AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

Just as Title VII prohibits discrimination in employment on the basis of race, color, sex, religion, or national origin, employers are mandated by the Age Discrimination in Employment Act (ADEA) to provide equal employment opportunity on the basis of age. As amended in 1986, the ADEA specifically proscribes discrimination on the basis of age for employees age 40 and over unless the employer can demonstrate that age is a BFOQ for the job in question. In a 1985 ruling involving the forced retirement of Western Airlines flight engineers at age 60, the Supreme Court established a tough legal test that employers must meet to establish age as a BFOQ. Specifically, an employer must show that a particular age is "reasonably necessary to the normal operations of the particular business" and that "all or nearly all employees above an age lack the qualifications." Failing that, an employer must show that it is "highly impractical" to test each employee to ensure that after a certain age each individual remains qualified (Wermiel, 1985, p. 2). This law is administered by the EEOC; in 2002, individuals filed almost 20,000 age-based complaints with the agency (EEOC, 2003).

A key objective of this law is to prevent financially troubled companies from singling out older employees when there are cutbacks. However, the EEOC has ruled that when there are cutbacks, older employees can waive their rights to sue under this law (e.g., in return for sweetened benefits for early retirement). Under the Older Workers Benefit Protection Act, which took effect in 1990, employees have 45 days to consider such waivers and 7 days after signing to revoke them.

Increasingly, older workers are being asked to sign such waivers in exchange for enhanced retirement benefits (Grossman, 2003). For example, at AT&T Communications, Inc., employees who signed waivers received severance pay equal to 5 percent of current pay times the number of years of service. For those without waivers, the company offered a multiplier of 3 percent.

THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

This law applies to every employer in the United States—no matter how small—as well as to every employee—whether full-time, part-time, temporary, or seasonal. The Act makes the enforcement of national immigration policy the job of every employer. It requires (1) that employers not hire or continue to employ aliens who are not legally authorized to work in the United States; and (2) that within three days of the hire date employers verify the identity and work authorization of every new employee, and then sign (under penalty of perjury) a form I-9, attesting that the employee is lawfully eligible to work in the United States. Each year the Immigration and Naturalization Service audits more than 60,000 I-9 forms (Nachman & Debiak, 2002).

Under this law, employers may not discriminate on the basis of national origin, but when two applicants are equally qualified, an employer may choose a U.S. citizen over an alien. The law also provides "amnesty rights" for illegal aliens who can show that they resided continuously in the United States from January 1982 to November 6, 1986 (the date of the law's enactment). This portion of the law granted legal status to about 1.7 million aliens who had been living in the country illegally ("Study Hints," 1988).
Penalties for noncompliance are severe. For example, failure to comply with the verification rules can result in fines ranging from $100 to $1,000 for each employee whose identity and work authorization have not been verified. The law also provides for criminal sanctions for employers who engage in a pattern of violations.

THE AMERICANS WITH DISABILITIES ACT (ADA) OF 1990

Passed to protect the estimated 54 million Americans with disabilities, 70 percent of whom are unemployed, the ADA applies to all employers with 15 or more employees (Wells, 2001a). Persons with disabilities are protected from discrimination in employment, transportation, and public accommodation.

As a general rule, the ADA prohibits an employer from discriminating against a “qualified individual with a disability.” A “qualified individual” is one who is able to perform the “essential” (i.e., primary) functions of a job with or without accommodation. A “disability” is a physical or mental impairment that substantially limits one or more major life activities, such as walking, talking, seeing, hearing, or learning. According to the EEOC’s ADA compliance manual (2000), persons are protected if they currently have an impairment, if they have a record of such an impairment, or if the employer thinks they have an impairment (e.g., a person with diabetes under control). Rehabilitated drug and alcohol abusers are protected, but current drug abusers may be fired. The alcoholic, in contrast, is covered and must be reasonably accommodated by being given a firm choice to rehabilitate himself or herself or face career-threatening consequences. The law also protects persons who have tested positive for the AIDS virus (ADA, 1990). Here are five major implications for employers (Janove, 2003; Willman, 2003; Wymer, 1999):

1. Any factory, office, retail store, bank, hotel, or other building open to the public must be made accessible to those with physical disabilities (e.g., by installing ramps, elevators, telephones with amplifiers). “Expensive” is no excuse unless such modifications might lead an employer to suffer an “undue hardship.”

2. Employers must make “reasonable accommodations” for job applicants or employees with disabilities (e.g., by restructuring job and training programs, modifying work schedules, or purchasing new equipment that is “user friendly” to blind or deaf people). Qualified job applicants (i.e., individuals with disabilities who can perform the essential functions of a job with or without reasonable accommodation) must be considered for employment. Practices such as the following may facilitate the process (Cascio, 1993e):
   - Obtaining expressions of commitment by top management to accommodate workers with disabilities
   - Assigning a specialist within the EEO/Affirmative Action section to focus on “equal access” for persons with disabilities
   - Centralizing recruiting, intake, and monitoring of hiring decisions
   - Identifying jobs or task assignments where a specific disability is not a bar to employment
   - Developing an orientation process for workers with disabilities, supervisors, and coworkers
   - Publicizing successful accommodation experiences within the organization and among outside organizations
   - Providing in-service training to all employees and managers about the firm’s “equal access” policy and how to distinguish “essential” from “marginal” job functions
• Conducting outreach recruitment to organizations that can refer job applicants with disabilities
• Reevaluating accommodations on a regular basis

3. Pre-employment physicals are permissible only if all employees are subject to them, and they cannot be given until after a conditional offer of employment is made. That is, the employment offer is conditioned on passing the physical examination. Prior to the conditional offer of employment, employers are not permitted to ask about past workers' compensation claims or about a candidate's history of illegal drug use. However, even at the pre-offer stage, if an employer describes essential job functions, he or she can ask whether the applicant can perform the job in question. Here is an example of the difference between these two types of inquiries: "Do you have any back problems?" clearly violates the ADA because it is not job-specific. However, the employer could state the following: "This job involves lifting equipment weighing up to 50 pounds at least once every hour of an eight-hour shift. Can you do that?"

4. Medical information on employees must be kept separate from other personal or work-related information about them.

5. Drug-testing rules remain intact. An employer can still prohibit the use of alcohol and illegal drugs at the workplace and can continue to give alcohol and drug tests.

**Enforcement**
The EEOC, the Department of Justice, and the Department of Transportation all have a hand in enforcing the ADA (Wells, 2001a). In cases of intentional discrimination, the Supreme Court has ruled that individuals with disabilities may be awarded both compensatory and punitive damages up to $300,000 if it can be shown that an employer engaged in discriminatory practices "with malice or with reckless indifference" (Kolstad v. American Dental Association, 1999).

**The Civil Rights Act of 1991**
This Act overturned six Supreme Court decisions issued in 1989. Here are some key provisions that are likely to have the greatest impact in the context of employment.

**Monetary Damages and Jury Trials**
A major effect of this Act is to expand the remedies in discrimination cases. Individuals who feel they are the victims of intentional discrimination based on race, gender (including sexual harassment), religion, or disability can ask for compensatory damages for pain and suffering, as well as for punitive damages, and they may demand a jury trial. In the past, only plaintiffs in age discrimination cases had the right to demand a jury.

Compensatory and punitive damages are available only from nonpublic employers (public employers are still subject to compensatory damages up to $300,000) and not for adverse impact (unintentional discrimination) cases. Moreover, they may not be awarded in an ADA case when an employer has engaged in good-faith efforts to provide a reasonable accommodation. The total amount of damages that can be awarded depends on the size of the employer's workforce.

As we noted earlier, victims of intentional discrimination by race or national origin may sue under the Civil Rights Act of 1866, in which case there are no limits to compensatory and punitive damages. Note also that since intentional discrimination by reason of disability is a basis for compensatory and punitive damages (unless the employer makes
a good-faith effort to provide reasonable accommodation), the 1991 Civil Rights Act provides the sanctions for violations of the Americans with Disabilities Act of 1990.

*Adverse Impact (Unintentional Discrimination) Cases*

The Act clarifies each party's obligations in such cases. As we noted earlier, when an adverse impact charge is made, the plaintiff must identify a specific employment practice as the cause of discrimination. If the plaintiff is successful in demonstrating adverse impact, the burden of producing evidence shifts to the employer, who must prove that the challenged practice is "job-related for the position in question and consistent with business necessity."

*Protection in Foreign Countries*

Protection from discrimination in employment, under Title VII of the 1964 Civil Rights Act and the ADA is extended to U.S. citizens employed in a foreign facility owned or controlled by a U.S. company. However, the employer does not have to comply with U.S. discrimination law if to do so would violate the law of the foreign country.

<table>
<thead>
<tr>
<th>Number of Employees</th>
<th>Maximum Combined Damages Per Complaint</th>
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<tbody>
<tr>
<td>15 to 100</td>
<td>$50,000</td>
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<tr>
<td>101 to 200</td>
<td>$100,000</td>
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<td>201 to 500</td>
<td>$200,000</td>
</tr>
<tr>
<td>More than 500</td>
<td>$300,000</td>
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</table>

*Racial Harassment*

As we noted earlier, the Act amended the Civil Rights Act of 1866 so that workers are protected from intentional discrimination in all aspects of employment, not just hiring and promotion.

*Challenges to Consent Decrees*

Once a court order or consent decree is entered to resolve a lawsuit, nonparties to the original suit cannot challenge such enforcement actions.

*Mixed-Motive Cases*

In a mixed-motive case, an employment decision was based on a combination of job-related factors, as well as unlawful factors such as race, gender, religion, or disability. Under the Civil Rights Act of 1991, an employer is guilty of discrimination if it can be shown that a prohibited consideration was a motivating factor in a decision, even though other factors that are lawful also were used. However, if the employer can show that the same decision would have been reached even without the unlawful considerations, the court may not assess damages or require hiring, reinstatement, or promotion.

*Seniority Systems*

The Act provides that a seniority system that intentionally discriminates against the members of a protected group can be challenged (within 180 days of any of three
points: (1) when the system is adopted, (2) when an individual becomes subject to the system, or (3) when a person is injured by the system.

Race Norming and Affirmative Action
The Act makes it unlawful "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of employment-related tests on the basis of race, color, religion, sex, or national origin." Prior to the passage of this Act, within-group percentile scoring (so-called race norming) had been used extensively to adjust minority candidates' test scores to make them more comparable to those of nonminority candidates. When race norming was used, each individual's percentile score on a selection test was computed relative only to others in his or her race/ethnic group, and not relative to the scores of all examinees who took the test. However, a merged list of percentile scores (high to low) was presented to those responsible for hiring decisions.

Despite these prohibitions, another section of the Act states: "Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are in accordance with the law." Although it could be argued that the Act would permit an employer to make test-score adjustments where a court-ordered affirmative action plan is in place or where a court approves a conciliation agreement, to date the courts have not interpreted it so broadly (Chicago Firefighters Local 2 v. City of Chicago, 2001).

Extension to U.S. Senate and Appointed Officials
The Act extends protection from discrimination on the basis of race, color, religion, gender, national origin, age, and disability to employees of the U.S. Senate, political appointees of the President, and staff members employed by elected officials at the state level. Employees of the U.S. House of Representatives are covered by a House resolution adopted in 1988.

The Family and Medical Leave Act (FMLA) of 1993
The FMLA covers all private-sector employers with 50 or more employees, including part-timers, who work 1,250 hours over a 12-month period (an average of 25 hours per week). The law gives workers up to 12 weeks of unpaid leave each year for birth, adoption, or foster care of a child within a year of the child's arrival; care for a spouse, parent, or child with a serious health condition; or the employee's own serious health condition if it prevents him or her from working. Employers can require workers to provide medical certification of such serious illnesses and can require a second medical opinion. Employers also can exempt from the FMLA key salaried employees who are among their highest paid 10 percent. However, employers must maintain health insurance benefits for leave takers and give them their previous jobs (or comparable positions) when their leaves are over (Davis, 2003). Enforcement provisions of the FMLA are administered by the U.S. Department of Labor. The overall impact of this law was softened considerably by the exemption of some of its fiercest opponents—companies with fewer than 50 employees, or 95 percent of all businesses.

In its first 10 years of existence, the law has generally worked well, although legislation has been introduced to expand its scope and to allow compensatory time off instead of overtime pay for hours over 40 in a week. Many employers already offer more than
the law requires. Fully 63 percent in one survey said they provide more flexibility for employees, and 57 percent said they offer job-protected leave for absences that are not covered under the law. Examples are paid leave, leave for parent-teacher conferences, and leave for employees with fewer than 12 months of service (Clark, 2003).

This completes the discussion of “absolute prohibitions” against discrimination. The following sections discuss nondiscrimination as a basis for eligibility for federal funds.

**Executive Orders 11246, 11375, and 11478**

Presidential executive orders in the realm of employment and discrimination are aimed specifically at federal agencies, contractors, and subcontractors. They have the force of law even though they are issued unilaterally by the President without congressional approval, and they can be altered unilaterally as well. The requirements of these orders are parallel to those of Title VII.

In 1965, President Johnson issued Executive Order 11246, prohibiting discrimination on the basis of race, color, religion, or national origin as a condition of employment by federal agencies, contractors, and subcontractors with contracts of $10,000 or more. Those covered are required to establish and maintain an affirmative action plan in every facility of 50 or more people. Such plans are to include employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff or termination, pay, and selection for training. As of 2002, however, contractors are permitted to establish an affirmative action plan based on a business function or line of business (commonly referred to as a functional affirmative action plan). Doing so links affirmative action goals and accomplishments to the unit that is responsible for achieving them, rather than to a geographic location. Contractors must obtain the agreement and approval of the Office of Federal Contract Compliance Programs prior to making this change (Anguish, 2002).

In 1967, Executive Order 11375 was issued, prohibiting discrimination in employment based on sex. Executive Order 11478, issued by President Nixon in 1969, went even further, for it prohibited discrimination in employment based on all of the previous factors, plus political affiliation, marital status, and physical disability.

**Enforcement of Executive Orders**

Executive Order 11246 provides considerable enforcement power. It is administered by the Department of Labor through its Office of Federal Contract Compliance Programs (OFCCP). Upon a finding by the OFCCP of noncompliance with the order, the Department of Justice may be advised to institute criminal proceedings, and the secretary of labor may cancel or suspend current contracts, as well as the right to bid on future contracts. Needless to say, noncompliance can be very expensive.

**The Rehabilitation Act of 1973**

This Act requires federal contractors (those receiving more than $2,500 in federal contracts annually) and subcontractors actively to recruit qualified individuals with disabilities and to use their talents to the fullest extent possible. The legal requirements are similar to those of the Americans with Disabilities Act.

The purpose of this act is to eliminate systemic discrimination—i.e., any business practice that results in the denial of equal employment opportunity. Hence, the Act emphasizes “screening in” applicants, not screening them out. It is enforced by the OFCCP.
Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994
Regardless of its size, an employer may not deny a person initial employment, reemploy-
ment, promotion, or benefits based on that person's membership or potential member-
ship in the uniformed services. USERRA requires both public and private employers
promptly to reemploy individuals returning from uniformed service (e.g., National Guard
or activated reservists) in the position they would have occupied and with the seniority
rights they would have enjoyed had they never left. Employers are also required to
maintain health benefits for employees while they are away, but they are not required to
make up the often significant difference between military and civilian pay (Garcia, 2003).
To be protected, the employee must provide advance notice. Employers need not always
rehire a returning service member (e.g., if the employee received a dishonorable discharge
or if changed circumstances at the workplace, such as bankruptcy or layoffs, make reem-
ployment impossible or unreasonable), but the burden of proof will almost always be on
the employer. If a court finds that there has been a "willful" violation of USERRA, it may
order double damages based on back pay or benefits. This law is administered by the
Veterans Employment and Training Service of the U.S. Department of Labor.

ENFORCEMENT OF THE LAWS—REGULATORY AGENCIES
State Fair Employment Practices Commissions
Most states have nondiscrimination laws that include provisions expressing the public
policy of the state, the persons to whom the law applies, and the prescribed activities
of various administrative bodies. Moreover, the provisions specify unfair employment
practices, procedures, and enforcement powers. Many states vest statutory enforce-
ment powers in a state fair employment practices commission. Nationwide, there are
about 100 such state and local agencies.

Equal Employment Opportunity Commission (EEOC)
The EEOC is an independent regulatory agency whose five commissioners (one of
whom is the chair) are appointed by the President and confirmed by the Senate for
terms of five years. No more than three of the commissioners may be from the same
political party. Like the OFCCP, the EEOC sets policy and in individual cases deter-
mines whether there is "reasonable cause" to believe that unlawful discrimination has
occurred. It should be noted, however, that the courts give no legal standing to EEOC
rulings on whether or not "reasonable cause" exists; each Title VII case constitutes a
new proceeding.

The EEOC is the major regulatory agency charged with enforcing federal civil
rights laws, but its 50 field offices, 24 district offices, and 2,800 employees are
rapidly becoming overwhelmed with cases. In 2003, for example, individuals filed
81,293 complaints with the agency. The average filing is resolved within six months,
but about 40,000 cases remain unresolved (Abelson, 2001). Race, sex, disability, and
age discrimination claims are most common, but claims of retaliation by employers
against workers who have complained have nearly tripled in the last decade, to
almost 23,000 in 2002. In 2002, the EEOC won more than $250 million for
aggrieved parties, not including monetary benefits obtained through litigation (EEOC, 2003).

The Complaint Process
Complaints filed with the EEOC first are deferred to a state or local fair employment practices commission if there is one with statutory enforcement power. After 60 days, EEOC can begin its own investigation of the charges, whether or not the state agency takes action. Of course, the state or local agency may immediately re-defer to the EEOC.

In order to reduce its backlog of complaints, the EEOC prioritizes cases and tosses out about 20 percent as having little merit (Abelson, 2001). Throughout the complaint process, the Commission encourages the parties to settle and to consider alternative resolution of disputes. This is consistent with the Commission's three-step approach: investigation, conciliation, and litigation. If conciliation efforts fail, court action can be taken. If the defendant is a private employer, the case is taken to the appropriate federal district court; if the defendant is a public employer, the case is referred to the Department of Justice.

In addition to processing complaints, the EEOC is responsible for issuing written regulations governing compliance with Title VII. Among those already issued are guidelines on discrimination because of pregnancy, sex, religion, and national origin; guidelines on employee selection procedures (in concert with three other federal agencies—see Appendix A); guidelines on affirmative action programs; and a policy statement on pre-employment inquiries. These guidelines are not laws, although the Supreme Court (in Albemarle Paper Co. v. Moody, 1975) has indicated that they are entitled to "great deference." While the purposes of the guidelines are more legal than scientific, violations of the guidelines will incur EEOC sanctions and possible court action.

The EEOC has one other major function: information gathering. Each organization with 100 or more employees must file annually with the EEOC an EEO-1 form, detailing the number of women and members of four different minority groups employed in nine different job categories from laborers to managers and officials. The specific minority groups tracked are African Americans; Americans of Cuban, Spanish, Puerto Rican, or Mexican origin; Orientals; and Native Americans (which in Alaska includes Eskimos and Aleuts). Through computerized analysis of EEO-1 forms, the EEOC is better able to uncover broad patterns of discrimination and to attack them through class-action suits.

Office of Federal Contract Compliance Programs (OFCCP)
The OFCCP, an agency of the U.S. Department of Labor, has all enforcement as well as administrative and policy-making authority for the entire contract compliance program under Executive Order 11246. That Order affects more than 26 million employees and 200,000 employers. "Contract compliance" means that in addition to meeting the quality, timeliness, and other requirements of federal contract work, contractors and subcontractors must satisfy EEO and affirmative action requirements covering all aspects of employment, including recruitment, hiring, training, pay, seniority, promotion, and even benefits (U.S. Department of Labor, 2002).
Goals and Timetables
Whenever job categories include fewer women or minorities “than would reasonably be expected by their availability,” the contractor must establish goals and timetables (subject to OFCCP review) for increasing their representation. Goals are distinguishable from quotas in that quotas are inflexible; goals, on the other hand, are flexible objectives that can be met in a realistic amount of time. In determining representation rates, eight criteria are suggested by the OFCCP, including the population of women and minorities in the labor area surrounding the facility, the general availability of women and minorities having the requisite skills in the immediate labor area or in an area in which the contractor can reasonably recruit, and the degree of training the contractor is reasonably able to undertake as a means of making all job classes available to women and minorities. The U.S. Department of Labor now collects data on four of these criteria for 385 standard metropolitan statistical areas throughout the United States.

How has the agency done? Typically OFCCP conducts 3,500 to 5,000 compliance reviews each year and recovers $30 to $40 million in back pay and other costs. The number of companies debarred varies each year, from none to about 8 (Crosby et al., 2003; U.S. Department of Labor, 2002).

JUDICIAL INTERPRETATION—GENERAL PRINCIPLES

While the legislative and executive branches may write the law and provide for its enforcement, it is the responsibility of the judicial branch to interpret the law and to determine how it will be enforced. Since judicial interpretation is fundamentally a matter of legal judgment, this area is constantly changing. Of necessity, laws must be written in general rather than specific form, and, therefore, they cannot possibly cover the contingencies of each particular case. Moreover, in any large body of law, conflicts and inconsistencies will exist as a matter of course. Finally, changes in public opinions and attitudes and new scientific findings must be considered along with the letter of the law if justice is to be served.

Legal interpretations define what is called case law, which serves as a precedent to guide, but not completely to determine, future legal decisions. A considerable body of case law pertinent to employment relationships has developed. The intent of this section is not to document thoroughly all of it, but merely to highlight some significant developments in certain areas.

Testing
The 1964 Civil Rights Act clearly sanctions the use of “professionally developed” ability tests, but it took several landmark Supreme Court cases to spell out the proper role and use of tests. The first of these was Griggs v. Duke Power Company, decided in March 1971 in favor of Griggs. It established several important general principles in employment discrimination cases:

1. African Americans hired before a high school diploma requirement was instituted are entitled to the same promotional opportunities as whites hired at the same time. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In
short, the Act does not command that any person be hired simply because he was formerly
the subject of discrimination or because he is a member of a minority group. Discriminatory prefer-
ence for any group, minority or majority, is precisely and only what Congress has proscribed
(p. 425).
2. The employer bears the burden of proof that any given requirement for employment is
related to job performance.
3. "Professionally developed" tests (as defined in the Civil Rights Act of 1964) must be job-
related.
4. The law prohibits not only open and deliberate discrimination, but also practices that are
fair in form but discriminatory in operation.
5. It is not necessary for the plaintiff to prove that the discrimination was intentional: intent is
irrelevant. If the standards result in discrimination, they are unlawful.
6. Job-related tests and other measuring procedures are legal and useful.

What Congress has forbidden is giving these devices and mechanisms controlling
force unless they are demonstrably a reasonable measure of job performance... What
Congress has commanded is that any tests used must measure the person for the job
and not the person in the abstract (p. 428).

Subsequently, in Albemarle Paper Co. v. Moody (1975), the Supreme Court specified in much greater detail what "job relevance" means. In validating several tests to
determine if they predicted success on the job, Albemarle focused almost exclusively
on job groups near the top of the various lines of progression, while the same tests
were being used to screen entry-level applicants. Such use of tests is prohibited.

Albemarle had not conducted any job analyses to demonstrate empirically that the
knowledge, skills, and abilities among jobs and job families were similar. Yet tests that
had been validated for only several jobs were being used as selection devices for all
jobs. Such use of tests was ruled unlawful. Furthermore, in conducting the validation
study, Albemarle's supervisors were instructed to compare each of their employees to
every other employee and to rate one of each pair "better." Better in terms of what?
The Court found such job performance measures deficient, since there is no way of
knowing precisely what criteria of job performance the supervisors were considering.

Finally, Albemarle's validation study dealt only with job-experienced white workers,
but the tests themselves were given to new job applicants, who were younger,
largely inexperienced, and in many cases nonwhite.

Thus, the job relatedness of Albemarle's testing program had not been demonstrated adequately. However, the Supreme Court ruled in Washington v. Davis (1976)
that a test that validly predicts police-recruit training performance, regardless of its ability
to predict later job performance, is sufficiently job related to justify its continued use,
despite the fact that four times as many African Americans as whites failed the test.

Overall, in Griggs, Moody, and Davis, the Supreme Court has specified in much
greater detail the appropriate standards of job relevance: adequate job analysis; relevant,
reliable, and unbiased job performance measures; and evidence that the tests used
forecast job performance equally well for minorities and nonminorities.

To this point, we have assumed that any tests used are job-related. But suppose that
a written test used as the first hurdle in a selection program is not job-related and that it
produces an adverse impact against African Americans? Adverse impact refers to a sub-
stantially different rate of selection in hiring, promotion, or other employment decisions
that works to the disadvantage of members of a race, sex, or ethnic group. Suppose further that among those who pass the test, proportionately more African Americans than whites are hired, so that the “bottom line” of hires indicates no adverse impact. This thorny issue faced the Supreme Court in Connecticut v. Teal (1982).

The Court ruled that Title VII provides rights to individuals, not to groups. Thus, it is no defense to discriminate unfairly against certain individuals (e.g., African-American applicants) and then to “make up” for such treatment by treating other members of the same group favorably (that is, African Americans who passed the test). In other words, it is no defense to argue that the bottom line indicates no adverse impact if intermediate steps in the hiring or promotion process do produce adverse impact and are not job-related.

Decades of research have established that when a job requires cognitive ability, as virtually all jobs do, and tests are used to measure it, employers should expect to observe statistically significant differences in average test scores across racial/ethnic subgroups on standardized measures of knowledge, skill, ability, and achievement (Sackett, Schmitt, Ellingson, & Kabin, 2001). Alternatives to traditional tests tend to produce equivalent subgroup differences when the alternatives measure job-relevant constructs that require cognitive ability. What can be done? Begin by identifying clearly the kind of performance one is hoping to predict, and then measure the full range of performance goals and organizational interests, each weighted according to its relevance to the job in question (DeCorte, 1999). That domain may include abilities, as well as personality characteristics, measures of motivation, and documented experience (Sackett et al., 2001). Chapter 8 provides a more detailed discussion of the remedies available. The end result may well be a reduction in subgroup differences.

Personal History

Frequently, qualification requirements involve personal background information or employment history, which may include minimum education or experience requirements, past wage garnishments, or previous arrest and conviction records. If such requirements have the effect of denying or restricting equal employment opportunity, they may violate Title VII.

This is not to imply that education or experience requirements should not be used. On the contrary, a review of 83 court cases indicated that educational requirements are most likely to be upheld when (1) a highly technical job, one that involves risk to the safety of the public, or one that requires advanced knowledge is at issue; (2) adverse impact cannot be established; and (3) evidence of criterion-related validity or an effective affirmative action program is offered as a defense (Meritt-Haston & Wexley, 1983).

Similar findings were reported in a review of 45 cases dealing with experience requirements (Arvey & McGowen, 1982). That is, experience requirements typically are upheld for jobs when there are greater economic and human risks involved with failure to perform adequately (e.g., airline pilots) or for higher-level jobs that are more complex. They typically are not upheld when they perpetuate a racial imbalance or past discrimination or when they are applied differently to different groups. Courts also tend to review experience requirements carefully for evidence of business necessity.

Arrest records, by their very nature, are not valid bases for screening candidates because in our society a person who is arrested is presumed innocent until proven guilty.
It might, therefore, appear that conviction records are always permissible bases for applicant screening. In fact, conviction records may not be used in evaluating applicants unless the conviction is directly related to the work to be performed—for example, when a person convicted of embezzlement applies for a job as a bank teller (cf. Hyland v. Fukada, 1978). Note that juvenile records are not available for pre-employment screening, and once a person turns 18, the record is expunged (Niam, 1999). Despite such constraints, remember that personal history items are not unlawfully discriminatory per se, but their use in each instance requires that job relevance be demonstrated.

**Sex Discrimination**

Judicial interpretation of Title VII clearly indicates that in the United States both sexes must be given equal opportunity to compete for jobs unless it can be demonstrated that sex is a bona fide occupational qualification for the job (e.g., actor, actress). Illegal sex discrimination may manifest itself in several different ways. Consider pregnancy, for example. EEOC’s interpretive guidelines for the Pregnancy Discrimination Act state:

A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth, or related medical conditions is in prima facie violation of Title VII. (2002, p. 185)

Under the law, an employer is never required to give pregnant employees special treatment. If an organization provides no disability benefits or sick leave to other employees, it is not required to provide them to pregnant employees (Trotter, Zacur, & Greenwood, 1982).

Many of the issues raised in court cases, as well as in complaints to the EEOC itself, were incorporated into the amended Guidelines on Discrimination Because of Sex, revised by the EEOC in 1999. The guidelines state that “the bona fide occupational exception as to sex should be interpreted narrowly.” Assumptions about comparative employment characteristics of women in general (e.g., that turnover rates are higher among women than men); sex role stereotypes; and preferences of employers, clients, or customers do not warrant such an exception. Likewise, the courts have disallowed unvalidated physical requirements—minimum height and weight, lifting strength, or maximum hours that may be worked.

**Sexual harassment** is a form of illegal sex discrimination prohibited by Title VII. According to the EEOC’s guidelines on sexual harassment in the workplace (1999), the term refers to unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct when submission to the conduct is either explicitly or implicitly a term or condition of an individual’s employment; when such submission is used as the basis for employment decisions affecting that individual; or when such conduct creates an intimidating, hostile, or offensive working environment. While many behaviors may constitute sexual harassment, there are two main types:

1. **Quid pro quo** (you give me this; I’ll give you that)
2. **Hostile work environment** (an intimidating, hostile, or offensive atmosphere)

*Quid pro quo harassment* exists when the harassment is a *condition of employment.* *Hostile environment harassment* was defined by the Supreme Court in its 1986 ruling in
Meritor Savings Bank v. Vinson. Vinson’s boss had abused her verbally, as well as sexually. However, since Vinson was making good career progress, the U.S. District Court ruled that the relationship was a voluntary one having nothing to do with her continued employment or advancement. The Supreme Court disagreed, ruling that whether the relationship was “voluntary” is irrelevant. The key question is whether the sexual advances from the supervisor are “unwelcome.” If so, and if they are sufficiently severe or pervasive to be abusive, then they are illegal. This case was groundbreaking because it expanded the definition of harassment to include verbal or physical conduct that creates an intimidating, hostile, or offensive work environment or interferes with an employee’s job performance.

In a 1993 case, Harris v. Forklift Systems, Inc., the Supreme Court ruled that plaintiffs in such suits need not show psychological injury to prevail. While a victim’s emotional state may be relevant, she or he need not prove extreme distress. In considering whether illegal harassment has occurred, juries must consider factors such as the frequency and severity of the harassment, whether it is physically threatening or humiliating, and whether it interferes with an employee’s work performance (Barrett, 1993).

The U.S. Supreme Court has gone even further. In two key rulings in 1998, Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton, the Court held that an employer always is potentially liable for a supervisor’s sexual misconduct toward an employee, even if the employer knew nothing about that supervisor’s conduct. However, in some cases, an employer can defend itself by showing that it took reasonable steps to prevent harassment on the job.

As we noted earlier, the Civil Rights Act of 1991 permits victims of sexual harassment—who previously could be awarded only missed wages—to collect a wide range of punitive damages from employers who mishandled a complaint.

Preventive Actions by Employers
What can an employer do to escape liability for the sexually harassing acts of its managers or workers? An effective policy should include the following features:

- A statement from the chief executive officer that states firmly that sexual harassment will not be tolerated
- A workable definition of sexual harassment that is publicized via staff meetings, bulletin boards, handbooks, and new-employee orientation programs
- An established complaint procedure to provide a vehicle for employees to report claims of harassment to their supervisors or to a neutral third party, such as the HR department
- A clear statement of sanctions for violators and protection for those who make charges
- A prompt, confidential investigation of every claim of harassment, no matter how trivial [Recognize, however, that investigators’ knowledge of a prior history of a dissolved workplace romance is likely to affect their responses to an ensuing sexual harassment complaint (Pierce, Aquinis, & Adams, 2000). Given this potential bias, consider developing an integrated policy that addresses both workplace romance and sexual harassment in the same document or training materials (Pierce & Aquinis, 2001).]
- Preservation of all investigative information, with records of all such complaints kept in a central location
- Training of all managers and supervisors to recognize and respond to complaints, giving them written materials outlining their responsibilities and obligations when a complaint is made
- Follow-up to determine if harassment has stopped (Casellas & Hill, 1998; Proskauser Rose LLP, 2002)
Age Discrimination

To discriminate fairly against employees over 40 years old, an employer must be able to demonstrate a “business necessity” for doing so. That is, the employer must be able to show that age is a factor directly related to the safe and efficient operation of its business. It was not always so. When the ADEA was enacted in 1967, 45 percent of the job announcements included a maximum age listing, saying that people between the ages of 30 and 35 need not apply (McCann, in Grossman, 2003, p. 42). Today, age discrimination is usually more subtle, but it still happens. In a recent survey by ExecuNet.com, a whopping 84 percent of executives and recruiters surveyed said it starts about age 50 (Fisher, 2002).

To establish a *prima facie* case (i.e., a body of facts presumed to be true until proven otherwise) of age discrimination, an aggrieved individual must show that

1. He or she is within the protected age group (over 40 years of age).
2. He or she is doing satisfactory work.
3. He or she was discharged despite satisfactory work performance.
4. The position was filled by a person younger than the person replaced (*Schwager v. Sun Oil Co. of Pa.*, 1979).

If a case gets to a jury, aggrieved employees have a 78 percent success rate in both state and local jury trials. In federal district courts, the median age discrimination verdict is almost $300,000, tops for all types of discrimination (Grossman, 2003). Some employers settle out of court, as the following case illustrates.

As Woolworth’s stores (later known as Foot Locker) fell behind the competition in the late 1990s, a new executive team came in to save the once-proud chain. In a major housecleaning, store managers were assigned the dirty work. According to one of them, “We were told to cut the old-time employees who had been with us for years, who had been making more than the minimum wage, with medical and retirement plans. These people were told that their jobs were being eliminated. Then I had to go out and hire part-time hourly workers at a little more than half the salary” (Russell, in Grossman, 2003, p. 44). Soon that same manager was fired and joined a class-action lawsuit filed by the EEOC against Foot Locker. Said an EEOC attorney, “The managers who came in had the mandate to change the workforce. They did it with name-calling, egregious changes in schedules, and changing job assignments, aimed at harassment, hoping people would resign” (LeMoal-Gray, in Grossman, 2003, p. 44). In October 2002, Foot Locker entered into a consent decree with the EEOC, agreeing to pay a total of $3.5 million to members of the class. Thus, age serves as one more factor on which an organization’s nondiscrimination is judged—not by intent, but rather by results.

“English Only” Rules—National Origin Discrimination?

Rules that require employees to speak only English in the workplace have come under fire in recent years. Employees who speak a language other than English claim that such rules are not related to the ability to do a job and have a harsh impact on them because of their national origin.

In one such case, an employer applied an “English only” rule while employees were on the premises of the company. Non-Spanish-speaking employees complained that they were being talked about by the plaintiff and others who spoke Spanish. The Eleventh Circuit Court of Appeals ruled in favor of the employer. The court noted that
the rule in this case was job-related in that supervisors and other employees who spoke only English had a need to know what was being said in the workplace (Digh, 1998).

Under other circumstances, safety issues arise when medical workers or firefighters do not understand or cannot make themselves understood (Prengaman, 2003). Conversely, many employers would be delighted to have a worker who can speak the language of a non-English-speaking customer.

Employers should be careful when instituting an “English only” rule. While it is not necessarily illegal to make fluency in English a job requirement or to discipline an employee for violating an “English only” rule, an employer must be able to show there is a legitimate business need for it. Otherwise, the employer may be subject to discrimination complaints on the basis of national origin.

**Seniority**

*Seniority* is a term that connotes length of employment. A seniority system is a scheme that, alone or in tandem with “non-seniority” criteria, allots to employees ever-improving employment rights and benefits as their relative lengths of pertinent employment increase (*California Brewers Association v. Bryant*, 1982).

Various features of seniority systems have been challenged in the courts for many years (Gordon & Johnson, 1982). However, one of the most nettlesome issues is the impact of established seniority systems on programs designed to ensure equal employment opportunity. Employers often work hard to hire and promote members of protected groups. If layoffs become necessary, however, those individuals may be lost because of their low seniority. As a result, the employer takes a step backward in terms of workforce diversity. What is the employer to do when seniority conflicts with EEO?

The courts have been quite clear in their rulings on this issue. In two landmark decisions, *Firefighters Local Union No. 1784 v. Stotts* (1984) (decided under Title VII) and *Wygant v. Jackson Board of Education* (1986) (decided under the equal protection clause of the Fourteenth Amendment), the Supreme Court ruled that an employer may not protect the jobs of recently hired African-American employees at the expense of whites who have more seniority (Greenhouse, 1984).

Voluntary modifications of seniority policies for affirmative action purposes remain proper, but where a collective bargaining agreement exists, the consent of the union is required. Moreover, in the unionized setting, courts have made it clear that the union must be a party to any decree that modifies a bona fide seniority system (Britt, 1984).

**Preferential Selection**

An unfortunate side effect of affirmative action programs designed to help minorities and women is that they may, in so doing, place qualified white males at a competitive disadvantage. However, social policy as embodied in Title VII emphasizes that so-called reverse discrimination (discrimination against whites and in favor of members of protected groups) is just as unacceptable as is discrimination by whites against members of protected groups (*McDonald v. Santa Fe Transportation Co.*, 1976).

This is the riddle that has perplexed courts and the public since the dawn of affirmative action 40 years ago: How do you make things fair for oppressed groups while
continuing to treat people as equal individuals (Von Drehle, 2003)? Court cases, together with the Civil Rights Act of 1991, have clarified a number of issues in this area:

1. Courts may order, and employers voluntarily may establish, affirmative action plans, including goals and timetables, to address problems of underutilization of women and minorities. Court-approved affirmative action settlements may not be reopened by individuals who were not parties to the original suit.

2. The plans need not be directed solely to identified victims of discrimination, but may include general classwide relief.

3. While the courts will almost never approve a plan that would result in whites losing their jobs through layoffs, they may sanction plans that impose limited burdens on whites in hiring and promotions (i.e., plans that postpone them).

What about numerically based preferential programs? The U.S. Supreme Court issued two landmark rulings in 2003 that clarified this issue. Both cases represented challenges to admissions policies at the University of Michigan, one involving undergraduate admissions (Gratz v. Bollinger, 2003) and one involving law school admissions (Grutter v. Bollinger, 2003). The undergraduate admissions policy was struck down because it was too mechanistic. It awarded 20 points of the 150 needed for admission (and 8 points more than is earned for a perfect SAT score) to any member of an officially recognized minority group. Such a disguised quota system denied other applicants the equal protection of the law guaranteed by the Fourteenth Amendment to the U.S. Constitution, and, thus, it was ruled illegal.

However, the Court also was mindful of arguments from leading businesses, educational institutions, and former military officials that a culturally diverse, well-educated workforce is vital to the competitiveness of the U.S. economy and that an integrated officer corps produced by diverse military academies and ROTC programs is vital to national security. The Court upheld the law school’s approach to enrolling a “critical mass” of African Americans, Latinos, and Native Americans, under which the school considers each applicant individually and sets no explicit quota. To be consistent with the constitutional guarantee of equal treatment for all under the law, race-conscious admissions must be limited in time. Thus, the Court noted, “We expect that 25 years from now the use of racial preferences will no longer be necessary.”

The Court emphasized that diversity is a “compelling state interest,” but that universities may not use quotas for members of racial or ethnic groups or put them on separate admissions tracks. The law school’s admissions policy satisfied these principles by ensuring that applicants are evaluated individually. Under that approach, the Court noted, a nonminority student with a particularly interesting contribution to make to the law school’s academic climate may sometimes be preferred over a minority student with better grades and test scores.

The net effect of the two rulings is to permit public and private universities to continue to use race as a “plus factor” in evaluating potential students—provided they take sufficient care to evaluate individually each applicant’s ability to contribute to a diverse student body (“Court Preserves,” 2003; Lane, 2003). The Court made clear that its rationale for considering race was not to compensate for past discrimination, but to obtain educational benefits from a diverse student body. Corporate hiring policies also will have to reflect the Court’s double message: Diversity efforts are acceptable, but quotas aren’t (Kronholz, Tomsho, & Forelle, 2003).
In Part I, we have examined the legal and social environments within which organizations and individuals function. In order for both to function effectively, however, competent HRM is essential. In the next chapter, therefore, we shall present fundamental tools (systems analysis and decision theory) that will enable the HR professional to develop a conceptual framework for viewing employment decisions and methods for assessing the outcomes of such decisions.

**Discussion Questions**

1. Discuss three features of the 1991 Civil Rights Act that you consider most important. What impact do these features have on organizations?
2. Prepare a brief outline for the senior management of your company that illustrates the requirements and expected impact of the Family and Medical Leave Act.
3. What specific steps would you recommend to a firm in order to ensure fair treatment of persons with disabilities?
4. Prepare a brief outline of an organizational policy on sexual harassment. Be sure to include grievance, counseling, and enforcement procedures.
5. What guidance would you give to an employer who asks about rights and responsibilities in administering a testing program?