

5.2: Overview of Title VII of the Civil Rights Act of 1964

Learning Objectives

- Learn about the history of the Civil Rights Act.
- Understand who has to comply with the Civil Rights Act.
- Explore what employment practices are protected by the Civil Rights Act.
- Study the procedures involved with the Equal Employment Opportunity Commission.

Hyperlink: Kennedy Calls for Legislative Action on Civil Rights

www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03CivilRights06111963.htm

On June 11, 1963, President John F. Kennedy delivered a speech to the nation describing the peaceful resolution to a tense standoff in Alabama after a federal court ordered the admission of two black students to the University of Alabama. He used the occasion to rail against continued discrimination against African Americans a century after the Civil War. “Next week I shall ask the Congress to act, to make a commitment it has not fully made in this century to the proposition that race has no place in American life or law...I am asking Congress to enact legislation giving all Americans the right to be served in facilities which are open to the public—hotels, restaurants, retail stores, and similar establishments. This seems to me to be an elementary right. Its denial is an arbitrary indignity that no American in 1963 should have to endure, but many do.” You can listen to the entire speech, and read the transcript of the speech, through the hyperlink.



Figure 5.2.1: President John F. Kennedy made passage of the Civil Rights Act a key part of his presidency. Source: Photo courtesy of Abbie Rowe, National Park Service, www.jfklibrary.org/Asset+Tree/Asset+Viewers/Image+Asset+Viewer.htm?guid={0AFA0FD7-9DBA-4467-B051-44A6DD69C48A}&type=Image.

In 1963 President Kennedy called for the passage of a sweeping civil rights bill in response to intransigent racial segregation. The bill was vehemently opposed by many in Congress, including avowed segregationists who saw the bill as an intrusion on states' rights. Kennedy was assassinated before he could see the bill passed into law, but his successor President Johnson carried Kennedy's wish forward through aggressive lobbying of Congress to pass the bill. At its core, the bill was designed to integrate

African Americans into the mainstream of American society. Today, the Civil Rights Act of 1964 has broad significance for all racial minorities, religious organizations, and women.

The bill has several provisions, but the most important for businesses is known widely as “Title VII.” It applies to employers with more than fifteen employees. It eliminates job discrimination on the basis of:

- Race
- Color
- Religion
- Sex
- National origin

Any act of discrimination on any of these bases is illegal. These acts may be a refusal to hire, a discharge or termination, a temporary layoff or retrenchment, compensation, an opportunity for advancement, or any other term or condition of employment. For example, employers are not permitted to maintain all-white or all-black work crews even if they can demonstrate that doing so is good for business or morale. Title VII also prohibits acts of retaliation against anyone who complains about, or participates in, any employment discrimination complaint. Employers need to be very careful about this provision, because while the employer may be innocent of the first charge of discrimination, taking any subsequent action after an employee has complained can be a separate charge of discrimination. Once an employee has made a complaint of discrimination, it is very important that the employer not alter any condition of his or her employment until the complaint has been resolved.

The law does, however, allow discrimination on religion, sex, and national origin if there is a bona fide occupational qualification (BFOQ) reasonably necessary for normal business operations. For example, a Jewish synagogue may restrict hiring of rabbis to Jewish people only, and a Catholic church can restrict hiring priests to Catholic men only. A nursing home that caters exclusively to elderly women and is hiring personal assistants to help the patients with personal hygiene and dressing may restrict hiring to women only as a BFOQ. Victoria’s Secret can legally discriminate against men in finding models to advertise and market their products. A movie producer can legally discriminate between men and women when casting for certain roles such as a woman to play Bella and a man to play Edward in the popular *Twilight* series. Since BFOQ discrimination extends to national origin, a play producer casting for a role that specifically calls for a Filipino can legally restrict hiring to Filipinos only. A gentlemen’s club can hire women only as a BFOQ.

Managers should be very careful in applying BFOQ discrimination. It is an exception that is very much based on individual cases and subject to strict interpretation. The BFOQ must be directly related to an essential job function to be “bona fide.” Customer preference is not a basis for BFOQ. For example, a taxi company cannot refuse to hire women as taxi drivers even if the company claims that customers overwhelmingly prefer male drivers, and airlines cannot refuse to hire men even if surveys show customers prefer female flight attendants.

Hyperlink: Men and Hooters

www.time.com/time/magazine/article/0,9171,987169,00.html

The Hooters restaurant chain hires scantily clad women exclusively as servers, refusing to hire men for that role. Men are hired for other roles such as kitchen staff and hosts. In 1997 a group of men sued Hooters for sex discrimination. Without admitting any wrongdoing, Hooters settled the claim. Hooters says that its policy of hiring only women to act as servers is a bona fide occupational qualification. What do you think?

Hooters has also been accused by women’s groups of only hiring women who fit a certain profile that discriminates against anyone who management deems to be unattractive or overweight. Do you believe Hooters should be able to take these factors into account when making hiring decisions?

Note that race and color are not on the list of acceptable BFOQs. This means that in passing the law, Congress made a determination that there is no job in the United States where race or color is a bona fide occupational qualification. A country-and-western-themed restaurant, for example, may not hire only white people as wait staff.

Title VII creates only five protected classes. Various other federal and state laws, discussed in Chapter 12 "Employment Discrimination", Section 12.4 "Other Federal Antidiscrimination Laws", create other protected classes. Many other classes, such as weight, attractiveness, and height, are not on the list of protected classes. Contrary to popular belief, there is also no federal law that protects against discrimination on the basis of sexual orientation. National restaurant chain Cracker Barrel, for example, for

many years maintained an open policy of not hiring homosexuals and dismissing any person who came out at work. It was only under pressure from shareholder activists that the company finally rescinded its discriminatory policy.

Hyperlink: The Employment Non-Discrimination Act

<http://www.npr.org/templates/story/story.php?storyId=113719460>

Since 2007 Congress has been debating the Employment Non-Discrimination Act (ENDA). The law would specifically prohibit employment discrimination on the basis of sexual orientation. The House passed the bill in 2007, but it died in the Senate. In 2009 new attempts were made at passing the law, but strident partisanship once again ended chances of passage, as this NPR story explains. Do you believe this law should be passed? If it passes, do you see an inconsistency with the Defense of Marriage Act, which prohibits federal recognition of same-sex marriage?

Note too that Title VII does not prohibit all discrimination. Employers are free to consider factors such as experience, business acumen, personality characteristics, and even seniority, as long as those factors are related to the job in question. Title VII requires employers to treat employees equally, but not identically.

Title VII is a federal law, but it does not give victims of discrimination the immediate right to file a federal lawsuit. Instead, Title VII created a federal agency, the Equal Employment Opportunity Commission (EEOC) to enforce civil rights in the workplace. The EEOC publishes guidelines and interpretations for the private sector to assist businesses in deciding what employment practices are lawful or unlawful. The EEOC also investigates complaints filed by workers who believe they are victims of unlawful discrimination. If the EEOC believes that unlawful discrimination has taken place, the EEOC can file charges against the employer. Even if the employee has signed a predispute arbitration clause with the employer agreeing to send employment disputes to arbitration, the Supreme Court has ruled that the predispute arbitration clause does not extend to the EEOC, which can still file a lawsuit on the employee's behalf in federal court. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).



Figure 5.2.2: Lilly Ledbetter. A jury found Lilly Ledbetter was the victim of regular pay discrimination at Goodyear because of her gender. Source: Photo courtesy of aflcio, <http://www.flickr.com/photos/labor20...in/photostream>.

Employees must file Title VII charges with the EEOC first before going to court. If the EEOC investigates and decides not to pursue the case any further, the EEOC can issue a “right to sue” letter. With that letter, the employee can then file a case in federal court within 90 days of the date of the letter. Any EEOC complaint must be filed within 180 days of the alleged discriminatory act taking place. This deadline is generally extended to 300 days if there is a state agency that enforces a state law prohibiting discrimination on the same basis. If employees wait beyond 180 or 300 days, their claims will be dismissed. The question of when the clock begins was the subject of much debate recently when a female manager at Goodyear, Lilly Ledbetter (Figure 12.2.2 “Lilly Ledbetter”), discovered she had been paid unequally compared to males for many years. She filed a Title VII lawsuit in federal court and won several million dollars in damages. At the Supreme Court, however, a narrow 5–4 majority opinion authored by Justice Alito held that she had to file her claim within 180 days of any decision to pay her unequally, which had happened many years ago. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). She, therefore, lost her case and her damages award. In

response, Congress passed the Lily Ledbetter Fair Pay Act of 2009, which gives victims the right to file a complaint within 180 days of their last discriminatory paycheck.

The EEOC has the authority to award several remedies to victims of discrimination. These include the award of back pay for any lost wages, the issuance of an injunction to stop the employer from making any continuing acts or policies of discrimination, ordering a terminated or demoted employee reinstated to his or her prior position, and the award of compensatory damages for out-of-pocket costs resulting from the discrimination as well as emotional harm. Attorneys' fees may also be recoverable. In cases of severe or reckless discrimination, punitive damages are also available. Punitive damages are capped by amendments to Title VII passed in 1991. These caps start at \$50,000 for employers with less than one hundred employees and rise to \$300,000 for employers with more than five hundred employees.

Anyone who files a Title VII claim in federal court must prove his or her claim using one of two possible theories. The first theory, known as disparate treatment, alleges that the defendant employer acted intentionally to discriminate against the victim because of the victim's membership in a protected class. Winning a disparate treatment case is very hard because it essentially requires proof that the defendant acted intentionally, such as a statement by the defendant that it is not hiring someone because of that person's race, an e-mail to the same effect, or some other sort of "smoking gun" evidence. If a defendant wants to discriminate against someone illegally in the workplace, it is very unusual for it to say so explicitly since under the at-will doctrine, it is easy for an employer to find a lawful reason to discriminate.

Under Supreme Court precedent, a plaintiff wishing to demonstrate disparate treatment has to first make out a *prima facie* case of discrimination, which involves demonstrating that he or she is a member of a protected class of workers. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). He or she applied for a job that he or she is qualified for, and the employer chose someone else outside of the plaintiff's class. Once that demonstration has been made, the employer can rebut the presumption of discrimination by arguing that a legitimate, nondiscriminatory reason existed for taking the adverse action against the plaintiff. If the employer can state such a legitimate reason, then the burden of proof shifts back to the employee again, who must then prove by a preponderance of evidence that the employer's explanation is insufficient and only a pretext for discrimination. This last step is very difficult for most victims of intentional discrimination.

If a victim is unable to find proof of disparate treatment, he or she may instead use a theory called disparate impact, where the discrimination is unintentional. Most Title VII cases fall into this category because it is so rare to find proof of the intentional discrimination required in disparate treatment cases. In a disparate impact case, the victim alleges that the defendant has adopted some form of race-neutral policy or employment practice that, when applied, has a disproportionate impact on certain protected classes. If a victim successfully demonstrates a disparate impact, then the employer must articulate a nondiscriminatory business necessity for the policy or practice. The Supreme Court first articulated this theory in 1971 in a case involving a power company that implemented an IQ test and high school diploma requirement for any position outside its labor department, resulting in very few African Americans working at the power company other than in manual labor. The Court held that the Civil Rights Act "proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity." *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In that case, the Court found that the power company could not prove a business necessity for having the IQ tests or high school diploma requirement, so those practices were ruled illegal.

Business policies that raise suspicions for disparate impact include educational qualifications, written tests, intelligence or aptitude tests, height and weight requirements, credit checks, nepotism in hiring, and subjective procedures such as interviews. Businesses that have these sorts of policies need to be very careful that the policies are directly related to and necessary for the job function under consideration. In one recent case, the city of Chicago received more than twenty-six thousand applications for firefighters in 1995 for only several hundred positions. The city required all the applicants to take a test, and it used that test to categorize applicants as failing, qualified, or well-qualified. Faced with so many applicants, the city decided to hire only candidates who received a well-qualified score. African Americans made up 45 percent of the qualified group, but only 11.5 percent of the well-qualified group, so the decision had an adverse and disparate impact on a protected class. More than ten years later and after an appeal all the way to the Supreme Court on the question of timeliness of their lawsuit, the plaintiffs are still waiting for a trial on whether the city acted illegally. *Lewis v. Chicago*, 560 U.S. ____ (2010), <http://www.law.cornell.edu/supct/html/08-974.ZS.html> (accessed September 27, 2010).

Proving a disparate impact case is not easy for victims of discrimination. It is not enough for the employee to use statistics alone to point out that a job policy or practice has a disparate impact on the victim's protected class. In addition, the 1991 amendments to the Civil Rights Act prohibited the use of race norming in employment testing.

Key Takeaways

The 1964 Civil Rights Act is a major piece of legislation that affects virtually all employers in the United States. Originally created to ensure the integration of African Americans into mainstream society, the law prohibits discrimination on the basis of race, color, religion, sex, and national origin. Some forms of discrimination on the basis of religion, sex, or national origin are permitted if they are bona fide occupational qualifications. Federal law does not prohibit discrimination on the basis of sexual orientation. The Equal Employment Opportunity Commission investigates charges of illegal workplace discrimination. These charges must be filed by workers within 180 days of the alleged discriminatory act taking place. If a worker believes intentional discrimination has taken place, he or she may pursue a theory of disparate treatment in his or her lawsuit. If the discrimination is unintentional, the worker may pursue a theory of disparate impact. Employment practices that have a disparate impact on members of a protected class are permissible, however, if they are job-related and qualify as a business necessity.

? Exercise 5.2.1

1. More than four decades after the passage of the 1964 Civil Rights Act, many libertarians and conservatives continue to believe that the law is a violation of states' rights. Do you agree? Why or why not?
2. In listening to President Kennedy's speech, do you believe that the promise held by the Civil Rights Act has been met? Why or why not?
3. Businesses sometimes discriminate against their customers on the basis of sex. A bar may charge females a reduced or waived cover charge in a "Ladies Night" promotion, for example, to increase the female ratio in their audience. Hair salons routinely charge more for services to women, and even dry cleaners charge higher prices for cleaning women's clothes. Do you believe these forms of discrimination should be illegal? Why or why not?
4. Research demonstrates that taller, more athletic, and more attractive people earn more in the workplace than shorter, less fit, or less attractive people. Do you believe this is unfair, and if so, do you believe the law should be amended to protect these classes?
5. Race and color can never be BFOQs. Does that mean that an African American actor could play Abraham Lincoln in a movie reenactment of Lincoln's life? Why or why not?

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