

## 5.3: Enforcement of Title VII

### Learning Objectives

- Explore what the protections of the Civil Rights Act mean.
- Understand implications of the Civil Rights Act for employers and employment practices.
- Examine how businesses can protect themselves against claim of discrimination.

Many times in the business world, it pays to be exceptional and different. Standing out from the crowd allows an employee to be noticed for exceptional performance and can lead to faster and greater advancement. In some other respects, however, standing out for being a racial or ethnic minority, or for being a woman, can be incredibly uncomfortable for employees. Learning to celebrate differences appropriately remains a challenge for many human resource professionals.

The main purpose of Title VII was to integrate African Americans into the mainstream of society, so it's no surprise that charges of race-based discrimination continue to generate the highest number of complaints to the Equal Employment Opportunity Commission (EEOC). In 2009 the EEOC received nearly thirty-four thousand complaints of race-based discrimination in the workplace, representing 36 percent of the total number of complaints filed. U.S. Equal Employment Opportunity Commission, "Charge Statistics FY 1997 through FY 2009," <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (accessed September 27, 2010). Intentional discrimination against racial minorities is illegal, but as discussed earlier in this section, proving intentional discrimination is exceedingly difficult. That means the EEOC pays close attention to disparate impact cases in this area.

### Hyperlink: Diversity Day at *The Office*

[http://www.nbc.com/The\\_Office/video/diversity-day/116137](http://www.nbc.com/The_Office/video/diversity-day/116137)

In NBC's hit sitcom *The Office*, Michael Scott is the hapless and often clueless manager of a paper company's branch office in Pennsylvania. In this clip, he decides to celebrate Diversity Day by having the employees engage in an exercise. He has written certain ethnicities and nationalities on index cards and taped them to employees' foreheads. The employee does not know what his or her card says and is supposed to figure it out through interactions with other employees. The results are a less-than-stellar breakthrough in an understanding of diversity. Does your school or university celebrate in diversity celebrations? Do you believe these celebrations are helpful or unhelpful in the workplace?

For example, an employer policy to examine the credit background of employees might be suspect. Statistically, African Americans have poorer credit than white Americans do, so this policy will necessarily reduce the number of African Americans who can qualify for the position. While a credit check may be a business necessity for a job requiring a high level of trustworthiness, it is hardly necessary for all positions. Similarly, sickle-cell anemia is a blood disease that primarily affects African Americans. An employer policy that excludes persons with sickle-cell anemia must be job-related and a business necessity to be legal. A "no-beard" employment policy may also be problematic for African Americans. Many African American men suffer from a medical skin condition that causes severe and painful bumps if they shave too closely, requiring them to keep a beard. A no-beard policy will therefore have to be justified by business necessity. For example, a firefighter may be required to be beard-free if a beard interferes with the proper functioning of an oxygen mask, a critical piece of equipment when fighting fires. White persons can be victims of race or color discrimination as well. A tanning salon cannot refuse to hire a very light-skinned person of Irish descent, for example, if its refusal is based on color appearance of the job candidate.

To correct past mistakes in treatment of women and minorities, many companies go beyond being equal opportunity employers by adopting affirmative action programs. Companies are not required to undertake affirmative action programs, but many do. In some instances, they do so to qualify as a federal contractor or subcontractor. Under Executive Order 11246, most federal contractors or subcontractors must develop an annual affirmative action plan and take "affirmative steps" to recruit, hire, and train females and minorities in the workforce. Even companies that do not seek to sell to the federal government may voluntarily undertake affirmative action programs, as long as those programs are meant to correct an imbalance in the workforce, are temporary, and do not unnecessarily infringe on the rights of nonbeneficiaries.

Affirmative action plans can be tricky to administer because white Americans can also be the victims of race discrimination or so-called reverse discrimination. The provisions of Title VII are meant to protect all Americans from race discrimination. One of the earliest cases of reverse discrimination took place in 1981, when a white air traffic controller successfully sued the Federal Aviation

Administration (FAA), claiming the FAA had hired women and racial minorities over him. In one recent case, the fire department in the city of New Haven conducted a management test to decide which firefighters to promote. When no black firefighters passed the test, the city decided to invalidate the test. Nineteen firefighters who did pass the test (all white or Hispanic) filed suit, alleging the city's actions violated Title VII. The Supreme Court found in favor of the firefighters, holding that the city's fear of a discrimination lawsuit from minorities if it went forward with the test was not enough justification to discriminate against the white firefighters. *Ricci v. DeStefano*, 557 U.S. \_\_\_\_ (2009), <http://www.law.cornell.edu/supct/html/07-1428.ZS.html> (accessed October 2, 2010).

A related form of discrimination is discrimination on the basis of national origin, which is also prohibited by Title VII. This involves treating workers unfavorably because of where they are from (specific country or region) or ethnicity. It is illegal to discriminate against a worker because of his or her foreign accent unless it seriously interferes with work performance. Workplace "English-only" rules are also illegal unless they are required for the job being performed. While English-only rules might be a business necessity for police officers, they would not be for late-night office cleaners.

 Hyperlink: Sikhs Regain Right to Wear Turbans in U.S. Army

<http://www.npr.org/templates/story/story.php?storyId=125142736>

Members of one of the world's oldest religions, Sikhism, do not cut their hair and wear their hair in a turban. Since 1984 this has been prohibited by the U.S. Army, which has standards for both hair and facial hair for recruits. In 2010 the army lifted this prohibition, resulting in the first Sikh Army officer, Captain Tejdeep Singh Rattan (Figure 12.3.1 "Captain Tejdeep Singh Rattan, the First Sikh Army Officer"), in more than twenty-five years, as this NPR story explains.



Figure 5.3.1: Captain Tejdeep Singh Rattan, the First Sikh Army Officer. Source: Photo courtesy of the U.S. Army, <http://www.flickr.com/photos/soldiersmediacenter/4464653659/sizes/o>.

Title VII's prohibition on religious discrimination has raised some interesting workplace issues. The law makes it illegal to treat an employee unfavorably because of his or her religious beliefs. Furthermore, employees cannot be required to participate in any religious activity as a condition of employment. It extends protection not just to major religions such as Buddhism, Christianity, Hinduism, Islam, and Judaism but also to anyone who has sincerely held religious or moral beliefs.

Additionally, employers must reasonably accommodate an employee's religious beliefs or practices as long as it does not cause an undue hardship on the employer's operation of its business. Typically, this would involve being flexible in schedule changes or leaves. A Muslim worker who asked for a few short breaks a day to pray, for example, might be reasonable for an administrative assistant but not for a police officer or air traffic controller. Issues of dress and appearance are often grounds for charges of religious discrimination. For example, if a Muslim woman wished to wear a *hijab*, or traditional headscarf, then she should be permitted to do so unless it places an undue hardship on operations. In 2010, UPS agreed to settle a case with the EEOC, paying \$46,000 in damages for firing a driver who refused to cut his hair or shave his beard, which the driver believes would violate tenets of his Rastafarian religion. U.S. Equal Employment Opportunity Commission, "UPS Freight to Pay \$46,000 to Settle EEOC

Religious Discrimination Lawsuit,” February, 17, 2010, <http://eeoc.gov/eeoc/newsroom/release/2-17-10.cfm> (accessed September 27, 2010).

A very interesting recent development of workplace discrimination arises when a worker refuses to carry out his or her job duties because of a sincerely held moral belief that doing so would promote immoral activity. For example, after the Food and Drug Administration approved sale of the so-called "morning after" pill to prevent unwanted pregnancy, some pharmacists refused to fill prescriptions for the drug, claiming it was against their religious beliefs to do so. Another example arose in Minnesota in 2006 when a bus driver refused to drive a bus carrying an advertisement for a gay-themed newspaper. Courts and legislatures continue to struggle with where to draw the line between respecting employees' religious beliefs and the rights of employers to insist their workers perform essential job functions.

Finally, Title VII prohibits discrimination on the basis of sex. Interestingly, the inclusion of sex as a protected class in Title VII was a legislative maneuver designed to kill the bill while it was being debated in Congress. Howard Smith, a Democrat from Virginia, strongly opposed the 1964 Civil Rights Act and thought that by adding the word "sex" to the list of protected classes, the bill would become so poisonous that it would fail passage. In fact, the bill quickly passed, and it led former Chief Justice Rehnquist to complain that courts were, therefore "left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on sex." *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).



Figure 5.3.2: An Advertisement for PSA Airlines. Source: [gulfnews.com/polopoly\\_fs/an-airline-advertisement-of-the-1960s-1.564441!image/4155641854.jpg\\_gen/derivatives/box\\_475/4155641854.jpg](http://gulfnews.com/polopoly_fs/an-airline-advertisement-of-the-1960s-1.564441!image/4155641854.jpg_gen/derivatives/box_475/4155641854.jpg).

The prohibition on sex discrimination means that employers cannot categorize certain jobs as single-sex only unless a bona fide occupational qualification (BFOQ) applies. Customer preferences or market realities are not the basis for BFOQ. For example, a job that requires heavy lifting cannot be categorized as male-only since a woman may qualify after passing a physical test. As society has changed, much progress has been made in this area of equal employment opportunity. Airlines, for example, used to routinely hire predominantly single young women as flight attendants (Figure 12.3.2 "An Advertisement for PSA Airlines"). Male cabin crew could marry, but women could not. Those distinctions have now been erased, partially because of Title VII, and partially because of societal attitudes.

The prohibition against sex discrimination also includes making stereotypical assumptions about women simply because they might be the primary caregiver to children at home. If there are two job applicants, for example, and both have young children at home, it would be illegal to give preference to the male candidate over the female candidate. Once a female employee has children, it would be illegal to assume that she is less committed to her job, or would like to work fewer hours. It's important to note that these protections extend to men as well. If an employer voluntarily provides time off to new mothers, for example, it must extend identical benefits to new fathers.

Discrimination on the basis of sex can also take the form of workplace sexual harassment. Contrary to popular belief, there isn't an actual statute that makes sexual harassment illegal. Instead, sexual harassment is the product of judicial interpretation of what it means to discriminate on the basis of sex. Courts have generally recognized two forms of sexual harassment. The first, known as quid pro quo, involves asking for sexual favors in return for job opportunities or advancement. Courts reason that if a male worker

asks a female worker for sex in return for favorable treatment, it is because that worker is female, and therefore a Title VII violation has occurred. If a supervisor fires a subordinate for breaking up with him or her, then quid pro quo harassment has taken place.

Another type of sexual harassment is known as the hostile work environment. First recognized by the Supreme Court in 1986, a hostile work environment is one where hostile conditions in the workplace are severe and pervasive, unwelcome, and based on the victim's gender. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Courts are careful not to impose manners on workplaces, so an offhand remark or dirty joke is unlikely to be sexual harassment. To be considered sexual harassment, the harassment must be so severe or pervasive that it alters the conditions of the victim's employment. In one recent case, the EEOC collected \$471,000 for thirteen female telemarketers from a firm providing basement waterproofing services. The harassment by male managers and coworkers at the firm included repeated requests for sex, frequent groping, sexual jokes, and constant comments about the bodies of women employees. U.S. Equal Employment Opportunity Commission, "EEOC Collects \$471,000 Jury Award after Winning Appeal from Waterproofing Company in Sex Harassment Case," May 5, 2010, <http://www.eeoc.gov/eeoc/newsroom/release/5-5-10.cfm> (accessed September 27, 2010). Similar cases involve workplace atmospheres where women are heckled with sexual comments, propositioned for sex, made to listen to crude sexual comments or comments about their bodies, subject to pornography in the workplace, or invited to after-work outings to strip clubs.

Under traditional tort doctrines, employers can be held liable for an employee's sexual harassment of another person. The Supreme Court has held that employers can overcome this liability by demonstrating that they conduct workplace training about sexual harassment and have implemented policies, including methods for employees to report suspected cases of harassment, and that they take prompt action against any employee found to be engaging in sexual harassment. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). The Supreme Court has also held that men can be the victims of sexual harassment and that same-sex sexual harassment is also illegal under Title VII. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998). The hostile work environment theory is not limited to discrimination on the basis of sex; a hostile work environment can also be motivated by discrimination on the basis of race, color, national origin, religion, age, and disability.

## Key Takeaways

Racial discrimination charges are the most common form of complaint filed with the EEOC. Discrimination on the basis of race or color prohibits employers from adopting any policy or practice that has a disparate impact on persons because of their race or color. To be legal, job policies or practices that have a disparate impact on protected classes must be related to the job function and qualify as a business necessity. Discrimination on the basis of national origin (ethnicity, accent, or language) is illegal. Discrimination on the basis of religion is also illegal. Employers must reasonably accommodate an employee's religious beliefs unless doing so would pose an undue hardship on the employer's operation of business. Discriminating against someone because of his or her sex is illegal. It is also illegal to treat primary caregivers differently because they are male or female. Finally, workplace harassment is illegal if it is severe and pervasive and alters the conditions of an employee's employment.

### ? Exercise 5.3.1

1. If a Jewish or Muslim worker asked for halal or kosher food in the employee cafeteria, should an employer accommodate this request? Why or why not? What factors do you think the employer should consider before making a decision?
2. In many countries it is common for résumés to contain photos of the job applicants. It is also common to classify jobs by sex (i.e., a job posting for a female secretary or male forklift driver). What do you believe the United States has gained or lost by moving away from this system of job applicant screening?
3. Do you believe that the school bus driver in Minnesota should be permitted to refuse driving a bus if it carries an advertisement that the driver believes promotes immoral lifestyles? Why or why not? Should a vegetarian driver be permitted to refuse to drive a bus with an advertisement for hamburgers? Should a Post Office delivery person be permitted to refuse to deliver copies of *Playboy* magazine on the same grounds?
4. Can you think of any jobs where speaking English without an accent may be very important or essential?

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