9.4: Equal Opportunity in Employment

A Landmark Case

In 1982, the financial services company Price Waterhouse announced a vacancy for the position of partner. Ann Hopkins, an employee of the company at the time, applied, but after an assessment, was passed over. Hopkins sued the company, arguing that she had billed more than $34 million in consulting contracts for the firm, far more than any of the other 87 candidates, who were all male. In rejecting her application, the partners at the company argued that Hopkins was "too macho" and that she should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled and wear jewelry." In the landmark legal suit that followed, Hopkins was awarded $371,000 in back pay, and Price Waterhouse was forced to make her a partner.

Laws Governing Equal Opportunity in Employment

Employees are protected in the workplace by a number of laws enacted at both the federal and state levels. Federal laws are usually considered to be the minimum level of protection, and state laws can provide employees with more, but not less, protection. In this section, the major laws pertaining to equal opportunity are discussed.

Civil Rights Act of 1964 – Title VII (Amended By the Civil Rights Act of 1991)

The Civil Rights Act provides broad provisions pertaining to citizens' civil rights. Title VII of the Civil Rights Act deals with discrimination in employment. It bans employers from discriminating against employees in their hiring, firing, and promotion practices on the basis of sex, national origin, color, religion, or race. All employers who are engaged in commercial activity and who employ 15 or more employees for 20 consecutive weeks in a year are covered by the Act. The Act also sets out the two main ways in which discrimination can be proven: disparate treatment and disparate impact.

Disparate treatment means that the employee believes that he or she has been discriminated against on the basis of one of the protected classes set out in the CRA. Proving that the employer engaged in disparate treatment is a three-step process:

1. The employee (plaintiff) is required to demonstrate a **prima facie** (accepted as correct unless proven otherwise) case of discrimination.
2. The employer (defendant) must show legitimate, non-discriminatory business reasons for undertaking the action.
3. The employee must demonstrate that the reason given by the employer is a mere pretext.

A trier of fact, usually a jury, will use the evidence presented to determine whether discrimination did in fact occur. If the jury finds for the employee-plaintiff, damages can be awarded, such as what occurred in the landmark Ann Hopkins case, described in the opening box. If the jury finds for the employer-defendant, no damages are assessed.

Table 9.4.1

Damages Permissible Under Title VII of the CRA
Up to two years of back pay
Compensatory damages
Punitive damages
Remedial seniority
Costs (e.g., attorney fees and court costs)
Court orders (e.g., reinstatement)

Disparate impact cases are cases of unintentional discrimination. This type of case occurs when the employer engages in a practice that has a disproportionately injurious impact on a protected class. Disparate impact cases are difficult to prove. The burden of responsibility is on the employee-plaintiff to statistically establish that the action impacts the protected class. The defendant can avoid liability by demonstrating that the practice is a business responsibility. The burden of proof then shifts to the employee to prove that the alleged business necessity is a mere pretext. These steps were established in *Griggs v. Duke Power Co.* Duke Power required all job applicants to have a high school diploma and to reach a certain minimum score on a professional intelligence test. Willie Griggs, the plaintiff, established that the rule was racially discriminatory because only 12 percent of black

men in the state had high school diplomas (compared to 34 percent of white men), and only 6 percent of blacks had passed similar intelligence tests, compared to 58 percent of whites. Duke Power tried to argue that the provisions were necessary to upgrade the quality of the workforce, but the court did not agree that this defense was an adequate business-related justification, and the plaintiff was successful.

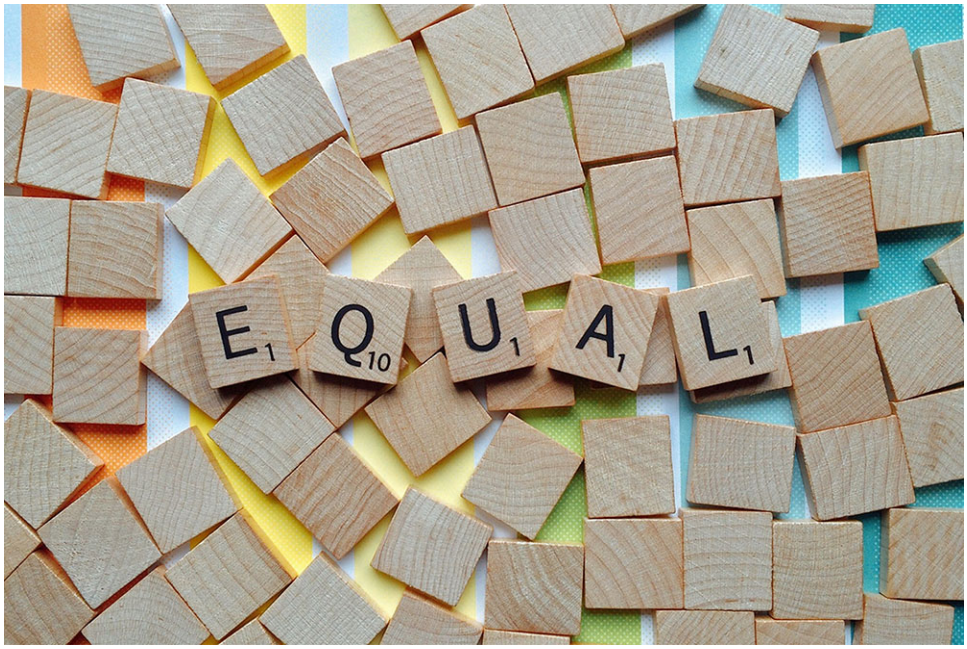

Figure 9.4.1: Employees are protected against discrimination by employers by a number of laws enacted at both the federal and state level. (Credit: Wokandapix/ pixabay/ License: CC0)

Sexual harassment is also protected under Title VII. This type of harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Two types of sexual harassment are recognized. **Quid pro quo** occurs when a manager makes a sexual demand on a worker, and this demand is perceived as a condition of employment. Actions that create a **hostile work environment** are another type of sexual harassment. These issues have been used in cases of discrimination based on race and religion as well as sex. Since the 1997 case *Oncale v. Sundowner Offshore Services Inc.*, it has been established that sexual harassment undertaken by a member of one sex against a member of the same sex is actionable under Title VII. In some limited circumstances, employers may also be liable for harassment of employees by non-employees, e.g., customers. The employer is liable if it does nothing to prevent and remedy harassment targeted at one of its employees. **The Pregnancy Discrimination Act** of 1987 expanded the definition of sex discrimination to include discrimination based on pregnancy, childbirth, or medical conditions related to the same.

Defenses to Title VII Claims

Table 9.4.2

Defense	Description
The Bona Fide Occupational Qualification Defense (BFOQ)	Using this defense, the employer can discriminate if it is deemed to be necessary for the performance of the job. Necessity, however, must be determined on the basis of actual qualifications, rather than stereotypes about the abilities of a certain class. For example, an employer is not expected to hire a man as a model for women's clothes. Hires on the basis of sexual privacy are covered under BFOQ. However, there are no BFOQs for discrimination on the basis of race or color.
The Merit Defense	This defense is used when decisions pertaining to hiring or promotion are made on the basis of the results of test scores. However, tests must be validated in accordance with professional standards and must be manifestly related to job performance.

Defense	Description
The Seniority Defense System	This defense system occurs when employees are given preferential treatment because of their length of tenure. As long as the system does not have its genesis in discrimination, and is not used to discriminate and applies to all persons equally, it is lawful.

The Equal Pay Act

The Equal Pay Act (EPA) is a United States federal law that seeks to equalize the salaries and wages paid to employed women with the levels paid to men for work of an equal nature and quantity. The Act amended the Fair Labor Standard Act of 1938 and was a key element of President F. Kennedy's New Frontier program. Under the terms of the EPA, women and men performing jobs that demand "equal skill, effort, and responsibility, and which are performed under similar working conditions" must be paid the same. The Act protects the rights of both sexes. An individual who seeks to establish a case under the Act must demonstrate that:

1. An employer pays one sex more than another
2. Both sexes perform an equal amount of work that demands equal levels of skill, effort and responsibility
3. Working conditions for both sexes are equivalent

An employer that is accused of discrimination under the EPA can present one of four **affirmative defenses**. An employer may legally pay employees of one sex more than another sex if wages are based on a system of seniority, a system of merit, a system that distinguishes payment on the basis of quality and quantity of production (e.g., certain piece rates), or if payment is differentiated on "any other factor other than sex." Of these four defenses, the "factor other than sex" defense has been invoked most frequently and has been the subject of intense debate and controversy. Critics have argued that this defense enables employers to fabricate other reasons for the wage gap.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) prevents employers from discriminating against workers on the basis of their physical or mental disabilities. In addition, employers are required to make reasonable accommodations to known disabilities, as long as such accommodations do not impose an undue burden on the business. To bring a successful ADA claim, the plaintiff is required to demonstrate that he or she:

- Has a disability
- Suffered an adverse employment decision because of that disability
- Was otherwise qualified for the position

ADA is enforced in a similar way to Title VII, and remedies for ADA violations are also similar.

Age Discrimination Act

Passed in 1967, this Act prohibits employers from making discriminatory employment decisions against people age 40 or older. This Act applies to all employers with 20 or more employees.

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