A. Statutes → Title VII, § 1981, § 1983, ADA, ADEA, PDA, EPA
   a. Rights extended to whites as well as blacks, drawing no distinction b/w Title VII and §1981. *McDonald v. Sante Fe Trail Transportation Co.*
      i. Most lawyers end up filing under both in case one law covers something that or did not.
      ii. Sex disc. → T7 applies only, but for race, color, n/o, or religion, 1981 could apply due to 19th century definition of “race.”
   b. When § 1981 is better than T7
      i. 1981 broader than T7 as it covers all emp. CONTRACTS, even those of small ears; reaches beyond emp. to race.
      ii. 1981 requires no filing with EEOC
      iii. 1981 – longer SOL
      iv. 1981 remedies broader than those of T7 due to absence of statutory cap on damages.
   c. Areas Covered by Title VII and not 1981
      i. Sex Disc.
      ii. Disparate Impact Cases
      iii. Some treatment by eer not covered 1981 (1981 relates to freedom to contract); ex. racial harassment would not be appropriate under 1981.

INDIVIDUAL DISPARATE TREATMENT

A. Pre-’64 CRA-
   a. All ees were at will, can be fired for any reason at any time (Common law at will rule)

B. Definition of disparate treatment - different treatment.
   a. Central Question → Were D’s actions were motivated by discriminatory intent?
   b. Discriminatory intent proved through:
      i. Direct evidence (Memo written by company president stating that he did not hire P b/c she is a woman.)
      ii. Circumstantial evidence (Records showing that no woman has ever been hired by D even though many qualified women have applied.)

C. Figure out which framework to use: Courts determine which analysis to use at end of evidence, instructing jury of which framework applies.

D. Always start with whether evidence is direct (*Price Waterhouse*), if not, *McDonnell* is default position. Direct evidence is one that proves a fact at issue without having to draw an inference.

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*McDonnell Douglas*

- 1. PF
- 2. Legitimate Non-Discriminatory Reason
- 3. Pretext

*Price Waterhouse*

- 1. Direct Evidence
- 2. Same decision would have been made w/o evidence

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a. *McDonnell Douglas/Burdine* (Circumstantial Evidence): (easier for D)
   i. P’s PF case: (easy to prove)
      1. Protected group (T7- sex, religion, n/origin, race, color. ADEA- age. Section 1981- race, ancestry, alienation)
      2. Applied for and was qualified for job
      3. Denied position despite qualifications (rejection is rarely at issue)
      4. Job remained open (when someone else was promoted or downsized)

   ii. D’s Rebuttal (Shanor → Easy to Prove)
      1. “Articulate legit non-disc reason” *McDonnell*
      2. D doesn’t have to show it was motivated by proffered reasons, sufficient that D raises genuine issue of fact whether it discriminated” *Burdine*
         a. Juries may infer other reasons than those given by D. *Hicks*
      3. D has burden of production, not persuasion. *Burdine*
         a. L & G → D’s burden is one of only going forward, of adducing evidence, ultimate burden of persuasion always rests w/ P. *Hicks*
         b. L & G → Some courts have held that D’s proffered reason for discharge may be deemed insufficient where it is too vague, internally inconsistent, or factually not credible.
      4. Reason doesn’t have to be legal. *Hazen Paper*
      5. L & G → Common reasons:
a. Lesser comparative qualifications, inability to get along w/ ors, misconduct, need to eliminate jobs, insubordination, inferior test scores. Poor performance, need to comply w/ rules set in union contracts, greater familiarity w/ favored D’s work.

7. Common defensive strategy – “same decision-maker” ⇒ no reasonable inference of disc. arises here b/c decision-maker would be unlikely to discriminate against same individual, particularly in a short-period of time. “He hired you, why would he fire you?”

iii. P’s surrebuttal of Pretext:

1. P shows that real reason was pretext for disc
2. P has burden of persuasion of intentional disc.
3. P must prove that protected trait actually played a role in D’s decision making process, and had a determinative influence on outcome. (“but for” showing). Biggins
4. L & G ⇒ Three categories of evidence proving pretext:
   a. Direct evidence of disc. such as discriminatory statements or admissions
   b. Comparative evidence (P was more qualified than person hired or that replaced P)
      Patterson—most common;
   c. Statistics – admissible but rarely determinative; Shanor is skeptical.

Shanor ⇒ Extremely DIFFICULT; this is where many cases are won/lost.

- Shanor ⇒ some federal judges believe that MD framework is very malleable, subject to judge’s personal assessment of credibility.
- L & G ⇒ This analysis applied to disparate treatment in: hiring, discharge, discipline, promotion, transfer, demotion, retaliation, and or contexts.
- Summary Judgment – D can move for SJ after discovery; SJ allowed much more freely than in past; granted either b/c P isn’t able to create at least an issue of fact as to each element of his PF case OR b/c he is unable to establish at least an issue of fact that D’s nondiscriminatory reason is pretext.

b. Price Waterhouse: Direct Evidence (intent to discrim) (more difficult on D)

Note: Price Waterhouse overruled by 703(m) of CRA of 1991. However, with respect to two federal statutes (1981 or ADEA) this case is still good law.

i. PF showing of motivating factor: (direct or circumstantial plus) P proves liability b/c race was motivating factor in decision
   1. Shanor ⇒ Very often, outstanding direct evidence (memo or testimony) n/a.

ii. D defenses: D can limit P’s remedies to declaratory and injunctive relief if it can prove by preponderance of evidence that it would have made same decision without considering characteristic ⇒ 706(g)(2)(B)

   (more on this below).
   1. Title VII (under Civil Rights Act of 1991, new § 703(m) 42 U.S.C.A § 2000e-2(m)) – P shows illegitimate criteria was prime motivating factor, even though or factors also motivated.
   2. Non-Title VII (ADEA & 1981; still using Price Waterhouse Standard): P must show that illegitimate criteria was a substantial factor.
   
   iii. § 703(m) limits P’s remedies where a violation has been established; § 706(g) provides that if D “would have taken same action in absence of impermissible motivating factor,” then...

   1. P may only get attny fees, declaratory and injunctive relief, but NOT backpay, front pay, emotional distress, instatement, reinstatement or promotion. 706(g)(2)(B)(ii)

iv. As a P – tie discriminatory remarks to decision-making process.
   As a D – separate or isolate decision-making process from inappropriate remarks.

SYSTEMIC DISPARATE TREATMENT

Note: P prefers systemic disparate treatment b/c
   - Trial by jury
   - Potential for compensatory and punitive damages
   - Only BFOQ defense available

I. 2 kinds Disparate Treatment:
A. Formal Policy of disc.: written or oral statement that it discriminates
   1. formal policy of disc.
      a. D admits policy (i.e. voluntary affirmative action)
      b. P shows it by inference (Manhart)
      c. If formal policy, no need to go through PW paradigm, employer MUST use BFOQ or AA plan as defense.
   2. Defenses:
      a. NO defenses of business necessity (Johnson Controls) and lack of disparate impact (Manhart)
      b. 4 essential ways to defend systemic disparate treatment
         1. Rebut stats or facts at hand.
         3. Rebut inference derived from stats... i.e. No policy exists
         4. BFOQ (only for formal policy).
            BFOQ: (applies only to religion, sex and n/origin and through ADEA; NOT race)
            703 (e)
               1. qualification is reasonably necessary to essence of business; not merely “convenient” or “reasonable.” Western Air Lines
               a. Must be qualification at “essence” of the business. (Diaz).
               2. no member of group can perform job OR impractical to determine on a case-by-case basis.
               3. Shanor  Usually when BFOQ is in question, court will take an individual case by case examination of discriminatory practice.
                  * Remember BFOQ construed very narrowly, otherwise would negate purpose of T7.
      Analysis: D raises voluntary affirmative action as defense, P should argue:
      1. There is no plan and D is just now asserting he used a “plan” in making disc. emp. decisions.
      2. D’s method of operation = “structured disc.” (ex. one month you hire a male, next month a female); no candidate treated fairly w/in pool.
      3. No appropriate predicate for plan such as:
         a. Prior disc.
         b. PF case of disc.
         c. MANIFEST IMBALANCE – this is really what it boils down to; this is what D must show to justify.
      4. Plan trammels rights of majority, cannot clear slots for non-majority individuals, must be temporary, and should not constitute a quota. Weber.

B. General Pattern/Practice: Shown through statistical and anecdotal evidence of gross and long lasting disparate treatment by D b/c of characteristic. Teamsters (involving D whose cumulative decisions support inference that it in fact discriminates, even if it denies it.)
   1. Take a snapshot of racial workforce at time of lawsuit.
      a. Statistics are enough to support a pattern/practice case (Teamsters)
         i. An expert to refute D’s interpretation of stats will help.
      b. No anecdotal evidence will make case harder to win for P. (Sears) Illustrative example (i.e. story of one P who was denied position.)
         i. Inexorable zero – anecdotal evidence matters less where some of “discriminated against” class is hired.
         ii. Some lower courts emphasize anecdotal.
   2. Examples of pattern/practice:
      a. History of alleged racially discriminatory practices
      b. Statistical disparities in hiring
      c. Standardless and largely subjective hiring procedures.
      d. Specific instances of alleged disc.
   3. D’s workforce vs. qualified labor pool is key to making out a practice of systemic disparate treatment disc.
      a. Statistics matter less as group gets smaller.
      b. Remember! Compare D’s labor pool to qualified labor pool: variables are “qualifications needed” and “geographic area.”
4. **Sources of Qualified Labor Pools:**
   a. **App. s for jobs** ("App. Flow Data")
      i. *This is preferred over forms of demographic data.*
      ii. WARNING ON THIS ONE! *Do not* require that stats must be based on characteristic of actual app. s, b/c application process may not reflect app. pool.
   b. **D’s own work force** as a labor pool (i.e. a higher paid division w/in same company) → sometimes best for P to use.
   c. **General Geographic Labor Market** for particular job → potential workers w/ min. qualifications; used w/ unskilled/low-skilled jobs. *Teamsters*
   d. **Qualified workers in Geographic Area** used when special skills/education needed. *Hazelwood*

5. **Evaluating Statistics:**
   a. Court “eyeballs” situation
   b. Expert statistician (**EEOC standard** > 2 standard deviations from mean is statistically significant (probability of a random occurrence of non-disc. < 5%)
      i. *Everything inside 2nd standard deviation = 96%*
      ii. variables should include: race, sex, ed, experience. *Bazemore.*

6. **Arguments:**
   a. P → want to show few minorities in D’s workforce w/ many available in labor pool.
   b. D → show it has many minority group members in workforce & few available in labor pool.

7. **D’s Rebuttals:**
   a. Challenge stats.
      i. Show that or factors left out of statistical analysis like education, experience, qualifications. *Smith*
      ii. Might be able to show that generally black females are less interested in this job. *Sears*
   b. **Challenge inference of disc.** (ex. word of mouth hiring is NOT a hiring practice)
      Argue that D acted in spite of, not b/c of adverse effects on particular group. *(Personnel Administrator v. Feeney)*

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**SYSTEMIC DISPARATE IMPACT**

- **Definition:** don’t need proof of intent to discriminate, focus on practices that weigh more heavily on protected group than majority. § 703(k)
- First established in *Griggs v. Duke Power Co* w/ following framework:
  1. P → show DI (heavy burden of persuasion) *(Griggs/Albermarle)*
  2. D → Justify rationale behind test, i.e. business necessity (heavy burden of persuasion). *(Griggs/Albermarle)*
  3. P → Alternative test was available and D refused to adopt it. *(Kept from Wards Cove)*
*Note: this is a very light component of this framework in comparison to MD pretext prong.*

- *Shanor – Griggs decided largely on public policy grounds; majority opinion by J. Burger – “Diplomas and tests are useful servants, but Congress has mandated common sense preposition that they are not to become masters of reality.”*
- **SDI** Not available under § 1981 or § 1983 b/c of contract
- D has burden of production and persuasion of “strict” business necessity

**I. Analysis:**

A. **P’s PF CASE** → D uses practice causing disparate impact on basis of race, color, sex, n/o. (5 Parts)
   1. **Particular Emp. Practice** – P must show that there is a specific practice.
      Examples of Appropriate Practices to Attack:
      - Active practice of D. Can’t use DI for passive practice such as word of mouth hiring b/c not a practice.
      - Does not apply to across the board vacation time or fringe benefits b/c not considered a practice
      - P can attack *objective* (tests) as well as *subjective practices* (ex. evaluations).
i. CRA 1991 modified Wards Cove - § 703(k)(1)(B)(i); **bottom line exception** in establishing a PF case of DI "if P can demonstrate that elements of decision are **not capable of separation** for analysis, decision making process may be analyzed as a single practice.

iii. Using only a particular labor market may be subject to DI model (ex. Cicero, Illinois (all white town hit w/ several suit.

2. D's use of practice – national data or data based on use of practice by other ees is sufficient.

3. Amount of Impact
   i. SC "eyeballs" stats to see if sufficient
   ii. Stats:
       a. App. Pool: compare # of blacks who took test w/ # of whites who passed. EEOC uses "four-fifths" rule for purposes of administrative enforcement = selection rate for race, sex or ethnic group is less than four-fifths of rate for group w/ highest rate.; B < 4/5(W)
       * Shanor → smaller sample, less significant application of this rule will be. Also, this rule generally used w/ DI, not DT; Conversely, larger sample better.
       b. Demographic Labor Pool: compare # of people in that protected group affected by policy w/ majority. Dothard. Use this when job requires "qualified" app. s. Look to appropriateness of labor pool.

   iii. How much is enough? **Sophisticated stats not necessary for DI, but some lower cts may ask**
       a. 45 rule
       b. 2-3 STD (Teamsters)
           • L & G → 0.05 probability level or below is accepted by many cts. as sufficient to rule out chance. (Review this)
       c. Multiple Regression Analysis (Bazemore)

   iv. Actual (Griggs, app. pool) vs. theoretical (Dothard, population)
       a. In Dothard, ct looked to theoretical, whereas in Griggs looked to actual. Why? If D broadcasts a rule to entire population, then using theoretical impact model would be correct b/c D has essentially "poisoned waters."
       b. Note: Most courts will stick w/ ACTUAL IMPACT, esp. when re is an absence of "skewing effects" on app. pool.

   vi. Perspective is everything! Shanor's example – 100 Whites apply for job and 100 blacks apply for job. 99 Whites are hired and 98 Blacks are hired.
       Got in = 99% of whites and 98% of blacks = no impact.
       Left out = 1% whites and 2% blacks (twice as many) = impact

4. Impact is Adverse
   i. Rises in cases involving claims of n/o disc. with bilingual cees; b/c they are able to speak English, bilingual ees are NOT adversely affected.

5. Impact is to a **Protected Group**
   i. Not clear whether DI theory available to white males Los Angeles Dept. of Water & Power v. Manhart.

B. D's Defenses

1. There is no disparate impact. § 701(k)(1)(B)(ii) – if D demonstrates practice does not cause DI, then D doesn't need to show practice is required by business necessity.
   i. REFUTING P'S DATA: D can use data from its own use of practice to escape liability under § 703(k)(1)(B)(ii) after P uses national data or data from other ees. Dothard
      1. Shanor → Another approach- we looked at demographic data, here's our app. flow data which refutes your inference of disc.
   2. Is demographic data or app. flow better? Depends on circumstances. If you're talking about disc. towards entire world – demographic is preferable. For internal disc. , app. flow is better.

2. "Job Related and Business Necessity"
   i. § 703(k)(1)(A)(i) – challenged practice is job related for position in question and is consistent w/ business necessity.
   ii. This defense is very narrow. Albermarle, Beazer. Teal.
   iii. This is significant in 3 ways:
      1. **Mention this on exam** → Congress rejected Ward's Cove view that (1) practice need merely be justification and (2) that P carried burden, returning to stricter notion of business necessity w/ both burdens on D.
         A. P still has to specify practice.
B. P still must show a causal connection.
2. Plain meaning of § 701(m) = burden on eer is one of persuasion and not merely production.
3. Requires eer to demonstrate that challenged practice is BOTH:
   A. job related AND
   B. justified by business necessity (the following is for tests...)
      I. Prove each step is business nec.
      II. Scrambled eggs theory - scramble full factors for assessment of ability.
      III. University - having a composite score that's like a scale.
iv. Life and death (safety) issues lean towards a finding of business necessity. (Fitzpatrick); also see Spurlock v. United Airlines.
v. REMEMBER! Ceiling-test should demonstrate reasonable measure of job performance (Albermarle/Beazer/Teal). Floor-test should only require minimum qualifications necessary (Lanning)
vi. Thus, efficiency-based policies likely to fail. See Lanning below.
3. OR it falls under 3 STATUTORY exceptions:
   i. professionally developed tests
      1. 703(h) - authorizes use of “any professionally developed ability test” not “designed, intended or used to discriminate b/c of race.”
         a. If test performance and job performance aren’t correlating then test is going to be found invalid. Albermarle v. Moody
         b. A discriminatory cutoff score on an entry level emp. examination must be shown to measure MINIMUM qualifications necessary for successful performance of job. Lanning v. Souwestern Penn. Tran. Authority
      2. Must show tests are job related or matter of business necessity.
   3. Professional Test Validation Standards:
      1) Criterion-related - like a controlled experiment: D administers tests and records scores to a sample of app.s; hires all of them and then, after workers have been working for a while, evaluates their work performance using trained evaluators and standard scoring measures. If there is a high correlation b/w scores workers get on test and job performance, then test is considered valid b/c high test score predicts good performance.
      2) Content validation -> used when a test purports to measure existing job skills. If test is a good sample of what workers who get job will do, it is valid. (Ex. test used in Gillespie v. Wisconsin (7th Cir. 1985)
* Differential validation and race test scores.
703(l) -> cannot raise scores of disadvantaged group; “It shall be an unlawful emp. practice......to adjust scores of, use of different cutoff scores...”

ii. Bona Fide Seniority System § 703(h)
   1. Only systems that are collective bargaining agreements b/w eer and a union are sheltered by § 703(h).
   2. 703(h) requires D to prove challenged policy is in fact a traditional component of a system of seniority.
   3. Questionable seniority systems (Stockman Valves):
      ▪ Does system operates to discourage all equally from transferring b/w units? If so, not ok.
      ▪ Seniority units are in separate bargaining units? If so, was it industry norm? If so, probably ok.
      ▪ Did system have genesis in racial disc. ? If so, not ok.
      ▪ Was system negotiated (collective bargaining agreement) and maintained free from illegal purpose? If so, it's ok.

iii. Bona Fide Merit or peacework system § 703(h)
   1. If system ranks person on performance on discriminatory exam not BFMS. Guardians Assn.
   c. P's Surrebuttal: P wins by proving an alternative emp. practice existed that caused less impact, but would serve D's legit business needs and D refused to adopt it.
      1. L & G -> How effective does alternative have to be?
i. D will contend that alternative must be at least *equally efficacious* from eer’s standpoint, both in terms of costs and results.

ii. P will say any valid selection device will suffice, 1991 CRA eliminated rigorous requirement.

2. L & G → Eer Knowledge:
   i. D will argue test can be met only by showing that D had actual knowledge of equally efficacious alternative selection process.
   ii. P may contend that D can be liable if it knew or should have known of alternative.

**GENDER**

A. Types:
   1. Classic – person not hired b/c female
      → treat as classic T7 violation: choose theory and apply paradigm (McDonnell-Douglas, 703(m), modified Price Waterhouse, formal policy or pattern/practice systemic DT, or 703(k) Griggs DI).
   2. Pregnancy Disc.
   3. Sexual Harassment
   4. Sexual Orientation
   5. Grooming and Dress Codes

B. Pregnancy Disc.
   1. PDA – amendment by Congress to overturn *Gilbert* by defining “sex” to include “pregnancy.”
      a. Made it illegal under T7 to discriminate based on pregnancy.
      b. 701(k) gives convoluted definition of pregnancy
         i. **Clause 1** → “because of sex” or “on basis of sex” includes pregnancy or related medical conditions.
            → Seems to allow individual DT, systemic DT, and systemic DI.
         ii. **Clause 2** → woman affected by pregnancy shall be treated same for all emp. purposes as other people not pregnant but similar in their ability to work.
            → Conflict w/ clause 1 b/c this looks like *pure disparate treatment*; may foreclose direct application of DI law to pregnancy.
      c. Intentional disc. only tolerated if BFOQ is present.
         i. BFOQ may include setting moral example for girls’ home. *Chambers*. BFOQ to not have preg flight attendnts during emergency. (*Leonard, Harriss*)
      d. P flouts rules, she can be fired. *Troupe* (Posner – no one else would have been allowed to continually show up tardy for work.)
      e. D may not give benefits to married male ees that is less inclusive than that afforded to married females. → SC adopts EEOC position on absolutely no pregnancy-base limitations. *Newport News*
      f. NOT reasonable to ask D to create new job position for preg woman.
      g. Conversely, some courts using much more of a DT approach to pregnancy disc. → D failure to hire pregnant woman who would require a leave of absence soon after starting work = no T7 violation.
         i. Under DT, D may defend showing equal treatment to preg. and non-preg. sick leave.
         ii. Shanor – points out graphically how DI and DT theories play out differently in regard to pregnancy disc.
      h. PDA does not pre-empt a state statute requiring eers to provide leave and reinstatement to ees “disabled” by pregnancy. (*Guerra*)
         i. “Congress intended PDA to be a floor beneath which pregnancy disability may not drop – not a ceiling above which y may not rise.”
      h. **P should try to connect PDA claim to similar ADA hypo.** (ex. X w/ arthritis would not have been fired, then P (preg.) should not have been fired.
      i. Lactation does not occur w/ out pregnancy preceding, however, a number of courts have cast doubts upon assertion that breast feeding is related to pregnancy b/e or alternatives are available to pregnant woman.

2. Effect of PDA on Main Theories of Disc.
   a. **Individual Disparate Treatment** – 2nd clause has caused major problems in application of individual DT to pregnancy. “Equal treatment” should mean D treats P same way it would treat ee similarly situated in terms of ability to work but was not pregnant.
   b. **Formal pregnancy policies are Systemic Disparate Treatment** – whether a formal classification of pregnancy violates PDA depends on whether classification serves to treat pregnancy less favorably or more favorably than other similar situations. *Newport News Shipbuilding*
      i. **Formal policies treating pregnancy more favorably** – NOT a violation of § 701(k). *Federal Savings & Loan v. Guerra* (701(k) does not forbid eers from giving special preferences for pregnancy benefits.)
c. FMLA (29 U.S.C.A. § 2601) — requires covered ems provide up to 12 weeks of unpaid leave “because of birth of a son or daughter of ee and in order to care for such son or daughter.”

d. If D has policy that applies to everyone (ex. No sick leave!)
   DT- no violation of PDA
   DI- violation of PDA

e. Systemic Disparate Impact — according to 2nd clause SDI may NOT apply.
   i. Impact on pregnant women may be impact on women. EEOC v. Warshawsky & Co.
   ii. For DI, P’s proper comparison is preg fired vs. non-pregnant fired.

C. Sexual Harassment

* Note: Sexual harassment unique b/c:

1. It is nearly indistinguishable from “normal” social relations b/w men and women.
2. Sexual harassment can violate T7 even if victim suffers no adverse emp. decision or economic impact.
4. Harassers are often satisfying their own interests, rather than seeking to further their ee’s interest.
5. B/c controlling discriminatory harassment in workplace by disciplining harassing ees may relieve D of liability, discriminatory harassment raises questions about rights of ees who perpetuate this form of disc.

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Elements of Sexual Harassment Claim:
1. harassment MUST be either Quid Pro Quo or Hostile Environment
2. harassment MUST be b/c of sex
3. D liability MUST be est. by showing supervisor was aided in harassment by his authority:
   a. Tangible employment action was taken against P … OR
   b. D was negligent b/c it knew or should have known of the harassment by supervisor/co-workers and failed to correct it

(show EITHER 1 or 2, then do the rest)

1. Quid pro quo— P is threatened by a supervisor, “sex or your job.”
   a. when P relents and has sex or she refuses and suffers tangible emp. action.
   b. Unwelcomeness — “gravamen of any sexual harassment claim is that alleged sexual advances were unwelcome.” Meritor
      i. Focuses on victim’s behavior → whether P by her conduct indicated that alleged sexual advances were unwelcome, NOT whether her actual participation in sexual intercourse was voluntary. Meritor
      ii. Sexually provocative speech or dress may be relevant to inquiry.
   c. Treated like a Disparate Treatment case.

2. Hostile Environment — even where sexual relations is not involved, case still can be made out when workplace is “permeated w/ discriminatory intimidation, ridicule, and insult.”
   a. Severe or pervasive to alter emp. conditions - creating an abusive working environment.
      i. Severity
         I. typically need a number of occurrences
            * Usually a single act will not suffice, unless bad physical contact (Lockard) or rape (Tomka)
         II. EE can use harassing events towards other if she knew of them & they impacted her.
         IV. Shanor → comments alone often NOT enough to be “severe and pervasive.” (Harris). This helps skirt first amendment free speech violations.
            o If most of what he said could be on prime time TV no harassment. Baskerville
            o Courts are reluctant to find harassment for single instance of verbal conduct Burgграф
      ii. Pervasiveness
         I. Depends on court
         II. Race is different b/c racial harassment always unwelcome were sexual advances may not be.
      iii. Unwelcome
         I. Unwelcome separate from severe and pervasive; test is not whether voluntary but welcome.
         II. Dress & Actions may influence unwelcomeness. Meritor
   b. All relevant circumstances — necessary to look at all circumstances including:
      i. frequency of discriminatory conduct
      ii. physically threatening or humiliating
      iii. unreasonably interferes w/ P’s work performance
iv. more than a mere offensive utterance
v. Use of P's provocative dress and publicly expressed fantasies may be used against P. Meritor

c. Objective and subjective
i. Objective prong - would a reasonable person find this conduct severe and pervasive enough to alter working conditions.
   I. Adding context to equation \( \rightarrow \) in same circumstances would a reason. person find conduct severe and pervasive. Oncle
     A. Examples: gender, size, position, type of job, person's conduct at work, dress at work, relationship w/ perp, but NOT outside sexual conduct. Burns v. McGregor
     B. Foul-mouth P problem - juries are often not sympathetic to those P's who have participated in sexually charged or hostile atmosphere.

     * Shanor \( \rightarrow \) If P is telling dirty jokes this doesn’t give others in workplace right to touch/perform escalated sexual harassment acts.

ii. Subjective prong - was harassment subjectively abusive to victim (what a reason. person might find to be enough might not affect P in question.)

Shanor \( \rightarrow \)

1) These things are now jury decisions. Juries have substantial discretion subject only to judicial oversight that no reas. person could reach this conclusion under law.

2) Raw language, compliments or criticism - not necessarily sexual harassment.

3. Harassment MUST be “Because of Sex”
   a. P must prove that conduct at issue not merely tinged w/ sexual connotations, but actually constituted “disc. because of sex.” Oncle v. Sundowner Offshore Servs. Inc.

   Ways to prove b/c of sex:
   i. Shanor \( \rightarrow \) Comments from men to women that are simply mean-spirited are NOT “because of sex.”
   ii. Male-female quid pro quo - challenged conduct involves explicit/implicit proposals of sexual activity (assuming they were not made to members of other sex.)
   iii. Male-male quid pro quo - same sex harassment recognized but harder to show harassment was b/c of sex (and not some characteristic of Oncle)

      I. Shanor \( \rightarrow \) Might need to bring in an expert that has studied male-only work subcultures that could testify that it's only because male is not a woman that he is being harassed.

      II. Might also attempt to use Price Waterhouse to argue that male is being harassed b/c of his sex as he does not fit sexual stereotype.

      III. Some courts say “same sex” won't be b/c of sex unless both homosexual. (McWilliams).

      IV. Homosexuals have no ADA claim or T7 protection (§ 508 ADA & DeSantis).

      V. Homosexuals may have state or constitutional law claim. (Ca. Cay Law Students Assoc.)

   iv. Female-Male – Men can have claim if women harass. (Dominoes)

   iv. Not motivated by sexual desire \( \rightarrow \) still violates T7 when harassment is b/c of sex. (i.e. general hostility to women in workplace or derogatory terms used.)

   v. b/c of race, color, religion and n/o – can still use hostile environment argument. Harris (Supreme Court).

4. Harm to P:
   a. P NOT required to show econ/physical harm. (Meritor), nor psychological injury (Harris) for T7. “Title VII comes into play before harassing conduct leads to nervous breakdown.” Harris

      i. Tangible emp. action = significant change in emp. status.

      ii. If P shows tangible emp. action against P \( \rightarrow \) NO affirmative defense available. Ellerth.

      iii. If P does NOT show tangible emp. action \( \rightarrow \) D may have affirmative defense to eer liability where supervisor is harasser. (see below...)

5. Liability for Harassment:
   a. Quid pro quo - if D has delegated or given authority to discriminating supervisor \( \rightarrow \) D liability. Tangible action taken by a supervisor = eer liability.

      i. Note however, that Ellerth defense (5b below) is available for instances of empty threats to emp. status (i.e. "You'll get fired if you don't...")

      ii. Bottom line, tangible emp. action = eer liability.

      I. Court split over what constitutes “tangible emp. action.”

      II. Usually write-up scenarios don't constitute tangible action.

      III. Rebecca Haner of UGA - anything subject to review, whether or not written ought to be called tangible emp. action.

b. Hostile environment harassment by a supervisor is NOT conduct w/in scope of emp. Ellerth.
i. Shanor \(\rightarrow\) Eer's need to establish firm policies so that ees are aware of company's disdain for inappropriate behavior b/f case ends up in front of jury.

ii. Don't forget to sue supervisor individually through state action or tort claim.

c. 3 Exceptions to liability:

i. Vicarious liability: D is subject to vicarious liability to P for hostile environment created by a "supervisor with immediate (or successsively higher) authority" over P. Ellerth.

ii. Where supervisor does NOT take tangible emp. action against P \(\rightarrow\) D may raise affirmative defense proving by preponderance of evidence following 2 facts:

1. P unreasonably failed to take advantage of preventive/corrective opportunities.
   - Failure to follow anti-harassment policy/complaint procedure. Gary
   - Failure to reasonably avoid harm. AND \(\rightarrow\)

2. Eer exercised reasonable care to prevent and correct promptly any sexually harassing behavior.

- Eer takes adequate response to fire when it finds out. Kaufman

iii. Co-Worker Hostile Environment \(\rightarrow\) D is still liable if negligent (i.e. D should have known about conduct and failed to stop it.)

d. Eer hear rumors of sexual harassment, should examine rumors, put them rest. Shanor.

e. Temps? Eer may still be responsible for temps.

i. Shanor \(\rightarrow\) strong incentive for courts to consider temps to be "ees" for purposes for T7. their temp agency cannot look after them, etc. Or "ee" characteristics - under direction of eer supervisor, not using their own tools or facilities, etc. However, very little case law here.

f. Customers? No eer liability for customers under T7. Might very well have tort liability if there was physical touching or groping involved. If customer is perp, D can avoid liability by taking reasonable calculated responses to end harassment. Adler

6. Grooming and Dress Codes:

a. This is an exception to T7 proscription of formal policies of sex disc.

b. Separate dress codes are NOT per se disparate treatment.

c. Dress Codes must NOT create erroneous impression as to authority/rank of men and women. (Carroll).

d. Shanor \(\rightarrow\) Here we find essentially an exception to general T7 standard, insomuch as grooming standards place one sex in a subordinate position to other.

3rd Cir. denied a man's challenge to an eer's rule prohibiting male, but not female, ees from having hair longer than shoulder length. Willingham v. Macon Telegraph

e. Often grooming and dress codes too trivial for courts to concern themselves with.

RELIGION

2 Claims for Religion:
1. Classic Discrim (T7)
2. Failure to accommodate (701)

A. General Info. :

1. T7 \(\rightarrow\) It is unlawful for an eer "to fail to or refuse to hire or to discharge any individual, or otherwise discriminate against any individual w/ respect to his compensation, terms, conditions, or privileges of emp. b/c of such individual's religion." 42 U.S.C. § 2000e-2(a)(1).

2. 1972 – Congress created special cause of action under T7 for a failure to accommodate religious beliefs - § 701(j).
   - Includes "observance and practice" of religion.

3. If P not hired or fired for religious beliefs use McDonnell Douglas or Price Waterhouse paradigms.

4. NO DISPARATE IMPACT for religious discrim.

5. It is violation of T7 to discriminate b/c P is not of a particular religion. Shapolia:

6. Shanor \(\rightarrow\) Cts. may show a little bit higher level of scrutiny for those religions which aren’t traditional. Courts will also examine lack of sincerity for those P’s claiming religious disc. who haven’t been practicing ir religion actively for years or ever.

7. Few atheists filings claims – Practically its simply not a problem b/c no lack of ace. issues. Additionally, atheists don’t wear their belief in no god on their sleeves, thus no one knows to discriminate against m.

B. P's PF case:

1. adverse action

2. qualified (current job performance was satisfactory)

3. evidence- additional evidence to support inference that emp. actions were taken b/c of discriminatory motive based on ee’s failure to hold or follow eer’s beliefs

4. Sincere religious belief – broadly defined, and difficult to rebut.

5. Belief conflicts w/ eer’s rule – easy for P to prove.
6. Eer knew of conflict – D need only have enough info. about P’s religious needs to permit D to understand existence of conflict. (Van Komen)

7. Eer didn’t satisfy P’s belief.

C. D’s Rebuttal: Proof of Pr shifts burden to D to prove:
   1. Reas. acc. has been provided.
      a. If it was reas., that end’s P’s case; section 703(j) – even if acc. did not satisfy P. Wilson (anti-abortion button).
         - Ct. stated that reasonable acc. need NOT completely satisfy ee so long as some effort to accommodate has been made. Philbrook
         - SC has held that D not required to select P’s proposal in order to sufficiently comply with statute. Ansonia.
   2. Undue Hardship: D need not bear more than de minimis in accommodating P. Hardison.
      a. TWA. SC case. Seventh Day Adventist Work schedule = undue hardship.
      Side point → A number of courts have rejected claims b/c P didn’t allege or prove her religious belief required certain conduct, even if they admittedly motivated it.

D. Exemptions listed under T7: Does not exempt harassment or other discrim. (Builard).
      a. Factors determining “religious institution”
         i. Purpose (not secular).
         ii. Faculty’s Religion
         iii. Student body’s religion
         iv. School activities (predominantly religious)
         v. Curriculum
      b. Shanon → What if a Methodist Church runs a subsidiary book store? At some point 702(a) becomes too attenuated.
   2. Religious Curriculum: 703(e)(2) – Disc. by educational institutions that propagate particular religion.
      a. 703(e) – construed narrowly; test is whether institution is “primarily secular” or “primarily religious” taking into account ownership, affiliation, purpose, faculty, student body, student activities, and curriculum.
   3. BFOQ: 703(e)(1). – Its ok to employ individuals in certain instances where religion is BFOQ reasonably necessary to normal operation of particular business. (ex. Loyola Jesuit priests in philosophy.)

If D is religiously affiliated make sure you look at different statutory exclusions and constitutionality of such exclusions.

E. Constitutional Concerns: free exercise and establishment clause of 1st amendment raise constitutional concern over T7.
   1. Free Exercise Clause – makes application of proscription against disc. unconstitutional when applied to key positions in religious institutions.
      a. 703 violated free exercise clause b/c sex discr. ok when P had to teach religious class. EEOC v. Catholic Univ.
      b. This ministerial exemption also applies to lay ees who primary duties consist of teaching, spreading faith, church governance, etc. ex. Church can pick its priest
   2. Establishment Clause:
      a. 702(a) and 703(e)(2) give religious orgs. and schools authority to discriminate in favor of members of their own religion, while not being in violation of establishment clause. Ex. We want to hire from our own religion (can’t discr. b/c of sex).
      b. 3 Part Test to examine constitutionality of law under Est Clause, from Lemon v. Kurtzman (SC):
         i. Law at issue serves a secular purpose. (702(c) serves a secular purpose and alleviated governmental interference w/ ability of orgs to carry out their missions.)
         ii. Primary effect must not advance/inhibit religion.
         iii. No impermissible entanglement of church and state.
      c. As long as religious institution is NON-PROFIT, special exemptions (702(a), 703(e)(2), 703(e)(1)) do not violate establishment clause.
      d. 703 deals w/ duty of religious eers not to discriminate on base of race, color, national origin, and sex (for non ministerial), however 702 exempts religious institutions from proscription of religious disc. in emp.
A. General Info.
If you're from a certain country and D not hiring you b/c of that = unlawful.
If D clearly favors people from America = unlawful.
J's purely citizenship → That's NOT national origin disc.

   a. Illegals have no protection under T7.
   b. N/O disc. = disc. b/c of country you or your forbears came from.
2. N/O disc NOT covered under § 1981 but... disc b/c of “ancestry or ethnic characteristics,” race and alienage ARE covered by § 1981.
3. Accent disc. is per se N/O disc. (per EEOC guidelines), but emp decisions MAY be predicated on accent if it impacts P's ability to do job (BFOQ). Garcia v. Rush-Presbyterian-St. Luke's Med. Ctr.
   i. Spun Steak = allowed English only rule where workers were bilingual.
4. DT and DI theories apply to N/O disc.
5. Immigration Reform and Control Act of 1986 → REQUIRES an eer to discriminate against “unauthorized aliens,” but prohibits disc. b/c of national origin or b/c of protected status of a U.S. citizen or national or an “authorized alien.”

AGE... ADEA

A. General Info.
1. Section 4(a) of ADEA prohibits disc. “b/c of such individual's age” rather than disc. b/c of race, color, religion, sex, or n/o. Everyone over age of 40 is protected. Section 12.
2. It is ok to take action otherwise prohibited where differentiation is based on reas. factors or than age.
   2 Exceptions:
   a. Bona fide executives – Section 12(d)(1) – can make BFE (or higher policy maker) retire at age 65 so long as he is entitled to pension of at least 44K.
      i. Note: In-house counsel are not BFE. Whittlesey v. Union Carbide Corp.
   b. Police & Firefigrs – can be hired and fired based on age. (Age Discrim in Emp Amend '96)
      i. Generally, exception sets a minimum age of not younger than 55
      ii. Police = ecs whose duties include investigation, apprehension, or detention of individuals suspected or convicted of offenses against criminal laws.
      iii. Firefighter = duties entail work directly connected w/ control and extinguishment of fires or maintenance and use of firefighting apparatus.
3. Applicability of DI disc – SC has never decided whether or not DI disc is available in ADEA actions and there is a split w/in circuit courts.
   a. T7 specifically includes DI (1991 CRA) but ADEA doesn’t expressly include DI.

B. Special Problems of Age Disc.
1. Protected Class
   a. Sec.4(a) – prohibits disc. “b/c of such individual’s age.
   b. Sec. 12 – protection is limited to those individuals who are at least 40 years of age.
   c. NO Involuntary Retirement b/c of Age – ADEA now protects workers w/out an age cap and prohibits involuntary retiring.
2. Fringe Benefit Plans
   a. Congress has adopted equal cost or equal benefit test for legality of benefit plans.
      i. Section 4(0)(2)(B) – provides that it shall be ok for an D “to observe terms of a bona fide ee benefit plan – (i) where, for each benefit or benefit package, actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker.
         • In other words, D can either provide a benefit plan that costs same amount per ee or that provides equal benefits across board. D spends equally on old and young.
         • Safe harbor - coordinate benefits w/ SS benefits, or reduce severance pay by retirement benefits.
3. Downsizing, Reductions in force, and Early Retirement Incentive Plans
   a. P was fired - Modified McDonnell-Douglas-Burdine showing required for P to establish PF case of age disc. (O'Connor v. Consolidated Coin Caterers Corp (4th Cir.))
      Prima Facie Case:
      i. P was protected by ADEA.
      ii. P was selected for discharge from a larger group of candidates.
      iii. P was performing at a level substantially equivalent to lowest level of those of group retained.
iv. Process of selection produces a residual workforce of persons in groups containing some unprotected persons who were performing at a lower level that that at which he was performing.

b. Early Retirement Plans
i. Conditions for waiver of ADEA rights (OWBPA 7(f)(1) 29 USCA 626(f)(1)
   1. waiver MUST be part of agreement b/w individual and er that is written in a manner calculated to be understood by individual, or by average individual eligible to participate.
      I. MUST be knowing and voluntary.
   2. waiver MUST specifically refer to rights or claims arising under ADEA.
   3. agreement cannot waive rights or claims that may arise after date waiver is executed.
   4. individual MUST receive in exchange for waiver consideration in addition to anything of value to which individual already is entitled.
   5. individual MUST be advised in writing to consult w/ an attorney prior to executing agreement.
   6. individual MUST be given a period of at least 21 days w/in which to consider agreement.
   7. agreement must provide that for a period of at least 7 days following execution of such agreement, in which P may revoke agreement, and agreement shall become effective or enforceable until revocation period has expired.
*Undue influence by D will invalidate waiver!

ii. OWBPA of 1990, Sec. 4(1)(1)(A) – pension plans will NOT violate ADEA solely b/c plan “provides for attainment of minimum age as condition of eligibility for normal or early retirement benefits.”
(Pension plans may use age to est. eligibility.)
   1. OWBPA – retirement programs are invalid if it takes away benefits from those who refuse to retire early.
   2. OWBPA – prohibits prospective waivers (waivers occurring b/f the claim).

iii. Shanor's Thoughts in regard to Early Retirement Plans
   1. Most common early retirement incentive plan – offer same incentives at 55, 57, 58 as ce would receive @ 60. P not punished if she decides not to leave. Lots of times companies have overfunded pension programs, so this is effective.
   2. Might set up a system whereby in next two weeks those people who are interested in early exit program could apply, D will review application, decide who needs to go, etc. there may be too many or too few.

iv. Additional conditions for early retirement program waivers. If waiver of ADEA rights is part of early retirement program, § 7(f) adds following requirements in addition to those above:
   1. Section 7(f)(F)(ii) extends period for P to consider offer from 21 days to 45 days.
   2. Section 7(f)(H) requires D inform “individual in writing in a manner calculated to be understood by avg. individual eligible to participate, as to—
      (a) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
      (b) job titles and ages of all individuals eligible or selected for program, and ages of all individuals in same job classification or organizational unit who are not eligible or selected for program.

No “tender back” of benefits necessary to challenge waiver of ADEA rights. Oubre. SC held individual not required to give back consideration given for a waiver agreement in order to bring a claim under ADEA. However, there may be an offset.

RETAILATION

• EEOC has started asking those filing charges if D has done anything bad to them since filing.
• P can lose on a completely bogus race, gender, or age case and still win on retaliation claim;
• Retaliation claims usually won by P.
• P also protected against retaliation under ADA, ADEA (4d), EPA, or 1981.
• Retaliation action is independent action from action for disc.

P's PF Case:
1. P must show she is protected from retaliation:
   a. 704 bars retaliation against:
      i. applicants
      ii. ees
      iii. former ees. Robinson v. Shell
2. P must prove she engaged in either free access or opposition conduct. § 704(a) of T7, AND experienced an adverse action as a result of that conduct.
   a. Free Access (participation) – P shows she participated in proceeding claiming disc. .
      i. Free access is relatively absolute. D cannot fire P for participating in a T7 or state emp law action.
      ii. Key distinction b/w free access and opposition is that free access triggers absolute protection, whereas opposition focuses on reas. reas.
      iii. Participation includes being a witness in a proceeding. (i.e. harasser who testified was fired)
      iv. Easier for P to prove participation than opposition.
      v. This would apply to giving bad references to future ecr.
      vi. See whether P took action before adverse emp. action took place. Clark Co. School District v. Breeden
   b. Opposition – D cannot retaliate against P who has opposed any practice made an unlawful emp. practice by this title.
      i. Need reasonable belief that conduct of D is illegal, and P MUST act in good faith.
         I. Subjective: good faith that D discriminated. Trent
         II. Objective fact: has reasonable basis of belief. Monteiro
      ii. P’s opposition conduct was reasonable.
         I. Unlawful protests are not reas. . McDonnell Douglas
         II. Disloyalty is NOT unreasonable b/c every act of opposition is somewhat disloyal. Jennings
         III. If D is open to talk about problems, going outside chain of command is unreas. . Jennings
         If a court perceives P action as “sandbagging” her D, it will find NO retaliation, as this conduct would not be reas. . → “cloak of statutory protection does not extend to deliberate attempts to undermine a superior’s ability to perform his job.”
      IV. When conduct is unreas. it becomes unprotected.
      V. Nothing in T7 compels D to rehire one who was engaged in deliberate unlawful activity against it. McDonnell Douglas.

3. P MUST show she was victim of adverse action by D.
   a. Usually easy to prove
      i. D must know of conduct. Goldsmith
      ii. Timing: closer time b/w two actions, easier to prove. Obryan. A direct causal link is vital.
      iii. According to several lower courts, 704 says adverse emp decision is required (i.e. hiring, firing, promoting, and granting leaves of absence.)
      iv. What is an adverse (retaliatory) action? Not a lateral transfer in same office, but a transfer to another city would be.
      v. Shanor → SC reluctant to adopt a subjective standard for adverse action. Clark Co.

B. D’s Defense
   1. D must “articulate some legit. non-discriminatory reason for adverse emp action.
      a. Cts. have held that a decision to discipline a P whose conduct is unreas. , even though borne out of legit pretests, does not violate T7.

DISABILITY (ADA)

A. General Info.
   1. 102(a) – general rule prohibited disc b/c of disability: No disc against qualified individual w/ disability in regard to job application, hiring, advancement, discharge compensation training and or terms, conditions and privileges of emp. .
      a. 102(a) – Employer must have 15 employees for 20 wks. per yr.
   2. Exception – 511(b)
      (i) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity, sexual behavior disorders.
      (ii) compulsive gambling, klepto, pyro
      (iii) psychoactive substance abuse disorders, illegal use of drugs.
      * Also note: 511(a) says homosexuality/ bisexuality not an impairment

3. Examples of impairment:
   a. Firing for contagious effects of disease (Arline).
   b. Asymptomatic diseases such as HIV are impairment b/c affects major physiological system of reproduction. (Bragdon).
      i. Sex may be a major life activity.
c. Morbid obesity (Cook). Here, cts saying “voluntariness” of disease doesn’t matter. Or examples include alcoholism, AIDS, diabetes, cancer resulting from cigarettes smoking, heart disease resulting from personal excesses.

4. Examples of non-impairment:
   a. Average person problems such as eyesight and asthma = not protected.
   b. Cts. not finding “disability” for individuals w/ severe phobias. Shanor disagrees w/ this one.
   c. EEOC has stated “physical or mental impairment” does NOT include: physical characteristics such as weight, height, and eye color that are in “normal range” and aren’t a physiological disorder. Also exclude common personality traits, illiteracy, economic disadvantages, and temporary physical conditions.

B. P's PF Case
   1. P is individual w/ disability: section 3(2) of ADA –

Reqs for qualifying as ind w/ disability:

(A) a physical or mental impairment that substantially limits one or more major life activities.
(B) a record of such impairment (ex. Woods)
(C) being regarded as having such an impairment

(a) Physical or Mental Impairment that substantially limits major life activity. SC has broad view of impairment. Bragdon
   * Note: An individual is substantially limited if totally or significantly restricted in her ability to perform major life activities in comparison w/ “average person in population.”
   i. Major Life Activity – includes caring for self, manual tasks, talking, breathing, seeing, hearing, speaking, learning, working; also reproduction (Bragdon). → opened door for disability claims by those who suffer from impairments causing fertility or require treatment improving fertility.
   ii. Substantially Limits – pertinent factors are nature and severity of impairment, its duration and permanent or long-term impact.
   I. Inability to perform single, particular job does not constitute a substantial limitation on major life activity of working. Sutton:
      1. When addressing major life activity of performing manuals task, central inquiry must be whether claimant is unable to perform a variety of tasks central to most people’s daily lives, not whether claimant is unable to perform specific job tasks. Toyota v. Williams
   II. If D offers other positions, it is more difficult to argue substantially limited.
   III. Illustrative not exhaustive list includes: any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic skin, and endocrine.
   iii. Mitigation of Impairment – effect of mitigating factors must be taken into account when judging if P is substantially limited. Sutton. Mitigating factors include: wearing glasses, taking meds and measures taken by individual’s own body systems.
      I. Essential Rule of Law – A disability only exists where an impairment substantially limits a major life activity, NOT where it might, could, or would be substantially limiting if mitigating measures were not taken into account. Sutton
      II. After Sutton, Ps must develop factual records to support that their impairment is substantially limiting even when controlled by meds.
   iv. Social security claims: Ps who assert disabled for purposes of receiving disability benefits will have an opportunity to establish that they are nonetheless “qualified” within meaning of ADA.
   * Shanor → Remember that there are two other prongs to “substantial limitation.” (see below). If your client can’t find protection under one, maybe one of others will provide shelter.

(b) Record of Impairment – even if P doesn’t have disability, still protected if discriminated against b/c P has record of disability. Adler.
   i. Variety of records contain such info, including emp records, medical records, educational records, etc.
   ii. What is necessary? Numerous cts. have found hospitalization and subsequent extended recuperation did NOT constitute substantially limiting impairments in absence of some chronic long-term impact.

(c) Regarded as having Impairment – D either:
   i. mistakenly believes that P has impairment substantially limiting life activity OR...
   ii. mistakenly believes that non-limiting impairment substantially limits life activity.
1. Courts have given limited reading to this provision. (Forist)
2. IMPORTANT - scope of "regarded as impaired" only pertains to impairments that are covered under statute in first place. (ex. don't really have any disability [D only has to stop disc]. pregnancy is NOT an "impairment" under ADA, where a D who fires a pregnant woman b/c he thinks she will be unable to work, fired pregnant woman does not fit under this category of protection.)

2. P was Qualified Individual - Sec. 101(8) - P can perform essential function of job with or without reasons. acc. (or where alleged essential job requirement is eliminated (Hamlin)).
   * Sec. 102(a) of ADA doesn't prohibit disc against a person w/a "disability" unless he is "qualified."
   a. Essential Functions: Some consideration given to D's judgment of what is essential but not complete deference. 101(8) must be job related and consistent w/bus. necessity. Posted descriptions and job advertisements taken into account.
      i. if Safety of public is at issue, D's get more deference. (Shadow Bd.).
      1. If risk of communicable diseases, in D's favor. (Bradley).
      ii. Ex. Nurse must be able to hear. Davis
      iii. P who fails to meet fed. safety regulations is NOT qualified.
      iv. 104(a) says qualified does not include app.s currently engaging in illegal use of drugs.
      v. P has opportunity to rebut contended "essential functions" as unessential.
         1. D will then bear burden of proving that challenged criterion is necessary. Hamlin
      vi. No duty to create a new position for someone if the applied for position "exists to perform the function" (ADA regulations, Kuntz).
   b. Reasonable Accommodation: (broader than duty to accommodate for religion).
      i. Whether cost-benefit analysis is used for determining reasons has not yet been decided.
      ii. Working at home usually not reason. acc. Vande Zande
      iii. Teacher assistant may be reason. acc. Warkowski
      iv. 101(9) - reasons acc. may include:
         (A) making existing facilities readily accessible to and usable
         (B) job restructuring, part time, modified work schedules, reassignment to vacant position
         acquisition or modification of devices, modification of examination, training materials or
         polices, provision of qualified readers/interpreters and or similar acc.s.
   v. No duty to accommodate personal needs due to disability. (Neison).
      vi. Shifting you internally much stronger case for P than asking for a different job coming in w/ a
disability.
   c. Identification of essential functions of job requires a fact specific inquiry into both eer's description of job
      and how job is actually performed in practice.
      i. Also mention whether reallocating that job function is a reason. acc.

3. D acted b/c of disability.
   a. May use Price Waterhouse showing w/ direct evidence that D took disability into account. Burns v. City of Columbus
   b. McDonnell Douglas/Burdine - use this analysis when you only have circumstantial evidence that D acted b/c
      of disability. Norcross v. Sneed

C. Defenses
1. Rebutting facts of P's PF case
2. ADA statutory defenses:
   a. Acc. would be undue hardship - 102(b)(5)(A) -
      i. D can show acc. would impose undue hardship on operation of business.
      ii. 101(10)(b) - says it means an action requiring significant difficulty or expense when considered in
         light of factors:
            (i). nature and cost of acc.
            (ii). overall financial resources of facility; number of persons employed @ facility, etc.
            (iii) overall financial resources of covered entity; overall size of business of covered entity w/ respect to number of its ees, location of its facilities, etc.
            (iv) type of operation of covered entity, including composition, structure, functions of workforce of such entity, etc.
      Note: Dexter - Dwarf at post office quite "reas." but created an undue hardship.
   b. Affirmative defense of direct threat - 103(b) -
      i. P would be a direct threat to others - 101(3) - Direct threat is significant risk to health or safety of
         others that cannot be eliminated by reas. acc.
      ii. In determining direct threat, EEOC factors are:

I. nature of risk (how disease is transmitted)
II. duration or risk how long is carrier infectious
III. severity of risk (what is potential harm to third parties)
IV. probability of transmission causing varying degrees of harm. Arline II. Courts should defer to healthcare professionals.

iii. D may refuse emp. to P seeking a position that poses a direct threat to workers' own health or safety.

_Chevron v. Echazabal_ Don't forget threat to self!

D. Other theories of Disc.

1. **Failure to Reasonably Accommodate**: 102(b)(5) - independent liability if eee fails to reasonably accommodate known disability. This includes:

   (A) not making res., acc. to known physical or mental limitations of an otherwise qualified individual w/ a disability who is an app. or ee.
   (B) denying emp. opportunities to a job...if such denial is based on need of such covered entity to make res. acc. to physical or mental impairments of ee or app. .'

   a. This duty goes beyond providing accom required to perform essential job functions. _Van Zante_

      i. Eees have additional duty to provide accs that permit disabled individuals to enjoy equal access to benefits and privileges of emp. (ex. access to lounges, kitchens, smoking rooms, etc.) These benefits and privileges do not fit into neat categories.

   b. **No duty to accommodate personal benefits** (i.e. providing ee w/ a prostic limb, wheelchair, or eyeglasses.)

   c. Areas of possible resas. acc., 101(9):

      (A) making existing facilities used by ees readily accessible to and usable by individuals w/ disabilities.
      (B) job restructuring, part-time or modified work schedules, reassignment to vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, qualified readers or interpreters, etc.

   d. $$$ enters at two points in analysis of claims to an acc. to a disability:

      i. P must show that acc. is resas. in sense of both efficaciousness and proportionality of costs.
      ii. D has opportunity to prove that upon more careful consideration costs are excessive in relation to either benefits of acc. or to D's financial survival or health.

2. **Systemic disparate treatment** (formal policies or pattern/practice)

   a. Benefit Plan Exception: 501(c)(1) and (2) allow disability based distinctions in bona fide benefit plans based on different risks not inconsistent w/ state law.... So long as _every ee is offered same plan, its ok even if plan offers different coverage for different disabilities_. _Rod v. Schering_

3. **Systemic Disparate Impact**

   a. Section 102(b) of ADA defines term "discriminate" to include two disparate impact concepts:

      (3) utilizing standards, criteria, or methods, of disc that have effect of disc. on basis of disability.
      (6) using qualification standards, emp. tests or other selection criteria that screen out or tend to screen out an individual w/ disability or class of individuals w/ disabilities unless standard, test or or selection criteria is shown to be job-related and consistent w/ business necessity.

   b. Vision requirement imposed by a federal regulation NOT subject to DI attack. _Kirkenburg_

   c. NOTE: While business necessity and job-relatedness are still affirmative defenses, seniority, merit and incentive systems are NOT available in ADA cases.

4. Special provisions for testing and special relationships –

   a. 102(7) adds requirement that tests for requirements of job, not for disabilities of test-taker.

      - NOTE: _job related or business necessity_ defense and professional test exception NOT available for claims brought under 102(7).

   b. 102(b)(4) - protects against disc. b/c of relationship w/ person who has disability.

E. **Special Disability Discrim Problems**

1. Alcoholism and Illegal Drug Use

   Generally

   a. ADA specifies certain things D may and may not do regarding drugs and alcohol use in 104(c):

      (1) may prohibit illegal use of drugs and use of alcohol at workplace
      (2) may require that css shall not be under influence of alcohol or be engaging in illegal use of drugs at work place
      (3) may hold an ee who engages in illegal use of drugs or who is an alcoholic to same qualification standards for emp. or job performance and behavior that such entity holds or css even if any unsatisfactory performance or behavior is related to drug use or alcoholism of ee.
Drugs
a. 511(b)(3) – disability doesn’t include “psychoactive substance use disorders resulting from current illegal use of drugs.”
b. 104(a) – “qualified individual w/ a disability” does not include any ee/app. who is currently engaged in illegal drug use.
c. Term “currently engaging in drug use” not limited to very moment at which eer takes action against ee but extends back even to weeks previous to termination.” Collings v. Longview Fibre
d. cleaned-up junkie – 104(b) – Disability shall be construed to exclude as a qualified individual with a disability an individual who has successfully completed a supervised drug rehabilitation program ……and is no longer engaging in such use.
e. ADA neutral to drug testing. Sec. 104(d)/(2).
Alcohol
a. Courts differentiating disc. b/c of status as alcoholic, which is protected by ADA, from disc. b/c of abuse of alcohol which is not protected.

2. Sexuality Issues
a. 508 – term “disabled” doesn’t apply to an individual solely b/c individual is a transvestite.
b. 511(a) – homosexuality and bisexuality are not impairments and as such are not disabilities.
c. 511(b)(1) – disability doesn’t include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or sexual behavior disorders.

3. Winona Rider
a. 511(b)(2) – disability doesn’t include compulsive gambling, kleptomania, and pyromania.

4. Medical Examinations
a. 102(d)/(2)/(B) allows eer to “make preemp. inquiries into ability of app. to perform job-related functions.”
b. 102(d)/(2)/(A) prohibits eers, before an offer of emp. has been extended, from conducting a medical examination or making inquiries as to whether individual has a disability or as to nature of severity of disability.
c. 102(d)/(3) – after offer of emp. is made, D can require a medical exam.
d. 104(d)/(1) - drug testing NOT considered medical exam.

5. Conflicts w/ Seniority Systems
a. To extent that there is a conflict b/w seniority system and sec., seniority usually wins. U.S. Airways v. Barnett
b. Scalia argues that duty to reasonably accommodate simply does not extend to seniority systems → seniority system is not a disability-related obstacle.”
c. Exceptions to General Rule
i. Where D having retained right to change seniority system fairly frequently, does so. In other words, a seniority system that is only a “system” on paper.

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**EQUAL PAY FOR EQUAL WORK (EPA)**

A. P must show D pays different wages to ees of opposite sex for **substantially same work**. This is a very strict standard. That showing shifts burden of persuasion to eer who has four affirmative defenses available

1. P’s PF Case
   (1) In same establishment – EPA does not define term establishment. Mere existence of physically separate operations is not necessarily fatal to an EPA claim. Brennan
   (2) Unequal pay – comparing pay of two jobs requires consideration of inflation, fringe benefits, as well as rates of pay. Bence
   (3) Equal work – Central issue to EPA case; has been construed to mean “substantially equal” and not identical. To constitute equal work, there must be a substantial, perhaps predominate core set of tasks common to both jobs. Strict interpretation, not just similar/comparable. Corning.
   (4) On basis of sex.

2. Defenses to PF Case (Statutory Exceptions)
   a. “Any factor other than sex.”
   b. Seniority system – To be a system of seniority, it must operate to improve emp. rights and benefits as ees’ relative length of cmp. increases.
   c. Merit systems
   d. Incentive systems – Most incentive pay systems can be characterized as objective and job related.
   e. **EPA only applies to substantially similar work, so in cases where work is different T7 is only remedy…..and so we encounter….**

3. Bennett Amendment – incorporates four affirmative defenses of EPA into T7 gender compensation cases
4. Title VII theories of disc in Gender Compensation Cases – engrafting those four EPA affirmative defenses onto T7 has lead to a constricted application of T7 to claims of compensation disc. b/c of sex:
   a. Individual DT – some courts have found McDonald Douglas/Burden approach is UNavailable.
   b. Systemic DT – statistical job evaluation studies and comparable worth statistics alone are insufficient to establish an intent to discriminate required under DT since they are based on labor market differences b/w men and women.
   c. Systemic DI – does NOT apply to sex disc in compensation claims.

PROCEDURES

A. Coverage – T7 says D must have 15+ ees for 20+ weeks per year. ADA requires 20 ees.
   1. Critical inquiry: defining ee and eer
      a. Associate in law firm is covered by T7 b/c she is ees. Hishon. Partners not covered by T7.
      b. Partnership is benefit, so being promoted is actionable under T7. Hishon.
      c. Partner is not protected by T7, would have to bring 1981 claim.
         i. Shanor – Your best argument in seeking redress would be to argue that decision to engage in sham took place when you were still an associate, thus still an “ee.”
         ii. In some large organizations, partners maybe considered ees w/in T7 meaning.
      d. Independent Contractors – basic difficulty in distinguishing b/w ee and independent contractor:
         i. Common law approach
         ii. Economic realities approach – based on degree of economic dependency of putative ee on principle.
         iii. Hybrid test – characterization turns primarily on degree of principal’s control, but degree of economic dependency on principal is also considered.
      e. Hourly, part-time, and on-leave workers are “ees” for T7 purposes.
      f. Volunteers – Not counted for statute coverage, but once an d is covered, volunteers of that eer will be protected.
         i. Volunteers at small eers who aren’t covered might possibly have a state law claim or tort claim but NO FED. CLAIM.

2. Defining “eer”
   a. State licensing agency NOT an eer for T7 purposes; might use 1981 as it applies to contracts.
   b. Doesn’t matter if eer is overseas. American law (including T7) applies overseas. Rambo
      i. However, in another instances foreign law enforcing mandatory retirement at a certain age has been upheld b/c otherwise would put American citizen in a better position.
   c. Aliens working in U.S. – SC has said that under labor relations act, no entitlement to back pay if you are an alien.

B. Private Enforcement under T7 – Basic T7 procedures for enforcement of substantive rights it creates are found in § 706, 42 U.S.C.A. § 2000e-5.

Basic Timeline:
   Act of discrim. → (no more than 180 days later) P files charge w/ EEOC → EEOC gives notice to D → Reas. cause → EEOC suit → Court
   1. Procedures same for T7 and ADA, but ADEA has some differences
   2. Filing charge w/ EEOC → must be filed w/in 180 days after unlawful practice occurred. Section 706(e)(1).
      a. 180 days extended to 300 days where state/local agency exists (or 30 days after local agency terminates proceeding).
         i. ADEA – 180/300 day applies to ADEA, filing w/ local agency is NOT prerequisite to filing w/ EEOC.
         ii. Filing w/ EEOC w/in 300 days suffices, although filing at some point w/local agency is necessary.
         iii. Statute says there has to be a written letter that is sworn to. EEOC form is usual way charges are filed. § 706(b)
            I. “A charge is sufficient when commission receives from person making charge a written statement sufficiently precise to identify parties and to describe generally action or practice complained of.” Waters
            II. Most cts. very permissive as to what will be deemed a charge for purposes of satisfying this requirement.
            III. Absence of oath can be remedied later. Weeks.
            IV. Some cts. have even held that questionnaire to constitute a valid charge at even though it was unsigned and formal charge not executed until later.
      b. TIMING:
         i. Charge must be filed w/in 180 days “after alleged unlawful emp. practice occurred.”
ii. Time unlawful practice occurred – filing period starts when act of disc. occurs and P receives notice of D’s act. Ricks, Chardon

iii. Continuing Violation – exception, when disc. (and not just effect) continues to be ongoing.
   I. Disc. may take place on date of application and P has no way of knowing. Cada, Gates, Tucker.
   II. Some cts. say when notice, others say when facts to know.

iv. Pendency of a grievance DOES NOT TOLL running of limitation periods which normally commence when D’s decision is made.
   I. Practical effect = P cannot safely await completion of internal procedures before filing w/ EEOC.
   II. If you were HR person in a big corporation and under productive ee is protected by age disc., keep P on for 180 days before firing him. On Jan. 1st P is notified that he will be fired as of July 1st.

v. Challenge to a seniority system must be raised w/in 180 days from when system was put into effect, even if P wasn’t working at time when system was created. Lorance argued by Shanor.
   I. CRA of 1991 – Congress changed this part of T7 so that unlawful practice occurs … when seniority system is adopted, when an individual becomes subject to seniority system, or when a person aggrieved is injured by application of seniority system.

vi. Amtrak → Claims of discrete discriminatory or retaliatory acts must be filed w/in 180/300 days of those acts, BUT a claim alleging a hostile work environment will NOT be time barred if all acts constituting claim were part of same unlawful practice.
   I. Hostile environment claims are unique b/c y very nature involves repeated conduct and cumulative and collective nature of se actions is what makes them actionable.
   II. Shanor → This case important b/c strikes down a lot of circuit court cases allowing 180/300 day rule to be disregarded when several discrete acts occurred (they called this “ongoing emp. practices.”) Shanor, “This will be a stave through heart of ongoing emp. practice type claim.”
   III. Shanor → Going to be difficult to distinguish b/w discrete acts and acts which are components of hostile environment claim.

c. Filing is a procedural prerequisite like a statute of limitations (subject to tolling), not a jurisdictional prerequisite to fed. court jurisdiction. Zipes

d. Tolling
   i. Waiver – D may agree to waive defense of charge filing period to make good faith efforts to formally investigate. Shanor says this usually happens when P may have a systemic claim that might bring class action.
   ii. Estoppel – D engages in certain wrongful conduct (i.e. hiding info.).
   iii. Equitable tolling – When EEOC has P’s case, clock is not running. There is no time limit for investigation, but latches may apply if it takes too long. If lawyer doesn’t file in time….ouch.
   iv. Class Action – tolling starts for all claims when first claim of class action is filed. Parker.

3. Filing suit w/time constraints – After charge is filed w/ EEOC, P must follow w/ procedural requirements:
   a. EEOC is directed by T7 to serve notice of charge on respondent w/in 10 DAYS and to conduct an investigation culminating in a determination of whether there is reas. cause to believe charge is true.
      i. If no reas. cause → dismiss and notify charging party, who has 90 days to bring private action.
      ii. If reas. cause → EEOC first attempt conciliation. If that fails to eliminate alleged unlawful emp. practice, EEOC may bring a civil suit against respondent in district court or issue right to sue letter.
   I. Shanor says that right to sue letter scenario is run of mill situation.
   II. P is only going to have 90 days to file suit after receiving right to sue letter (or dismissal for that matter) on pain of forfeiting all power to sue.
   III. Even an EEOC finding that there is no reas. cause to believe disc. occurred doesn’t bar suit. McDonnell Douglas

b. EEOC has 180 days – P must wait 180 days from filing w/ EEOC b/f filing suit …unless EEOC procedures terminate earlier. After 180 days, P can demand right-to-sue letter, after receipt of which he has 90 days to bring action.

c. EEOC runs longer than 180 days – P can permit EEOC to continue investigation past 180, and retain power to demand letter at any time until EEOC makes its determination. After receipt of this delayed letter, charging party must bring suit w/in 90 days of that point.

d. EEOC files suit – EEOC either brings suit itself, dismisses claim, attempts conciliation (which if it fails leads to suit by EEOC or right to sue letter for P).

4. EEOC suit
   a. P must have standing (i.e. aggrieve party of disc.) ;
i. Testers cannot bring suit b/c not an aggrieved party.
b. D must be sufficiently implicated by charge (not necessary to be named 100% precisely).
   i. Shanor → Respondent must be named. Sometimes P’s get this mixed up esp. if it company is huge and
   y’re working for subsidiary. Courts generally sympathetic to screw ups.
   ii. Party filed w/ EEOC and didn’t check a box. EEOC found disc. for race, gender, national origin, etc.
      Filed suit for all of those. 5th Cir. Court of Appeals allowed it. Sanche vs. Brands – leading case as to
      ambiguity in EEOC filing.
   iii. May be able to piggy-back national origin onto race disc. when filing charge w/ EEOC as its are
      fairly forgiving.
c. Scope of complaint must be based on EEOC charge. Interpreted broadly (i.e. if only one box on form is
      checked, EEOC can still argue several different theories).

C. Private Class Actions
   * For T7, 1981 and ADA must FRCP Rule 23. This does not apply to ADEA.

1. Rule 23(a) has 4 requirements:
   1. Numbers -- so many P that joinder of all is impractical
   2. Commonality -- common questions of law or fact
   3. Typicality -- claims/ defenses of parties are typical of claims/ defenses of class.
   4. Adequate Representations -- representation will fairly and adequately protected interests of class. (This tends
      to be focus of class action questions.)
      * P can represent a class of those similarly situated to herself (i.e. If P is male secretary, P can represent all male
      secretary app. s.) Falcon
      * If you were hired, you cannot bring claim for those who were not.
         - However, Note: Footnote 15 from Falcon which said → Significant proof that an eer operated under a
           general policy of disc., that conceivably could justify a class of both app. s and ccs if disc. manifested
           itself in hiring and promotion practices in same general fashion, such as through entirely subjective decision
           making processes.

2. Rule 23(b)
   1. 23(b)(2) -- D treated all members of class similarly. B/c of general treatment of eer, individual members of
      class need NOT be notified or given opportunity to opt out of class. Kyriazi
   2. 23(b)(3) -- Court must find common issues predominate over individual claims, and class action would be a
      superior form of litigation. Allison. Class members MUST be given notice of existence of class and
      opportunity to opt out of class.
      * If not general pattern or practice found in class action, no preclusion of individual claim.

3. Settling Class Actions
   1. 23(e) -- Even if class has not been certified, class action shall NOT be dismissed w/out approval of court and
      notice of proposed dismissal shall be given to all members of class as directed by court.

4. Time Limits w/ Class Actions
   i. Proper approach -- Take charge and go back 300 days and pick up anybody that fits w/in this time frame.
   ii. Shanor → Anything b/f 300 retro day marker is a dead claim.
   iii. Shanor → You may be able to “find” another earlier class which is a ticket to a bigger class.

D. Public Government Enforcement (EEOC)
   1. SC liberal approach so that EEOC suit generally will NOT be barred unless D can show it was prejudiced by EEOC
      errors. Shell Oil.
   2. Challenges to sufficiency of EEOC investigation are not very successful.
      i. EEOC suit not limited to original charge, it can be broadened through investigation. G.E.
   3. SOL does NOT apply to EEOC suits unless time period is unreasonably long. Occidental Life

E. Relation b/w Public and Private Suit
   1. Public: When EEOC files on behalf of individual, P loses right to bring private suit b/c represented by EEOC. Cooper
   2. Private: Courts are split.

F. Settlement and Arbitration
   1. Waiver -- OWBPA permits waiver of ADEA claims so long as reqs are met (sometimes used for or anti-disc. laws).
   2. Settlement -- SC says consent decrees should be interpreted like contracts. Stotts. Modification of consent decree
      requires movant to establish change in factual conditions or law to warrant action.
      a. Binding of non-parties -- company can seek joinder under Rule 19, generally non-parties will not be bound
         by prior judgments. 1991 CRA 703(n) binds non-parties when y are:
            i. Adequately represented by a party re.
            ii. Have actual notice of threat to ir interest and an opportunity to protect mselves.
   3. Arbitration
a. If P files grievance and union takes grievance to arbitration it does not prevent P from bringing T7 action.
b. In specific circumstances, P may be forced into arbitration even when there is violation of anti-disc statute.
c. Where P had signed an arbitration agreement waiving right to pursue litigation, P cannot file w/ EEOC or pursue private claim. Gilmer, however, note EXCEPTION:
   i. Some arbitration clauses don’t meet minimum standards as laid out in Rosenberg.

**REMEDIES/JUDICIAL RELIEF**

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**B. Individual Relief**

1. Section 706(g)(2)(B) Exception to Full Relief
   a. 1991 CRA added an affirmative defense to most relief when D carries burden of proving that it would have made same decision even if it had not discriminated.
      i. As 703(m) – D is liable when P proves disc. was “a motivating factor” in decision \(\Rightarrow 706(g)(2)(B)\) creates **affirmative defense to full remedies** if D can prove it would have taken “same action in absence of impermissible motivating factor.”

2. Types of Remedies in Individual Cases
   a. **Backpay** – award including all compensation victim would have received in absence of disc. including lost wages, raises, overtime compensation, bonuses, vacation pay, and fringe benefits as contributions to a retirement plan.
      i. Presumptively awarded to victims of disc. to make P whole. *Albermarle.*
      ii. **Requires no intent to discriminate by eer**
      iii. Burden of P to prove damages – P must establish damages in form of difference b/w her actual earnings and amount of she would have earned in absence of disc. .
         1. **P’s duty to engage in reas. efforts to mitigate. 706(g)(1)**
         2. **P’s counsel** – Advise P to start looking for new “comparable” job immediately. Comparable doesn’t mean equal pay.
         3. **D’s counsel** – Might go through old copies of AJC classified to see what jobs P could have applied for.
      iv. **Covers entire time from disc. to final judicial notice, except:**
         1. If claimant gets new job, or could have gotten a new job, those wages work to mitigate backpay.
            - D has burden of proving backpay should be reduced b/c P could have earned more w/ reas. diligence. Eer must show:
              - Existence of comparable emp.
              - Amount P would have earned
              - P’s lack of reas. diligence resulted in failure to obtain position.
         2. If eer goes out of business, that cuts off backpay.
         3. If eer makes offer of judgment.
         4. If eer makes unconditional offer of reinstatement or instatement of previously denied job, this will cut off backpay from date of offer (but not for damages) *Ford Motor Co.*
            - “Victims bringing lawsuits want jobs, not lawsuits.”
         5. If eer gets after-acquired evidence of ce’s wrongdoing which was of such severity that she would have been terminated on those grounds alone. *McKinnon*
      v. **Limited by § 796(g)(1) to period of 2 years prior to date of filing. No limitation period on ADEA.**
      1. Shanor \(\Rightarrow\) This two year limitation period is now a dead letter after Amtrak b/c now courts are permitted to only look back w/in 180/300 charge filing period unless harassment claim.
      vi. **Prejudgment interest** – Prevailing P’s may recover prejudgment interest on backpay
      vii. Miscellaneous Points from Notes:
         1. Shanor \(\Rightarrow\) Courts won’t look to good faith/ bad faith for back pay award.
         2. *Manhart* \(\Rightarrow\) only example of equitable cutback in backpay.
viii. For P to recover backpay for lost wages beyond date of retirement or resignation evidence must establish that D constructively discharged P.

I. Test varies from court to court.
II. 4th Circuit (most strict) – D must have made conditions intolerable to continue working.
III. Elsewhere – “If eer deliberately made it so intolerable on ee that he was obligated to quit.”

So what’s intolerable for purposes of constructive discharge?

- Not getting a raise = insufficient.
- Not getting a promotion = insufficient
- Sexual harassment = You’ve been constructively discharged.
- Where eer has added insult to injury = constructive discharge.
  - Ex. Eer accuses ee of stealing and then proceeds to make a public scene of ordeal, public chastising.
- Demotions = sometimes sufficient, sometimes not
  - May be part of your mitigation to stay on job and earn what you can while moving ahead w/suit.
  - Unreasonably drastic demotion may suffice.

b. Instatement & Reinstatement

i. Antidisc. statutes permit pts. to grant prohibitory and compensatory equitable relief, in form of injunction, reinstatement, or reinstatement.

ii. Reinstatement (decision of judge) – same policy of providing a “make whole” remedy underlying presumption of backpay supports a similar presumption of instatement/reinstatement.

I. A person can be reinstated and placed into seniority rankings where he would be if disc had not occurred. Franks

II. Rebuttal – Eer has burden of proving special circumstances denying instatement/reinstatement:

- No bumping of innocent incumbent – Reinstatement denied when eer proves that position P would have been entitled to is occupied by another ee who is innocent in any disc against P.
  - Currently, there is circuit court authority indicating that its allowable to bump a person in order to reinstate an ee.
  - Shanor – sees nothing wrong w/ “bumping;” feels that bumped ee should consider themselves fortunate to have job for time they did. Also, says that merely paying black ee a monetary sum equaling what he’s lost and throwing him into work force leaves unanswered problem that monetary relief is always second best.
  - NAACP against “bumping;” b/c kicking out IWE’s (interim white ees) because it creates anti-black backlash.

- Hostility or animosity – Eer can prove there is such hostility and animosity b/w P and eer that a harmonious working relationship would be impossible. Usually, triggers award of front pay as an alternative remedy.

C. Retroactive Seniority – permissible only for reasons which would not frustrate central statutory purpose of eliminating disc.

i. “Rightful place” instatement – Instead of ordering D to hire P immediately, which would displace incumbent ees, “rightful place” relief puts P on a priority hiring list. When job opens, P is hired and granted seniority back to date she was discriminate against. No incumbent workers displaced but become somewhat more vulnerable to layoff.

d. Injunctive relief – D found liable of disc is subjected to an injunction against further disc.

i. “Absent clear and convincing proof of no reas. probability of further noncompliance w/ law a grant of injunctive relief is mandatory.” Stockham Valves

c. Front Pay – compensates victim of disc. For wages she will lose after judgment date; runs from date of judgment until date victim obtains wrongfully denied position.

i. Alternative to instatement/reinstatement. Avitia
ii. Usually paid in a lump sum.
iii. Temporary in nature (usually 1-3 yrs.)
iv. Lower courts have refused to subtract unemp. benefits from front and back pay.

f. Compensatory (P must show medical bills, etc.) & Punitive Damages

i. Varies from statute to statute.
ii. § 1981 & 1983 → Both compensatory and punitive damages w/ several restrictions when sought from a govt. entity.

iii. ADEA → DOES NOT PERMIT, but does allow liquidated damages, essentially double damages for willful violations.
   I. To recover liquidated, P must establish a “willful” violation; defined as acting w/ knowledge or reckless disregard of risk that policy P challenged contravened statute.

iv. T7 & ADA → Allow such damages but place limits on amount of awards.
   I. Limitations of recovery under T7 - Punitive only recovered if D acted w/ malice or reckless indifference, but cannot be recovered from govt.
   II. T7 - Compensatory and punitive capped depending on # of ees:
       o $50,000 for 100 or fewer ees Hudson.
       o $300,000 for 500 or more. Hogan.
   III. Jury not told cap, judge reduces award to conform to cap.

v. Compensatory damages specifically
   I. Downside to asking for compensatory damages → Open P up to inquiry into lifelong medical and psychiatric history.
   II. Look to state law where there are often no caps or much higher caps than federal law.
   III. mental stress- must prove actual injury. Carey. Usually proved through testimony of P.

vi. Punitive damages specifically
   I. Focus on bad conduct of D, will come down to a jury question.
   II. Medical history of P totally irrelevant here.
   III. there doesn’t have to be a special standard of egregiousness. All that must be shows in malice or reckless indifference.

g. Attorney’s Fees - two essential issues: Entitlement & Calculation
   * Each state, w/ slight variation, contains a provision allowing atty. fees and costs. May include arb. Keenan.
   i. Entitlement: Prevailing Ps → P should be presumptively entitled to atty. fees b/c they are Congress’ tool of enforcement. Only if there are special circumstances of unjustness will presumption that a prevailing P is entitled to atty. fees be defeated. Christianburg
   ii. Entitlement: Prevailing Ds → A district court may award atty. fees to a prevailing D only upon a finding that P’s action was frivolous, unrea., or w/out foundation.
   iii. What’s a “prevailing party”?
       I. To qualify as a prevailing party, a civil rights P must obtain some relief on merits of claim that directly benefits him. Farrar

iv. Calculation of atty fees → Supreme Court has laid out formula for calculating an award of atty. fees:
   I. “Lodestar” Amount = Number of hours atty reasonably expended on litigation x a reas. rate per hour.
       I. Includes service for every stage in enforcement scheme.
       I. May need affidavit from members of bar attesting to reas. ness of your figure.
       I. Special circumstances justifying adjustment. – Rare circumstances.

v. Attys. fees in non-traditional circumstances
   I. In case of a contingency fee contract, if you prevail you still go back and collect your lonestar rate from opposition in following fashion:
       o If your rate is 30%, collect statutory atty. fees in way of 10% from defense and collect or 20% from your client.
   II. In case of a beneficial settlement for P, if its determined to be “prevailing” n he can collect atty. fees from D.
   III. What if P sues D, D realizes he does have exposure, D changes practice in response to lawsuit, but P doesn’t get anything else out of lawsuit. Here, P cannot collect atty. fees from D.

3. Relief of Systemic Disc.
   a. Retroactive Seniority & Backpay
      i. Individual relief → Where re has been a pattern/practice of disc. → Individual class members need only establish that y unsuccessfully applied for a job or would have applied. This shifts burden to e to prove D’s disc. on a case-by-case basis that individuals had not been discriminated against.
      ii. Non-app. s → Failure to apply for job does not automatically bar an award of retroactive seniority. Non-app. s have burden of establishing they were potential victims and possessed threshold qualifications for job. Eer then bears burden of proving lawful reasons existing in emp. decision.
      iii. You can have Phase 1 litigation on merits and Phase 2 on remedies. Teamsters
GENERAL INFO

A. Statutes → Title VII, § 1981, § 1983, ADA, ADEA, PDA, EPA
   a. Rights extended to whites as well as blacks, drawing no distinction b/w Title VII and §1981. *McDonald v. Sante Fe Trail Transportation Co.*
      i. Most lawyers end up filing under both as one law covers something that or did not.
      ii. Sex disc. → T7 applies only, but for race, color, n/o, or religion, 1981 could apply due to 19th century definition of “race.”
   b. When § 1981 is better than T7
      i. 1981 broader than T7 as it covers all emp. CONTRACTS, even those of small ers; reaches beyond emp. to race.
      ii. 1981 requires no filing with EEOC
      iii. 1981 – longer SOL
      iv. 1981 remedies broader than those of T7 due to absence of statutory cap on damages.
   c. Areas Covered by Title VII and not 1981
      i. Sex Disc.
      ii. Disparate Impact Cases
      iii. Some treatment by eer not covered 1981 (1981 relates to freedom to contract); ex. racial harassment would not be appropriate under 1981.

INDIVIDUAL DISPARATE TREATMENT

A. Pre-'64 CRA-
   a. All ees were at will, can be fired for any reason at any time (Common law at will rules)
B. Definition of disparate treatment- different treatment.
   a. Central Question → Were D’s actions were motivated by discriminatory intent?
   b. Discriminatory intent proved through:
      i. Direct evidence (Memo written by company president stating that he did not hire P b/c she is a woman.)
      ii. Circumstantial evidence (Records showing that no woman has ever been hired by D even though many qualified women have applied.)
C. Figure out which framework to use: Courts determine which analysis to use at end of evidence, instructing jury of which framework applies.

D. Always start with whether evidence is direct (Price Waterhouse), if not, McDonnell is default position. Direct evidence is one that proves a fact at issue without having to draw an inference.

Price Waterhouse – 1. Direct Evidence 2. Same decision would have been made w/out evidence*

a. McDonnell Douglas/Burdine (Circumstantial Evidence): (easier for D)
   i. P’s PF case: (easy to prove)
      1. Protected group (T7- sex, religion, n/origin, race, color. ADEA- age. Section 1981- race, ancestry, alienation)
      2. Applied for and was qualified for job
      3. Denied position despite qualifications (rejection is rarely at issue)
      4. Job remained open (when someone else was promoted or downsized)
   ii. D’s Rebuttal (Shanor → Easy to Prove)
      1. “Articulate legit non-disc reason” McDonnell
      2. D doesn’t have to show it was motivated by proffered reasons, sufficient that D raises genuine issue of fact whether it discriminated” Burdine
         a. Juries may infer other reasons than those given by D. Hicks
      3. D has burden of production, not persuasion. Burdine
         a. L & G → D’s burden is one of only going forward, of adducing evidence, ultimate burden of persuasion always rests w/ P. Hicks
         b. L & G → Some courts have held that D’s proffered reason for discharge may be deemed insufficient where it is too vague, internally inconsistent, or facially not credible.
      4. Reason doesn’t have to be legal. Hazen Paper
      5. L & G → Common reasons:
a. Lesser comparative qualifications, inability to get along w/ ows, misconduct, need to eliminate jobs, insubordination, inferior test scores, poor performance, need to comply w/ rules set in union contracts, greater familiarity w/ favored D’s work.

7. Common defensive strategy - “same decision-maker” – no reasonable inference of disc. arises here b/c decision-maker would be unlikely to discriminate against same individual, particularly in a short-period of time. “He hired you, why would he fire you?”

iii. P’s surrebuttal of Pretext:
1. P shows that real reason was pretext for disc
2. P has burden of persuasion of intentional disc.
3. P must prove that protected trait actually played a role in D’s decision making process, and had a determinative influence on outcome. (“but for” showing). Biggins
4. L & G – Three categories of evidence proving pretext:
   a. Direct evidence of disc. such as discriminatory statements or admissions
   b. Comparative evidence (P was more qualified than person hired or that replaced P)
      Patterson – most common;
   c. Statistics – admissible but rarely determinative; Shanor is skeptical.

Shanor – Extremely DIFFICULT; this is where many cases are won/lost.

- Shanor – some federal judges believe that MD framework is very malleable, subject to judge’s personal assessment of credibility.
- L & G – This analysis applied to disparate treatment in: hiring, discharge, discipline, promotion, transfer, demotion, retaliation, and or contexts.
- Summary Judgment – D can move for SJ after discovery; SJ allowed much more freely than in past; granted either b/c P isn’t able to create at least an issue of fact as to each element of his PF case OR b/c he is unable to establish at least an issue of fact that D’s nondiscriminatory reason is pretext.

b. Price Waterhouse: Direct Evidence (intent to discrim) (more difficult on D)

Note: Price Waterhouse overruled by 703(m) of CRA of 1991. However, with respect to two federal statutes (1981 or ADEA) this case is still good law:

i. PF showing of motivating factor: (direct or circumstantial plus) P proves liability b/c race was motivating factor in decision
   1. Shanor – Very often, outstanding direct evidence (memo or testimony) n/a.
ii. D defenses: D can limit P’s remedies to declaratory and injunctive relief if it can prove by preponderance of evidence that it would have made same decision without considering characteristic \( 706(g)(2)(B) \)
    (more on this below).
   1. Title VII (under Civil Rights Act of 1991, new § 703(m) 42 U.S.C.A § 2000e-2(m)) – P shows illegitimate criteria was prime motivating factor, even though or factors also motivated.
   2. Non-Title VII (ADEA & 1981; still using Price Waterhouse Standard): P must show that illegitimate criteria was a substantial factor.
iiii. § 703(m) limits P’s remedies where a violation has been established; § 706(g) provides that if D “would have taken same action in absence of impermissible motivating factor,” then...
    1. P may only get atiny fees, declaratory and injunctive relief, but NOT backpay, front pay, emotional distress, instatement, reinstatement or promotion. 706(g)(2)(B)(i)

iv. As a P – tie discriminatory remarks to decision-making process.
   As a D – separate or isolate decision-making process from inappropriate remarks.

**SYSTEMIC DISPARATE TREATMENT**

Note: P prefers systemic disparate treatment b/c
- Trial by jury
- Potential for compensatory and punitive damages
- Only BFOQ defense available

I. 2 kinds Disparate Treatment:
A. Formal Policy of disc. : written or oral statement that it discriminates

1. formal policy of disc.
   a. D admits policy (i.e. voluntary affirmative action)
   b. P shows it by inference (Manhart)
   c. If formal policy, no need to go through PW paradigm, employer MUST use BFOQ or AA plan as defense.

2. Defenses:
   a. NO defenses of business necessity (Johnson Controls) and lack of disparate impact (Manhart)
   b. 4 essential ways to defend systemic disparate treatment
      1. Rebut stats or facts at hand.
      2. Rebut inference derived from stats... i.e. No policy exists
      3. BFOQ (only for formal policy).
         BFOQ- (applies only to religion, sex and n/orign and through ADEA; NOT race)
         → 703 (e)
            1. qualification is reasonably necessary to essence of business; not merely “convenient” or “reasonable.” Western Air Lines
               a. Must be qualification at “essence” of the business. (Diaz).
            2. No member of group can perform job OR impractical to determine on a case-by-case basis.
            3. Shanor → Usually when BFOQ is in question, court will take an individual case by case examination of discriminatory practice.
               * Remember BFOQ construed very narrowly, otherwise would negate purpose of T7.

   Analysis: D raises voluntary affirmative action as defense, P should argue:
   1. There is no plan and D is just now asserting he used a “plan” in making disc. emp. decisions.
   2. D’s method of operation = “structured disc.” (ex. one month you hire a male, next month a female), no candidate treated fairly w/in pool.
   3. No appropriate predicate for plan such as:
      a. Prior disc.
      b. PF case of disc.
      c. MANIFEST IMBALANCE -- this is really what it boils down to; this is what D must show to justify.
   4. Plan trammels rights of majority, cannot clear slots for non-majority individuals, must be temporary, and should not constitute a quota. Weber.

B. General Pattern/Practice: Shown through statistical and anecdotal evidence of gross and long lasting disparate treatment by D b/c of characteristic. Teamsters (involving D whose cumulative decisions support inference that it in fact discriminates, even if it denies it.)

1. Take a snapshot of racial workforce at time of lawsuit.
   a. Statistics are enough to support a pattern/practice case (Teamsters)
      i. An expert to refute D’s interpretation of stats will help.
   b. No anecdotal evidence will make case harder to win for P. (Sears) Illustrative example (i.e. story of one P who was denied position.)
      i. Inexorable zero – anecdotal evidence matters less where some of “discriminated against” class is hired.
      ii. Some lower courts emphasize anecdotal.

2. Examples of pattern/practice:
   a. History of alleged racially discriminatory practices
   b. Statistical disparities in hiring
   c. Standardless and largely subjective hiring procedures.
   d. Specific instances of alleged disc.

3. D’s workforce vs. qualified labor pool is key to making out a practice of systemic disparate treatment disc.
   a. Statistics matter less as group gets smaller.
   b. Remember! Compare D’s labor pool to qualified labor pool: variables are “qualifications needed” and “geographic area.”
4. **Sources of Qualified Labor Pools:**
   a. *App. s for jobs* (*App. Flow Data*)
      i. This is preferred over forms of demographic data.
      ii. WARNING ON THIS ONE! *Dothard*—no requirement that stats must be based
          on characteristic of actual app. s, b/c application process may not reflect app.
          pool.
   b. *D’s own work force* as a labor pool (i.e. a higher paid division w/in same company) →
      sometimes best for P to use.
   c. *General Geographic Labor Market* for particular job → potential workers w/ min.
      qualifications; used w/ unskilled/low-skilled jobs. *Teamsters*
   d. *Qualified workers in Geographic Area* → used when special skills/education needed.
      *Hazelwood*

5. **Evaluating Statistics:**
   a. Court “eyeballs” situation
   b. Expert statistician (**EEOC standard**) > 2 standard deviations from mean is statistically
      significant (probability of a random occurrence of non-disc. < 5%)
      i. Everything inside 2nd standard dev. = 96%
      ii. variables should include: race, sex, ed, experience. *Bazemore.*

6. **Arguments:**
   a. P → want to show few minorities in D’s workforce w/ many available in labor pool.
   b. D → show it has many minority group members in workforce & few available in labor
      pool.

7. **D’s Rebuttals:**
   a. *Challenge stats.*
      i. Show that or factors left out of statistical analysis like education, experience,
         qualifications. *(Smith)*
      ii. Might be able to show that generally black females are less interested in this job. *(Sears)*
   b. *Challenge inference of disc.* (ex. word of mouth hiring is NOT a hiring practice)
      Argue that D acted in *spite of,* not b/c of adverse effects on particular goup. *(Personnel
      Administrator v. Feeney)*

**Note:** § 712 of Title VII explicitly excepts veterans’ preference laws from attack under statute.

**SYSTEMIC DISPARATE IMPACT**

- Definition: don’t need proof of intent to discriminate, focus on practices that weigh more heavily on protected group than
  majority. § 703(k)
- First established in *Griggs v. Duke Power Co* w/ following framework:
  1. P → show DI (heavy burden of persuasion) *(Griggs/Albermarle)*
  2. D → Justify rationale behind test, i.e. business necessity (heavy burden of persuasion).
     *(Griggs/Albermarle)*
  3. P → Alternative test was available and D refused to adopt it. *(Kept from Wards Cove)*
     *Note: this is a very light component of this framework in comparison to MD pretext prong.
- *Shanor*—Griggs decided largely on public policy grounds; majority opinion by J. Burger—“Diplomas and tests are
  useful servants, but Congress has mandated common sense proposition that they are not to become masters of reality.”
- **SDI** Not available under § 1981 or § 1983 b/c of contract
- D has burden of production and persuasion of “strict” business necessity

I. Analysis:
   A. **P’s PF CASE** — D uses practice causing disparate impact on basis of race, color, sex, n/o. (5 Parts)
      1. *Particular Emp. Practice* — P must show that there is a specific practice.
         Examples of Appropriate Practices to Attack:
         - Active practice of D. Can’t use DI for passive practice such as word of mouth hiring b/c not a
           practice.
         - Does not apply to across the board vacation time or fringe benefits b/c not considered a practice
         - P can attack **objective (tests)** as well as **subjective practices** (ex. evaluations).
i. CRA 1991 modified Wards Cove - § 703(k)(1)(B)(i); **bottom line exception** → in establishing a PF case of DI "if P can demonstrate that elements of decision are not capable of separation for analysis, decision making process may be analyzed as a single practice.

iii. Using only a particular labor market may be subject to DI model (ex. Cicero, Illinois (all white town hit w/ several law suits).

2. D’s use of practice – national data or data based on use of practice by other eers is sufficient.

3. **Amount of Impact**
   i. SC “eyeballs” stats to see if sufficient
   ii. Stats:
      a. **App. Pool**: compare # of blacks who took test w/ # of whites who passed. EEOC uses “four-fifths” rule for purposes of administrative enforcement = selection rate for race, sex or ethnic group is less than four-fifths of rate for group w/ highest rate.; B < 4/5(W)
         * Shanor → smaller sample, less significant application of this rule will be. Also, this rule generally used w/ DI; not DT; Conversely, larger sample better.
      b. **Demographic Labor Pool**: compare # of people in that protected group affected by policy w/ majority. Dothard. Use this when job requires “qualified” app. s. Look to appropriateness of labor pool.
   iii. How much is enough? **Sophisticated stats not necessary for DI, but some lower cts may ask**
      a. 4/5 rule
      b. 2-3 STD (Teamsters)
         * L & G → 0.05 probability level or below is accepted by many cts. as sufficient to rule out chance. (Review this)
      c. Multiple Regression Analysis (Bazemore)
   iv. **Actual** (Griggs; app. pool) vs. **theoretical** (Dothard; population)
      a. In Dothard, ct looked to theoretical, whereas in Griggs looked to actual. Why? If D broadcasts a rule to entire population, then using theoretical impact model would be correct b/c D has essentially “poisoned waters.”
      b. Note: Most courts will stick w/ ACTUAL IMPACT, esp. when re is an absence of “skewing effects” on app. pool.
   vi. Perspective is everything! Shanor’s example – 100 Whites apply for job and 100 blacks apply for job. 99 Whites are hired and 98 Blacks are hired.
      Got in = 99% of whites and 98% of blacks = no impact.
      Left out = 1% whites and 2% blacks (twice as many) = impact

4. **Impact is Adverse**
   i. Rises in cases involving claims of n/o disc. with bilingual ees; b/c they are able to speak English, bilingual ees are NOT adversely affected.

5. **Impact is to a Protected Group**
   i. Not clear whether DI theory available to white males *Los Angeles Dept. of Water & Power v. Manhart.*

B. **D’s Defenses**

1. **There is no disparate impact.** § 703(k)(1)(B)(ii) – if D demonstrates practice does not cause DI, then D doesn’t need to show practice is required by business necessity.
   i. **REFUTING P’S DATA**: D can use data from its own use of practice to escape liability under § 703(k)(1)(B)(ii) after P uses national data or data from other eers. Dothard
      1. Shanor → Another approach – we looked at demographic data, here’s our app. flow data which refutes your inference of disc.
   2. **Is demographic data or app. flow better?** Depends on circumstances. If you’re talking about disc. towards entire world – demographic is preferable. For internal disc., app. flow is better.

2. **“Job Related and Business Necessity”**
   i. § 703(k)(1)(A)(i) – challenged practice is job related for position in question and is consistent w/ business necessity.
   ii. This defense is very narrow. *Albermarle, Beazer, Teal.*
   iii. This is significant in 3 ways:
      1. **Mention this on exam** → Congress rejected Ward’s Cove view that (1) practice need merely be justification and (2) that P carried burden, returning to stricter notion of business necessity w/ both burdens on D.
         A. P still has to specify practice.
B. P still must show a causal connection.
2. Plain meaning of § 701(m) = burden on eir is one of persuasion and not merely production.
3. Requires eir to demonstrate that challenged practice is BOTH:
   A. job related AND
   B. justified by business necessity (the following is for tests...)
   I. Prove each step is business nec.
   II. Scrambled eggs theory – scramble full factors for assessment of ability.
   III. University – having a composite score that’s like a scale.
iv. Life and death (safety) issues lean towards a finding of business necessity. (Fitzpatrick); also see Spurlock v. United Airlines.
v. REMEMBER! Ceiling- test should demonstrate reasonable measure of job performance (Albermarle/Beazer/Teal). Floor- test should only require minimum qualifications necessary (Lanning)
vi. Thus, efficiency-based policies likely to fail. See Lanning below.
3. OR it falls under 3 STATUTORY exceptions:
   i. professionally developed tests
      1. 703(h) – authorizes use of “any professionally developed ability test” not “designed, intended or used to discriminate b/c of race.”
         a. If test performance and job performance aren’t correlating then test is going to be found invalid. Albermarle v. Moody
         b. A discriminatory cutoff score on an entry level emp. examination must be shown to measure MINIMUM qualifications necessary for successful performance of job. Lanning v. Souastern Penn. Tran. Authority
      2. Must show tests are job related or matter of business necessity.
   2. Professional Test Validation Standards:
      1) Criterion-related – like a controlled experiment; D administers tests and records scores to a sample of app.s; hires all of them and then, after workers have been working for a while, evaluates their work performance using trained evaluators and standard scoring measures. If there is a high correlation b/w scores workers get on test and job performance, then test is considered valid b/c high test score predicts good performance.
      2) Content validation → used when a test purports to measure existing job skills. If test is a good sample of what workers who get job will do, it is valid. (Ex. test used in Gillespie v. Wisconsin (7th Cir. 1985)
   + Differential validation and race test scores.
703(l) → cannot raise scores of disadvantaged group, “It shall be an unlawful emp. practice......to adjust scores of, use of different cutoff scores..."

ii. Bona Fide Seniority System § 703(h)
   1. Only systems that are collective bargaining agreements b/w eir and a union are sheltered by § 703(h).
   2. 703(h) requires D to prove challenged policy is in fact a traditional component of a system of seniority.
   3. Questionable seniority systems (Stockman Valves):
      • Does system operates to discourage all ees equally from transferring b/w units? If so, not ok.
      • Seniority units are separate bargaining units? If so, was it industry norm? If so, probably ok.
      • Did system have genesis in racial disc.? If so, not ok.
      • Was system negotiated (collective bargaining agreement) and maintained free from illegal purpose? If so, it’s ok.

iii. Bona Fide Merit or peacework system § 703(h)
   1. If system ranks person on performance on discriminatory exam not BFMS. Guardians Assn.

c. P’s Surrebuttal: P wins by proving an alternative emp. practice existed that caused less impact, but would serve D’s legit business needs and D refused to adopt it.
   1. L & G → How effective does alternative have to be?
i. D will contend that alternative must be at least equally efficacious from eer's standpoint, both in terms of costs and results.
ii. P will say any valid selection device will suffice, 1991 CRA eliminated rigorous requirement.

2. L & G → Eer Knowledge:
   i. D will argue test can be met only by showing that D had actual knowledge of equally efficacious alternative selection process.
   ii. P may contend that D can be liable if it knew or should have known of alternative.

GENDER

A. Types:
   1. Classic – person not hired b/c female
      → treat as classic T7 violation: choose theory and apply paradigm (McDonnell-Douglas, 703(n), modified Price Waterhouse, formal policy or pattern/practice systemic DT, or 703(k) Griggs DI).

2. Pregnancy Disc.
3. Sexual Harassment
4. Sexual Orientation
5. Grooming and Dress Codes

B. Pregnancy Disc.
   1. PDA – amendment by Congress to overturn Gilbert by defining “sex” to include “pregnancy.”
      a. Made it illegal under T7 to discriminate based on pregnancy.
      b. 701(k) gives convoluted definition of pregnancy
         i. Clause 1 → “because of sex” or “on basis of sex” includes pregnancy or related medical conditions.
         ii. Seems to allow individual DT, systemic DT, and systemic DI.
      c. Intentional disc. only tolerated if BFOQ is present.
         i. BFOQ may include setting moral example for girls’ home. Chambers. BFOQ to not have preg flight attnnds during emergency. (Leonard, Harriss)
      d. P flouts rules, she can be fired. Troupe (Posner – no one else would have been allowed to continually show up tardy for work.)
      e. D may not give benefits to married male ees that is less inclusive than that afforded to married females. → SC adopts EEOC position on absolutely no pregnancy-base limitations. Newport News
      f. NOT reasonable to ask D to create new job position for preg woman.
   f. Conversely, some courts using much more of a DT approach to pregnancy disc. → D failure to hire pregnant woman who would require a leave of absence soon after starting work = no T7 violation.
      i. Under DT, D may defend showing equal treatment to preg. and non-preg. sick leave.
      ii. Shanor – points out graphically how DI and DT theories play out differently in regard to pregnancy disc.
      g. PDA does not pre-empt a state statute requiring eers to provide leave and reinstatement to ees “disabled” by pregnancy. (Guerra)
         i. “Congress intended PDA to be a floor beneath which pregnancy disability may not drop – not a ceiling above which y may not rise.”
      h. P should try to connect PDA claim to similar ADA hypo. (ex. X w/ arthritis who had not been fired, then P (preg.) should not have been fired.
      i. Lactation does not occur w/out pregnancy preceding, however, a number of courts have cast doubts upon assertion that breast feeding is related to pregnancy b/c or alternatives are available to pregnant woman.

2. Effect of PDA on Main Theories of Disc.
   a. Individual Disparate Treatment – 2nd clause has caused major problems in application of individual DT to pregnancy. “Equal treatment” should mean D treats P same way it would treat ee similarly situated in terms of ability to work but was not pregnant.
   b. Formal pregnancy policies are Systemic Disparate Treatment – whether a formal classification of pregnancy violates PDA depends on whether classification serves to treat pregnancy less favorably or more favorably than other similar situations. Newport News Shipbuilding
      i. Formal policies treating pregnancy more favorably – NOT a violation of § 701(k). Federal Savings & Loan v. Guerra (701(k) does not forbid eers from giving special preferences for pregnancy benefits.)
c. **FMLA** (29 U.S.C.A. § 2601) - requires covered ees provide up to 12 weeks of unpaid leave “because of birth of a son or daughter of ee and in order to care for such son or daughter.”

d. If D has **policy that applies to everyone** (ex. No sick leave!)
   
   **DT**: no violation of PDA  
   **DI**: violation of PDA  

**e. Systemic Disparate Impact** - according to 2nd clause SDI may NOT apply.
   
   i. Impact on pregnant women may be impact on women. **EEOC v. Warshawsky & Co.**  
   ii. For DI, P’s proper comparison is preg. fired vs. non-pregnant fired.

### C. Sexual Harassment

*Note: Sexual harassment unique b/c:

1. It is **nearly indistinguishable** from “normal” social relations b/w men and women.
2. Sexual harassment can **violate T7 even if victim suffers no adverse emp. decision or economic impact**.
4. Harassers are often **satisfying their own interests**, rather than seeking to further their eer’s interest.
5. B/c controlling discriminatory harassment in workplace by disciplining harassing ees may relieve D of liability, discriminatory harassment raises questions about **rights of ees who perpetuate this form of disc.**

**Elements of Sexual Harassment Claim:**

1. Harassment MUST be **either Quid Pro Quo or Hostile Environment**
2. Harassment MUST be b/c of sex
3. D liability MUST be est. by showing supervisor was aided in harassment by his authority:
   
   a. Tangible employment action was taken against P ... OR  
   b. D was negligent b/c it knew or should have known of the harassment by supervisor/co-workers and failed to correct it

(show EITHER 1 or 2, then do the rest)

1. **Quid pro quo**— P is threatened by a supervisor, “sex or your job.”
   
   a. when P relents and has sex or she refuses and suffers tangible emp. action.
   
   b. Unwillingness — “gravamen of any sexual harassment claim is that alleged sexual advances were unwelcome.” **Merit**
      
      i. Focuses on victim’s behavior → whether P by her conduct indicated that alleged sexual advances were unwelcome, **NOT** whether her actual participation in sexual intercourse was voluntary. **Merit**
      
      ii. Sexually provocative speech or dress may be relevant to inquiry.

   c. Treated like a **Disparate Treatment** case.

2. **Hostile Environment** — even where sexual relations is not involved, case still can be made out when workplace is “permeated w/ ‘discriminatory intimidation, ridicule, and insult.’”
   
   a. **Severe or pervasive** to alter emp. conditions - creating an abusive working environment.
      
      i. **Severity**
         
         I. Typically need a **number of occurrences**  
            *Usually a single act will not suffice, unless bad physical contact (Lockard) or rape (Tomka)*
         
         II. EE can use **harassing events towards other** if she knew of them & they impacted her.
         
         III. Factors: **Power & Presence** of perp.
         
         IV. Shanor → comments alone often NOT enough to be “severe and pervasive.” *(Harris).* This helps skirt first amendment free speech violations.
            
            o If most of what he said could be on prime time TV no harassment. **Baskerville**
            
            o Courts are reluctant to find harassment for single instance of verbal conduct (Burggraf)

      ii. **Pervasiveness**
         
         I. Depends on court*
         
         II. Race is different b/c racial harassment always unwelcome were sexual advances may not be.

   iii. **Unwelcome**
      
      I. Unwelcome separate from severe and pervasive; test is not whether voluntary but welcome.
      
      II. Dress & Actions may influence unwelcomeness. **Merit**

b. **All relevant circumstances** — necessary to look at all circumstances including:

   i. **frequency** of discriminatory conduct
   
   ii. **physically threatening or humiliating**
   
   iii. **unreasonably interferes w/ P’s work performance**
iv. more than a mere offensive utterance
v. Use of P's provocative dress and publicly expressed fantasies may be used against P. Meritor

**c. Objective and subjective**

i. **Objective prong** – would a reasonable person find this conduct severe and pervasive enough to alter working conditions.
   I. Adding context to equation → in same circumstances would a reass. person find conduct severe and pervasive. Oncale
      A. Examples: gender, size, position, type of job, person’s conduct at work, dress at work, relationship w/ perp, but NOT outside sexual conduct. Burns v. McGregor
      B. Foul-mouth P problem – juries are often not sympathetic to those Ps who have participated in sexually charged or hostile atmosphere.
         * Shanor → If P is telling dirty jokes this doesn’t give others in workplace right toouch/perform escalated sexual harassment acts.

ii. **Subjective prong** – was harassment subjectively abusive to victim (what a reass. person might find to be enough might not affect P in question.)

Shanor →
1) These things are now jury decisions. Juries have substantial discretion subject only to judicial oversight that no reass. person could reach this conclusion under law.
2) Raw language, compliments or criticism – not necessarily sexual harassment.

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**3. Harassment MUST be “Because of Sex”**

a. P must prove that conduct at issue not merely tinged w/ sexual connotations, but actually constituted “disc. because of sex.” Oncale v. Sundowner Offshore Servs. Inc.

Ways to prove b/c of sex:
   i. Shanor → Comments from men to women that are simply mean-spirited are NOT “because of sex.”
   ii. Male-female quid pro quo – challenged conduct involves explicit/implicit proposals of sexual activity (assuming they were not made to members of other sex.)
   iii. Male-male quid pro quo – same sex harassment recognized but harder to show harassment was b/c of sex (and not some characteristic of P). Oncale
      I. Shanor → Might need to bring in an expert that has studied male-only work subcultures that could testify that it’s only because male is not a woman that he is being harassed.
      II. Might also attempt to use Price Waterhouse to argue that male is being harassed b/c of his sex as he does not fit sexual stereotype.
      III. Some courts say “same sex” won’t be b/c of sex unless both homosexual. (McWilliams).
   IV. Homosexuals have no ADA claim or T7 protection (§ 508 ADA & DeSantis).
   V. Homosexuals may have state or constitutional law claim. (Ca. Cay Law Students Assoc.)

   iv. Female-Male – Men can have claim if women harass. (Dominoes)

   iv. Not motivated by sexual desire→ still violates T7 when harassment is b/c of sex. (i.e. general hostility to women in workplace or derogatory terms used.)

   v. b/c of race, color, religion and n/o – can still use hostile environment argument. Harris (Supreme Court).

**4. Harm to P:**

a. P NOT required to show econ/physical harm. (Meritor), nor psychological injury (Harris) for T7. “Title VII comes into play before harassing conduct leads to nervous breakdown.” Harris
   i. Tangible emp. action = significant change in emp. status.
   ii. If P shows tangible emp. action against P → NO affirmative defense available. Ellerth.
   iii. If P does NOT show tangible emp. action → D may have affirmative defense to cer liability where supervisor is harasser. (see below…)

**5. D Liability for Harassment:**

a. Quid pro quo- if D has delegated or given authority to discriminating supervisor → D liability. Tangible action taken by a supervisor = cer liability.
   i. Note however, that Ellerth defense (5b below) is available for instances of empty threats to emp. status (i.e. “You’ll get fired if you don’t…”)
   ii. Bottom line, tangible emp. action = cer liability.
      I. Court split over what constitutes “tangible emp. action.”
      II. Usually write-up scenarios don’t constitute tangible action.
      III. Rebecca Haner of UGA – anything subject to review, whether or not written ought to be called tangible emp. action.

b. Hostile environment harassment by a supervisor is NOT conduct w/in scope of emp. Ellerth.
i. Shanor \rightarrow\text{ Eer’s need to establish firm policies so that ees are aware of company’s disdain for inappropriate behavior b/f case ends up in front of jury.}

ii. Don’t forget to sue supervisor individually through state action or tort claim.

\textbf{c. 3 Exceptions to liability:}

i. Vicarious liability: D is subject to vicarious liability to P for hostile environment created by a “supervisor with immediate (or successively higher) authority” over P. Ellerth.

ii. Where supervisor does NOT take tangible emp. action against P \rightarrow D may raise affirmative defe.

\begin{itemize}
  \item proving by preponderance of evidence following 2 facts:
    \begin{itemize}
      \item I. P unreasonably failed to take advantage of preventive/corrective opportunities.
        \begin{itemize}
          \item Failure to follow anti-harassment policy/complaint procedure. \textit{Gary}
          \item Failure to reasonably avoid harm. AND \rightarrow
        \end{itemize}
      \item II. Eer exercised reasonable care to prevent and correct promptly any sexually harassing behavior.
    \end{itemize}
  \end{itemize}

- \textit{Eer takes adequate response to fire when it finds out. Kaufman}

\textit{Even if D has anti-harassment policy, D is still liable to victim of tangible emp. action by supervisors who harass (either quid pro quo or hostile env.).}

\textbf{iii. Co-Worker Hostile Environment \rightarrow D is liable if negligent (i.e. D should have known about conduct and failed to stop it.)}

d. \textit{Eer hear rumors of sexual harassment, should examine rumors, put them rest. Shanor.}

e. \textit{Temps? Eer may still be responsible for temps.}

i. Shanor \rightarrow strong incentive for courts to consider temps to be “ees” for purposes for T7. their temp agency cannot look after them, etc. Or “ee” characteristics – under direction of eer supervisor, not using their own tools or facilities, etc. However, very little case law here.

f. \textit{Customers? No eer liability for customers under T7. Might very well have tort liability if there was physical touching or groping involved. If customer is perp, D can avoid liability by taking reasonable calculated responses to end harassment. Adler}

\textbf{6. Grooming and Dress Codes:}

a. This is an exception to T7 proscription of formal policies of sex disc.

b. Separate dress codes are NOT per se disparate treatment.

c. Dress Codes must NOT create erroneous impression as to authority/rank of men and women. \textit{(Carroll).}

d. Shanor \rightarrow\text{ Here we find essentially an exception to general T7 standard, insomuch as grooming standards p. one sex in a subordinate position to other.}

e. 8 th Cir. denied a man’s challenge to an eer’s rule prohibiting male, but not female, ees from having hair longer than shoulder length. \textit{Willingham v. Macon Telegraph}

f. Often grooming and dress codes too trivial for courts to concern themselves with.

\begin{tabular}{|l|}
  \hline
  \textbf{REligion} \ \\
  \hline
  1. Classic Discrim (T7) \ \\
  2. Failure to accommodate (701j) \ \\
  \hline
\end{tabular}

\textbf{A. General Info. :}

1. \textit{T7 \rightarrow It is unlawful for an eer “to fail to or refuse to hire or to discharge any individual, or otherwise discriminate against any individual w/ respect to his compensation, terms, conditions, or privileges of emp. b/c of such individual’s religion.” 42 U.S.C. § 2000e-2(a)(1).}

2. 1972 -- Congress created special cause of action under T7 for a failure to accommodate religious beliefs - § 701(j).

i. Includes “observance and practice” of religion.

3. If P not hired or fired for religious beliefs use \textit{McDonnell Douglas or Price Waterhouse} paradigms.

\textbf{4. NO DISPARATE IMPACT for religious discrim.}

5. It is violation of T7 to discriminate b/c P is not of a particular religion. \textit{Shaparia:}

6. Shanor \rightarrow Cts. may show a little bit higher level of scrutiny for those religions which aren’t traditional. Courts will also examine lack of sincerity for those P’s claiming religious disc. who haven’t been practicing ir religion actively for years or ever.

7. Few \textit{atheists} filings claims – Practically its simply not a problem b/c no lack of acc. issues. Additionally, athies don’t wear their belief in no god on their sleeves, thus no one knows to discriminate against m.

\textbf{B. P’s PF case:}

1. adverse action

2. qualified (current job performance was satisfactory)

3. evidence- additional evidence to support inference that emp. actions were taken b/c of discriminatory motive based on ee’s failure to hold or follow eer’s beliefs

4. \textit{Sincere} religious belief – broadly defined, and difficult to rebut.

5. Belief conflicts w/ eer’s rule – easy for P to prove.
6. *Eer knew* of conflict – D need only have enough info. about P’s religious needs to permit D to understand existence of conflict. *(Van Koten)*

7. *Eer didn’t satisfy* P’s belief.

C. D’s *Rebuttal*: Proof of PF shifts burden to D to prove:

1. **Reas. acc. has been provided.**
   
   a. If it was reas., that end’s P’s case- section 703(j) – even if acc. did not satisfy P. *Wilson* (anti-abortion buttorn)
   

   - Ct. stated that reasonable acc. need NOT completely satisfy ee so long as some effort to accommodate has been made. *Philbrook*
   
   - SC has held that D not required to select P’s proposal in order to sufficiently comply with statute. *Ansonia.*

2. **Undue Hardship**: D need not bear more than *de minimis* in accommodating P. *Hardison.*


   Side point > A number of courts have rejected claims b/c P didn’t allege or prove her religious belief required certain conduct, even if they admittedly motivated it.

D. **Exemptions** listed under T7: *Does not exempt harassment or other discrim.* *(Bellard)*.

1. **Religious *Eer***: 702(a).

   a. Factors determining “religious institution”
   
   i. Purpose (not secular).
   
   ii. Faculty’s Religion
   
   iii. Student body’s religion
   
   iv. School activities (predominantly religious)
   
   v. Curriculum

   b. Shanor > What if a Methodist Church runs a subsidiary book store? At some point 702(a) becomes too attenuated.

2. **Religious Curriculum**: 703(e)(2) – Disc. by educational institutions that propagate particular religion.

   a. 703(e) – construed narrowly; test is *whether institution* is “primarily secular” or “primarily religious” taking into account ownership, affiliation, purpose, faculty, student body, student activities, and curriculum.

3. **BFOQ**: 703(e)(1). – *It’s ok to employ individuals in certain instances where religion is BFOQ reasonably necessary to normal operation of particular business.* *(Ex. Loyola Jesuit priests in philosophy.)*

   If D is religiously affiliated make sure you look at different statutory exclusions and constitutionality of such exclusions.

E. **Constitutional Concerns**: free exercise and establishment clause of 1st amendment raise constitutional concern over T7.

1. **Free Exercise Clause** – makes application of proscription against disc. unconstitutional when applied to key positions in religious institutions.

   a. 703 violated free exercise clause b/c sex discrim ok when P had to teach religious class. *EEOC v. Catholic Univ.*

   b. This ministerial exemption also applies to lay ccs who primary duties consist of teaching, spreading faith, church governance, etc. ex. *Church can pick its priest*

2. **Establishment Clause**:

   a. 702(a) and 703(e)(2) give religious orgs and schools authority to discriminate in favor of members of their own religion, while not being in violation of establishment clause. Ex. *We want to hire from our own religion (can’t discrim b/c of sex).*

   b. 3 Part Test to examine constitutionality of law under Est Clause, from *Lemon v. Kurtzman* (SC):

   i. Law at issue serves a secular purpose (702(e) serves a secular purpose and alleviates governmental interference w/ ability of orgs to carry out their missions.)

   ii. Primary effect must not advance/inhibit religion.

   iii. No impermissible entanglement of church and state.

   c. As long as religious institution is NON-PROFIT, special exemptions (702(a), 703(e)(2), 703(e)(1)) do not violate establishment clause.

   d. 703 deals w/ duty of religious eers not to discriminate on base of race, color, national origin, and sex (for non-ministerial), however 702 exempts religious institutions from proscription of religious disc. in emp.
A. General Info.

If you're from a certain country and D not hiring you b/c of that = unlawful.
If D clearly favors people from America = unlawful.
J's purely citizenship \rightarrow That's NOT national origin disc.

   a. Illegals have no protection under T7.
   b. N/O disc. = disc. b/c of country you or your forbears came from.

2. N/O disc NOT covered under § 1981 but... disc b/c of "ancestry or ethnic characteristics," race and alienage ARE covered by § 1981.

3. Accent disc. is per se N/O disc. (per EEOC guidelines), but emp decisions MAY be predicated on accent if it impacts P's ability to do job (BFOQ). Garcia v. Rush-Presbyterian-St. Luke's Med. Ctr.
   i. Spun Steak - allowed English only rule where workers were bilingual.

4. DT and DI theories apply to N/O disc.

5. Immigration Reform and Control Act of 1986 \rightarrow REQUIRES an eer to discriminate against "unauthorized aliens," but prohibits disc. b/c of national origin or b/c of protected status of a U.S. citizen or national or an "authorized alien."

AGE... ADEA

A. General Info.

1. Section 4(a) of ADEA prohibits disc. "b/c of such individual's age" rather than disc. b/c of race, color, religion, sex, or n/o. Everyone over age of 40 is protected. Section 12.

2. It is ok to take action otherwise prohibited where differentiation is based on reas. factors or than age.

   2 Exceptions:
   a. Bona fide executives - Section 12(d)(1) - can make BFE (or higher policy maker) retire at age 65 so long as he is entitled to pension of at least 44K.
      i. Note: In-house counsel are not BFE. Whittlesey v. Union Carbide Corp.
   b. Police & Firefigrs - can be hired and fired based on age. (Age Discrim in Emp Amend '96)
      i. Generally, exception sets a minimum age of not younger than 55
      ii. Police = ees whose duties include investigation, apprehension, or detention of individuals suspecte;
          convicted of offenses against criminal laws.
      iii. Firefighter = duties entail work directly connected w/ control and extinguishment of fires or
           maintenance and use of firefighting apparatus.

3. Applicability of DI disc. - SC has never decided whether or not DI disc is available in ADEA actions and there is a split w/in circuit courts.
   a. T7 specifically includes DI (1991 CRA) but ADEA doesn't expressly include DI.

B. Special Problems of Age Disc.

1. Protected Class
   a. Sec.4(a) - prohibits disc. "b/c of such individual's age."
   b. Sec. 12 - protection shall be limited to those individuals who are at least 40 years of age.
   c. NO Involuntary Retirement b/c of Age - ADEA now protects workers w/out an age cap and prohibits involuntary retiring.

2. Fringe Benefit Plans
   a. Congress has adopted equal cost or equal benefit test for legality of benefit plans.
      i. Section 4(f)(2)(B) - provides that it shall be ok for an D "to observe terms of a bona fide ee benefit plan - (i) where, for each benefit or benefit package, actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker.
         * In other words, D can either provide a benefit plan that costs same amount per ee or that provides equal benefits across board. D spends equally on old and young.
         * Safe harbor - coordinate benefits w/ SS benefits, or reduce severance pay by retirement benefits

3. Dowsizing, Reductions in force, and Early Retirement Incentive Plans
   a. P was fired - Modified McDonnell-Douglas-Burdine showing required for P to establish PF case of age disc.
      (O'Connor v. Consolidated Coin Caterers Corp (4th Cir.)) : Prima Facie Case:
         i. P was protected by ADEA.
         ii. P was selected for discharge from a larger group of candidates.
         iii. P was performing at a level substantially equivalent to lowest level of those of group retained.
iv. Process of selection produces a residual workforce of persons in groups containing some unprotected persons who were performing at a lower level that that at which he was performing.

b. Early Retirement Plans
   i. Conditions for waiver of ADEA rights (OWBPA §7(f)(1)) 29 USCA 626(f)(1)
      1. waiver MUST be part of agreement b/w individual and employer calculated to be understood by individual, or by average individual eligible to participate
      1. MUST be knowing and voluntary.
      2. waiver MUST specifically refer to rights or claims arising under ADEA.
      3. agreement cannot waive rights or claims that may arise after date waiver is executed.
      4. individual MUST receive in exchange for waiver consideration in addition to anything of value to which individual already is entitled.
      5. individual MUST be advised in writing to consult w/ an attorney prior to executing agreement.
      6. individual MUST be given a period of at least 21 days w/in which to consider agreement.
      7. agreement must provide that for a period of at least 7 days following execution of such agreement, in which P may revoke agreement, and agreement shall become effective or enforceable until revocation period has expired.
      *Undue influence by D will invalidate waiver!
   ii. OWBPA of 1990, Sec. 4(f)(1)(A) – pension plans will NOT violate ADEA solely b/c plan “provides for attainment of minimum age as condition of eligibility for normal or early retirement benefits.” (Pension plans may use age to est. eligibility.)
      1. OWBPA – retirement programs are invalid if it takes away benefits from those who refuse to retire early.
      2. OWBPA – prohibits prospective waivers (waivers occurring b/f the claim).
   iii. Shanor’s Thoughts in regard to Early Retirement Plans
      1. Most common early retirement incentive plan – offer same incentives at 55, 57, 58 as ee who would receive @ 60, P not punished if she decides to not leave. Lots of times companies have over-funded pension programs, so this is effective.
      2. Might set up a system whereby in next two weeks those people who are interested in early exit program could apply, D will review application, decide who needs to go, etc. there may be too many or too few.

iv. Additional conditions for early retirement program waivers. If waiver of ADEA rights is part of early retirement program, §7(f) adds following requirements in addition to those above:
   1. Section 7(f)(F)(ii) extends period for P to consider offer from 21 days to 45 days.
   2. Section 7(f)(H) requires D inform individual in writing in a manner calculated to be understood by avg. individual eligible to participate, as to—
      (a) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, any time limits applicable to such program; and
      (b) job titles and ages of all individuals eligible or selected for program, and ages of all individuals in same job classification or organizational unit who are not eligible or selected for program.
   c. No “tender back” of benefits necessary to challenge waiver of ADEA rights. Oubre. SC held individual not required to give back consideration given for a waiver agreement in order to bring a claim under ADEA. However, there may be an offset.

RECALITATION

- EEOC has started asking those filing charges if D has done anything bad to them since filing.
- P can lose on a completely bogus race, gender, or age case and still win on retaliation claim;
- Retaliation claims usually won by P.
- P also protected against retaliation under ADA, ADEA (4d), EPA, or 1981.
- Retaliation action is independent action from action for disc. .

P’s FF Case:
   1. P must show she is protected from retaliation:
      a. 704 bars retaliation against:
         i. applicants
         ii. ees
         iii. former ees. Robinson v. Shell
2. P must prove she engaged in either free access or opposition conduct. §704(a) of T7, AND experienced an adverse action as a result of that conduct.
   a. Free Access (participation) – P shows she participated in proceeding claiming disc. .
      i. Free access is relatively absolute. D cannot fire P for participating in a T7 or state emp law action.
      ii. Key distinction b/w free access and opposition is that free access triggers absolute protection, whereas opposition focuses on reas. ness.
      iii. Participation includes being a witness in a proceeding. (i.e. harasser who testified was fired)
   iv. Easier for P to prove participation than opposition.
   v. This would apply to giving bad references to future eer.
   vi. See whether P took action before adverse emp. action took place. Clark Co. School Dist. v. Breeden

b. Opposition – D cannot retaliate against P who has opposed any practice made an unlawful emp. practice by this title.
   i. Need reasonable belief that conduct of D is illegal, and P MUST act in good faith.
      I. Subjective: good faith that D discriminated. Trent
      II. Objective fact: has reasonable basis of belief. Monteiro
   ii. P's opposition conduct was reasonable .
      I. Unlawful protests are not reas. McDonnell Douglas
      II. Disloyalty is NOT unreasonable b/c every act of opposition is somewhat disloyal. Jennings
      III. If D is open to talk about problems, going outside chain of command is unreas. . Jennings
      If a court perceives P action as “sandbagging“ her D, it will find NO retaliation, as this conduct would not be reas. . “cloak of statutory protection does not extend to deliberate attempts to undermine a superior’s ability to perform his job.”
   IV. When conduct is unreas. it becomes unprotected.
   V. Nothing in T7 compels D to rehire one who was engaged in deliberate unlawful activity against it. McDonnell Douglas.

3. P MUST show she was victim of adverse action by D.
   a. Usually easy to prove
      i. D must know of conduct. Goldsmith
      ii. Timing: closer time b/w two actions, easier to prove. Obryan. A direct causal link is vital.
      iii. According to several lower courts, 704 says adverse emp decision is required (i.e. hiring, firing, promoting, and granting leaves of absence
      iv. What is an adverse (retaliatory) action? Not a lateral transfer in same office, but a transfer to another city would be.
      v. Shanor → SC reluctant to adopt a subjective standard for adverse action. Clark Co.

B. D's Defense
   1. D must “articulate some legit. non-discriminatory reason for adverse emp action.
      a. Cts. have held that a decision to discipline a P whose conduct is unreas. , even though borne out of legit protests, does not violate T7.

DISABILITY (ADA)

A. General Info.
   1. 102(a) – general rule prohibited disc b/c of disability: No disc against qualified individual w/ disability b/c of disability in regard to job application, hiring, advancement, discharge compensation training and or terms, conditions and privileges of emp. .
      a. 102(a) – Employer must have 15 employees for 20 wks. per yr.
   2. Exception – 511(b)
      (i) transvestism, transexualism, pedophilia, exhibitionism, voyeurism, gender identity, sexual behavior disorders.
      (ii) compulsive gambling, klepto, pyro
      (iii) psychoactive substance abuse disorders, illegal use of drugs.
      * Also note: 511(a) says homosexuality/ bisexuality not an impairment

3. Examples of Impairment:
   a. Firing for contagious effects of disease (Arline).
   b. Asymptomatic diseases such as HIV are impairment b/c affects major physiological system of reproduction (Bragdon).
      i. Sex may be a major life activity.
c. Morbid obesity (Cook). Here, cts saying "voluntariness" of disease doesn’t matter. Or examples include alcoholism, AIDS, diabetes, cancer resulting from cigarettes smoking, heart disease resulting from personal excesses.

4. Examples of non-impairment:
   a. Average person problems such as eyesight and asthma = not protected.
   b. Cts. not finding "disability" for individuals w/ severe phobias. Shanor disagrees w/ this one.
   c. EEOC has stated “physical or mental impairment” does NOT include: physical characteristics such as weight, height, and eye color that are in “normal range” and aren’t a physiological disorder. Also exclude common personality traits, illiteracy, economic disadvantages, and temporary physical conditions.

B. P’s PF Case

1. P is individual w/ disability: section 3(2) of ADA –

Reqs for qualifying as ind w/ disability-
(A) a physical or mental impairment that substantially limits one or more major life activities.
(B) a record of such impairment (ex. Woods)
(C) being regarded as having such an impairment

(a) Physical or Mental impairment that substantially limits major life activity. SC has broad view of impairment. Bragdon

* Note: An individual is substantially limited if totally or significantly restricted in her ability to perform major life activities in comparison w/ “average person in population.”

i. Major Life Activity – includes caring for self, manual tasks, talking, breathing, seeing, hearing, speaking, learning, working; also reproduction (Bragdon). → opened door for disability claims by those who suffer from impairments causing fertility or require treatment improving fertility.

   ii. Substantially Limits – pertinent factors are → nature and severity of impairment, its duration and permanent or long-term impact.

1. Inability to perform single, particular job does not constitute a substantial limitation on major life activity of working. Sutton;

   1. When addressing major life activity of performing manuals task, central inquiry must be whether claimant is unable to perform a variety of tasks central to most people’s daily lives, not whether claimant is unable to perform specific job tasks. Toyota v. Williams

   2. ADA requires those claiming Act’s protection to prove a disability by offering evidence of extent of limitation in terms of their own experience. Albertsons

II. If D offers other positions, it is more difficult to argue substantially limited.

III. Illustrative not exhaustive list includes: any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of following body systems:

   neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic skin, and endocrine.

iii. Mitigation of Impairment – effect of mitigating factors must be taken into account when judging if P is substantially limited. Sutton. Mitigating factors include: wearing glasses, taking meds and measures taken by individual’s own body systems.

   I. Essential Rule of Law – A disability only exists where an impairment substantially limits a major life activity, NOT where it might, could, or would be substantially limiting if mitigating measures were not taken into account. Sutton

   II. After Sutton, Ps must develop factual records to support that their impairment is substantially limiting even when controlled by meds.

   iv. Social security claims: Ps who assert disabled for purposes of receiving disability benefits will have an opportunity to establish that they are nonetheless "qualified" within meaning of ADA.

* Shanor → Remember that there are two other prongs to "substantial limitation." (see below). If your client can’t find protection under one, maybe one of others will provide shelter.

(b) Record of Impairment – even if P doesn’t have disability, still protected if discriminated against b/c P has record of disability. Arline.

i. Variety of records contain such info, including emp records, medical records, educational records, etc.

ii. What is necessary? Numerous cts. have found hospitalization and subsequent extended recuperation did NOT constitute substantially limiting impairments in absence of some chronic long-term impact.

(c) Regarded as having Impairment – D either:

   i. mistakenly believes that P has impairment substantially limiting life activity OR...

   ii. mistakenly believes that non-limiting impairment substantially limits life activity.
1. Courts have given limited reading to this provision. *(Forisi)*

2. IMPORTANT – scope of “regarded as impaired” only pertains to impairments that are covered under statute in first place. (ex. *don’t really have any disability* [D only has to stop disc], pregnancy is NOT an “impairment” under ADA, where a D who fires a pregnant woman b/c he thinks she will be unable to work, fired pregnant woman does not fit under this category of protection.)

2. P was **Qualified Individual** - Sec. 101(8) – P can perform essential function of job with or without reas. acc. (or where alleged essential job requirement is eliminated *(Hamlin)*).

   * Sec. 102(a) of ADA doesn’t prohibit disc against a person w/ a “disability” unless he is “qualified.”

   a. **Essential Functions**: Some consideration given to D’s judgment of what is essential but not complete deference. 101(8) must be job related and consistent w/ bus. accessibility. Posted descriptions and job advertisements taken into account.

      i. If Safety of public is at issue, D’s get more deference. *(Shadow Bd.)*

      ii. If risk of communicable diseases, in D’s favor. *(Bradley)*

      iii. P who fails to meet fed. safety regulations is NOT qualified.

      iv. 104(a) says qualified does not include app. s currently engaging in illegal use of drugs.

      v. P has opportunity to rebut contended “essential functions” as unessential.

      1. D will then bear burden of proving that challenged criterion is necessary. *(Hamlin)*

      vi. No duty to create a new position for someone if the applied for position “exists to perform the function” (ADA regulations, *(Kunz)*).

   b. **Reasonable Accommodation**: *(broader than duty to accommodate for religion)*.

      i. Whether cost-benefit analysis is used for determining reas. ness has not yet been decided.

      ii. Working at home usually not reas. acc. *(Vande Zande)*

      iii. Teacher assistant may be reas. acc. *(Warkowski)*

   iv. 101(9) – reas. acc. may include:

      (A) making existing facilities readily accessible to and usable

      (B) job restructuring, part time, modified work schedules, reassignment to vacant position, acquisition or modification of devices, modification of examination, training materials or polices, provision of qualified readers/interpreters and or similar acc.s.

   v. **No duty to accommodate personal needs due to disability. (Nelson).**

      vi. Shifting you internally much stronger case for P than asking for a different job coming in w/ a disability.

   c. Identification of essential functions of job requires a fact specific inquiry into both eer’s description of job and how job is actually performed in practice.

      i. Also mention whether reallocating that job function is a reas. acc..

3. D acted b/c of disability:

   a. May use Price Waterhouse showing w/ direct evidence that D took disability into account. *(Burns v. City of Columbus)*

   b. McDonnell Douglas/Burdine – use this analysis when you only have circumstantial evidence that D acted b/c of disability. *(Norcross v. Sneed)*

C. **Defenses**

1. Rebutting facts of P’s PF case

2. ADA statutory defenses:

   a. Acc. would be undue hardship – 102(b)(5)(A) –

      i. D can show acc. would impose undue hardship on operation of business.

      ii. 101(10)(b) – says it means an action requiring significant difficulty or expense when considered in light of factors:

         (i). nature and cost of acc.

         (ii). overall financial resources of facility; number of persons employed @ facility, etc.

         (iii) overall financial resources of covered entity; overall size of business of covered entity w/ respect to number of its ees, location of its facilities, etc.

         (iv) type of operation of covered entity, including composition, structure, functions of workforce of such entity, etc.

      Note: *Dexter* – Dwarf at post office quite “reas.” but created an undue hardship.

   b. Affirmative defense of direct threat – 103(b) –

      i. P would be a direct threat to others – 101(3) – Direct threat is significant risk to health or safety of others that cannot be eliminated by reas. acc..

      ii. In determining direct threat, *EEOC factors* are:
I. **nature** of risk (how disease is transmitted)
   II. **duration** or risk how long is carrier infectious
   III. **severity** of risk (what is potential harm to third parties)
   IV. **probability** of transmission causing varying degrees of harm. *Arlene II*. Courts should defer to healthcare professionals.

   iii. D may refuse emp. to P seeking a position that poses a direct threat to workers' own health or safety. *Chevron v. Echazabal*  *Don't forget threat to self!*

D. Other theories of Disc.

1. **Failure to Reasonably Accommodate**: 102(b)(5) – **independent** liability if eer fails to reasonably accommodate known disability. This includes:

   (A) not making reas. acc. to known physical or mental limitations of an otherwise qualified individual w/ a disability who is an app. or ce.

   (B) denying emp. opportunities to a job...if such denial is based on need of such covered entity to make reas. acc. to physical or mental impairments of ee or app. "

   a. This duty *goes beyond providing accom required to perform essential job functions*. *Van Zante*

     i. Eers have additional duty to provide accs. that permit disabled individuals to enjoy equal access to benefits and privileges of emp. (ex. access to lounges, kitchens, smoking rooms, etc) These benefits and privileges do not fit into neat categories.

   b. **No duty to accommodate personal benefits** (i.e. providing ee w/ a prostic limb, wheelchair, or eyeglasses.)

   c. Areas of possible reas. acc., 101(9):

     (A) making existing facilities used by ees readily accessible to and usable by individuals w/ disabilities.

     (B) job restructuring, part-time or modified work schedules, reassignment to vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, qualified readers or interpreters, etc.

   d. $$$ enters at two points in analysis of claims to an acc. to a disability:

     i. P must show that acc. is reas. in sense of both efficaciousness and proportionality of costs.

     ii. D has opportunity to prove that upon more careful consideration costs are excessive in relation to either benefits of acc. or to D's financial survival or health.

2. **Systemic disparate treatment** (formal policies or pattern/practice)

   a. Benefit Plan Exception: 501(c)(1) and (2) allow disability based distinctions in bona fide benefit plans based on different risks not inconsistent w/ state law.... So long as *every ee is offered same plan, its ok even if plan offers different coverage for different disabilities*. *Rod v. Schering*

3. **Systemic Disparate Impact**

   a. Section 102(b) of ADA defines term “discriminate” to include two disparate impact concepts:

     (3) utilizing standards, criteria, or methods, of disc. that have effect of disc. on basis of disability.

     (6) using qualification standards, emp. tests or other selection criteria that screen out or tend to screen out an individual w/ disability or class of individuals w/ disabilities unless standard, test or or selection criteria is shown to be job-related and consistent w/ business necessity.

   b. Vision requirement imposed by a federal regulation NOT subject to DI attack. *Kirchenburg*

   c. NOTE: While business necessity and job-relatedness are still affirmative defenses, seniority, merit and incentive systems are NOT available in ADA cases.

4. Special provisions for testing and special relationships –

   a. 102(7) adds requirement that tests for requirements of job, not for disabilities of test-taker.

     - NOTE: *job related or business necessity* defense and professional test exception NOT available for claims brought under 102(7).

   b. 102(b)(4) – protects against disc. b/c of relationship w/ person who has disability.

E. Special Disability Discrim Problems

1. Alcoholism and Illegal Drug Use

   Generally

   a. ADA specifies certain things D may and may not do regarding drugs and alcohol use in 104(c):

      (1) may prohibit illegal use of drugs and use of alcohol at workplace

      (2) may require that ees shall not be under influence of alcohol or be engaging in illegal use of drugs at work place

      (4) may hold an ee who engages in illegal use of drugs or who is an alcoholic to same qualification standards for emp. or job performance and behavior that such entity holds or ees even if any unsatisfactory performance or behavior is related to drug use or alcoholism of ee.
Drugs
a. 511(b)(3) – disability doesn’t include “psychoactive substance use disorders resulting from current illegal use of drugs.”
b. 104(a) – “qualified individual with a disability” does not include any employee who is currently engaged in illegal drug use.
c. Term “currently engaging in drug use” not limited to very moment at which employer takes action against employee but extends back even to weeks previous to termination.” Collings v. Longview Fiber
d. cleaned-up junkie – 104(b) – Disability shall be construed to exclude as a qualified individual with a disability an individual who has successfully completed a supervised drug rehabilitation program...and is no longer engaging in such use.
e. ADA neutral to drug testing. Sec. 104(d)(2).

Alcohol
a. Courts differentiating disc. b/c of status as alcoholic, which is protected by ADA, from disc. b/c of abuse of alcohol which is not protected.

2. Sexuality Issues
a. 508 – term “disabled” doesn’t apply to an individual solely b/c individual is a transvestite.
b. 511(a) – homosexuality and bisexuality are not impairments and as such are not disabilities.
c. 511(b)(1) – disability doesn’t include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or sexual behavior disorders.

3. Winona Rider
a. 511(b)(2) – disability doesn’t include compulsive gambling, kleptomania, and pyromania.

4. Medical Examinations
a. 102(d)(2)(B) allows employer to “make preemp. inquiries into ability of app. to perform job-related functions.”
b. 102(d)(2)(A) prohibits inquiries, before an offer of emp. has been extended, from conducting a medical examination, for making inquiries as to whether individual has a disability or as to nature of severity of disability.
c. 102(d)(3) – after offer of emp. is made, D can require a medical exam.
d. 104(d)(1) - drug testing NOT considered medical exam.

5. Conflicts w/ Seniority Systems
a. To extent that there is a conflict b/w seniority system and agg., seniority usually wins. U.S. Airways v. Barnett
b. Scalia argues that duty to reasonably accommodate simply does not extend to seniority systems → seniority system is not a disability-related obstacle.”
c. Exceptions to General Rule
   i. Where D having retained right to change seniority system fairly frequently, does so. In other words, a seniority system that is only a “system” on paper.

** EQUAL PAY FOR EQUAL WORK (EPA) **

A. M must show D pays different wages to coes of opposite sex for substantially same work. This is a very strict standard. That showing shifts burden of persuasion to employer who has four affirmative defenses available

1. P’s PF Case
   (1) In same establishment – EPA does not define term establishment. Mere existence of physically separate operations is not necessarily fatal to an EPA claim. Brennan
   (2) Unequal pay – comparing pay of two jobs requires consideration of inflation, fringe benefits, as well as rates of pay. Bence
   (3) Equal work – Central issue to EPA case; has been construed to mean “substantially equal” and not identical. To constitute equal work, there must be a substantial, perhaps predominate core set of tasks common to both jobs. Strict interpretation, not just similar/comparable. Corning.
   (4) On basis of sex.

2. Defenses to PF Case (Statutory Exceptions)
   a. “Any factor other than sex.”
   b. Seniority system – To be a system of seniority, it must operate to improve emp. rights and benefits as ecs’ relative length of emp. increases.
   c. Merit systems
   d. Incentive systems – Most incentive pay systems can be characterized as objective and job related.

*** EPA only applies to substantially similar work, so in cases where work is different T7 is only remedy......and so we encounter....

3. Bennett Amendment – incorporates four affirmative defenses of EPA into T7 gender compensation cases
4. Title VII theories of disc in Gender Compensation Cases – engrafting those four EPA affirmative defenses onto T7 has lead to a constricted application of T7 to claims of compensation disc. b/c of sex:
   a. Individual DT – some courts have found McDonnell Douglas/Burdine approach is UNavailable.
   b. Systemic DT – statistical job evaluation studies and comparable worth statistics alone are insufficient to establish an intent to discriminate required under DT since they are based on labor market differences b/w men and women.
   c. Systemic DI – does NOT apply to sex disc in compensation claims.

PROCEDURES

A. Coverage – T7 says D must have 15+ ees for 20+ weeks per year. ADA requires 20 ees.
   1. Critical inquiry: defining ee and eer
      a. Associate in law firm is covered by T7 b/c she is ees. Hisron. Partners not covered by T7.
      b. Partnership is benefit, so being promoted is actionable under T7. Hisron.
      c. Partner is not protected by T7, would have to bring 1981 claim.
         i. Shanor – Your best argument in seeking redress would be to argue that decision to engage in sham took place when you were still an associate, thus still an “ee.”
         ii. In some large organizations, partners may be considered ees w/in T7 meaning.
      d. Independent Contractors – basic difficulty in distinguishing b/w ee and independent contractor:
         i. Common law approach
         ii. Economic realities approach – based on degree of economic dependency of putative ee on principal.
         iii. Hybrid test – characterization turns primarily on degree of principal’s control, but degree of economic dependency on principal is also considered.
      e. Hourly, part-time, and on-leave workers are “ees” for T7 purposes.
      f. Volunteers – Not counted for statute coverage, but once and d is covered, volunteers of that eer will be protected.
         i. Volunteers at small ees who aren’t covered might possibly have a state law claim or tort claim but NO FED. CLAIM.

2. Defining “eer”
   a. State licensing agency NOT an eer for T7 purposes; might use 1981 as it applies to contractors.
   b. Doesn’t matter if eer is overseas. American law (including T7) applies overseas. Ramco
      i. However, in another instances foreign law enforcing mandatory retirement at a certain age has been upheld b/c otherwise would put American citizen in a better position.
   c. Aliens working in U.S. – SC has said that under labor relations act, no entitlement to back pay if you are an alien.

B. Private Enforcement under T7 – Basic T7 procedures for enforcement of substantive rights it creates are found in § 706, 42 U.S.C.A. § 2000e-5.

Basic Timeline:
   Act of discrim. → (no more than 180 days later) P files charge w/ EEOC → EEOC gives notice to D → Reas. cause → EEOC suít → Court
   1. Procedures same for T7 and ADA, but ADEA has some differences
   2. Filing charge w/ EEOC → must be filed w/in 180 days after unlawful practice occurred. Section 706(e)(1).
      a. 180 days extended to 300 days where state/local agency exists (or 30 days after local agency terminates proceeding).
         i. ADEA – 180/300 day applies to ADEA, filing w/ local agency is NOT prerequisite to filing w/ EEOC.
         ii. Filing w/ EEOC w/in 300 days suffices, although filing at some point w/ local agency is necessary.
         iii. Statute says there has to be a written letter that is sworn to. EEOC form is usual way charges are filed.
         § 706(b)
            I. “A charge is sufficient when commission receives from person making charge a written statement sufficiently precise to identify parties and to describe generally action or practice complained of.” Waters
            II. Most cts. very permissive as to what will be deemed a charge for purposes of satisfying this requirement.
            III. Absence of oath can be remedied later. Weeks.
            IV. Some cts. have even held that questionnaire to constitute a valid charge at even though it was unsigned and formal charge not executed until later.
      b. TIMING:
         i. Charge must be filed w/in 180 days “after alleged unlawful emp. practice occurred.”
ii. Time unlawful practice occurred – filing period starts when act of disc. occurs and P receives notice of D’s act.  
   **Ricks, Chardon**

iii. **Continuing Violation** – exception, when disc. (and not just effect) continues to be ongoing.
   1. Disc. may take place on date of application and P has no way of knowing.  
   **Cada, Gates, Tucker.**
   2. Some cts. say when notice, others say when facts to know.

iv. **Pendency of a grievance DOES NOT TOLL running of limitation periods** which normally commence when D’s decision is made.
   1. Practical effect = P cannot safely await completion of internal procedures before filing w/ EEOC.
   2. If you were HR person in a big corporation and under productive ee is protected by age disc., keep P on for 180 days before firing him. On Jan. 1st P is notified that he will be fired as of July 1st.

v. **Challenge to a seniority system** must be raised w/in 180 days from when system was put into effect, even if P wasn’t working at time when system was created.  
   **Lorance** argued by Shanor.
   1. CRA of 1991 – Congress changed this part of T7 so that unlawful practice occurs ... when seniority system is adopted, when an individual becomes subject to seniority system, or when a person aggrieved is injured by application of seniority system.
   2. **Amtrak** 
   Claims of discrete discriminatory or retaliatory acts must be filed w/in 180/300 days of those acts, BUT a claim alleging a hostile work environment will NOT be time barred if all acts constituting claim were part of same unlawful practice.
      1. Hostile environment claims are unique b/c y very nature involves repeated conduct and cumulative and collective nature of se actions is what makes them actionable.
      2. Shanor → This case important b/c it strikes down a lot of circuit court cases allowing 180/300 day rule to be disregarded when several discrete acts occurred (they called this “ongoing emp. practices.”) Shanor, “This will be a stake through heart of ongoing emp. practice type claim.”
      3. Shanor → Going to be difficult to distinguish b/w discrete acts and acts which are components of hostile environment claim.

   c. Filing is a **procedural prerequisite like a statute of limitations (subject to tolling), not a jurisdictional prerequisite** to fed. court jurisdiction.  
   **Zipes**

d. **Tolling**
   1. **Waiver** – D may agree to waive defense of charge filing period to make good faith efforts to formally investigate. Shanor says this usually happens when P may have a systemic claim that might bring class action.
   2. **Estoppel** – D engages in certain wrongful conduct (i.e. hiding info.).
   3. **Equitable tolling** – When EEOC has P’s case, clock is not running. there is no time limit for investigation, but latches may apply if it takes too long. If lawyer doesn’t file in time .... tough shit.

   iv. **Class Action** – tolling starts for all claims when first claim of class action is filed.  
   **Parker.**

3. **Filing suit w/ time constraints** – After charge is filed w/ EEOC, P must follow w/ procedural requirements:
   a. EEOC is directed by T7 to serve notice of charge on respondent w/in 10 DAYS and to conduct an investigation culminating in a determination of whether there is reas. cause to believe charge is true.
      1. If no reas. cause → dismiss and notify charging party, who has **90 days to bring private action**.
      2. If reas. cause → EEOC first attemptconciliation. If that fails to eliminate alleged unlawful emp. practice, EEOC may bring a civil suit against respondent in district court or issue right to sue letter
         1. Shanor says that right to sue letter scenario is run of mill situation.
         2. P is only going to have **90 days to file suit after receiving right to sue letter** (or dismissal for that matter) on pain of forfeiting all power to sue.
         3. III. Even an EEOC finding that there is no reas. cause to believe disc. occurred doesn’t bar suit.  
   **McDonnell Douglas**
   b. EEOC has 180 days – P must wait 180 days from filing w/ EEOC b/f filing suit...unless EEOC procedures terminate earlier. After 180 days, P can demand right-to-sue letter, after receipt of which he has 90 days to bring action.
   c. EEOC runs longer than 180 days – P can demand EEOC to continue investigation past 180, and retain power to demand letter at any time until EEOC makes its determination.  
   **After receipt of this delayed letter,**  
   **charging party must bring suit w/in 90 days of that point.**
   d. EEOC files suit – EEOC either brings suit itself, dismisses claim, attempts conciliation ( which if it fails leads to suit by EEOC or right to sue letter for P).

4. **EEOC suit**
   a. P must have standing (i.e. aggrieve party of disc.) ;
i. Testers cannot bring suit b/c not an aggrieved party.

b. D must be sufficiently implicated by charge (not necessary to be named 100% precisely).
   i. Shanor → Respondent must be named. Sometimes P’s get this mixed up esp. if tr company is huge and y’re working for subsidiary. Courts generally sympathetic to screw ups.
   ii. Party filed w/ EEOC and didn’t check a box. EEOC found disc. for race, gender, national origin, etc. Filed suit for all of those. 5th Cir. Court of Appeals allowed it. Sanchez v. Brands – leading case as to ambiguity in EEOC filing.
   iii. May be able to piggy-back national origin onto race disc. when filing charge w/ EEOC as cts. are fairly forgiving

c. Scope of complaint must be based on EEOC charge. Interpreted broadly (i.e. if only one box on form is checked, EEOC can still argue several different theories).

C. Private Class Actions

* For T7, 1981 and ADA must FRCP Rule 23. This does not apply to ADEA.
   1. Rule 23(a) has 4 requirements:
      1. Numbers – so many P that joinder of all is impractical
      2. Commonality – common questions of law or fact
      3. Typicality – claims/ defenses of parties are typical of claims/ defenses of class.
      4. Adequate Representations – representation will fairly and adequately protected interests of class. (This tends to be focus of class action questions.)
   * P can represent a class of those similarly situated to herself (i.e. If P is male secretary, P can represent all male secretary app. s.) Falcon
   * If you were hired, you cannot bring claim for those who were not.
      - However, Note: Footnote 15 from Falcon which said → Significant proof that an eer operated under a general policy of disc., that conceivably could justify a class of both app. s and ees if disc. manifested itself in hiring and promotion practices in same general fashion, such as through entirely subjective decision making processes.

   2. Rule 23(b)
      1. 23(b)(2) – D treated all members of class similarly. B/c of general treatment of eer, individual members of class need NOT be notified or given opportunity to opt out of class. Kyriazi
      2. 23(b)(3) – Court must find common issues predominate over individual claims, and class action would be a superior form of litigation. Allison. Class members MUST be given notice of existence of class and opportunity to opt out of class.
   * If not general pattern or practice found in class action, no preclusion of individual claim.

3. Settling Class Actions
   1. 23(e) → Even if class has not been certified, class action shall NOT be dismissed w/out approval of court and notice of proposed dismissal shall be given to all members of class as directed by court.

4. Time Limits w/ Class Actions
   i. Proper approach – Take charge and go back 300 days and pick up anybody that fits w/in this time frame.
   ii. Shanor → Anything b/f 300 retro day marker is a dead claim.
   iii. Shanor → You may be able to “find” another earlier class which is a ticket to a bigger class.

D. Public Government Enforcement (EEOC)

1. SC liberal approach so that EEOC suit generally will NOT be barred unless D can show it was prejudiced by EEOC errors. Shell Oil.

2. Challenges to sufficiency of EEOC investigation are not very successful.
   i. EEOC suit not limited to original charge, it can be broadened through investigation. G.E.

3. SOL does NOT apply to EEOC suits unless time period is unreasonably long. Occidental Life


E. Relation b/w Public and Private Suit

1. Public: When EEOC files on behalf of individual, P loses right to bring private suit b/c represented by EEOC. Cooper

2. Private: Courts are split.

F. Settlement and Arbitration

1. Waiver – OWBPA permits waiver of ADEA claims so long as reqs are met (sometimes used for or anti-disc. laws).

2. Settlement – SC says consent decrees should be interpreted like contracts. Stotts. Modification of consent cecree requires movant to establish change in factual conditions or law to warrant action.
   a. Binding of non-parties – company can seek joinder under Rule 19, generally non-parties will not be bound by prior judgments. 1991 CRA 703(n) binds non-parties when y are:
      i. Adequately represented by a party re.
      ii. Have actual notice of threat to ir interest and an opportunity to protect mselves.

3. Arbitration
A. Scope of Judicial Relief

<table>
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<tr>
<th>ACT</th>
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<td>EPA</td>
<td>Backpay, liquidated damages (equal to backpay), atty. fees, &amp; question about interest</td>
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<tr>
<td>ADA</td>
<td>Backpay, frontpay, interest, atty. fees, compensatory &amp; punitive damages (only if eer didn’t attempt to accommodate)</td>
</tr>
<tr>
<td>ADEA</td>
<td>Backpay, liquidated damages, atty. fees, &amp; question about interests</td>
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B. Individual Relief

1. Section 706(g)(2)(B) Exception to Full Relief
   a. 1991 CRA added an affirmative defense to most relief when D carries burden of proving that it would have made same decision even if it had not discriminated.
      i. As 703(m) – D is liable when P proves disc. was “a motivating factor” in decision → 706(g)(2)(B) creates affirmative defense to full remedies if D can prove it would have taken “same action in absence of impermissible motivating factor.”

2. Types of Remedies in Individual Cases
   a. Backpay – award including all compensation victim would have received in absence of disc. including lost wages, raises, overtime compensation, bonuses, vacation pay, and fringe benefits as contributions to a retirement plan.
      i. Presumptively awarded to victims of disc. to make P whole. Albermarle.
      ii. Requires no intent to discriminate by eer
      iii. Burden of P to prove damages – P must establish damages in form of difference b/w her actual earnings and amount of she would have earned in absence of disc.
         i. P’s duty to engage in reas. efforts to mitigate. 706(g)(1)
         ii. P’s counsel – Advise P to start looking for new “comparable” job immediately. Comparable doesn’t mean equal pay.
         iii. D’s counsel – Might go through old copies of AJC classified to see what jobs P could have applied for.
      iv. Covers entire time from disc. to final judicial notice, except:
         i. If claimant gets new job, or could have gotten a new job, those wages work to mitigate backpay.
            • D has burden of proving backpay should be reduced b/c P could have earned more w/ reas. diligence. Eer must show:
               o Existence of comparable emp.
               o Amount P would have earned
               o P’s lack of reas. diligence resulted in failure to obtain position.
         ii. If eer goes out of business, that cuts off backpay.
         iii. If eer makes offer of judgment.
         iv. If eer makes unconditional offer of reinstatement or instatement of previously denied job, this will cut off backpay from date of offer (but not for damages). Ford Motor Co.
               o “Victims bringing lawsuits want jobs, not lawsuits.”
         v. If eer gets after-acquired evidence of ee’s wrongdoing which was of such severity that she would have been terminated on those grounds alone. McKinnon
      vi. Limited by § 796(g)(1) to period of 2 years prior to date of filing. No limitation period on ADEA.
         i. Shanor → This two year limitation period is now a dead letter after Amtrak b/c now courts are permitted to only look back w/in 180/300 charge filing period unless harassment claim.
      vii. Prejudgment interest – Prevailing P’s may recover prejudgment interest on backpay
      viii. Miscellaneous Points from Notes:
         i. Shanor → Courts won’t look to good faith/bad faith for back pay award.
         ii. Manhart → only example of equitable cutback in backpay.
viii. For P to recover backpay for lost wages beyond date of retirement or resignation evidence must establish that D constructively discharged P.
   1. Test varies from circuit to circuit.
   2. 4th Circuit (most strict) – D must have made conditions intolerable to continue working.
   3. Elsewhere – “If eee deliberately made it so intolerable or ee that he was obligated to quit.”
      So what’s intolerable for purposes of constructive discharge?
      o Not getting a raise = insufficient.
      o Not getting a promotion = insufficient
      o Sexual harassment = You’ve been constructively discharged.
      o Where eee has added insult to injury = constructive discharge.
         ▪ Ex. Eer accuses eee of stealing and n proceeds to make a public scene of
           ordeal, public chastising.
      o demotions = sometimes sufficient, sometimes not
         ▪ May be part of your mitigation to stay on job and earn what you can while
           moving ahead w/ suit.
         ▪ Unreasonably drastic demotion may suffice.

b. Instatement & Reinstatement
   i. Antidisc. statutes permit ees. to grant prohibitory and compensatory equitable relief, in form of
      injunction, reinstatement, or instatement.
   ii. Reinstatement (decision of judge) – same policy of providing a “make whole” remedy underlying
       presumption of backpay supports a similar presumption of instatement/reinstatement.
       I. A person can be reinstated and placed into seniority rankings where he would be if disc had
          not occurred. Franks
       II. Rebuttal – Eer has burden of proving special circumstances denying
          instatement/reinstatement:
         o No bumping of innocent incumbent – Reinstatement denied when eer proves that
           position P would have been entitled to is occupied by another eee who is innocent in
           any disc against P.
            ▪ Currently, there is circuit court authority indicating that its allowable to
              bump a person in order to reinstate an eee.
            ▪ Shanor – sees nothing wrong w/ “bumping;” feels that bumped eee should
              consider themselves fortunate to have had job for time they did. Also, says
              that merely paying black eee a monetary sum equaling what he’s lost and
              throwing him into work force leaves unanswered problem that monetary
              relief is always second best.
            ▪ NAACP against “bumping;” b/c kicking out IWE’s (interim white ees) because
              it creates anti-black backlash.
         o Hostility or animosity – Eer can prove there is such hostility and animosity b/w P
           and eee that a harmonious working relationship would be impossible. Usually,
           triggers award of front pay as an alternative remedy.

c. Retroactive Seniority – permissible only for reasons which would not frustrate central statutory purpose of
   eliminating disc. .
   i. "Rightful place" instatement – Instead of ordering D to hire P immediately, which would displace
      incumbent ees, “rightful place” relief puts P on a priority hiring list. When job opens, P is hired and
      granted seniority back to date she was discriminate against. No incumbent workers displaced but
      become somewhat more vulnerable to layoff.

d. Injunctive relief – D found liable of disc is subjected to an injunction against further disc. .
   i. “Absent clear and convincing proof of no reas. probability of further noncompliance w/ law a grant of
      injunctive relief is mandatory.” Stockham Valves

e. Front Pay – compensates victim of disc. for wages she will lose after judgment date; runs from date of
   judgment until date victim obtains wrongfully denied position.
   i. Alternative to instatement/reinstatement. Avitia
   ii. Usually paid in a lump sum.
   iii. Temporary in nature (usually 1-3 yrs.)
   iv. Lower courts have refused to subtract unemp benefits from front and back pay.

f. Compensatory (P must show medical bills, etc.) & Punitive Damages
   i. Varies from statute to statute.
ii. § 1981 & 1983 → Both compensatory and punitive damages w/ several restrictions when sought from a govt. entity.

iii. ADEA → DOES NOT PERMIT, but does allow liquidated damages, essentially double damages for willful violations.
   I. To recover liquidated, P must establish a “willful” violation; defined as acting w/ knowledge or reckless disregard of risk that policy P challenged contravened statute.

iv. T7 & ADA → Allow such damages but place limits on amount of awards.
   I. Limitations of recovery under T7 → Punitive only recovered if D acted w/ malice or reckless indifference, but cannot be recovered from govt.
   II. T7 – Compensatory and punitive capped depending on # of ees:
      o $50,000 for 100 or fewer ees Hudson.
      o $300,000 for 500 or more. Hogan.

   III. Jury not told cap, judge reduces award to conform to cap.

v. Compensatory damages specifically
   I. Downside to asking for compensatory damages → Open P up to inquiry into lifelong medical and psychiatric history.
   II. Look to state law where there are often no caps or much higher caps than federal law.
   III. Mental stress- must prove actual injury. Carey. Usually proved through testimony of P.

vi. Punitive damages specifically
   I. Focus on bad conduct of D, will come down to a jury question.
   II. Medical history of P totally irrelevant here.
   III. there doesn’t have to be a special standard of egregiousness. All that must be shows in malice or reckless indifference.

g. Attorney’s Fees - two essential issues: Entitlement & Calculation
   * Each state, w/ slight variation, contains a provision allowing atty. fees and costs. May include arb. Keenan.

   i. Entitlement: Prevailing Ps – P should be presumptively entitled to atty. fees b/c they are Congress’ tool of enforcement. Only if there are special circumstances of unjust will presumption that a prevailing P is entitled to atty. fees be defeated. Christianburg

   ii. Entitlement: Prevailing Ds – A district court may award atty. fees to a prevailing D only upon a finding that P’s action was frivolous, unreason., or w/out foundation.

   iii. What’s a “prevailing party?”
      I. To qualify as a prevailing party, a civil rights P must obtain some relief on merits of claim that directly benefits him. Farrar

   iv. Calculation of atty fees – Supreme Court has laid out formula for calculating an award of atty. fees:
      I. “Lodestar” Amount = Number of hours atty reasonably expended on litigation x a reas. rate per hour.
         I. Includes service for every stage in enforcement scheme.
         II. May need affidavit from members of bar attesting to reas. ness of your figure.

   v. Atty. fees in non-traditional circumstances
      I. In case of a contingency fee contract, if you prevail you still go back and collect your lonestar rate from opposition in following fashion:
         o If your rate is 30%, collect statutory atty. fees in way of 10% from defense and collect 20% from your client.

      II. In case of a beneficial settlement for P, it its determined to be “prevailing” n he can collect atty. fees from D.

      III. What if P sues D, D realizes he does have exposure, D changes practice in response to lawsuit, but P doesn’t get anything else out of lawsuit. Here, P cannot collect atty. fees from D.

3. Relief of Systemic Disc.
   a. Retroactive Seniority & Backpay
      i. Individual relief – Where re has been a pattern/practice of disc. Individual class members need only establish that y unsuccessfully applied for a job or would have applied. This shifts burden to eer to prove D’s disc. on a case-by-case basis that individuals had not been discriminated against.

      ii. Non-app. s – Failure to apply for job does not automatically bar an award of retroactive seniority. Non-app.,s have burden of establishing they were potential victims and possessed threshold qualifications for job. Eer then bears burden of proving lawful reasons existing in emp. decision.

      iii. You can have Phase 1 litigation on merits and Phase 2 on remedies. Teamsters