormier, 2023); not advancing or promoting employees with disabilities; and/or not providing accommodations in creating training materials or formulating employment policies, which may include providing qualified readers or interpreters for employees (see Kiviniemi & Sanjo, 2012).

Employers can use medical examinations for applicants, after making an offer of a job, only if *all* applicants (regardless of disability) must take the examination and if it is treated as a confidential medical record. As noted, *qualified individuals* do not include any employee or applicant who is currently engaging in the *illegal* use of drugs when that usage is the basis for the employer's actions.

5.1. What is "reasonable accommodation"?

A reasonable accommodation (Bowman, 2011) is any modification or adjustment to a job or the work environment that will enable an "otherwise qualified applicant" or employee with a disability to participate in the application process or to perform essential job functions (see Keating, 2010). A reasonable accommodation also includes necessary adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities (Mello, 1993).

Examples of reasonable accommodation may include:

- making existing facilities used by employees readily accessible to and usable by an individual with a disability;
- restructuring a job (Coffield, 2023);
- modifying work schedules;
- acquiring or modifying equipment;
- providing qualified readers or interpreters;
- or appropriately modifying examinations, training, or other programs (Timmons, 2005; Repa, 2023).

A reasonable accommodation also may include reassigning a current employee to a vacant position for which the individual is qualified (Wilson, 2022), if the person is unable to do the original job because of a disability even with an accommodation (Befort & Donesky. 2000), However, there is no obligation to find a position for an applicant who is not "otherwise qualified" for the position sought. Employers are not required to lower quality or quantity standards as an accommodation; nor are they obligated to *provide* personal use items such as glasses or hearing aids to employees at the employer's expense.

The decision relating to the appropriateness of any accommodation must be based on the particular facts of each case because the nature and extent of a disability and the requirements of a job will vary in each case. In selecting the particular type of reasonable accommodation, the principal test is that of *effectiveness*, i.e., whether the accommodation will provide an opportunity for a person with a disability to achieve the same level of performance and to enjoy the benefits of employment equal to those of an "average, similarly situated person" without a disability. However, the accommodation does not have to ensure equal results or provide exactly the same benefits.

An employer is only required to accommodate a "known" disability of a qualified applicant or employee. The requirement generally will be triggered by a request from an individual with a disability, who frequently will be able to suggest an appropriate accommodation.

If the individual does not request an accommodation, the employer is not obligated to provide one, except where an individual's disability impairs his/her ability to know of, or effectively communicate a need for, an accommodation that is obvious to the employer.

5.2. Limitations on the Obligation to Make a Reasonable Accommodation

The individual with a disability requiring the accommodation must be "otherwise qualified." In addition, an employer is not required to make an accommodation if it would impose an "undue hardship" on the operation of the employer's business.

"Undue hardship" is defined as an "action requiring significant difficulty or expense" when considered in light of a number of factors. According to MRA (2023), "Factors used to determine whether an undue hardship exists include:

- The nature and cost of the accommodation.
- The size, type, and financial resources of the specific facility where the accommodation would occur.
- The overall size, type of operation, and financial resources of the covered employer."

Undue hardship is likewise determined on a case-by-case basis (see McCord, 2023). Where a facility or business is part of a larger entity, the structure and overall resources of the larger organization would be considered, as well as the financial and administrative relationship of the facility or business to the larger organization. In general, a larger employer with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources (Shinn, 2016).

Norman (2014) noted "ADA 'undue hardship' standard is tough to prove" for an employer.
If a particular accommodation would amount to an undue hardship, the employer must attempt to identify another accommodation that will not pose such a hardship. Also, if the cost of an accommodation would impose an undue hardship on the employer, the individual with a disability should be given the option of paying that portion of the cost which would constitute an undue hardship or providing the accommodation.

The employer's obligation under Title I of the ADA is to provide access for an *individual* applicant to participate in the job application process, and for an *individual* employee with a disability to perform the essential functions of his/her job, including access to a building, to the work site, to needed equipment, and to facilities used by employees. For example, if an employee recreation or "break" area is located in a place or facility inaccessible to an employee using a wheelchair, the place or facility might be modified or relocated, or comparable facilities might be provided in a location that would enable the individual with a disability to take a break with co-workers. The employer must provide such access unless it would cause an undue hardship, as discussed above.

Under Title I, an employer s not required to make its existing facilities accessible until a particular applicant or employee with a particular disability demonstrates a need for an accommodation, and then the modifications should meet that individual's specific work needs. However, in the spirit of the ADA, employers should at least consider initiating changes that will provide general accessibility for all employees as well as for job applicants, since it is quite likely that people with disabilities will be applying for jobs.

Burden (2019) suggests the following as "best practices" of a decidedly pro-active strategy for businesses and other entities who are attempting to comply with both the "letter and spirit" of the ADA. These include:

"1: Write clear employee handbook policies

Employers should have a handbook policy that instructs employees to contact HR if they need accommodations to perform the essential functions of their job. There should also be a policy in the handbook stating that the company does not retaliate against employees who request accommodations, she said.

2: Don't skimp on training for supervisors and managers

Employers need to train supervisors and managers on recognizing the needs of employees and responding to them in an appropriate and lawful way.

3: Request medical documentation only when necessary

Experts have recommended that employers require medical documentation only when necessary. The EEOC takes the position that employees may not even be required to start the interactive process when a need is obvious.

Requiring the employee to provide medical information from his or her health professional typically comes into play when the disability is invisible to the employer.

4: Ensure job descriptions stay true to job duties

Job descriptions should accurately outline job duties, experts say. Descriptions can help establish expectations for employees and also set a baseline for what employers do or do not have to accommodate.

5: Maintain flexibility

It's important for employers to stay flexible. Rigidly following set practices or using certain technologies might cause compliance complications.

An employer who conducts initial job interviews only by phone, for example, would need to find other options to accommodate a deaf applicant, she said. And while flow charts or standardized checklists can help an employer navigate the accommodation process, employers should understand and accept alternatives and recognize other options that may work better for an applicant or employee in a particular situation.

6: Move the interactive process forward

The interactive process is so important. Through it, the employer can show that it made every effort to engage with the employee. If the employee refuses to communicate, then the employer can show that it made a good-faith effort and the employee didn't engage. But if the employer is responsible for ending the process too early, that can serve as evidence of an ADA violation… HR [should] be trained on the components of a "good, interactive process system."

7: Document the dialogue

Documenting the interactive process is critical step for the employer. Many employers fail to keep adequate documentation of the dialogue and fail to confirm steps taken and/or agreements made in writing. Keeping thorough, contemporaneous documentation is critical."

6. Conclusions and Commentary

While a full understanding of the statutory materials, major cases, and regulatory materials in the area of employment law and employment discrimination is still an important obligation of managers in the business environment, it must also be recognized that the "world of employment" is rapidly changing. The "industrial economy" of the 1930s through the 1980s is literally being transformed into a "knowledge economy" where patterns of work are subject to challenges not before experienced or anticipated. The workplace is no longer dominated by "traditional" 40-hour employees and is composed today of nearly 50% of employees who are temporary, part-time, or independent contractors (see U.S. Department of Labor, 2023).

This "new reality" poses a unique challenge to managers who must adapt the statutory and regulatory scheme of traditional "employment law" to employees of various stripes, responsibilities, physical conditions, orientations, ethnicities, ages, languages, etc. This challenge is also shared by the legal system itself who will be responsible to construct a new approach to the legal environment of employment that will reflect this "new reality" in statutory, regulatory, and case developments. Whether or not managers or the legal system itself will be successful is another matter.

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