Know the Buzz Words in a Charge or Determination Letter

John F. Wymer, III
404.567.4376
ejwymer@shermanhoward.com

Lori Wright Keffer
602.240.3068
lkeffer@shermanhoward.com

Title VII

- Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based upon sex, color, race, national origin and religion
- Equal Employment Opportunity Commission (EEOC): responsible for administering Title VII, including investigating charges

Discrimination: Basic Theories of Liability

- Employment discrimination suits under Title VII generally proceed under one of two theories:
  - Disparate Treatment: The employer treats some people less favorably than others due to race, color, religion, sex or national origin
  - Disparate Impact: Facially neutral employment practices that fall more harshly on one protected group than others, and that cannot be justified by business necessity
**Disparate Treatment**

- General Description: Treating people differently based upon one of the statutorily prohibited grounds, including age, race, color, religion, sex, disability or national origin

- Issues of Analysis:
  1. Is there a protected status?
  2. Was there an adverse employment action?
  3. What was the motivating factor?
  4. What evidence is available to establish the motives or defenses?
  5. Burden-shifting scheme

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**Disparate Treatment**

Is There A Protected Status?

- Association: An employee may claim a protected class based not on his or her own status, but on the status of a person associated with the plaintiff

- Futility: Persons may be treated as applicants, even when they did not actually apply for a job, if applying would have been futile due to discrimination

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**Disparate Treatment**

Did An Adverse Employment Action Occur?

- To bring a claim of disparate treatment, the employee must have suffered an adverse employment action

- Courts disagree on the appropriate threshold for what qualifies as an “adverse action”
Disparate Treatment

Did An Adverse Employment Action Occur?
– Supreme Court: "a tangible employment action" is a significant change in employment status, such as hiring, firing, promotions, reassignments with significantly different responsibilities or a decision causing a significant change in benefits
– Others hold that an adverse action must be a materially adverse change that is more disruptive than a mere inconvenience or an alteration of job responsibilities
– Others use a case-by-case approach

Disparate Treatment

What Is The Motivating Factor Behind The Adverse Action?
– Standard: Employees are only required to show that their protected status was a motivating factor in the adverse employment action at issue
– The employer is liable, even though a number of other factors also may have motivated the decision

Disparate Treatment

Is There A Mixed Motive Defense Behind The Adverse Action?
– When other factors also motivated the decision, it is known as a mixed motive decision
– Partial Defense: Employers may limit liability in Mixed Motive cases if:
  • They would have taken the same action, even if the employee’s protected status had not been a motivating factor
Disparate Treatment

What Evidence Is Available To Establish The Motives Or Defenses?

– Direct evidence: Such as notes or statements by decision-makers

– Circumstantial evidence: Evidence that provides an inference of discrimination

Disparate Treatment

The Burden-Shifting Scheme

• Step 1: The Employee/Plaintiff has the burden of proving by a preponderance of the evidence that:
  – S/he is a member of a protected group;
  – S/he applied for or held a position for which s/he was qualified;
  – S/he was subjected to an adverse employment action;
  – The position remained open, or other similarly situated employees outside their protected group were not subjected to the adverse action

Disparate Treatment

The Burden-Shifting Scheme

– Step 2: The Defendant has the burden of articulating (not proving) a legitimate, non-discriminatory reason for its decision

– Step 3: Once the Defendant articulates a legitimate, non-discriminatory reason, the Employee/Plaintiff must present evidence establishing that the Defendant's legitimate reason is false or pretextual
Disparate Treatment

The Burden-Shifting Scheme

• Step 4: Defendant's Defenses to Unlawful Discrimination:
  – Good-faith belief
  – Qualifications
  – Knowledge

Disparate Impact

Employment practices that:

1. Are facially neutral in their treatment of different groups, but
2. That in implementation fall more harshly on one group than another, and
3. Are not justified by business necessity

Disparate Impact

• Griggs v. Duke Power: Supreme Court struck down the employer's high school education requirement and general intelligence test used as a condition of employment or in transfer to jobs
  – Held that standards were not necessary or related in a significant way to successful job performance;
  – Requirements operated to disqualify African American applicants at a substantially higher rate than Caucasian applicants; and
  – Employer's lack of intent to discriminate in using the requirement was not determinative.
Disparate Impact

• Business Necessity
  – If an employment practice that operates to exclude a protected clause cannot be shown to be related to job performance, the practice is prohibited
  – Even if Employer/Defendant can prove job-relatedness, the Employee/Plaintiff may still show that another method would serve the interest without the undesirable effects

Disparate Impact

The Burden-Shifting Scheme

• Step 1: Employee/Plaintiff must demonstrate that a particular employment practice causes a disparate impact on the basis of race, color, religion, sex or national origin

Disparate Impact

• Step 2: Defendant must establish that the practice is job-related and consistent with business necessity
  – If so, no violation, unless Step 3 satisfied
• Step 3: Employee/Plaintiff must demonstrate that there is an alternative employment practice that does not cause the disparate impact, and that Defendant refuses to adopt this practice
Class Actions

• Private individuals may bring suit under Title VII either for themselves or on behalf of a class of persons similarly situated

• Requirements of Rule 23(a):
  - Numerosity
  - Commonality
  - Typicality
  - Adequate Representation

Class Actions

• Requirements of Rule 23(a)
  
  – Numerosity: The class must be so numerous that joinder of all members is impracticable
  
  – Commonality: “Questions of law or fact common to the class”

Class Actions

• Requirements of Rule 23(a)
  
  – Typicality:
    • Identifiable class; and
    • Appropriate representative for that class, that possesses the same interest and suffered the same injury as class members
  
  – Adequate Representation: “The representative parties will fairly and adequately protect the interests of the class”
Collective Actions

- The Fair Labor Standards Act ("FLSA") establishes minimum wage, overtime pay eligibility, child labor standards and recordkeeping for workers
  - Creates a private cause of action against an employer by employees, for and on behalf of themselves, and any other similarly situated employees. This is known as a collective action.

Class v. Collective Actions

1. Opt-In vs. Opt-Out Distinction
   - In collective actions, members must affirmatively opt into the litigation. In class actions, employees are presumed to be part of the class and must opt out.

2. Types of Claims
   - Class actions cannot be used to assert wage and hour claims brought under the FLSA. Employees may only bring collective actions for such claims.

Retaliation

- An employee or applicant is protected from retaliation under Title VII if:
  - He or she opposed any practice made unlawful by Title VII; or
  - Brought a charge, testified in, assisted with or otherwise participated in an investigation, proceeding, or hearing under Title VII.
Retaliation

To prevail on a retaliation claim, one must demonstrate that the Employee/Plaintiff:

1. Engaged in protected activity;
2. Suffered a materially adverse action; and
3. Established the causal connection between the protected activity and materially adverse action.

Retaliation

1. Protected Activity:
   - Case Examples of protected activity:
     • Complaints to employer regarding harassment;
     • Participation in an investigation, even if only participating at the employer's request and not voluntarily;
     • Complaints about supervisor's handling of harassment complaints; and
     • Speaking out on behalf of other workers.

Retaliation

1. Protected Activity
   - Case examples of activity that is not protected:
     • Employee's efforts to secure affirmative action requirements (because such efforts do not oppose a practice violating Title VII); and
     • Employee's complaints of an office affair (because preferential treatment on the basis of a consensual romantic relationship is not discrimination, and thus reporting such is not protected conduct).
Retaliation

2. Materially Adverse Action:
   - Materially adverse to a reasonable employee or job applicant
     • Harmful to the point that the actions could well dissuade a reasonable worker from making or supporting a discrimination charge
     • May be unrelated to the employee's employment and does not need to occur at the workplace

Retaliation

2. Materially Adverse Action
   • The following do not qualify as a materially adverse action:
     – Petty slights;
     – Minor annoyances; and
     – Simple lack of good manners.

Retaliation

3. Causal Connection:
   • To prevail on a retaliation claim, Employee/Plaintiff must show that "but for" the protected activity, he/she would not have suffered the adverse employment action
     – Timing may be an important causal factor (i.e., the fact that adverse employment action occurred very shortly after protected activity)
Harassment

• “Hostile work environment”

  – A hostile work environment occurs when harassment is so pervasive and severe that it alters an employee’s terms or conditions of employment, creating an abusive working environment