Employment Discrimination

Look At:

- **Is there an employer-employee relationship to be protected?**
  -If you're not an employee, you are generally not covered by discrimination laws. Discrim. law does not protect vendors, customers, independent contractors, etc.
    -most common issue: independent contractor v. employee (Use factors to argue both ways)
      ***most important is control**
    -Joint Employers still liable
    -3RD Party beneficiaries: If putative employees are beneficiaries—no duty
- **employment at will v. employment by written/oral K**
    -presumption that employment is at will unless there is K, public policy reason, unlawful discrimination violating a statute
    -wrongful termination: K theories of recovery (also look at personnel manual/handbook)
      -express/oral K
      -implied in fact K
      -implied covenant of good faith fair dealing
- **What constitutes good cause**
- **What law is being invoked—Is employer discriminating on an impermissible basis**
- **Do I have the right as an employer to fire/discipline someone? What do I have to think about?**

DEFINING EMPLOYEE STATUS

Steps:

1. **How the relevant statute defines "employee"** (Different relationships: independent contractor; intern/volunteer; joint employer; director (not employees unless holds other emp. Position)
    a. employer may be held liable under respondeat superior
    b. coming & going rule –employer liable for acts in "scope of employment"
    c. generally not employees:
        i. intern/volunteer (Fair Labor Standards Act requires satisfaction of a 6 point test P. 10)
        ii. independent contractor
        i. directors: RSMT "not an employee of an enterprise if the individual through an ownership interest controls all or part of the enterprise"
            1. Use Clackamas to argue both: Do you have all the control or do you have people numerous other members: Weigh (6) factors—look at p.25
2. **Look at the # of employees**
3. If no definition: Use CL factors by using the Common Law **CONTROL TEST**
    a. Most important factor is "CONTROL"—who has right to control
    b. Other Factors:
        i. Skill required (more skill you have—tilts scale to indep. Contractor)
        ii. Who provides the tools (if provided—more employee)
        iii. Extent of duration of employer (Longer—more employee)
        iv. Exclusivity of relationship (more exclusive—more employee)
        v. Employment benefits
        vi. Directions as to how, when, where individual is to work; ask does the employee have discretion (note: commission doesn't really play a part in whether you are an employee or independent contractor)
4. **Economic Realities Test**—*Sec of Labor v. Lauritzen*— Employees are those who as a matter of economic reality are dependent upon the business to which they render service, considering 6 factors:
        i. Nature & degree of control to the manner in which work is to be performed
        ii. Employees opportunity for profit or loss
        iii. Employee's investment in equipment or materials required
        iv. Whether service requires special skill
        v. Degree of permanency & duration of the working relationship
        vi. Extent to which services rendered is an integral part of the employer's business
    b. In *Laureitzen*, migrant pickle workers were employees b/c workers depend on the D's land, crops, expertise, equipment & marketing skills; invested nothing except cost of work gloves and has no money to lose

5. **Entrepreneurial Opportunity Test** — Did the putative independent contractor have significant opportunity for gain or loss?
    a. FedEx case: Considering the CL agency factors, drivers are independent contractors
        i. Looked at: ability to operate multiple routes, hire additional drivers/helpers, sell routes without permission, parties' intent expressed in K
            1. Cost of operation—drivers owned the trucks
            2. Can use the car after hours—just need to take off logo
            3. Can sell & bequest route w/o fedex's approval
        ii. Failure to take advantage of an opportunity is not of importance, court looked at what drivers could do: Actual right to engage in activity (doesn't matter that few took opp.)
    b. RSMT: (3) entrepreneurial control—control over important buss decisions including whether to hire, assign assistants, purchase/deploy equipment, whether/when to service other customers

THIRD PARTY BENEFICIARIES & JOINT EMPLOYERS (p.29-37)

1. Joint employers need not be a single enterprise. Rather court seeks to determine whether putative joint employers share in the actual or functional control of the work or compensation of the employees
    a. Pertinent factors p.32
    b. If employer—responsible
2. If employees are third party beneficiaries, no duty — so if an employer has the right to inspect, but it does not have the duty to, there can be no guaranteed beneficiary. Turns on the employers control over and ability to supervise the day-to-day activities, and previous relationship with the persons/employees

EMPLOYMENT CONTRACTS

1. Start with presumption that employment is at will
2. If you don't have a K guaranteeing your employment for a specific amt of time, and no illegal reason for terminating the employee—employer can terminate for any reason/no reason.
3. Restrictions to Employer's Right to Fire Employee At-Will:
    a. Contract — express, oral, implied in fact, covenant of good faith & fair dealing
    b. Public Policy Reasons (i.e.—exercising your legal rights—jury duty; takings leaves; etc)
    c. Unlawful Discrimination/Retaliation—if employer violates a statute
4. TIPS for employers
    a. Be explicit in offer letter, personnel paperwork, promotion letter—don't rely on presumption
    b. DON'T USE "permanent employment"
    c. Use language like "Full-Time" employee, or "Temporary" employee
    d. Distribute manuals to everyone
    e. Don't have such small font that people can't see

PERSONNEL MANUALS/EMPLOYEE HANDBOOK

1. Generally all jdx have found employee handbooks to give rise to enforceable promise of job security
2. **Employee Manual creates a K**—handbook is considered an offer and employee's continued work is acceptance & creates a unilateral K (*Woolley v. Hoffmann-La Roche, Inc.* (1985))
3. Once you start putting in rules in the employment manual, you need to abide by that: If you have things in writing & practice is different—courts will interpret against the employer
4. ***Manual's preparation and distribution* is most persuasive proof** that an employee would believe it to be a binding contract concerning the terms of his employment
5. What if there's a conflict between terms in the employee manual & what is in the employment K?
    a. Look for provisions that say—this overrides the other > K usually overrides the manual
6. What if employer doesn't give employee a copy of the employment manual? Is there a K?
    a. YES, courts assume reliance, and assumes employee's knowledge.
7. **Unilateral Modification/Rescission of Handbook Promises**
    a. **CA Approach** (rejects the unilateral K theory): **Do NOT need consideration**, bc the employer cannot negotiate employment with each employee. **Only required to give NOTICE** to change employee handbook, so long as it doesn't affect a vested right > for example in *Morris vs. Ernst & Young* case, the SCt held that Ernst's arbitration clause was invalid bc it prohibited employees from bringing class action (9th Cir held that it was valid, but just can't prohibit class actions).
    b. **Minority Approach:** Need consideration for modification or termination to employee handbook
        i. What would be sufficient consideration? Bonuses, stock options, day off
        ii. You can deny & not sign new manual & not receive the consideration

WRONGFUL TERMINATION: K THEORIES OF RECOVERY

1. Default Rule—unless otherwise stated, either party may terminate an employment relationship
2. BUT there is not a mutuality of obligation > obligation is on the EMPLOYER bc the employee can leave at any time, but employer cannot always terminate an employment contract at any time…
3. EMPLOYER CANNOT TERMINATE IF (page 44)
    a. agreements provides for (1) definite terms, or (2) indefinite term and requires cause to terminate the employment; or
        i. §2.03—for both: must have cause for termination
    b. promise by the employer to limit termination reas. induces detrimental reliance; or
        i. policy statement limits termination; or
        ii. implied duty of good faith & fair dealing limit termination; or
        iii. any other principle recognized in general law of Ks
4. **Agreements for Definite or Indefinite Term**:
    a. Express Contracts
    b. Oral K
        i. Ohanian v. Avis Rent a Car System
            1. F: Employer assured him that "unless he screwed up badly, there was no way he was going to get fired…" P signed a form for relocation fees which stated that there was no "obligation on the part of Avis to employ him for a period of time"
            2. R: SOF—if you can't perform in a year—in writing
            3. Here, could have been performed within 1 year
            4. H: Found that there was a promise of lifetime employment to a "star" employee who would revive a dying division of D's corporation
        ii. Contrary case: McInerney: required the K to be in writing b/c lifetime employment, better to view K as one "not to be performed within one year from making" (More normal resolution of lifetime employment—SOF applies)
    c. Implied in fact Ks — where, through course of conduct including various oral representations, created reasonable expectation (*Foley v. Interactive Data Corp*.)
        i. ***First look at consideration & express terms:** No K so presumption is that there is at will employment, BUT presumption rebuttable if factors show that there was implied in fact K
        ii. *FACTORS:
            1. Personnel policies or practices of employer;
            2. Employee's longevity of service;
            3. Actions or communication by the employer reflecting assurances of continued employment;
            4. Practice of industry
        iii. Application in Foley (P pleaded an implied in fact K)
            1. 6 years and 9 months is long enough
            2. Termination Guidelines could be enough to show a cause of action for a breach of an employment contract
            3. P supplied D with consideration by signing those separate agreements (confidentiality, etc), to show that parties prob intended a continuing relationship with limitations of employer's dismissal authority bc employer has been provided a benefit beyond P's usual services.
        iv. Courts don't like to enforce it's own business judgment
            1. *Guz v. Bechtel Nationa*l—where employee's department was eliminated, and employee claimed he was wrongfully terminated because he worked there for 20 years, the court held longevity and approval of an employee's work alone cannot show an implied K, there must be other factors.
            2. Such a rule would discourage the retention and promotion of employees, and the implied covenant of good faith and fair dealing cannot create limitations on termination right that parties have not actually agreed on.
    d. Implied Covenant of Good Faith and Fair Dealing
        i. RSMT: each party to an employment K owes a duty of good faith & fair dealing which includes an agreement not to hinder the other's performance or to deprive the other the benefit of the K
        ii. Decision to terminate must be in good faith—can't prevent accrual of benefit or retaliate against the employee for performing employee's obligations: NO strategic firing

WHAT CONSTITUTES "GOOD CAUSE"

1. *Cotran v. Rollins*: Good cause is whether the employer acted w. a fair & honest cause or reason, regulated by good faith (Reasonable Grounds, not Actual)
    a. **ASK:** Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, **after an appropriate investigation** and for reasons that are not arbitrary or pretextual?
    b. **Case**—When an employer accepts the recommendation of a biased supervisor without further investigation, the employer becomes liable.
2. "Good Cause": reasoned conclusion supported by evidence gathered through an adequate investigation that includes notice of the claimed misconduct & a chance for the employee to respond
3. NOT good cause: anything that is trivial, not related to the business goals
4. **Doctrine of Self-Publication—**Employee can say that she worked here from date to date; can say the promotion she achieved, but if employee lies as to why she was let go, automatic reason as to why new employer can terminate

DISCRIMINATION BASED ON STATUS (Pages 101-147)

1. Discrimination is not per se illegal but it is illegal if based on an unlawful basis
2. *The key is: to treat all similarly situated employees or applicants for employment *similarly*
3. The ultimate burden of showing that he/she was discrim. against is ON the employee/Plaintiff
4. Jury generally looks at 3 things:
    a. Policy/practice: can look at the manual
    b. See if in fact that policy/practice applied to this employee
    c. See if that policy/practice is equally applied to other similarly situated employees
5. Best Evidence: employment evals, have meeting/give a chance, document all counseling/record

STATUTES (each has min. # of employees)

1. TITLE VII under Civil Rights Act of 1964, amended in 91'
    a. Prohibits pub & private discrim. on **race, color, religion, sex (gender) and national origin**
    b. For employers with at least 15 employees, working 20+ calendar weeks of current preceding year
    c. Title VII is not limited to economic or tangible discrimination. The phrase, "terms, conditions or privileges of employment" includes conduct that would effect psychological wellbeing.
    d. Applies to employees & applicants
        i. Applies to USC—even if employed in foreign countries
        ii. Does NOT apply to aliens employed by US companies outside of the US
        iii. Does apply to EVERYONE working within the US, whether you are a citizen or not
    e. Age is not under Title VII—look at ADEA
    f. Sexual orientation is covered in CA but not yet in federal law (look at state by state)
    g. Not retroactive
    h. <u>What kind of relief can you receive?</u>
        i. Backpay in most cases for wages lost
        ii. Instatement/Reinstatement
        iii. Forward pay: not unheard of; (from judgment—on): but in situations where environment would be too hostile for P to return
        iv. Compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses"
        v. Punitive damages for intentional discrim.
        vi. *Must mitigate damages: forfeits right to backpay if refuses to mitigate—ie. Refuses a job substantially equivalent to the one he was denied
    i. Can also go through EEOC before private right of action
2. ADEA (**Age** Discrim. In Employment Act): See BELOW
    a. Applies to people over 40
    b. For employers with at least 20 employees
3. ADA (Americans with **Disabilities** Act)
4. ERISA (Employee **Retirement** Income Security Act)
5. Other protected bases(?): **pregnancy; sexual orientation; veterans' status**

TITLE VII: TO ESTABLISH VIOLATION—SHOW DISPARATE TREATMENT OR DISPARATE IMPACT

DISPARATE TREATMENT (TREATING 2 SIMILARLY SITUATED PEOPLE DIFFERENTLY)
***MCDONNEL DOUGLAS RULE**

1. First, EMPLOYEE HAS BURDEN to establish a *prima facie* case of race (or gender, etc) discrimination
    a. That he belongs to a protected class
    b. Applied and was qualified for a job for which employer was seeking applicants
    c. That despite his qualifications, he was rejected; and
    d. After rejection, position remained open & employer continued to seek applicants
2. Then BURDEN SHIFTS to EMPLOYER to show *legit, nondiscriminatory reason* for the employee's rejection
    a. If D says nothing—will still go the jury who will decide; however will probably find for P
    b. D doesn't have to prove that the new hired employee was better but should raise genuine issue of fact (Employer still retains discretion to choose among equally qualified candidates)
    c. *Cat's paw doctrine: Even though the ultimate decision makers don't know about the protected status, not insulated from liability & can still be liable—Employer can't just take what someone tells you at face value, MUST investigate
3. Then BURDEN SHIFTS back to EMPLOYEE to show that rejection was a *pretext* for discrimination (employee/P has the ultimate burden proof)
    a. Can assert pretext by showing directly that discrim. Reasons more likely motivated the employer or indirectly by showing that the employer's proffered reasons were unworthy of credence
    b. Relevant to show pretext:
        i. Facts as to treatment of respondent during prior employment
        ii. General policy & practices w. re minority employment
        iii. Statistics
4. Ultimately, even if employee says pretext—still goes to the jury: just b/c employee poked holes in the "legitimate reason" doesn't mean employee automatically wins

When the discrim was a MOTIVATING FACTOR—Mixed Motive Instruction: The "mixed motive" instruction requires a jury to find in favor of P/employee if finds that a protected characteristic was a motivator in D's/employer's treatment of the employee, even if also finds that an employer was also motivated by lawful considerations.

1. Cases where discrim. was one of multiple motivating factors for a challenged employment
    a. In these cases, evidence shows that the employer acted for both lawful & unlawful reasons
    b. *Price Waterhouse*: Employer could avoid liability in a mixed motive case if it could show that it would have made the same decision even absent the unlawful factor. BUT if it's A factor, employer is still liable
2. P/employee doesn't have to present direct evidence of discrim. to get a mixed-motive instruction under Title VII… P/employee just has to show discrimination was A motivating factor
    a. Show by prep of evidence that a reasonable jury could conclude that race, religion, sex or national origin was a motivating factor for any employment practice.
    a. Show that BUT-FOR the discrimination, employee would not have been rejected, fired, etc.

TITLE VII RELIEF—when an employee is unlawfully discharged and employer later discovers wrongdoing.

- While the wrongdoing would have led to the employee's termination on lawful and legitimate grounds, proving that the same decision would have been justified is not the same as proving that the same decision would have been made, and thus the employee cannot be barred from all relief.
- The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason.
- **General rule in cases of this type**: neither reinstatement nor front pay is an appropriate remedy, so backpay is appropriate here…
- Calculation = from the date of the unlawful discharge to the date the new information was discovered

SYSTEMATIC (PATTERN & PRACTICE) DISPARATE TREATMENT—Employer has discrimination in its practices

1. Need both statistics & testimonials to show systemwide discrim. (Pages 147-169, 172-78)
    a. Make sure to compare relevant stats:
        i. Show that there is a big pool of qualified people, yet actual hiring is small
        ii. Ex) Teachers hired v. pool of qualified teachers in a specific geographic area
    b. Testimonials: individual cases of discrim. > show actual discrimination by bringing evidence of a few individuals
    c. Teamsters: 40 specific instances of discrim. (page 148)

DISPARATE IMPACT (Discrim. based on facially neutral standard, w no bus. necessity & no less discrim alt) (Page 193-237)

1. First **EMPLOYEE HAS BURDEN** to establish a *prima facie* case—that a facially neutral practice or policy disproportionately impacts members of the protected class
    a. Demonstrated through presentation of statistical evidence that establishes disparity linked to the challenged practice or policy
2. Then **BURDEN SHIFTS to EMPLOYER** to show that the requirement/practice has a manifest relationship to the employment—meaning D/employer can rebut by showing **business necessity** to justify the actions
    a. Must demonstrate a relationship to the successful performance of the job
    b. Must show that test was not arbitrary or unnecessary barrier but was job-related
    c. ***Dothard v. Rawlinson***
        i. Policy—weight & height requirement for correctional officer position
        ii. P/applicant (female) was turned down b/c did not meet requirement
        iii. D/employer argued business necessity of needing a "big" officer to intimidate
        iv. P argued a less discrim. alt—needing a "strong" officer, therefore D's was pretext
    d. Employer's lack of discriminatory intent is not controlling > Court looks at consequences of the employment practices, not simply motivation
3. Then **BURDEN SHIFTS** back to **EMPLOYEE** to show a **less discriminatory alternative**—showing of pretext
4. ***Griggs Test:*** a non-job related test that has a disparate racial impact, and is used to limit or classify employees, is used to discriminate, whether or not it was designed or intended to have this effect & despite an employer's efforts to compensate for its discriminatory effect
5. …Problem is that testing & making sure tests are job-related is expensive & need testing companies
    a. If employer is going to validate tests, must be very careful
    b. Make sure people validating are good, experts, they know the job requirements, they know the industry, and they know what they're doing

Disparate Treatment & Disparate Impact (Page 261-276)

1. ***Ricci v. DeStefano***
    a. Under Title VII, employers cannot take adverse action b/c of an individual's race. Here, D/City chose not to certify exam results b/c of the statistical disparity based on race (white candidates outperformed minority candidates). So the white employees lost rare chance for promotion.
    b. Then D/City gave a "legitimate non-discriminatory reason" for throwing out the tests, as trying to avoid racially disparate hiring/avoid a disparate impact claim
    c. R: Strong Basis Evidence Standard (reached as a balance)
        i. Race-based actions like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate impact statute.
        ii. Gives effect to both the disparate treatment & disparate impact provisions
        iii. Here, no evidence/no "strong basis" in evidence, that the tests were flawed > there was no evidence that the tests were not job-related or less discrim. tests were available
        iv. Good faith reliance is not enough

RETALIATION FOR THE ASSERTION OF EMPLOYEE RIGHTS

1. Virtually every federal & most state emp. law protect against retaliation (Employer's illegal conduct must not be excessive, deliberately calculating to inflict needless economic hardship on employer)
2. 3 types of anti-retaliatory provision under Title VII: *First look at employee's conduct*
    a. (1) Participation Clause—if you made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing
        i. Policy: want to discourage action employers from retaliating against employees participating in investigations
    b. (2) Opposition Clause—Broader Form which allows self-help—actively opposing unlawful activities
        i. You don't have to instigate or initiate a complaint
        ii. When an employee communicates to her employer a belief that the employer has engaged in a form of employment discrim, the communication virtually always constitutes the employee's opposition to the activity (being silent or answering in the affirmative constitutes opposition)
    c. (3) Protecting assertion of statutory claims: i.e, employee has a right under ERISA to a certain benefit, but employer retaliate against you from obtaining contractual benefits.

3. R: *Employers can't discriminate against an employee/applicant bc has "opposed" a practice that Title VII forbids, or bc has testified, assisted or participated in a Title VII investigation, proceeding or hearing* BUT the law only protects individuals from retaliation that produced INJURY OR HARM
    a. Retaliation has to be serious enough
        i. P must show that a reasonable employee would have found the challenged action "materially adverse" –(ie. might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination: deter)
        ii. "Same actor" inference — if the employer hired the employee, then fired the employee two months later (close in time), this is the "same actor" and the inference is that discrimination/retaliation was NOT a factor for the adverse action
4. Limits/Defenses:
    a. Law does not afford an employee unlimited license to complain at any & all times & places
    b. Congress did not mean to grant sanctuary to employees to engage in political activity
    c. Self-Help: Does not create general right to walk off job whenever there is a safety hazard
        i. Rather, workers must show: (1) good faith reas. grounded fear of a real danger of death or serious injury (2) insufficient time due to the urgency of the situation to eliminate the danger through regular statutory channels; and (3) where possible, they have sought from the employer & been unable to obtain a correction of the dangerous condition
5. Implied Antiretaliation Provisions—Criteria
    a. Is P one of the class for whose especial benefit the statute was enacted
    b. Legislative intent
    c. Consistent with the underlying purpose of the legislative scheme to imply such a remedy
    d. Is the cause of action one based solely on federal law

CONSTRUCTIVE DISCHARGE-allows employees to quit their employment in circumstances where reas. persons would not continue working without the quit being treated as a voluntary separation

1. Kelsay: Unlawful to interfere with or coerce employee to quit when applying for worker's comp.

AFFIRMATIVE ACTION p.242-288; 293-299

- The question for affirmative action programs - can a court award relief to people who aren't actual victims of discrimination?

2 Types of AA: (1) Voluntary and (2) Involuntary

Constitutional Standard: strict scrutiny, which requires that the means be narrowly tailored to achieve a compelling gov. interest (Gov action should not infringe on other's rights)

***Steel Metal Workers* case** — Factors for whether affirmative action is necessary to remedy past discrim — it was necessary here because

1. necessary to remedy that employer's past discrim—here, employer's reputation discouraged nonwhites from even applying, so it was necessary for a substantial number of nonwhite workers to become member of the union in order for the effects of discrim to cease

2. no racial balancing—here the numerical membership goal was a benchmark for petitioner's progress, and the court was not being unreasonable as it granted accommodations based on legitimate explanations (court's hate quotas)

3. once goal is met, no more AA program—the membership goal and Fund program were temporary

4. cannot "unnecessarily trammel the interests of white employees"—neither the membership goal nor the Fund program did that

- Can have goals but NOT quotas
    - Quotas: certain fixed # of opportunities reserved for minority groups (insulates the group from other ppl in the applicant pool) > race cannot be THE factor, can only be one factor
    - Goal: good faith effort to come within a range that is demarcated by that goal > whole person review is ok; race was one factor used for diversity
- Not accepted to justify AA (not compelling gov interests)
    - Need for role models
    - General societal discrim. (Need more—prior existence of prior discrimin.)
    - Overly burdensome (ie. Layoffs—which are extremely intrusive & burdensome)
- **TITLE VII Standard:** 2 ways to show that AA plan falls on the right side of the line
    - (1) Show a lack of a certain protected class employed & there is a big pool of qualified people: statistical imbalance—easy case (no liability, can have AA)

- (2) Show a manifest imbalance resulting from historical discrim. within that job category ***Johnson v. Transportation Agency*** — court used the manifest imbalance test (easier standard, applied to unskilled workers) and did away with the prima facie case, so employer only had to point to a conspicuous imbalance in traditionally segregated job category, and didn't have to show that employer was the one who discriminated in Title VII.

- Involuntarily Ordered AA:
  - Executive Order 11246: An executive order that imposes obligations on gov. contractors to include in every gov. contract affirmative action programs to not discriminate
- Voluntarily Imposed AA by Employer:
  - Remedy to cure manifest imbalance
  - Recognized underrepresentation—racial balance
  - Protected class was just A factor

SEX DISCRIMINATION

Gender discrim. Violates TITLE VII

Sex Based Pension Funding: The Problem of Rational Discriminatory Prediction

1. Under Title VII, even a true generalization about a class cannot justify class-based treatment. Therefore, even if true that women live longer, can't use sex-segregated actuarial tables to calculate retirement benefits. (Norris)
2. Women can't be treated different b/c they live longer:
   a. Can't require women to pay more in order to save for their retirement.
   b. Can't pay lower monthly benefits to retired women who deferred the same amt of compensation.
3. Other arguments
   a. Private companied made actuarial tables: Doesn't matter, can't avoid liability b/c employer can't find a Co. that calculates retirement on a nondiscrim. basis

Pregnancy & Fertility

1. Pre-PDA
   a. Court seems to look at whether there was a BURDEN or BENEFIT
   b. Not as sympathetic when benefits denied IF covered men & women the same: there wasn't any one thing that the policy did not cover for men that it did cover for women or vice versa
      i. Ex) Court held that there was no discrim. For disability plan paying weekly benefits to exclude disabilities arising from pregnancy. (NOT THE LAW)
   c. Even before PDA—employers could not deny seniority to females returning to work following disability caused by childbirth: DISCRIMINATION IMPACT—imposes on women subst. burden that men need not suffer
      i. Can't permit employer to burden female employees in such a way to deprive them of employment opportunities b/c of different role
2. **Post-PDA: Pregnancy Disability Act (PDA) 1978 added to Title VII**
   a. Pregnancy (childbirth, or related conditions) IS a protected class under TITLE VII as part of sex
   b. Not retroactive
   c. Does not require employers to offer accommodations to pregnant employees not offered to other employees similar in their ability or inability to work
   d. Goal was to ensure fair treatment of pregnancy by employers: important to make sure that women who go on pregnancy leave are treated just like men who go on disability leave
   e. Employers are not obligated under TITLE VII to provide dependent benefits & it's ok to only provide benefits for employees & not their spouses.

The BFOQ—Bona Fide Occupational Qualification Defense

ONLY APPLIES TO SEX & AGE, NOT RACE

There are instances where Ct would find gender (even age) discrim. to be legitimate: more logical/common sense distinctions. Therefore allows the BFOQ defense…

1. **Sex Discrimination is valid** in certain instances where it's **(1)** "reasonably necessary" (objective verifiable std.) to the **(2)** "essence of the business" ("normal operation" of the "particular" business)
2. **To qualify as a BFOQ**, job requirements must concern a "job-related" skills & aptitudes
   a. Meaning, must look at the essence or central mission of the employer's business
   b. So, if essence of business operation would be undermined by not hiring members of one sex exclusively, defense works > question of fact: look at surveys, how the company identifies

3. Meant to be a narrow defense—BFOQs that Work:
    a. For ex) Case law makes clear that safety exception is limited to instances in which sex or pregnancy actually interferes w. the employee's ability to perform the job (would cover safety to customers but not for health of fetus)—protecting fetus has nothing to do w. making batteries
    b. OK to protect safety of customers or third parties, not employee's safety
4. BFOQs that FAIL:
    a. Excluding fertile females from certain jobs due to exposure of dangerous chemicals to fetus
    b. Moral concerns about welfare of future generations
    c. Sex appeal/feminine spirit for flight attendants—SW Airline Case
        i. Not a necessity bc survey by customers did not rank this at the top of customer pref.
        ii. Primary bus. function is transporting passengers—wouldn't be jeopardized by hiring males
    d. Merely wanting to increase profits (extra costs of employing members of one sex cannot justify refusing to hire that sex, unless it would threaten the survival of the employer's business)
    e. Other argument: fostered an environment of discrimination
5. Other Arguments by employers:
    a. Business model (ie. Sexy flight attendants): threatening the survival of the employer's business
    b. Businesses that sell sex:
        i. Playboy's club (it's ok to hire only females to be bunnies)
        ii. Hooters—somewhere in the middle & case settled: could argue both ways
            1. BFOQ for servers: it's serving food & fails; or
            2. Employer argue what SW did: business model
    c. Privacy BFOQ: Cts have accepted in limited setting customer preferences based on privacy concerns as justifications for sex-based hiring or job assignments (p.339)
6. EEOC: Customer Preference should not be considered in analyzing BFOQ

SEX BASED STEREOTYPES

1. You can't discriminate based on one's failure to conform to gender stereotypes
    a. ARGUE: Discrimination against a P who is transsexual & therefore fails to act and or identify with his/her gender is no different from unlawful Price
    b. PRICE WATERHOUSE: Hopkins was the only female candidate for partnership. She played a key role in the company's successful effort to win a multi million dollar K. However, she had some interpersonal skills issues & came off aggressive. Nonetheless, there were signs that some of the partners reacted negatively to Hopkins' personality bc she was a woman. Comment that she should walk more femininely, talk more fem., dress more fem, wear makeup.. etc etc
2. **GROOMING CODES—**generally ok: do not violate Title VII as long as they impose roughly the same aggregate burden on women & men
3. Variant weight or height standard: can be different but not more burdensome

SEXUAL HARASSMENT

1. Examples: You need to have a sexual predicate to these kinds of claims. If there is no sex involved, then you don't have a claim for sex harassment. (For ex, if employer just criticized you for bad work or yelled at you, not Sex Harassment)
    a. Physical touching
    b. Verbal conduct: Making rude comments; sexual innuendo
    c. Persistent request for dates
    d. Visual conduct: derogatory/suggestive cartoons; photos; drawing; gestures (workplace is not a locker room)
    e. Request for sexual favors: casting couch
2. Note—if the employer retaliates: you can bring a separate COA for reprisal
3. *Same-sex sexual harassment still violated TITLE VII (Oncale)
4. *Off-duty sexual harassment is still illegal (ie. Work related dinners, Co. party)
5. *Doesn't have to be targeted directly at P
6. 2 types of sexual harassment—HOSTILE WORK ENVIRON & QUID PRO QUO
    a. **(1) Hostile Work Environ:** Arises in situations where workplace conduct is alleged to create hostile or intimidating or offensive work environment where it unrea. Interferes his ability to do his/her job—Judged in context of reasonable person looking at all circumstances
        i. **Ask:** would a reas. person perceive the situation as hostile or abusive?
            1. Consider the perspective of the persons of the alleged victim's race, color, religion, gender, national origin, age or disability

ii. **Totality of circumstances**, not just one single factor: **4 Factors from *Harris v. Forklift***
    1. Frequency (sexual harassment must be reoccurring, more than once or twice)
    2. Severity of Conduct (you look nice today v. something else)
    3. Physically threatening or humiliating (don't have to show psychological harm)
    2. Unreasonable Interference w employee's work performance
    3. + CONTEXT matters
        a. If you wrote jokes for a comedian - prob okay (ex—writers for SNL)
    4. + P's participation: look at whether P was actually offended (was P just going along to get along v. P actively participating)
    5. **Note: Meritor:** sexually provocative speech or dress can be relevant in determining whether he or she found particular sexual advances unwelcome

iii. **Effective anti sexual harassment policy includes:**
    1. no retaliation
    2. effective reporting procedure > have to follow up
    3. employer acted timely and reasonably to stop harassment
    4. under Title VII, cannot recover from the supervisor/harasser; can only recover from the employer for sex harassment, but some state laws that allow such recovery

iv. **Not strictly liable:** Title VII does not always make an employer liable for sexual harassment by their supervisors

v. **Vicarious Liability:** Employer may be vicariously liable for actionable discrim. caused by supervisor but subj. to an affirmative defense to the reasonableness of the employer's conduct & that of the victim—***Faragher v. City of Boca Raton***
    1. R: employer is vic. liable to victim/employee for HWE created by supervisor
    2. When harassment results in tangible emp. action such as discharge, demotion, undesirable resignation—NO affirmative defense
    3. IF there is no tangible emp. action, employer can raise defense to liability subj to prep of evidence: 2 ELEMENTS
        a. Employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior (in *Faragher*, employer had anti harassment policy but failed to articulate the memo & many were unaware)
        b. P unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise
    4. If a client harasses an employer, law requires the Co. to go to the client & tell them to stop harassment

b. **(2) Quid Pro Quo** (meaning, this for that): occurs when someone in a position of power, conditions the receipt of a job benefit on employee giving a sexual favor.
    i. Ex) if a coworker says if you have sex w. me, I won't bother you at work… NOT quid pro quo although might be HWE
    ii. Who is a supervisor(?)
        1. EEOC Guidance: the individual has authority to undertake or recommend tangible employment decisions affecting the employee or the individual has authority to direct the employee's daily work activities
    iii. Employers ARE strictly liable for quid pro quo actions for supervisory employees, regardless of whether employer knew or should have known about it (doesn't matter if employee complained or not)
    iv. Often arises in the context of previous voluntary/consensual relationship.
c. Courts generally hold that favoritism toward a subordinate with whom he has a consensual romantic relationship DOES NOT violate Title VII
d. Cannot have quid pro quo for other protected classes? Probably not

7. What should employers do?
a. Implement Anti-harassment policy w reporting procedure: elements of a good policy:
    i. Make sure there is no retaliation
    ii. Effective reporting procedure
        1. Have alternatives, so P can't say I didn't report bc it wouldn't have done any good
        2. Supervisor should never trivialize the complaint and provide opinions about it, or excuse the behavior
    iii. What if P says they will do something on their own?
        1. Tricky b/c employer should protect themselves & don't want P later coming back
    iv. Investigate and take appropriate action

1. Inform P that this is going on–that there has been an investigation and that it concluded/took appropriate action
2. In almost every case, don't tell P what happened to the D—privacy issue

v. Frequent Training: Sexual harassment training must be every 2 years

b. Once someone complains, you must take appropriate action & conduct reas. INVESTIGATION (DON'T promise confidentiality)
   i. If P just quits, employer is not liable if employee didn't say anything bc there was no way for employer to remedy the situation
   ii. After investigation, determine whether conduct warranted termination > if not, demotion, transfer, separate the parties
   iii. Be careful what you do to the victim bc could come back & seek claim for retaliation

PUNITIVE DAMAGES

- To be awarded punitive damages, the discriminatory practice must have been with malice or with reckless indifference (mental state): knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination [higher standard]
- Not just egregious conduct - must pertain to the employer's knowledge that it may be acting in violation of federal law
- To impute liability for an agent's discriminatory decision, look at good faith efforts to enforce discrimination policy and Cat's Paw

AGE DISCRIMINATION (Pages 437-499)

ADEA STATUTE

1. Applies to employers with more than 20 employees
2. Protected class: Individuals over 40
   a. Note: If they don't hire you, b/c you look older than you really are, still age discrimination
3. Generally, plaintiffs are white, middle aged, educated men
4. No reverse discrim for ADEA: the whole point is to protect older group so it's okay for employer to just have older employees
   a. Policy: don't want employers to use age as a predictor for efficiency/capabilities
5. Can sue for HOSTILE WORK ENVIRON for being taunted for one's age

AGE Disparate Treatment

1. **Start w. McDonnel Douglas**
   a. (1) Still follow McDonnel Douglas but P just has to show that he was discharged due to AGE
      i. Over 40+ as protected by ADEA
      ii. Discharged or denied
      iii. Was qualified for position
      iv. Employer sought another to perform same work
         1. Doesn't have to show that someone OUTSIDE the group was chosen (relaxed)
         2. Court will look at the age gap: Better indicator is that you were replaced by someone significantly younger
   b. (2) D's legitimate, nondiscriminatory reason
      i. Note: for Systemic Disparate Treatment
         1. Should be objective as possible; Rating system; Performance Evals
         2. D can't rebut even if performance evals were subjective & rating system was never validated (In a case where more older employees were laid off & 90% of new hires were younger class)
   c. (3) P's pretext
      i. What if decision-maker is same or older?
         1. Goes both ways but argue—shouldn't matter; Just like Latinos can discrim. against other Latinos; Male against Male
      ii. For Systemic Disparate Treatment: statistical evidence + attitudinal evidence
2. **Age as BFOQ (defense for disparate treatment; use RFOA for disparate impact)**
   a. 2 PRONGS when using age as proxy: Job qualification is (1) reas. necessary to (2) the essence of business (not just convenient or reasonable)
   b. 2 Reasons when it's ok to use age as proxy
      i. If you know or everyone believes that anyone over the age qualification would be unable to perform safely & efficiently or

ii. Too impractical to test each person to see if they would qualify
c. Western Airlines: Prohibiting anyone from 60+ from serving as pilots violated ADEA (may be rational but not enough considering rare accidents, contrary practices of other airlines)

3. **REDUCTION IN FORCE ACTIONS:**
   a. What if more older employees are laid off? Look at:
      i. Was employer objective?—performance evaluations, standards, statistical evidence through experts
      ii. RFOA-reasonable factor other than age: Did employer treat Age neutrally in making the decision
      iii. How many outside the protected class was retained
      iv. Behavior of employer w. previous RIF
   b. Correct way to Layoff
      i. Company will look at performance evals, seniority, absentee record, etc. Offer voluntary severance plan, in hopes that enough people will take it. Also provide enough time for employee to make a well-informed decision = genuine voluntary retirement
      ii. Need to provide complete information as well
4. **MIXED MOTIVE INSTRUCTION <u>NEVER</u> PROPER UNDER ADEA**
   a. Therefore, P can't just produce evidence that age was ONE motivating factor. Can't establish discrimination this way: NEED DIRECT EVIDENCE.

Disparate Impact: You can bring a disparate impact claim under ADEA but scope is narrower than Title VII

1. Ex) City of Jackson granted raises to all city employees but those with less than 5 years of tenure received greater raises than those w. more seniority
   a. DID not violate ADEA b/c City had legitimate goal of retaining police officers-upheld as **RFOA**
      i. Point to **RFOA**—reasonable factor other than age: To establish RFOA defense, employer must show that the employment practice was both reas. designed to further or achieve a legitimate buss purpose and administered in a way that reas. achieves that purpose in light of the particular facts & circumstances that were known or should have been known
   b. Also, was no specific practice within pay plan that had an adverse impact on the older workers
   c. Can't just say the plan was less generous to older people
   d. ADEA std = reasonable way to achieve goal, and Title VII std = must meet business necessity (which is a harder std to meet)
2. **Pension:** Just b/c employer fired P before pension benefits would vest did not mean employer discriminated based on AGE: length of service is not proxy for age discrim. (but, P has an ERISA claim)

<u>Benefits</u>

- ERISA (Employee Retirement Income Security Act): Once vesting has occurred, employees have a nonforfeitable right to accrued retirement benefit
- OWBPA (Older Workers Benefit Protection Act) p.462

<u>Retirement</u>

- Age based mandatory retirement ages are not allowed except:
  - 1) BFOQ
  - 2) firefighters & law enforcement officers
  - 3) college professors (or higher edu) who attained age of 70 serving under K of unlimited tenure
  - 4) Those who attained the age of 65, entitled to annual retirement benefit from their employer's plans ($44,000+) and who for two years were employed in a bona fide executive or high policy making position
- <u>ADEA has been the basis for two types of challenges to early retirement incentive plans</u>
  - Aged-based plans that offer less valuable retirement incentive to older workers than is offered to younger or exclude some older workers from incentive program entirely
  - Plans offering benefits only to older employees on ground that they place undue pressure on such employers to exit the work force (Constructive Discharge)
    - Not every early retirement plan creates age discrim.
      - Look at if P had a *voluntary choice*: Factors
        - Did person receive info about what would happen in response to the choice
        - Was the choice free from fraud or other misconduct
        - Opportunity to say no

        - Was there only a short period to say no or did he had time to consult family/friends, digest info
    - **Is not constructive discharge**
        - Reducing the # of employees & offering everyone over 55 the option of one time early retirement
    - **IS constructive discharge**
        - Option is manipulated so that employees are driven to early retirement not by its attractions but by the terror of the alternative (being fired)
        - Coercing employees into accepting positions with lower pay by threatening them w. discrim. reduction in force would constitute illegal "constructive demotion"
        - If rejecting of an early retirement plan would result in work so arduous or unappealing or working conditions so intolerable that a reas. person would feel compelled to forsake his job rather than to submit to looming indignities

WAIVER

1. To see to what extent a waiver agreement b/t employers & employees are enforceable—look at:
    a. Whether ordinary K principles or the totality of the circumstances under which the agreement was signed
    b. Education level
    c. Knowing & Voluntary factors
    d. Clarity of agreement
    e. Notice & attempt to inform: was counseling given?
2. Title II of the OWBPA provides that individual may not waive any right or claim under ADEA unless the waiver is "knowing & voluntary"

DISABILITY DISCRIMINATION

ADAA/Rehabilitation Act (enacted in 08'; went into effect in 09')

1. 2 fundamental changes:
    a. expanded the class of individuals protected
    b. two-tier system of protection: class of individuals *protected* from discrimination may be much larger than a subclass of individuals *requiring accommodation*
        i. Need not provide reasonable accommodation to person "regarded as" having disability
        ii. To claim reasonable accommodation from an employer, an individual must have, or must have a record of having, a "physical impairment that substantially limits one or more major life activities of such an individual"
2. Disability: The term "disability" means, with respect to an individual
    a. physical or mental impairment that substantially limits one or more major life activities of such individual (does NOT include physical characteristics—eye, hair color, left handedness)
    b. a record/history of such an impairment; or
    c. being regarded as having such an impairment
3. Major life activities: ADAA greatly expanded—mostly everything effects a major life activity
    a. [Even internal systems are major bodily function even if it does not manifest externally]
    b. [Transitory (not disability) but if recurring (it is a disability)]
    c. [Rules of construction for interpreting major life activity]
        i. construed broadly
        ii. comparison is to most people in general population
        iii. Should not receive extensive analysis (no need for stats, med evidence)
        iv. Case by case analysis
        v. Mitigating measures are NOT considered when determining subst. limit major life activity
            1. Big issue w. epilepsy
            2. BUT-FOR vision: look at people w. corrected vision (mitigating measures of ordinary glasses or contacts shall be considered in determining whether an impairment subst. limits a major life activity)
                a. Sutton still applies
                b. The ADAA provides than an employer should NOT use qualifications or tests based on uncorrected vision unless the stds/tests are shown to be job related & consistent w. buss necessity (Policy—ADAA should protect employers who make themselves more desirable)

GINA: Genetic Information Nondiscrimination Act of 2008

Treatment of Drug & Alcohol Addiction

1. ADA does not protect individuals currently engaging in illegal use of drugs or alcohol (recent enough to indicate that the individual is actively engaging in such conduct)
2. BUT if you're in rehab (may have problems)
3. Ex) rehire issue. If an employee gets rehabilitated & comes back & employer denies b/c you're an "addict"—maybe have dis. Discrim
4. As employer: should have policy set up saying they never rehire

LEVEL OF D's Argument:

- **DENY THAT CONDITIONS CONSTITUTE DISABILITES UNDER ADA**
- **DENY P REQUESTED ACCOMMODATION THAT WOULD BE REASONABLE; OR**
- **DENY P REQUESTED ACCOMMODATION THAT COULD BE GRANTED W/O UNDUE HARDSHIP**

DUTY OF REAS. ACCOMMODATION

Not making reas. accommodation for qualified individuals w. disability who is an applicant or employee (for known physical or mental limitations: If you want accommodation, you should tell your employer) violates ADA UNLESS employer can demonstrate that the accommodation would impose an undue hardship on business op.

- "Qualified Individual": individual w. disability who with or w/o reas. accommodation can perform the *essential functions* of the employment position
    - Look at job description (Although not conclusive)—prepared before advertising or interviewing ap
    - Employer's judgment as to essential function is good evidence
- You can't deny employment to a qualified individual w. disability based on the need to accommodate
- Remember 2 TIER
    - NEED NOT PROVIDE REAS. ACCOMMODATION TO AN INDIVIDUAL WHO IS ONLY "REGARDED AS"
    - TO CLAIM REAS. ACCOMMODATION, AN INDIVIDUAL MUST HAVE OR MUST HAVE RECORD OF PHYSICAL IMPAIRMENT THAT SUBST. LIMITS 1 OR MORE MAJOR LIFE ACTIVITY

McDonnel Douglas Analysis

1. P must prove his prima facie case
    a. In a protected class—person w. disability
    b. Capable of performing the essential functions of the job
    c. There was Reas. accommodation for disability: P's burden
        i. Reasonable in the sense of both effectiveness and proportion to costs
        ii. Do a Cost/Benefit Analysis
        iii. Ex) Generally, requesting to work from home w/o any supervision is not reasonable
            1. Are there things you can't do at home?
            2. Could argue—no need to provide office; ability to supervise via web
        iv. Ex) Most courts hold that leave for an indefinite period of time or for over a year is unreas.
            1. State laws may vary; Also look at collective bargaining agreement
        v. Ex) Seniority system does not always trump demand for accommodation but "reasonable" accommodation also does not mean there must be effective accommodation
            1. A showing that a requested accommodation conflicts w. the seniority system warrants summary jmt for employer UNLESS P can show extraordinary circumstances to show that assignment is nonetheless reasonable (US Airways)
        vi. What if someone is overqualified & want the position for which they are overqualified? Courts may say that it's not reasonable accommodation
    d. P was denied the position
2. D must assert legitimate, nondiscriminatory reasons for it's action
    a. Show undue hardship (can also show that accommodation was unreasonable)
        i. Do a Cost/Benefit Analysis
            1. Excessiveness (Unduly costly) in relation to the benefits to the plaintiff; or
            2. Excessiveness to the employer's financial survival
            3. Case by Case basis: so it would depend on the size of the company, # of employees, & #s who would receive benefit
    b. Fact that employer previously accommodated could be a factor
3. Burden Back to P to show pretext

Another defense-Direct Threat: Persons who pose direct threat to health/safety of others
Employers do not need to hire someone who pose significant risk of communicating an infectious disease

1. Direct Threat: Direct Threat Defense: The ADA defines a direct threat to be a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices
2. NOTE: ADA specifically says that for jobs involving FOOD HANDLERS—can refuse to assign job to any individual w. listed disease for which risk of transmission cannot be eliminated by reas. accommodation
3. EEOC has held that determination of whether P poses a "direct threat" is based on individualized assessment of the individual's present ability to safely perform the essential functions of the job
    a. Factors:
        i. Duration of the risk
        ii. Nature & severity of the potential harm
        iii. Likelihood that the potential harm will occur; and
        iv. Imminence of the potential harm

DISABILITY DISCRIM: DISPARATE IMPACT
Facially neutral policy that has the effect of discriminating against a certain group

Special Provisions Re: Disparate Impact in ADA

- Consistent w. business necessity & job related
- *Also have to show that it can't be reasonably accommodated
- Even if you show that the test satisfies business necessity & job relatedness, still have to show that it cant be reasonably accommodated

[SIDE NOTE] If someone asks you for a job, what can you ask them?: You can't ask if they have a disability but you can ask, here's what the job entails, can you do the job

[INSURANCE]

- Persons w. disability may be able to bring a claim if policies have exclusions that effect someone w. that disability more than other people
- General Rule w. re: insurance policy: NOT ON FINAL
    - If policy says that anyone w. PTSD is not covered—violates ADA
    - But if it excludes broad categories of conditions that may happen to include the disabled person's condition—NOT ADA
- Social Security Benefits: Question is: How disabled are you? Partially, Fully?

RELIGIOUS DISCRIMINATION

1. Protected under Title VII
    a. Discrimination on account of "religion" encompasses all aspects of religious observance and practice as well as beliefs, requiring reas. accommodation
    b. Sincere belief in a religion does not have to be a well practiced religion
2. Title VII explicitly requires accommodation
    a. What is reasonable(?)
        i. Ex) Unpaid leave is not reas. accommodation when paid leave is provided all purposes *except* religious ones (would have to look at past/present administration of personal business leave; collective bargaining agreement; did it only discriminate against P's religious practice)
    b. But doesn't force employers to take steps against collective bargaining agreement if the agreement itself is otherwise a VALID agreement > would infringe on other employees' K rights
    c. D can also argue undue hardship
        i. For religious purpose—if it's more than de minimus cost, you don't have to accommodate
        ii. Ex) employer had a need to have someone working on the weekend. Option of paying OT to someone else to cover P's shift or give him 4 day weekend causes undue hardship
    d. Common forms of accommodation: changing tasks, shifts, making exceptions to grooming rules, lateral job changes, changing schedules, etc.
3. Quid Pro Quo Claim:
    a. Convert or you're fired—valid COA
4. Religious Harassment: If coercive, unwelcome conduct
    a. If it's offensive & employer wants to stop it, employer probably can
    b. Employer liable for religious harassment: when knows about it and does nothing/ignores it

Constitutional Setting: Look at: Establishment clause/Free exercise

- **Establishment Clause:** Under this, a statute must not only have a *secular purpose* but also not foster *excessive entanglement* of government w. religion. It's primary effect must not advance or inhibit religion.
    - Incidental or remote effect of advancing religion might be okay but it can't be the primary effect
    - You can't advance all religion while not providing any protection to nonreligious people
    - Thornton: Statute forbidding employer's dismissal of an employee who refused to work on his Sabbath violates the Establishment Clause
    - Can't impose an absolute duty to conform one's business practice to the particular religious practices of the employee—b/c there are no exceptions & too unilateral
    - RFRA: p.583 Religious Freedom Restoration Act

Discrimination by religious institutions

- Title VII provides an **exemption** from the religious clause to religious corporations (So, religious orgs are permitted to give preferences to ppl. Who practice their religion)
    - Policy: to minimize the interference w. the decision making process in religious institutions
    - Includes all activities of religious institution
        - Nonprofit activities of protected org. are exempt
        - For-profit activities(?)—S.Ct has yet to decide
            - Lower courts have held that for-profit activities of religious orgs. Do not qualify as religious so DON'T fall under the exemption
    - <u>However, does not authorize race, color, national origin, or sex discrim., age by religious institutions.</u>
        - BUT subject to **Ministerial Exception** (concerning employment relationship b/t religious institution & its ministers)
            - Policy: 1st Am. Principle to protect freedom of religious org. to manage its own religious mission to avoid state entanglement in that mission
            - Hosanna: Ministerial exception applied to teacher b/c church held her out as minister w. role distinct from members. Title reflected a significant degree of religious training followed by formal process of commissioning. Also, teacher held herself out as a minister of the church by accepting formal call to religious service.
            - Some courts have held that this exception applies to lay employees whose primary duties consist of teaching, spreading the faith, church governance, supervision of religious order, etc.
- If an organization does NOT fall under any exemption, can invoke **BFOQ**

<u>PROTECTION OF PUBLIC INTEREST: WHISTLEBLOWERS</u>

1. Despite the At Will Doctrine, most states have carved out exceptions that say that there are certain reasons other than discrimination for which you cannot fire someone:
2. **Public policy (Absent statutory language, court decides—look at social rights, duties & responsibilities)**

<u>EMPLOYEE EXPRESSION 1st AMENDMENT</u>

1. Key—only reaches GOV action, not private employers > Mostly involves teachers, DA's, City Attys
2. **(1) See if there is a private concern or public concern:**
    a. Think about the manner, time, place (how the issue is raised) & Ask, is this the kind of thing employer should be managing, or should the public be in on the discussion
    b. IF private (for ex—complaining about supervisor/relationship of employer-employee)—No balancing test & analysis stops
        i. Ex) Private convo about school policy not covered
        ii. Ex) Threats to working relationships are not covered (Employer can't pass around questionnaire & ask about management, transfer policy)
    c. IF public concern: Balance
        i. Ex) Pickering: Allocation of taxpayer money & way school handles past proposal
        ii. *Teachers do not shed their constitutional rights when they go through the school house doors setting for matters of public concern

3. **(2) BALANCING TEST to see if 1st Am protections apply:** balance the interest of the employee as a citizen in commencing upon matters of public concern v. interest of the state as an employer in promoting the efficiency of the public service
    a. Pickering: Absent proof of false statements knowingly or recklessly made by him, teacher's exercise of his right to speak on issues of public importance may not have furnished the basis for his dismissal from public employment
        i. Employer:
            1. Duty of employee to be loyal & support superiors
            2. If factually incorrect—should be liable for defamation
        ii. Employee:
            1. Have to be malicious to be held liable for defamation (Good faith mistakes are excused—Employer can have chance to fix false points)
    b. **Is the employee making statements *pursuant to their duties* or *speaking as a citizen:***
        i. R: When public employees make statements based on official duties, not speaking as citizens for first amendment purposes & constitution does not insulate their communication from employer discipline.
        ii. If pursuant to duty: not insulated from employment discipline
        iii. *You can't constitutionlaize every employment grievance
4. **(3) Does it interfere w. internal operations of the office?**
    f. ASK, Can you perform your job
    g. Look at whether speech could create hostile work environment; disrupt work environment
    h. Ex) occupy la lauds teacher—zionist jews are taking our money—she was fired

FREE ASSOCIATION 1ST AMENDMENT

- Teachers have a right of free association & employer's unjustified interference w. the teacher's associational freedom violated due process.
- Unless there was some illegal intent, the employees' right to form and join a union was protected