Having discussed the major laws defining equal employment opportunity and the agencies that enforce these laws, we now address the various types of discrimination and the ways these forms of discrimination have been interpreted by the courts in a number of cases.

**Types of Discrimination**

How would you know if you had been discriminated against? Assume that you have applied for a job and were not hired. How do you know if the organization decided not to hire you because you are unqualified, because you are less qualified than the individual ultimately hired, or simply because the person in charge of the hiring decision “didn’t like your type”? Discrimination is a multifaceted issue. It is often not easy to determine the extent to which unfair discrimination affects an employer’s decisions.

Legal scholars have identified three theories of discrimination: disparate treatment, disparate impact, and reasonable accommodation. In addition, there is protection for those participating in discrimination cases or opposing discriminatory actions. In the act, these theories are stated in very general terms. However, the court system has defined and delineated these theories through the cases brought before it. A comparison of the theories of discrimination is given in Table 3.3.

**Table 3.3**

Comparison of Discrimination Theories

<table>
<thead>
<tr>
<th>TYPES OF DISCRIMINATION</th>
<th>DISPARATE TREATMENT</th>
<th>DISPARATE IMPACT</th>
<th>REASONABLE ACCOMMODATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Show intent?</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Show intent?</td>
<td>Individual is a member of a protected group, was qualified for the job, and was turned down for the job, and the job remained open.</td>
<td>Statistical disparity in the effects of a facially neutral employment practice.</td>
<td>Individual has a belief of disability, provided the employer with notice (request to accommodate), and was adversely affected by a failure to be accommodated.</td>
</tr>
<tr>
<td>Employer’s defense</td>
<td>Produce a legitimate, non-discriminatory reason for the employment decision or show bona fide occupational qualification (BFOQ).</td>
<td>Prove that the employment practice bears a manifest relationship with job performance.</td>
<td>Job-relatedness and business necessity, undue hardship, or direct threat to health or safety.</td>
</tr>
<tr>
<td>Plaintiff’s rebuttal</td>
<td>Reason offered was merely a “pretext” for discrimination.</td>
<td>Alternative procedures exist that meet the employer’s goal without having disparate impact.</td>
<td></td>
</tr>
<tr>
<td>Monetary damages</td>
<td>Compensatory and punitive damages.</td>
<td>Equitable relief (e.g., back pay).</td>
<td>Compensatory and punitive damages (if discrimination was intentional or employer failed to show good-faith efforts to accommodate).</td>
</tr>
</tbody>
</table>
procedures. Therefore, the EEOC issued guidelines in the Federal Register that provided more detailed information regarding what the agency will consider legal and illegal employment practices concerning disabled individuals. Although companies are well advised to follow these guidelines, it is possible that courts will interpret the ADA differently from the EEOC. Thus, through the issuance of guidelines, the EEOC gives employers directions for making employment decisions that do not conflict with existing laws.

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP)

The OFCCP is the agency responsible for enforcing the executive orders that cover companies doing business with the federal government. Businesses with contracts for more than $50,000 cannot discriminate in employment based on race, color, religion, national origin, or sex, and they must have a written affirmative action plan on file.

These plans have three basic components. First, the utilization analysis compares the race, sex, and ethnic composition of the employer’s workforce with that of the available labor supply. For each job group, the employer must identify the percentage of its workforce with a given characteristic (e.g., female) and identify the percentage of workers in the relevant labor market with that characteristic. If the percentage in the employer’s workforce is much less than the percentage in the comparison group, then that minority group is considered to be “underutilized.”

Second, the employer must develop specific goals and timetables for achieving balance in the workforce concerning these characteristics (particularly where underutilization exists). Goals and timetables specify the percentage of women and minorities that the employer seeks to have in each job group and the date by which that percentage is to be attained. These are not to be viewed as quotas, which entail setting aside a specific number of positions to be filled only by members of the protected class. Goals and timetables are much more flexible, requiring only that the employer have specific goals and take steps to achieve those goals. In fact, one study that examined companies with the goal of increasing black employment found that only 10% of them actually achieved their goals. Although this may sound discouragingly low, it is important to note that these companies increased their black employment more than companies that set no such goals.

Third, employers with federal contracts must develop a list of action steps they will take toward attaining their goals to reduce underutilization. The company’s CEO must make it clear to the entire organization that the company is committed to reducing underutilization, and all management levels must be involved in the planning process. For example, organizations can communicate job openings to women and minorities through publishing the company’s affirmative action policy, recruiting at predominantly female or minority schools, participating in programs designed to increase employment opportunities for underemployed groups, and removing unnecessary barriers to employment. Organizations must also take affirmative steps toward hiring Vietnam veterans and individuals with disabilities.

The OFCCP annually audits government contractors to ensure that they actively pursue the goals in their plans. These audits consist of (1) examining the company’s affirmative action plan and (2) conducting on-site visits to examine how individual employees perceive the company’s affirmative action policies. If the OFCCP finds that the contractors or subcontractors are not complying with the executive order, then its representatives may notify the EEOC (if there is evidence that Title VII has been violated), advise the Department of Justice to institute criminal proceedings, request that the secretary of labor cancel or suspend any current contracts, and forbid the firm from bidding on future contracts. This last penalty, called debarment, is the OFCCP’s most potent weapon.
DISPARATE TREATMENT

Disparate treatment exists when individuals in similar situations are treated differently and the different treatment is based on the individual's race, color, religion, sex, national origin, age, or disability status. If two people with the same qualifications apply for a job and the employer decides whom to hire based on one individual's race, the individual not hired is a victim of disparate treatment. In a disparate treatment case, the plaintiff must prove that there was a discriminatory motive—that is, that the employer intended to discriminate.

Whenever individuals are treated differently because of their race, sex, or the like, there is disparate treatment. For example, if a company fails to hire women with school-age children (claiming the women will be frequently absent) but hires men with school-age children, the applicants are being treated differently based on sex. Another example would be an employer who checks the references and investigates the conviction records of minority applicants but does not do so for white applicants. Why are managers advised not to ask about marital status? Because in most cases, a manager will either ask only the female applicants or, if the manager asks both males and females, he or she will make different assumptions about females (such as “She will have to move if her husband gets a job elsewhere”) and males (such as “He’s very stable”). In all these examples, notice that (1) people are being treated differently and (2) there is an actual intent to treat them differently.19

For instance, the Timken Company agreed to a $120,000 settlement over a sex and disability discrimination suit. In 2007, Carmen Halloran applied for a full-time position at Timken, after having worked at the facility as a part-time process associate for four years. The EEOC alleged that the company refused to hire Halloran because managers believed that Halloran, who is the mother of a disabled child, would be unable to work full time and care for her disabled child. They also alleged that this decision was based on an unfounded gender stereotype that the mother of a disabled child would necessarily be the primary caregiver because they did hire men with disabled children. “The EEOC is committed to fighting discrimination in the workplace,” said Lynette A. Barnes, regional attorney for the EEOC’s Charlotte District Office. “Employers must be careful not to apply stereotypes against women based on perceptions that they must always be the primary caregivers and therefore are unreliable employees.”20

To understand how disparate treatment is applied in the law, let’s look at how an actual court case, filed under disparate treatment, would proceed.

The Plaintiff’s Burden

As in any legal case, the plaintiff has the burden of proving that the defendant has committed an illegal act. This is the idea of a “prima facie” case. In a disparate treatment case, the plaintiff meets the prima facie burden by showing four things:

1. The plaintiff belongs to a protected group.
2. The plaintiff applied for and was qualified for the job.
3. Despite possessing the qualifications, the plaintiff was rejected.
4. After the plaintiff was rejected, the position remained open and the employer continued to seek applicants with similar qualifications, or the position was filled by someone with similar qualifications.

Although these four elements may seem easy to prove, it is important to note that what the court is trying to do is rule out the most obvious reasons for rejecting the plaintiff’s claim (for example, the plaintiff did not apply or was not qualified, or...
the position was already filled or had been eliminated). If these alternative explanations are ruled out, the court assumes that the hiring decision was based on a discriminatory motive.

**The Defendant’s Rebuttal**

Once the plaintiff has made the prima facie case for discrimination, the burden shifts to the defendant. The burden is different depending on whether the prima facie case presents only circumstantial evidence (there is no direct evidence of discrimination such as a formal policy to discriminate, but rather discriminatory intent must be inferred) or direct evidence (a formal policy of discrimination for some perceived legitimate reason). In cases of circumstantial evidence, the defendant simply must produce a legitimate, non-discriminatory reason, such as that, although the plaintiff was qualified, the individual hired was more qualified.

However, in cases where direct evidence exists, such as a formal policy of hiring only women for waitess jobs because the business is aimed at catering to male customers, then the defendant is more likely to offer a different defense. This defense argues that, for this job, a factor such as sex or religion was a *bona fide occupational qualification (BFOQ)*. For example, if one were hiring an individual to hand out towels in a women’s locker room, being a woman might be a BFOQ. However, there are very few cases in which sex qualifies as a BFOQ, and in these cases it must be a necessary, rather than simply a preferred, characteristic of the job.

*UAW v. Johnson Controls, Inc.*, illustrates the difficulty in using a BFOQ as a defense. Johnson Controls, a manufacturer of car batteries, had instituted a “fetal protection” policy that excluded women of child-bearing age from a number of jobs in which they would be exposed to lead, which can cause birth defects in children. The company argued that sex was a BFOQ essential to maintaining a safe workplace. The Supreme Court did not uphold the company’s policy, arguing that BFOQs are limited to policies that are directly related to a worker’s ability to do the job.

Interestingly, some factors are by no means off-limits when it comes to discrimination. For instance, a survey by *Newsweek* of 202 hiring managers revealed that almost 60% said that qualified, yet unattractive, applicants face a harder time getting hired. In addition, two-thirds believe that managers hesitate before hiring qualified, but overweight, candidates.

**The Plaintiff’s Rebuttal**

If the defendant provides a legitimate, nondiscriminatory reason for its employment decision, the burden shifts back to the plaintiff. The plaintiff must now show that the reason offered by the defendant was not in fact the reason for its decision but merely a “pretext” or excuse for its actual discriminatory decision. This could entail providing evidence that white applicants with similar qualifications to the plaintiff have often been hired while black applicants with similar qualifications were all rejected. To illustrate disparate treatment, let’s look at the first major case dealing with disparate treatment, *McDonnell Douglas Corp. v. Green*.

This Supreme Court case was the first to delineate the four criteria for a *prima facie* case of discrimination. From 1956 to 1964, Green had been an employee at McDonnell Douglas, a manufacturing plant in St. Louis, Missouri, that employed about 30,000 people. In 1964, he was laid off during a general workforce reduction.
While unemployed, he participated in some activities that the company undoubtedly frowned upon: a “lock-in,” where he and others placed a chain and padlock on the front door of a building to prevent the employees from leaving; and a “stall-in,” where a group of employees stalled their cars at the gates of the plant so that no one could enter or leave the parking lot. About three weeks after the lock-in, McDonnell Douglas advertised for qualified mechanics, Green’s trade, and he reapplied. When the company rejected his application, he sued, arguing that the company didn’t hire him because of his race and because of his persistent involvement in the civil rights movement.

In making his prima facie case, Green had no problem showing that he was a member of a protected group, that he had applied for and was qualified for the job (having already worked in the job), that he was rejected, and that the company continued to advertise the position. The company’s defense was that the plaintiff was not hired because he participated in the lock-in and the stall-in. In other words, the company was merely refusing to hire a troublemaker.

The plaintiff responded that the company’s stated reason for not hiring him was a pretext for discrimination. He pointed out that white employees who had participated in the same activities (the lock-in and the stall-in) were rehired, whereas he was not. The court found in favor of the plaintiff.

This case illustrates how similarly situated individuals (white and black) can be treated differently (whites were hired back whereas blacks were not) with the differences in treatment based on race. As we will discuss later, most plaintiffs bring cases of sexual harassment under this theory of discrimination, sexual harassment being a situation in which individuals are treated differently because of their sex.

**Mixed-Motive Cases**

In a mixed-motive case, the defendant acknowledges that some discriminatory motive existed but argues that the same hiring decision would have been reached even without the discriminatory motive. In Hopkins v. Price Waterhouse, Ann Hopkins was an accountant who had applied for partnership in her firm. Although she had brought in a large amount of business and had received high praise from her clients, she was turned down for a partnership on two separate occasions. In her performance reviews, she had been told to adopt more feminine dress and speech and received many other comments that suggested gender-based stereotypes. In court, the company admitted that a sex-based stereotype existed but argued that it would have come to the same decision (not promoted Hopkins) even if the stereotype had not existed.

One of the main questions that came out of this case was, Who has the burden of proof? Does the plaintiff have to prove that a different decision would have been made (that Hopkins would have been promoted) in the absence of the discriminatory motive? Or does the defendant have to prove that the same decision would have been made?

According to CRA 1991, if the plaintiff demonstrates that race, sex, color, religion, or national origin was a motivating factor for any employment practice, the prima facie burden has been met, and the burden of proof is on the employer to demonstrate that the same decision would have been made even if the discriminatory motive had not been present. If the employer can do this, the plaintiff cannot collect compensatory or punitive damages. However, the court may order the employer to quit using the discriminatory motive in its future employment decisions.
EVIDENCE-BASED HR

Weight discrimination, that is, making decisions based on negative stereotypes about people who are perceived as overweight, is not illegal and has been described as the last acceptable form of discrimination. A recent study used experts to rate male and female CEOs regarding their weight. These ratings suggested that 5–22% of top female CEOs in the United States are overweight and approximately 5% are obese, and that 45–61% of male CEOs are overweight and approximately 5% are obese. Compared to the general U.S. population, overweight and obese women are significantly underrepresented among top female CEOs. Compared to the population, these results show that overweight and obese female CEOs are underrepresented, overweight male CEOs are overrepresented, and obese male CEOs are underrepresented. In other words, weight discrimination occurs at the highest levels in organizations, and it impacts women more negatively than men.


DISPARATE IMPACT

The second type of discrimination is called disparate impact. It occurs when a facially neutral employment practice disproportionately excludes a protected group from employment opportunities. A facially neutral employment practice is one that lacks obvious discriminatory content yet affects one group to a greater extent than other groups, such as an employment test. Although the Supreme Court inferred disparate impact from Title VII in the Griggs v. Duke Power case (discussed later in this section), it has since been codified into the Civil Rights Act of 1991.

There is an important distinction between disparate impact and disparate treatment discrimination. For there to be discrimination under disparate treatment, there has to be intentional discrimination. Under disparate impact, intent is irrelevant. The important criterion is that the consequences of the employment practice are discriminatory.

For example, if, for some practical reason, you hired individuals based on their height, you may not have intended to discriminate against anyone, yet using height would have a disproportionate impact on certain protected groups. Women tend to be shorter than men, so fewer women will be hired. Certain ethnic groups, such as those of Asian ancestry, also tend to be shorter than those of European ancestry. Thus, your facially neutral employment practice will have a disparate impact on certain protected groups.

This is not to imply that simply because a selection practice has disparate impact, it is necessarily illegal. Some characteristics (such as height) are not equally distributed across race and gender groups; however, the important question is whether the characteristic is related to successful performance on the job. To help you understand how disparate impact works, let’s look at a court proceeding involving a disparate impact claim.

The Plaintiff’s Burden

In a disparate impact case, the plaintiff must make the prima facie case by showing that the employment practice in question disproportionately affects a protected group relative to the majority group. To illustrate this theory, let’s assume that you are a manager who has 60 positions to fill. Your applicant pool has 80 white and 40 black applicants.
You use a test that selects 48 of the white and 12 of the black applicants. Is this a disparate impact? Two alternative quantitative analyses are often used to determine whether a test has adverse impact.

The four-fifths rule states that a test has disparate impact if the hiring rate for the minority group is less than four-fifths (or 80%) of the hiring rate for the majority group. Applying this analysis to the preceding example, we would first calculate the hiring rates for each group:

\[
\text{Whites} = \frac{48}{80} = 60% \\
\text{Blacks} = \frac{12}{40} = 30%
\]

Then we would compare the hiring rate of the minority group (30%) with that of the majority group (60%). Using the four-fifths rule, we would determine that the test has adverse impact if the hiring rate of the minority group is less than 80% of the hiring rate of the majority group. Because it is less (i.e., \(30\% \times 60\% = 50\%\), which is less than 80%), we would conclude that the test has adverse impact. The four-fifths rule is used as a rule of thumb by the EEOC in determining adverse impact.

The standard deviation rule uses actual probability distributions to determine adverse impact. This analysis uses the difference between the expected representation (or hiring rates) for minority groups and the actual representation (or hiring rate) to determine whether the difference between these two values is greater than would occur by chance. Thus, in our example, 33% (40 of 120) of the applicants were blacks, so one would expect 33% (20 of 60) of those hired to be black. However, only 12 black applicants were hired. To determine if the difference between the expected representation and the actual representation is greater than we would expect by chance, we calculate the standard deviation (which, you might remember from your statistics class, is the standard deviation in a binomial distribution):

\[
\sqrt{\frac{\text{Number hired} \times \text{Number of minority applicants}}{\text{Number of total applicants}} \times \frac{\text{Number of nonminority applicants}}{\text{Number of total applicants}}}
\]

or in this case:

\[
\sqrt{60 \times \frac{40}{120} \times \frac{80}{120}} = 3.6
\]

If the difference between the actual representation and the expected representation (20 – 12 = 8 in this case) of blacks is greater than 2 standard deviations (2 \(\times\) 3.6 = 7.2 in this case), we would conclude that the test had adverse impact against blacks, because we would expect this result less than 1 time in 20 if the test were equally difficult for both whites and blacks.

The 
_Wards Cove Packing Co. v. Atanio_ case involved an interesting use of statistics. The plaintiffs showed that the jobs in the cannery (lower-paying jobs) were filled primarily with minority applicants (in this case, American Eskimos). However, only a small percentage of the noncannery jobs (those with higher pay) were filled by nonminorities. The plaintiffs argued that this statistical disparity in the racial makeup of the cannery and noncannery jobs was proof of discrimination. The federal district, appellate, and Supreme Courts all found for the defendant, stating that this disparity was not proof of discrimination.

Once the plaintiff has demonstrated adverse impact, he or she has met the burden of a prima facie case of discrimination.\(^{23}\)
Defendant’s Rebuttal
According to CRA 1991, once the plaintiff has made a prima facie case, the burden of proof shifts to the defendant, who must show that the employment practice is a “business necessity.” This is accomplished by showing that the practice bears a relationship with some legitimate employer goal. With respect to job selection, this relationship is demonstrated by showing the job relatedness of the test, usually by reporting a validity study of some type, to be discussed in Chapter 6. For now, suffice it to say that the employer shows that the test scores are significantly correlated with measures of job performance.

Measures of job performance used in validation studies can include such things as objective measures of output, supervisor ratings of job performance, and success in training. Normally, performance appraisal ratings are used, but these ratings must be valid for the court to accept the validation results. For example, in Albemarle Paper v. Moody, the employer demonstrated that the selection battery predicted performance (measured with supervisors’ overall rankings of employees) in only some of the 13 occupational groups in which it was used. In this case, the court was especially critical of the supervisory ratings used as the measure of job performance. The court stated, “There is no way of knowing precisely what criteria of job performance the supervisors were considering.”

Plaintiff’s Rebuttal
If the employer shows that the employment practice is the result of some business necessity, the plaintiff’s last resort is to argue that other employment practices could sufficiently meet the employer’s goal without adverse impact. Thus, if a plaintiff can demonstrate that selection tests other than the one used by the employer exist, do not have adverse impact, and correlate with job performance as highly as the employer’s test, then the defendant can be found guilty of discrimination. Many cases deal with standardized tests of cognitive ability, so it is important to examine alternatives to these tests that have less adverse impact while still meeting the employer’s goal. At least two separate studies reviewing alternative selection devices such as interviews, biographical data, assessment centers, and work sample tests have concluded that none of them met both criteria. It seems that when the employment practice in question is a standardized test of cognitive ability, plaintiffs will have a difficult time rebutting the defendant’s rebuttal.

To illustrate how this process works, let’s look at the Griggs v. Duke Power case. Following the passage of Title VII, Duke Power instituted a new system for making selection and promotion decisions. The system required either a high school diploma or a passing score on two professionally developed tests (the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test). A passing score was set so that it would be equal to the national median for high school graduates who had taken the tests.

The plaintiffs met their prima facie burden showing that both the high school diploma requirement and the test battery had adverse impacts on blacks. According to the 1960 census, 34% of white males had high school diplomas, compared with only 12% of black males. Similarly, 58% of white males passed the test battery, whereas only 6% of blacks passed.

Duke Power was unable to defend its use of these employment practices. A company vice president testified that the company had not studied the relationship between these employment practices and the employees’ ability to perform the job. In addition, employees already on the job who did not have high school diplomas and had never taken the tests were performing satisfactorily. Thus, Duke Power lost the case.