Civil Rights, Employee Discrimination, and Human Resource Management

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Introduction

This book is designed as a supplement to courses in employment relations and human resource management. The book uses a historical perspective to study American employment.

Chapter 1 explores the most controversial area of employment relations in our system. Take, for example, the recent case of a white firefighter in New Haven, Connecticut, who was denied a promotion because the city council refused to accept the results of a test. The council thought the test had an adverse impact on black applicants and was unfair. The white firefighter thought it was unfair to him because he suffered from a reading disability and hired a tutor to help him prepare for the test, on which he scored the high grade. Do you agree with him, or the minority test-takers? The materials in this chapter explore the scope and meaning of anti-discrimination laws.

Chapter 2 is devoted to the area of human resource management (HRM). This subject is often treated as a separate course of study, but it is included in this book for two reasons. First, the HRM function incorporates the legal principles set forth in the preceding chapters, and that learning informs the daily activities of an HR manager. Second, the field is practical and applied in nature. The treatment in this chapter gives an overview of the subject matter, and offers directions for further exploration.

A word of thanks goes to the staff at Cognella who helped put this project in print. Al Grisanti provided editorial guidance from the start and helped to shape the book. Amy Wiltbank located an ideal picture for the cover and designed the accompanying format. Jessica Knott, the Managing Editor, helped me to meet our agreed-upon deadlines. Jamie Giganti moved the manuscript through the editing phase of production, ensuring a consistent and accurate text. I'm grateful for all the help along the way.

CHAPTER 1

Civil Rights and Employee Discrimination Laws

I. Introduction

In April 2011 a Republican Party committee member in Orange County, California, distributed an e-mail that contained a family photo showing President Barack Obama as the offspring of two apes. The picture was captioned, "Now you know why no birth certificate." The party operative, Marilyn Davenport, denied that it had any racist implications. She said, "In no way did I even consider the fact he's half black when I sent out the e-mail. In fact, the thought never entered my mind until one or two other people tried to make this about race."[1] A blogger who wrote about this incident disagreed and observed: "President Obama has received far more death threats than any president before him, the Republicans have made it their mission in life to obstruct anything he tries to do, he's received a level of hatred and animosity that seems to accuse him of working to destroy the free world, and no one seems to think there's anything odd about this."[2]

Should a cartoon depicting an African American as an ape be considered racist? Winthrop Jordan, the leading historian on the subject of white cultural attitudes toward blacks, published a 1968 study that comprehensively analyzes the ways in which whites created a social and legal apparatus to justify the system of slavery. One of his chapters is titled "The Bodies of Men," and it examines the treatment of Africans in terms of physical differences. On the one hand, Christians believed that the "great chain of being" categorically differentiated humans above all animals. At the same time, classifying Africans as closer to apes made it possible to reduce the cognitive dissonance that permeated slavery. In a poignant description, Jordan offers this explanation:

> Even in an age thoroughly accustomed to the hovering omnipresence of early death, the enormous toll of Negro life must have caused many white men to withdraw in silent horror, to refuse to admit identity with a people they were methodically slaughtering year after year. The cruelties of slavery inevitably produced a sense of disassociation. To the horrified witness of a scene of torture, the victim becomes a "poor devil," a "mangled creature. He is no longer a man. He can no longer be human because to credit him with one's own human attributes would be too horrible."[3]

By reducing blacks to a "lower order," whites could rationalize the injustice and indignity that necessarily accompanied enslavement and ownership of other human beings. So, by depicting a U.S. president as an ape, Obama's political opponents can simultaneously degrade his presidency and undermine his legitimacy. The e-mail photo is reprinted on numerous Web sites; you can judge the picture for yourself.[4] You can also reach your own conclusions about whether we have arrived at a "post-racial" society.

A related development adds to the discussion about race. During his publicity campaign touting himself as a possible presidential candidate in early 2011, Donald Trump made Obama's American citizenship (or asserted lack of it) the centerpiece of his platform. Critics accused Trump of legitimizing the "birther" wing of the conservative movement, thereby adding further racist elements to our political system. Trump maintained that he had investigators on location in Hawaii to provide evidence in support of his position, but, in fact, President Obama produced the "long form" of his birth certificate in a nationally televised news conference. When Trump subsequently dropped out of the race to pursue his television program, his political career ended for the moment. If someone like Donald Trump can so conveniently and successfully depict a U.S. president as some kind of "foreign" operative, it speaks volumes about our society.

Adding to racial friction, one of the interesting turns in antidiscrimination law involves the phenomenon of "reverse discrimination," where an innocent third party is injured by an attempt to overcome the effects of discrimination. The U.S. Supreme Court in 2009 decided that the City

of New Haven had intentionally discriminated against a white firefighter when it refused to promote him, even though he had the top score on a qualifying exam. The New Haven city council concluded that the test had a disparate impact on black candidates, and it therefore rejected the test as a criterion for advancement.[5] The Court's decision rejecting the city council's efforts was only the latest ambiguous pronouncement on an issue that is now more than three decades old. Justice Thurgood Marshall, who was the first African American appointed to the Supreme Court, wrote a concurring opinion in the 1978 case of *Bakke v. Regents of the University of California* summarizing the history of race relations in this country[6] His opinion offers a succinct account of how law, politics, and social mores interacted to the disadvantage of blacks in this country and justified the practice of giving some groups preferential treatment to remedy past inequalities. Here is part of his opinion. It is a trenchant summary of race relations in this country.

Mr. Justice Marshall

> I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution, as interpreted by this Court, did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.
>
> Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.

The denial of human rights was etched into the American Colonies' first attempts at establishing self-government. When the colonists determined to seek their independence from England, they drafted a unique document cataloguing their grievances against the King and proclaiming as 'self-evident' that' all men are created equal' and are endowed 'with certain unalienable Rights,' including those to 'Life, Liberty and the pursuit of Happiness.' The self-evident truths and the unalienable rights were intended, however, to apply only to white men. An earlier draft of the Declaration of Independence, submitted by Thomas Jefferson to the Continental Congress, had included among the charges against the King that '[h]e has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither.'

The Southern delegation insisted that the charge be deleted; the colonists themselves were implicated in the slave trade, and inclusion of this claim might have made it more difficult to justify the continuation of slavery once the ties to England were severed. Thus, even as the colonists embarked on a course to secure their own freedom and equality, they ensured perpetuation of the system that deprived a whole race of those rights.

The implicit protection of slavery embodied in the Declaration of Independence was made explicit in the Constitution, which treated a slave as being equivalent to three-fifths of a person for purposes of apportioning representatives and taxes among the States. Art. I, § 2. The Constitution also contained a clause ensuring that the 'Migration or Importation' of slaves into the existing States would be legal until at least 1808, Art. I, § 9, and a fugitive slave clause requiring that, when a slave escaped to another State, he must be returned on the claim of the master, Art. IV, § 2. In their declaration of the principles that were to provide the cornerstone of the new Nation, therefore, the Framers made it plain that we the people,' for whose protection the Constitution

was designed, did not include those whose skins were the wrong color. As Professor John Hope Franklin has observed, Americans proudly accepted the challenge and responsibility of their new political freedom by establishing the machinery and safeguards that insured the continued enslavement of blacks.'

The individual States likewise established the machinery to protect the system of slavery through the promulgation of the Slave Codes, which were designed primarily to defend the property interest of the owner in his slave. The position of the Negro slave as mere property was confirmed by this Court in *Dred Scott v. Sanford,* 19 How. 393 (1857), holding that the Missouri Compromise—which prohibited slavery in the portion of the Louisiana Purchase Territory north of Missouri—was unconstitutional because it deprived slave owners of their property without due process. The Court declared that, under the Constitution, a slave was property, and '[t]he right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States. …' 'The Court further concluded that Negroes were not intended to be included as citizens under the Constitution, but were regarded as beings of an inferior order … altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect. …'

The status of the Negro as property was officially erased by his emancipation at the end of the Civil War. But the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of 'laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value.' *Slaughter-House Cases,* 16 Wall. 36, 70 (1873). Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those Amendments were supposed to secure. The combined actions and inactions of the State and Federal Governments

maintained Negroes in a position of legal inferiority for another century after the Civil War.

The Southern States took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and, finally, the white primary.

Congress responded to the legal disabilities being imposed in the Southern States by passing the Reconstruction Acts and the Civil Rights Acts. Congress also responded to the needs of the Negroes at the end of the Civil War by establishing the Bureau of Refugees, Freedmen, and Abandoned Lands, better known as the Freedmen's Bureau, to supply food, hospitals, land, and education to the newly freed slaves. Thus, for a time, it seemed as if the Negro might be protected from the continued denial of his civil rights, and might be relieved of the disabilities that prevented him from taking his place as a free and equal citizen. That time, however, was short-lived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights. In the words of C. Vann Woodward, 'By narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights.'

The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections. *See, e.g., Slaughter-House Cases, supra; United States v. Reese,* 92 U.S. 214 (1876); *United States v. Cruikshank,* 92 U.S. 542 (1876). Then, in the notorious *Civil Rights Cases,* 109 U.S. 3 (1883), the Court strangled Congress' efforts to use its power

to promote racial equality. In those cases, the Court invalidated sections of the Civil Rights Act of 1875 that made it a crime to deny equal access to 'inns, public conveyances, theatres and other places of public amusement.' According to the Court, the Fourteenth Amendment gave Congress the power to proscribe only discriminatory action by the State. The Court ruled that the Negroes who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy that. 'When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state,' the Court concluded, 'there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws. …' As Mr. Justice Harlan noted in dissent, however, the Civil War Amendments and Civil Rights Acts did not make the Negroes the 'special favorite' of the laws, but instead 'sought to accomplish in reference to that race … — what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more.'

The Court's ultimate blow to the Civil War Amendments and to the equality of Negroes came in *Plessy v. Ferguson,* 163 U.S. 537 (1896). In upholding a Louisiana law that required railway companies to provide 'equal but separate' accommodations for whites and Negroes, the Court held that the Fourteenth Amendment was not intended 'to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.' Ignoring totally the realities of the positions of the two races, the Court remarked: 'We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.'

Mr. Justice Harlan's dissenting opinion recognized the bankruptcy of the Court's reasoning. He noted that the 'real meaning' of the legislation was 'that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens.' He expressed his fear that, if like laws were enacted in other States, 'the effect would be in the highest degree mischievous.' Although slavery would have disappeared, the States would retain the power 'to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens. …'

The fears of Mr. Justice Harlan were soon to be realized. In the wake of *Plessy,* many States expanded their Jim Crow laws, which had, up until that time, been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts. In 1898, after *Plessy,* the Charlestown News and Courier printed a parody of Jim Crow laws: 'If there must be Jim Crow cars on the railroads, there should be Jim Crow cars on the street railways. Also on all passenger boats. … If there are to be Jim Crow cars, moreover, there should be Jim Crow waiting saloons at all stations, and Jim Crow eating houses. … There should be Jim Crow sections of the jury box, and a separate Jim Crow dock and witness stand in every court—and a Jim Crow Bible for colored witnesses to kiss.' The irony is that, before many years had passed, with the exception of the Jim Crow witness stand, 'all the improbable applications of the principle suggested by the editor in derision had been put into practice—down to and including the Jim Crow Bible.'

Nor were the laws restricting the rights of Negroes limited solely to the Southern States. In many of the Northern States, the Negro

was denied the right to vote, prevented from serving on juries, and excluded from theaters, restaurants, hotels, and inns. Under President Wilson, the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated. When his segregationist policies were attacked, President Wilson responded that segregation was 'not humiliating, but a benefit,' and that he was 'rendering [the Negroes] more safe in their possession of office, and less likely to be discriminated against.'

The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were, for the most part, confined to separate military units; it was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools—and thereby denied the opportunity to become doctors, lawyers, engineers, and the like is also well established. It is, of course, true that some of the Jim Crow laws (which the decisions of this Court had helped to foster) were struck down by this Court in a series of decisions leading up to *Brown v. Board of Education,* 347 U.S. 483 (1954). *See, e.g., Morgan v. Virginia,* 328 U.S. 373 (1946); *Sweatt v. Painter,* 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents,* 339 U.S. 637 (1950). Those decisions, however, did not automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality. The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.

II

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality

remains a distant dream for the Negro. [Justice Marshall cites various statistics to support his point.]

III

I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.

A

This Court long ago remarked that 'in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy. …' *Slaughter-House Cases,* 16 Wall. at 72. It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negroes. The Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act, an Act that provided many of its benefits only to Negroes. Although the Freedmen's Bureau legislation provided aid for refugees, thereby including white persons within some of the relief measures, the bill was regarded, to the dismay of many Congressmen, as 'solely and entirely for the freedmen, and to the exclusion of all other persons. …' Cong.Globe, 39th Cong., 1st Sess., 544 (1866) (Indeed, the bill was bitterly opposed on the ground that it 'undertakes to make the negro in some respects … superior …, and gives them favors that the poor white boy in the North cannot get' (remarks of Sen. McDougall). The bill's supporters defended it not by rebutting the claim of special treatment, but by pointing to the need for such treatment: 'The very discrimination it makes between "destitute and suffering" negroes and destitute and suffering white paupers proceeds upon

the distinction that, in the omitted case, civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection.' (remarks of Rep. Phelps).

Despite the objection to the special treatment the bill would provide for Negroes, it was passed by Congress. President [Andrew] Johnson vetoed this bill, and also a subsequent bill that contained some modifications; one of his principal objections to both bills was that they gave special benefits to Negroes. Rejecting the concerns of the President and the bill's opponents, Congress overrode the President's second veto. Cong.Globe, 39th Cong., 1st Sess., 3842, 3850 (1866).

Since the Congress that considered and rejected the objections to the 1866 Freedmen's Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures. It 'would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color,' *Railway Mail Assn. v. Corsi,* 326 U.S. 88, 94 (1945), to hold that it barred state action to remedy the effects of that discrimination. Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve.

IV

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years, Negroes have been discriminated against not as individuals, but rather solely because of the color of their skins. It is

unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone, but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color, he never even made it into the pot.

These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination. In the *Civil Rights Cases, supra,* the Court wrote that the Negro emerging from slavery must cease 'to be the special favorite of the laws.' 109 U.S. at 25. We cannot, in light of the history of the last century, yield to that view. Had the Court, in that decision and others, been willing to 'do for human liberty and the fundamental rights of American citizenship what it did … for the protection of slavery and the rights of the masters of fugitive slaves,' 109 U.S. at 53 (Harlan, J., dissenting), we would not need now to permit the recognition of any 'special wards.'

Most importantly, had the Court been willing in 1896, in *Plessy v. Ferguson,* to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that the principle that the 'Constitution is colorblind' appeared only in the opinion of the lone dissenter. The majority of the Court rejected the principle of color blindness, and for the next 60 years, from *Plessy* to *Brown v. Board of Education,* ours was a Nation where, by law, an individual could be given 'special' treatment based on the color of his skin.

> It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.
>
> It has been said that this case involves only the individual, Bakke, and this University. I doubt, however, that there is a computer capable of determining the number of persons and institutions that may be affected by the decision in this case. For example, we are told by the Attorney General of the United States that at least 27 federal agencies have adopted regulations requiring recipients of federal funds to take *'affirmative action* to overcome the effects of conditions which resulted in limiting participation … by persons of a particular race, color, or national origin.' I cannot even guess the number of state and local governments that have set up affirmative action programs, which may be affected by today's decision.
>
> I fear that we have come full circle. After the Civil War, our Government started several 'affirmative action' programs. This Court, in the *Civil Rights Cases* and *Plessy v. Ferguson,* destroyed the movement toward complete equality. For almost a century, no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative action programs. Now, we have this Court again stepping in, this time to stop affirmative action programs of the type used by the University of California."

Justice Marshall cited data concerning racial disparities in employment and earnings. In March 2011, as the effects of the Great Recession still lingered, the percentage unemployment rate by race, age, and gender is shown in the following chart:

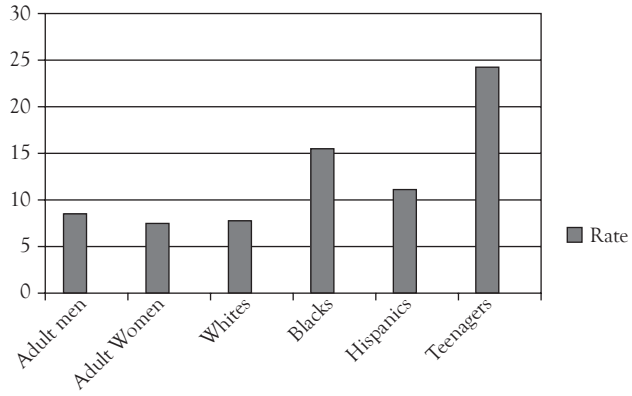

Figure 1. Unemployment Rates

Differences in income show similar disparities, with white men earning more than women and racial minorities.[7] As Justice Marshall argued, racial differences in our economy and society have hardly disappeared.

II. The Civil Rights Acts of 1964 and 1991

As a result of the civil rights movement of the early 1960s led by Martin Luther King Jr. and others, Congress enacted legislation in 1964 to outlaw the practice of segregation condoned under *Plessy v. Ferguson.* The campaign started under President John Kennedy, who was elected in 1960. After Kennedy's assassination in 1963, President Lyndon Johnson continued the drive. Johnson was particularly effective in gaining congressional support for the bill, despite the opposition of Southern legislators, and he signed it into law on July 2, 1964. The law very broadly prohibited discrimination on the basis of race and other factors in housing, accommodation, and employment. The section of the bill affecting employment is set out in Title VII of the act. For that reason, the prohibition against discrimination in the workplace is sometimes referred to simply as "Title VII."

As with the earlier civil rights laws, the United States Supreme Court has played an important role in interpreting Title VII. Several early decisions created rules about race discrimination that still apply today; those

Legislation	Summary of Provisions
Title VII, Civil Rights Act of 1964	Illegal to discriminate against someone on the basis of race, color, religion, national origin, or sex.
Age Discrimination in Employment Act, 1967	Unlawful to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.
Civil Rights Act of 1991	Amends Title VII and the ADA to permit jury trials and compensatory and punitive damage awards in intentional discrimination cases; caps damage amounts by size of firm.
Americans with Disabilities Act of 1992	Illegal to discriminate against a qualified person with a disability in the private sector and in state and local governments; also requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless doing so would impose an undue hardship on the operation of the employers business.
The Genetic Information Nondiscrimination Act of 2008	Prohibits discrimination on the basis of genetic information, with respect to health insurance and employment.

decisions will be taken up in more detail below. In its 1989 term, the Court decided six cases that dramatically altered the scope and effect of Title VII. Those decisions were so bizarre that Congress swiftly acted to overrule them. The result was a set of amendments to Title VII known as the Civil Rights Act of 1991. While it was engaged in correcting the Court's spurt of irrationality' Congress went on to strengthen some parts of the law and to add additional protections. The result is the current set of rules governing relations of race, gender, religion, age, and disabilities in the workplace. The table below summarizes the development of the law between 1964 and 2008.

A. *Coverage and Claim Procedures*

Whether or not an employer falls under the various laws enforced by the EEOC depends on the specific statutory regulation. As a general rule for private businesses, a complaint that involves "race, color, religion, sex

(including pregnancy), national origin, age (40 or older), disability or genetic information, the business is covered by the laws we enforce if it has 15 or more employees who worked for the employer for at least twenty calendar weeks (in this year or last)." State and local governmental entities are covered if they have 15 employees, and all employees of the federal government are covered.

The first step in bringing a claim of discrimination is to file a complaint with the Equal Employment Opportunity Commission (EEOC), which is responsible for administering the laws summarized above, and, as noted in a previous chapter, the Equal Pay Act. Filing with the EEOC is necessary to have a claim heard in court, because Congress wanted the federal agency to resolve issues, if possible, before an individual filed a lawsuit. Here is the EEOC statement on how to file a claim:

> You may file a charge of employment discrimination at the EEOC office closest to where you live, or at any one of the EEOC's 53 field offices (http:// www.eeoc.gov/field/index.cfm.). Your charge, however, may be investigated at the EEOC office closest to where the discrimination occurred. If you are a U.S. citizen working for an American company overseas, you should file your charge with the EEOC field office closest to your employer's corporate headquarters.
>
> Where the discrimination took place can determine how long you have to file a charge. The 180 calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a state or local law that prohibits employment discrimination on the same basis. The rules are slightly different for age discrimination charges. For age discrimination, the filing deadline is only extended to 300 days if there is a state law prohibiting age discrimination in employment and a state agency or authority enforcing that law. The deadline is not extended if only a local law prohibits age discrimination.
>
> Many states and localities have agencies that enforce laws prohibiting employment discrimination. EEOC refers to these agencies as Fair Employment Practices Agencies (FEPAs). EEOC and

some FEPAs have worksharing agreements in place to prevent the duplication of effort in charge processing. According to these agreements, if you file a charge with either EEOC or a FEPA, the charge also will be automatically filed with the other agency. This process, which is defined as dual filing, helps to protect charging party rights under both federal and state or local law.

The EEOC requires that a charge be filed either in person or by mail. The agency will not accept electronic filing of charges, but it does have information online that will assist employees in deciding if their issue belongs with the EEOC. The link is at https://egov.eeoc.gov/eas/. For filings in person, the individual can contact one of the EEOC offices. Workers can also contact the EEOC by telephone for further assistance with charges. If filing by mail is preferred, the EEOC requires the following information:

- Your name, address, and telephone number
- The name, address, and telephone number of the employer (or employment agency or union) you want to file your charge against
- The number of employees employed there (if known)
- A short description of the events you believe were discriminatory (for example, you were fired, demoted, harassed)
- When the events took place
- Why you believe you were discriminated against: for example, because of your race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information
- Your signature

Once a charge is filed, the EEOC may suggest mediation of the dispute. The agency describes mediation as an impartial process that benefits all parties. According to the EEOC Web site, "The decision to mediate is completely voluntary. If either party turns down mediation, the charge will be forwarded to an investigator. If both parties agree to

mediate, we will schedule a mediation, which will be conducted by a trained and experienced mediator. If the parties do not reach an agreement at the mediation, the charge will be investigated like any other charge. A written signed agreement reached during mediation is enforceable in court just like any other contract." Among other benefits, a resolution may be reached in a fairly short time compared to an investigation and decision.

As noted, filing a charge is generally a requirement for getting into a court. The EEOC explains the law as follows:[8]

> If you plan to file a lawsuit alleging discrimination on the basis of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, genetic information, or retaliation, you first have to file a charge with one of our field offices (unless you plan to bring your lawsuit under the Equal Pay Act, which allows you to go directly to court without filing a charge). We will give you what is called a "Notice-of-Right-to-Sue" at the time we dismiss your charge, usually, after completion of an investigation. However, we may dismiss for other reasons, including failure to cooperate in an investigation. This notice gives you permission to file a lawsuit in a court of law. Once you receive a Notice-of-Right-to-Sue, you must file your lawsuit within 90 days.
>
> If you plan to file an age discrimination lawsuit, you wont need a Notice of Right-to-Sue to file in court. You can file any time after 60 days have passed from the day you filed your charge (but no later than 90 days after you receive notice that our investigation is concluded). If you plan to file a lawsuit under the Equal Pay Act, you don't have to file a charge or obtain a Notice of Right-to-Sue before filing. Rather, you can go directly to court, provided you file your suit within two years from the day the discrimination took place (3 years if the discrimination was willful).
>
> Keep in mind, though, Title VII also makes it illegal to discriminate based on sex in the payment of wages and benefits. If you

have an Equal Pay Act claim, there may be advantages to also filing under Title VII. In order to pursue a Title VII claim in court, you must have filed a charge with EEOC and received a Notice of Right-to-Sue.

Once the EEOC procedures have been satisfied, a claimant can litigate under any bases covered in the statutes. The law provides that a prevailing plaintiff can recover attorneys' fees in any case on the theory that the individual is acting to benefit others by enforcing the statute.

The EEOC maintains records of their cases for every law they enforce. Their most recent update shows EEOC activity from fiscal year 1997 through fiscal year 2010.[9] For the category of "all charges," the agency handled 80,680 cases in 1997, and that amount increased to 99,922 in 2010. During the latest year, most cases involved race discrimination, which consisted of 35,890 charges for 35.9 % of the caseload. That was followed by sex discrimination at 29.1%; disability discrimination at 25.2%; and age discrimination at 23.3%. To some extent, charges follow economic conditions and decline when unemployment is low. When unemployment reaches above 10 percent, as it did in 2010, charges likewise go up. The chart below depicts the fluctuation in the EEOC caseload for the 1997–2010 reporting period.

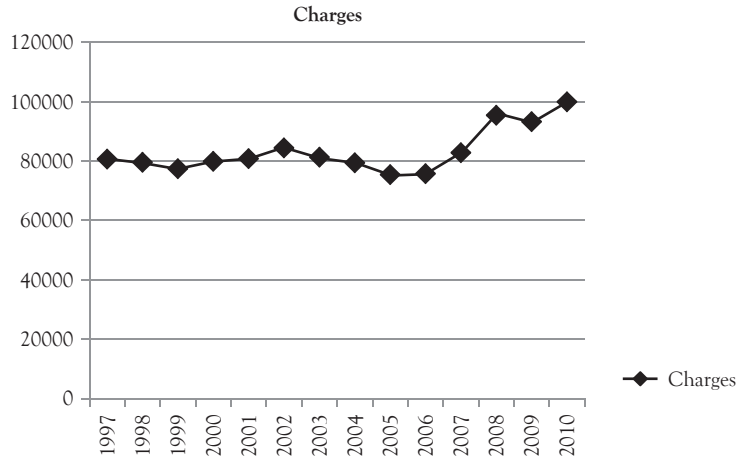

Figure 2. Number of Charges Filed

B. Theories of Discrimination

Disparate Treatment

One of the obvious ways an employer might discriminate is to treat someone in a protected class differently from other workers. The structure of a disparate treatment lawsuit is fairly straightforward, in terms of evidence and burdens of proof. There are four steps to the basic process.

Step 1. The plaintiff proves that an adverse job or hiring decision affected him or her.

Step 2. The plaintiff proves a "prima facie" case of discrimination, based on his or her protected status, such as race or gender.

Step 3. The employer "articulates a legitimate, nondiscriminatory reason" for the decision.

Step 4. The plaintiff proves that the employer's reason is "pretextual."

If a party fails to carry the assigned burden of proof at any step, the opposing party wins the lawsuit. In the 1991 Civil Rights Act, Congress added a further refinement to the procedure. Some cases may involve what is called a "mixed motive," where the employer did engage in unlawful discrimination but claims that the same result would have been reached even in the absence of the plaintiff's protected status.

The case excerpt below involves an African American employee named Stalter who worked at Wal-Mart and was discharged for theft. Employees at the store sometimes left opened containers of food on a table in the break room, and the general understanding was that the item could be consumed by anyone in the room. The employee ate a handful of taco chips from a bag belonging to another employee who was not in the room at the time. After his termination, Stalter filed a charge with the EEOC, received the right-to-sue letter, and proceeded to federal district court. The district court ruled against him, finding that theft was a legitimate reason for termination. The Seventh Circuit disagreed and reversed the lower court. The appellate court's opinion is a lucid example of how antidiscrimination suits are litigated.[10]

> The district court assumed for the purposes of Wal-Mart's summary judgment motion that Stalter met his burden of establishing

a prima facie case of racial discrimination. Wal-Mart met its burden of articulating a legitimate, non-discriminatory reason, according to the district court, by explaining that it terminated Stalter for theft, and not because of his race. This explanation shifted the burden back to Stalter to show that the reason stated was a pretext for race discrimination. Stalter argued to the district court that Wal-Mart's stated reason was pretextual, as evidenced by (1) Wal-Mart's failure to investigate his claim of racial harassment by Sowinski and Ellenbecker; (2) Wal-Mart's use of the theft provision in circumstances where it clearly should not apply; and (3) Wal-Mart's more favorable treatment of Ellenbecker, a Caucasian employee, who committed another form of gross misconduct near the time of the taco chip incident. The district court rejected each of these arguments, finding that there was no evidence that Stalter had informed Wal-Mart that Ellenbecker's and Sowinski's mistreatment of him was race-based, that Stalter did technically commit theft under Wal-Mart's policy, and that lying to a supervisor was readily distinguishable from and less serious than theft. The district court therefore granted summary judgment in favor of Wal-Mart.

On appeal, Stalter raises as evidence of pretext: (1) that Wal-Mart did not actually believe that Stalter engaged in theft; (2) that the punishment was grossly excessive in relation to the offense committed; (3) that Wal-Mart treated a Caucasian employee who had committed a similar offense much more leniently; and (4) that Wal-Mart failed to respond to Stalter's complaints of racial harassment by co-workers. Wal-Mart, in turn, contends that Stalter has not even made out a prima facie case of racial discrimination, much less shown that Wal-Mart's proffered reason for the termination was pretext.

Stalter seeks to prove his case under the *McDonnell Douglas* burden shift-ing method. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To make out a prima facie case under this framework, Stalter must show that he is a member of a protected class, that he suffered an adverse employment action, that he was

meeting his employer's legitimate performance expectations, and that his employer treated similarly situated employees who were not in the protected class more favorably.

To defeat summary judgment on the prima facie case, Stalter need only demonstrate that there is a genuine issue of material fact regarding these factors. No one disputes that Stalter, an African-American person, is in a protected class, and suffered an adverse employment action when he was terminated. Stalter raises a genuine issue of material fact on the remaining two prongs with evidence that he received a satisfactory performance review shortly before his firing, and with evidence that Wal-Mart counseled a Caucasian employee who committed a similar offense instead of terminating her. Wal-Mart makes much of the difference between theft and lying, but its policy for gross misconduct encompasses both, and Wal-Mart's dispute with Stalter's evidence cannot be resolved on summary judgment. Stalter therefore carries his burden on the prima facie case.

Under *McDonnell Douglas,* the burden then shifts back to Wal-Mart to state a legitimate, non-discriminatory reason for the firing. Wal-Mart claims that it fired Stalter not because of his race, but because he committed theft, and that company policy regarding gross misconduct such as theft, requires immediate dismissal. Stalter believes that Wal-Mart's argument fails at this point because part of meeting the legitimate, nondiscriminatory reason criteria is that the stated reason be credible. According to Stalter, Wal-Mart could not have believed that he committed theft based on the statement of the alleged victim, who did not care that her property had been taken. Stalter's argument really applies to the third part of the *McDonnell Douglas* test, whether the plaintiff can show that the employer's stated reason for the termination is a pretext for race discrimination. Certainly if Wal-Mart believed that Stalter committed theft, that would be a legitimate, nondiscriminatory reason to fire him.

Under the *McDonnell Douglas* framework, the burden then shifts back to Stalter to show that Wal-Mart's reason is pretextual.

Stalter may show pretext by producing evidence that Wal-Mart's ostensible justification is unworthy of credence. "[A] plaintiff may accomplish this showing with evidence tending to prove that the employer's proffered reasons are factually baseless, were not the actual motivation for the discharge in question, or were insufficient to motivate the discharge" [case citation omitted].

Stalter maintains that Wal-Mart could not have reasonably believed that he committed theft, especially in light of the statement of the alleged victim of the theft that he should "forget about it" and that she considered it "no big deal." He also points out that the punishment of termination was grossly excessive in light of the alleged infraction of eating a handful of taco chips without permission, also casting doubt on Wal-Mart's true motive. Moreover, he asserts that Wal-Mart treated a similarly situated Caucasian employee who committed a similar offense much more leniently. Finally, he maintains that Wal-Mart's failure to investigate his claims of harassment by other employees indicates that Wal-Mart's true motive was race-based. With the exception of this last bit of evidence, we believe that Stalter raises more than sufficient evidence to impugn the genuineness of Wal-Mart's motives. We discount the last fact, that Wal-Mart failed to investigate his claim of harassment, because Stalter conceded at oral argument that he never told Wal-Mart that the harassment was race-related. Wal-Mart's failure to investigate the claim cannot therefore be construed as race-related.

However, Stalter's other claims are more than adequate to call into question the sincerity of Wal-Mart's claim that it terminated him for theft. Wal-Mart's policy did not define theft, but any common understanding of the term would include a wrongful taking or a taking without permission, a definition [the management official], embraced at his deposition. Wal-Mart was well aware that the chips were left in an open bag on the countertop of the break room and that the owner of the chips did not object to their taking. Stalter produced evidence that food left in the break room in this fashion was considered abandoned and was fair game for

anyone who wished to eat it. Wal-Mart claims that food left on tables was abandoned but that food left on the countertop was not considered abandoned by employees. This is a classic dispute of material fact, best left to the finder of fact to resolve, and on summary judgment, we construe the facts in Stalter's favor. Under Stalter's version of events, Wal-Mart knew that Stalter had Ellenbecker's implied permission to take the chips because of the placement of the open bag in the break room. Wal-Mart also knew that Ellenbecker did not actually object to Stalter's taking of the chips.

Wal-Mart claims it was sincere in its application of its theft policy, but we think this is much like the employer's claim in *Williams v. Bristol-Myers Squibb Co.,* 85 F.3d 270, 275 (7th Cir. 1996). There the employer claimed it terminated an older worker for falsifying records, when the company's code could not be reasonably read to support that interpretation. The employee had not falsified the record in question but had merely failed to notice that the record contained an unauthorized signature. We found that the company's insistence that the employee's action was identical to the actions of other employees terminated for falsification (employees who clearly met the definition) was "so perverse as to cast additional doubt on its good faith." Here Wal-Mart claims that it terminated seven other employees, not in the protected group, for theft. Wal-Mart was unable to tell us at oral argument what these employees took, except to say that some of the terminations were for theft of time, i.e. conducting personal business on company time, and some for theft of property. These actions clearly fit within a reasonable understanding of the term "theft." Eating a handful of Doritos from an open bag on a countertop in the lunchroom is well outside of this domain, and a jury is certainly free to believe that this was not the true reason Wal-Mart fired Stalter.

More compelling is the severity of the punishment in relation to the alleged offense. It bears repeating that Stalter ate a handful of chips belonging to an employee who considered the incident

> "no big deal" and conveyed that sentiment to the company as well as to Stalter. This strikes us as swatting a fly with a sledge hammer. That Wal-Mart felt compelled to terminate Stalter for this offense does not pass the straight-face test, especially in light of two additional facts: first, Wal-Mart did not terminate a Caucasian employee who also committed gross misconduct by failing to report to work as scheduled and then lying to her supervisor twice about the reason she was absent. Second, Wal-Mart claims that its policy was mandatory, that it was obliged to terminate an employee for any theft, no matter how slight the offense. This claim is belied both by the fact that Wal-Mart did not terminate the Caucasian employee for conduct that came under the very same provision of its policy, the gross misconduct provision, and by the fact that the provision is actually permissive. The policy reads:
>
> There are, however, certain actions of misconduct which may result in immediate termination—Coaching for Improvement will not be used to address gross misconduct. These actions include, but are not limited to, the following examples:
>
> - Theft
> - Dishonesty/Compromised Integrity
>
> Later in the policy, Wal-Mart states that "Dishonesty in any form will result in immediate termination." Thus, Wal-Mart's policy did not require termination for theft, and Stalter was terminated. The policy did require termination for dishonesty, yet the Caucasian employee was merely "counseled" and allowed to keep her job. A jury could certainly infer from these facts that Wal-Mart's claim of theft was a pretext for Stalter's termination, and that the leniency extended to the Caucasian worker was evidence that race played a role in Stalter's termination.

As the appeals court makes clear, Wal-Mart's actions were suspect at best. The circuit court sent the case back to the district level for a trial to a jury. Based on the evidence cited in the opinion, the plaintiff might well convince a jury that race discrimination occurred.

Disparate Impact

The second theory of unlawful employer activity is much different than the simple notion of an employer intentionally acting to disadvantage an employee because of the employee's protected status. Disparate impact refers to a fair and neutral employment policy that adversely affects some group of persons, even though the employer had no intent to discriminate. For example, assume a correctional facility offers to hire guards for work in the prison. The facility posts a newspaper advertisement about the positions, and the ad specifies that all applicants must be at least 6' in height and 200 pounds in weight. This requirement does not single out any race or gender, but, in practice, many more men can meet the qualification than women. Why is this unlawful? The landmark case of *Griggs v. Duke Power Company* in 1971 changed the way American businesses hired workers.11 In deciding this case, the Supreme Court explained the rule by using a fable. The decision is set forth in part below.

[CHIEF JUSTICE BURGER Wrote the Unanimous Opinion of the Court.]

> We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.
>
> The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant. The plant was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test.

Negroes were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four "operating" departments in which only whites were employed. Promotions were normally made within each department on the basis of job seniority. Transferees into a department usually began in the lowest position.

In 1955 the Company instituted a policy of requiring a high school education for initial assignment to any department except Labor, and for transfer from the Coal Handling to any "inside" department (Operations, Maintenance, or Laboratory). When the Company abandoned its policy of restricting Negroes to the Labor Department in 1965, completion of high school also was made a prerequisite to transfer from Labor to any other department. From the time the high school requirement was instituted to the time of trial, however, white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions in the "operating" departments. Findings on this score are not challenged.

The Company added a further requirement for new employees on July 2, 1965, the date on which Title VII became effective. To qualify for placement in any but the Labor Department it became necessary to register satisfactory scores on two professionally prepared aptitude tests, as well as to have a high school education. Completion of high school alone continued to render employees eligible for transfer to the four desirable departments from which Negroes had been excluded if the incumbent had been employed prior to the time of the new requirement. In September 1965 the Company began to permit incumbent employees who lacked a high school education to qualify for transfer from Labor or Coal Handling to an "inside" job by passing two tests: the Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Comprehension Test. Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates.

The District Court had found that while the Company previously followed a policy of overt racial discrimination in a period prior to the Act, such conduct had ceased. The District Court also concluded that Title VII was intended to be prospective only and, consequently, the impact of prior inequities was beyond the reach of corrective action authorized by the Act.

The Court of Appeals was confronted with a question of first impression, as are we, concerning the meaning of Title VII. After careful analysis a majority of that court concluded that a subjective test of the employer's intent should govern, particularly in a close case, and that in this case there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements. On this basis, the Court of Appeals concluded there was no violation of the Act.

The Court of Appeals reversed the District Court in part, rejecting the holding that residual discrimination arising from prior employment practices was insulated from remedial action. The Court of Appeals noted, however, that the District Court was correct in its conclusion that there was no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test, and that these standards had been applied fairly to whites and Negroes alike. It held that, in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. In so doing, the Court of Appeals rejected the claim that because these two requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under Title VII unless shown to be job related. We granted the writ on these claims.

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot

be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, "whites register far better on the Company's alternative requirements" than Negroes. This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County v. United States,* 395 U.S. 285 (1969). There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has, to resort again to the fable, provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.

The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used. The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need. In the present case the Company had made no such showing.

The Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.

The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the consequences

> of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question. …
>
> Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.
>
> [The judgment of the Court of Appeals is reversed.]

The *Griggs* decision created an industry to satisfy the Court's assertion that "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." If a protected class proves statistically that it has been "excluded" from a job, then unless it can "be shown to be related to job performance," the employer must abandon the policy. Note that the Court does not say who must prove job relatedness, but the law places the burden of proof on the employer.

Assume a fairly simple example. A police department gives a written examination for promotion. The test asks questions about legal rules and proper police procedures. Overall, 90 out of 100 white officers had a passing grade, but only 25 blacks out of 50 passed. The difference between a 90 percent and 50 percent pass rate establishes disparate impact. If the police department wants to use the test, what must it do to prove job relatedness? The answer depends on the nature of the test and the validation strategy. For example, a firefighter might be asked to perform physical tasks, such as unrolling a hose, climbing a ladder, and carrying a heavy weight out of a building. This is known as "content" validation, because

it is based on the actual duties of the job. A written test, in contrast, uses a "criterion" validation strategy, because it measures certain criteria that psychologists can show will predict job success, such as "analytical ability."

In one of its 1989 cases trying to change existing civil rights laws, the Supreme Court attempted to undo the rules in the *Griggs* case. The decision in *Wards Cove v. Antonio,* which involved the fishing industry in Alaska, changed the language requiring an employer to prove business necessity for a policy having an adverse impact. Instead, the Court said, the employer's only obligation was to present a reasonable explanation for its policy. To quote Justice White for the majority, "Though we have phrased the query differently in different cases, it is generally well established that, at the justification stage of such a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[12] White insisted that any greater burden imposed on employers would result in hiring quotas not consistent with the act. Congress corrected the Court's view by rejecting the *Wards Cove* analysis by name and reinstating the formula stated in *Griggs.* Consequently, the rule of *Griggs* is still the rule.

In September 2010 the EEOC issued guidelines dealing with validation under the different validation techniques.[13] Below is some material taken from those guidelines. Note that the EEOC is simply describing some of the tests that employers might use. The agency does not say that all of the tests are always legal.

Examples of employment tests and other selection procedures, many of which can be administered online, include the following:

- Cognitive tests assess reasoning, memory, perceptual speed and accuracy, and skills in arithmetic and reading comprehension, as well as knowledge of a particular function or job;
- Physical ability tests measure the physical ability to perform a particular task or the strength of specific muscle groups, as well as strength and stamina in general;
- Sample job tasks (e.g., performance tests, simulations, work samples, and realistic job previews) assess performance and aptitude on particular tasks;

- Medical inquiries and physical examinations, including psychological tests, assess physical or mental health;
- Personality tests and integrity tests assess the degree to which a person has certain traits or dispositions (e.g., dependability, cooperativeness, safety) or aim to predict the likelihood that a person will engage in certain conduct (e.g., theft, absenteeism);
- Criminal background checks provide information on arrest and conviction history;
- Credit checks provide information on credit and financial history;
- Performance appraisals reflect a supervisor's assessment of an individual's performance; and
- English proficiency tests determine English fluency.

The EEOC also published a document that advised employers on testing procedures titled "Uniform Guidelines on Employee Selection Procedures," which was subsequently made a part of the Code of Federal Regulations.[14] A portion of that document is reprinted below and gives a general summary of the validation process.

Sec. 1607.5 General standards for validity studies.

A. Acceptable types of validity studies. For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 below. New strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

B. Criterion-related, content, and construct validity. Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. See section 14B below. Evidence of the validity of a test

or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See 14C below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See section 14D below.

C. Guidelines are consistent with professional standards. The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, DC, 1974) (hereinafter "A.P.A. Standards") and standard textbooks and journals in the field of personnel selection.

C. *Reverse Discrimination and Affirmative Action*

As noted above, Donald Trump began his truncated political career by demanding that President Obama prove his American citizenship. Obama did in fact produce the "long form" birth certificate to settle the matter. Immediately afterward, Trump switched his attack to Obama's academic credentials. Trump publicly speculated how Obama managed to gain admittance to such prestigious schools as Columbia and Harvard Law School. The underlying motif of those questions had to do with public attitudes toward "preferences" presumably granted to some groups in our society to create a more level playing field. The civil rights laws did not mandate affirmative action; in fact, most members of Congress who spoke on the subject made clear that the laws were intended to

eliminate discrimination in the future, not to eliminate the past effects of discrimination. The Supreme Court made up its own set of rules as the issue was presented, and it continues to do so. Even though the law is still under construction, a fairly solid foundation exists on which employers can build policies to promote "diversity" as they think appropriate.

1. Doing Business with the Government: Contracts with Affirmative Action Plans

Different anti-discrimination laws cover different types of employment relations. The one clear principle about "reverse discrimination" is that the federal government cannot monitor a private sector employer and order them to hire more women and minorities to achieve a "balanced" workforce. There are many variations on this theme, however. Consider a private sector employer who *wants* to hire minority workers for legitimate business reasons. Another case involves hiring by a public sector employer. To what extent can they make race- or gender-conscious decisions? Can an employer flatly discriminate against a man in order to hire female food servers, as happens at Hooters restaurants? Finally, how does the federal government get the authority to require private sector firms to have, and comply with, an "affirmative action" plan? This section addresses the last question, followed by longer and more complex discussions of the other questions.

The reason the federal government can require an employer to maintain an appropriately diverse workforce arises out of the government's power to write contracts with firms who do business with the government. In other words, if someone wants to sell beef to the government, the company may have to enter into an agreement to hire a certain number of underrepresented workers, such as women. The Office of Federal Contract Compliance Programs (OFCCP) is the agency responsible for creating and administering such agreements. In 2011 the agency announced a settlement with a beef packing company which had failed to hire enough women. The press release is printed below.[15]

> **U.S. Labor Department Settles Gender-Discrimination Case with Green Bay Dressed Beef on behalf of 970 Female Applicants for $1.65 million**

GREEN BAY, Wis. Federal contractor Green Bay Dressed Beef LLC will pay $1.65 million in back wages, interest, and benefits to 970 women who were subjected to systemic discrimination by the company The settlement follows an investigation by the U.S. Department of Labor's Office of Federal Contract Compliance Programs, which found that the women were rejected for general laborer positions at the company's Green Bay plant in 2006 and 2007.

"This is the 21st century in the United States of America. There is no such thing as a 'man's job,'" said Secretary of Labor Hilda L. Solis. "I am pleased that my department has been able to work out a resolution with Green Bay Dressed Beef, and that the settlement not only compensates the victims of discrimination but also provides jobs for many of these women."

In addition to financial compensation, the beef supplier will extend a total of 248 offers of employment to affected women as positions become available. The company already has hired more than 60 of the women in the original class.

During a scheduled compliance review, OFCCP determined that the company had violated Executive Order 11246, which prohibits its federal contractors from discriminating on the basis of gender in their employment practices. Under the terms of the conciliation agreement worked out between the Labor Department and the contractor, the $1.65 million will be divided among the affected women who return timely notifications. The company also has agreed to undertake extensive self-monitoring and corrective measures to ensure that all employment practices fully comply with the law and will immediately correct any discriminatory practices.

Two of Green Bay Dressed Beef's largest clients are the U.S. Department of Agriculture and the U.S. Department of Defense as one of the largest suppliers of beef products for the federal school lunch program and one of the leading providers of beef products to American military personnel worldwide.

In addition to Executive Order 11246, OFCCP's legal authority exists under Section 503 of the Rehabilitation Act of 1973 and

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As the bulletin makes clear, anyone dealing with the federal government may be required to comply with affirmative action guidelines. Secretary Solis claims that employing more women in a packing plant serves some legitimate government interest. Does the press release set forth a convincing explanation of what that interest might be? What interest would women have in working in a packing house (formerly known as a "slaughterhouse")?

2. Private Sector Preferential Treatment: Weber v. United Steelworkers

In 1978 the Supreme Court made a landmark ruling about reverse discrimination in the private sector. Put simply, the Court held that employers have broad discretion to give minorities preferential hiring treatment. The rationale for that conclusion is unconvincing. The law says clearly that any discrimination on the basis of race is illegal. If white people are considered a "race," it seems inescapable that employers could not legally discriminate against them. Justice Rehnquist wrote a powerful dissent in this case, part of which is included in the excerpt below. Compare the logic of the majority and the dissent in terms of persuasiveness.

[MR. JUSTICE BRENNAN delivered the opinion of the Court:]

> Challenged here is the legality of an affirmative action plan—collectively bargained by an employer and a union—that reserves for black employees 50% of the openings in an in-plant craft training program until the percentage of black craft workers in

the plant is commensurate with the percentage of blacks in the local labor force. The question for decision is whether Congress, in Title VII of the Civil Rights Act of 1964, left employers and unions in the private sector free to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories. We hold that Title VII does not prohibit such race-conscious affirmative action plans.

In 1974, petitioner United Steelworkers of America (USWA) and petitioner Kaiser Aluminum & Chemical Corp. (Kaiser) entered into a master collective bargaining agreement covering terms and conditions of employment at 15 Kaiser plants. The agreement contained, inter alia, an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craft workforces. Black craft hiring goals were set for each Kaiser plant equal to the percentage of blacks in the respective local labor forces. To enable plants to meet these goals, on-the-job training programs were established to teach unskilled production workers—black and white—the skills necessary to become craft workers. The plan reserved for black employees 50% of the openings in these newly created in-plant training programs.

This case arose from the operation of the plan at Kaiser's plant in Gramercy' La. Until 1974, Kaiser hired as craft workers for that plant only persons who had had prior craft experience. Because blacks had long been excluded from craft unions, few were able to present such credentials. As a consequence, prior to 1974, only 1.83% (5 out of 273) of the skilled craft workers at the Gramercy plant were black, even though the workforce in the Gramercy area was approximately 39% black.

Pursuant to the national agreement, Kaiser altered its craft hiring practice in the Gramercy plant. Rather than hiring already trained outsiders, Kaiser established a training program to train its production workers to fill craft openings. Selection of craft trainees was made on the basis of seniority, with the proviso that at least 50% of the new trainees were to be black until the percentage of

black skilled craft workers in the Gramercy plant approximated the percentage of blacks in the local labor force.

During 1974, the first year of the operation of the Kaiser-USWA affirmative action plan, 13 craft trainees were selected from Gramercy's production workforce. Of these, seven were black and six white. The most senior black selected into the program had less seniority than several white production workers whose bids for admission were rejected. Thereafter, one of those white production workers, respondent Brian Weber (hereafter respondent), instituted this class action in the United States District Court for the Eastern District of Louisiana.

The complaint alleged that the filling of craft trainee positions at the Gramercy plant pursuant to the affirmative action program had resulted in junior black employees' receiving training in preference to senior white employees, thus discriminating against respondent and other similarly situated white employees in violation of §§ 703(a) and (d) of Title VII. The District Court held that the plan violated Title VII, entered a judgment in favor of the plaintiff class, and granted a permanent injunction prohibiting Kaiser and the USWA "from denying plaintiffs, Brian F. Weber and all other members of the class, access to on-the-job training programs on the basis of race." A divided panel of the Court of Appeals for the Fifth Circuit affirmed, holding that all employment preferences based upon race, including those preferences incidental to bona fide affirmative action plans, violated Title VII's prohibition against racial discrimination in employment. … We reverse.

We emphasize at the outset the narrowness of our inquiry. Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment. Further, since the Kaiser-USWA plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act. The only question before us is the narrow statutory issue of whether Title VII forbids private

employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan. That question was expressly left open in *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 281 n. 8 (1976), which held, in a case not involving affirmative action, that Title VII protects whites as well as blacks from certain forms of racial discrimination.

Respondent argues that Congress intended in Title VII to prohibit all race-conscious affirmative action plans. Respondent's argument rests upon a literal interpretation of §§ 703(a) and (d) of the Act. Those sections make it unlawful to "discriminate … because of … race" in hiring and in the selection of apprentices for training programs. Since, the argument runs, *McDonald v. Santa Fe Trail Transp. Co.* settled that Title VII forbids discrimination against whites as well as blacks, and since the Kaiser-USWA affirmative action plan operates to discriminate against white employees solely because they are white, it follows that the Kaiser-USWA plan violates Title VII.

Respondent's argument is not without force. But it overlooks the significance of the fact that the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation. In this context, respondent's reliance upon a literal construction of §§ 703(a) and (d) and upon *McDonald* is misplaced. It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church v. United States,* 143 U.S. 457, 459 (1892). The prohibition against racial discrimination in §§ 703(a) and(d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose. Examination of those sources makes clear that an interpretation of the sections that forbade all race-conscious affirmative action would "bring about an end completely at variance with the purpose of the statute," and must be rejected.

Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey). Before 1964, blacks were largely relegated to "unskilled and semi-skilled jobs." Because of automation, the number of such jobs was rapidly decreasing. As a consequence, "the relative position of the Negro worker [was] steadily worsening. In 1947, the nonwhite unemployment rate was only 64 percent higher than the white rate; in 1962, it was 124 percent higher."

Congress considered this a serious social problem. As Senator Clark told the Senate: "The rate of Negro unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and a social situation which we should not tolerate. That is one of the principal reasons why the bill should pass." Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend were reversed. And Congress recognized that that would not be possible unless blacks were able to secure jobs "which have a future." As Senator Humphrey explained to the Senate:

> What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford to pay the bill? What good does it do him to be accepted in a hotel that is too expensive for his modest income? How can a Negro child be motivated to take full advantage of integrated educational facilities if he has no hope of getting a job where he can use that education?
>
> Without a job, one cannot afford public convenience and accommodations. Income from employment may be necessary to further a man's education, or that of his children. If his children have no hope of getting a good job, what will motivate them to take advantage of educational opportunities?

These remarks echoed President Kennedy's original message to Congress upon the introduction of the Civil Rights Act in 1963. "There is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job." Accordingly, it was clear to Congress that "[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them, and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed."

It plainly appears from the House Report accompanying the Civil Rights Act that Congress did not intend wholly to prohibit private and voluntary affirmative action efforts as one method of solving this problem. The Report provides:

No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.

Given this legislative history, we cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve. …

Our conclusion is further reinforced by examination of the language and legislative history of § 703(j) of Title VII. Opponents of Title VII raised two related arguments against the bill. First, they argued that the Act would be interpreted to require employers with racially imbalanced workforces to grant preferential treatment to racial minorities in order to integrate. Second, they argued that employers with racially imbalanced workforces would grant preferential treatment to racial minorities, even if not required to do so by the Act. Had Congress meant to prohibit all race-conscious affirmative action, as respondent urges, it easily could

have answered both objections by providing that Title VII would not require or permit racially preferential integration efforts. But Congress did not choose such a course. Rather, Congress added § 70(j), which addresses only the first objection. The section provides that nothing contained in Title VII "shall be interpreted to require any [p. 206] employer … to grant preferential treatment … to any group because of the race … of such … group on account of a de facto racial imbalance in the employer's workforce." The section does not state that "nothing in Title VII shall be interpreted to permit" voluntary affirmative efforts to correct racial imbalances. The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action. …

We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."

At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labor force.

We conclude, therefore, that the adoption of the Kaiser-USWA plan for the Gramercy plant falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance

in traditionally segregated job categories. Accordingly, the judgment of the Court of Appeals for the Fifth Circuit is reversed.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

In a very real sense, the Court's opinion is ahead of its time: it could more appropriately have been handed down five years from now, in 1984, a year coinciding with the title of a book from which the Court's opinion borrows, perhaps subconsciously, at least one idea. Orwell describes in his book a governmental official of Oceania, one of the three great world powers, denouncing the current enemy, Eurasia, to an assembled crowd:

> It was almost impossible to listen to him without being first convinced and then maddened. … The speech had been proceeding for perhaps twenty minutes when a messenger hurried onto the platform and a scrap of paper was slipped into the speaker's hand. He unrolled and read it without pausing in his speech. Nothing altered in his voice or manner, or in the content of what he was saying, but suddenly the names were different. Without words said, a wave of understanding rippled through the crowd. Oceania was at war with Eastasia! … The banners and posters with which the square was decorated were all wrong! …
>
> [T]he speaker had switched from one line to the other actually in mid-sentence, not only without a pause, but without even breaking the syntax. [G. Orwell, *Nineteen Eighty-Four* 181–182 (1949).]

Today's decision represents an equally dramatic and equally unremarked switch in this Court's interpretation of Title VII.

The operative sections of Title VII prohibit racial discrimination in employment simpliciter. Taken in its normal meaning, and as understood by all Members of Congress who spoke to the issue during the legislative debates, this language prohibits a covered

employer from considering race when making an employment decision, whether the race be black or white. Several years ago, however, a United States District Court held that "the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted." *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 278 (1976). This Court unanimously reversed, concluding from the "uncontradicted legislative history" that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes. …"

We have never wavered in our understanding that Title VII "prohibits all racial discrimination in employment, without exception for any group of particular employees." In *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971), our first occasion to interpret Title VII, a unanimous Court observed that "[d]iscriminatory preference, for any group, minority or majority, is precisely and only what Congress has proscribed." And in our most recent discussion of the issue, we uttered words seemingly dispositive of this case: "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce."

Today, however, the Court behaves much like the Orwellian speaker earlier described, as if it had been handed a note indicating that Title VII would lead to a result unacceptable to the Court if interpreted here as it was in our prior decisions. Accordingly, without even a break in syntax, the Court rejects "a literal construction of § 703(a)" in favor of newly discovered "legislative history," which leads it to a conclusion directly contrary to that compelled by the "uncontradicted legislative history" unearthed in *McDonald* and our other prior decisions. Now we are told that the legislative history of Title VII shows that employers are free to discriminate on the basis of race: an employer may in the Court's words, "trammel the interests of the white employees" in favor

> of black employees in order to eliminate "racial imbalance." Our earlier interpretations of Title VII, like the banners and posters decorating the square in Oceania, were all wrong.

Justice Rehnquist goes on to review the legislative history of Title VII and reaches a much different conclusion than the majority. He insisted that Congress made clear its intention, which was that "no racial discrimination in employment is permissible under Title VII, not even preferential treatment of minorities to correct racial imbalance." In one particularly incisive passage, Rehnquist quotes two of the Senate leaders of the bill on established seniority rights.

As if directing their comments at Brian Weber, the Senators said:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating the past and as a result has an all-white working force, when the tile comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

Rehnquist sums up by noting that "with virtual clairvoyance the Senate's leading supporters of Title VII anticipated precisely the circumstances of this case and advised their colleagues that the type of minority preference [as here] would violate Title VII's ban on racial discrimination." His argument seems unassailable.

3. Public Sector Preferences under the 14th Amendment: Two University of Michigan Cases

Because of the state action component, legal claims in the public sector can be brought to vindicate federal constitutional rights. Accordingly, if a student in a public university believes he or she has been the victim of

"reverse" discrimination, as in *Bakke,* the individual can use the equal protection clause as a theory of litigation. Two cases involving the University of Michigan came before the Supreme Court in 2003.[16] One of the cases, *Gratz v. Bollinger,* was decided against the College of Liberal Arts' diversity program. The Court ruled that the program was not narrowly tailored to achieve a well-defined goal. Conversely, the program at the School of Law was upheld in *Grutter v. Bollinger.* Portions of that opinion are set forth below.

[Justice O'Connor delivered the opinion of the Court:]

> This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.
>
> The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class of around 350 students. Seeking to "admit a group of students who individually and collectively are among the most capable," the Law School looks for individuals with "substantial promise for success in law school" and "a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others." More broadly, the Law School seeks "a mix of students with varying backgrounds and experiences who will respect and learn from each other." In 1992, the dean of the Law School charged a faculty committee with craft-ing a written admissions policy to implement these goals. In particular, the Law School sought to ensure that its efforts to achieve student body diversity complied with this Court's most recent ruling on the use of race in university admissions. Upon the unanimous adoption of the committee's report by the Law School faculty, it became the Law School's official admissions policy.
>
> The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." The policy requires admissions officials to evaluate each

applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admissions Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school.

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. Nor does a low score automatically disqualify an applicant. Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives. So-called soft variables, such as "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection" are all brought to bear in assessing an "applicant's likely contributions to the intellectual and social life of the institution."

The policy aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." By enrolling a "critical mass of [underrepresented] minority students," the Law School seeks to "ensure their ability to make unique contributions to the character of the Law School."

The policy does not define diversity "solely in terms of racial and ethnic status." Nor is the policy "insensitive to the competition among all students for admission to the [L]aw [S]chool." Rather, the policy seeks to guide admissions officers in "producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession."

Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 grade point average and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application. In December 1997, petitioner filed suit in the United States District Court for the Eastern District of Michigan against the Law School, the Regents of the University of Michigan, Lee Bollinger (Dean of the Law School from 1987 to 1994, and President of the University of Michigan from 1996 to 2002), Jeffrey Lehman (Dean of the Law School), and Dennis Shields (Director of Admissions at the Law School from 1991 until 1998). Petitioner alleged that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment. …

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Because the Fourteenth Amendment "protects persons, not groups," all "governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227 (1995).

We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. "Absent searching judicial inquiry into the justification for such

race-based measures," we have no way to determine what "classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J. A. Croson Co.,* 488 U.S. 469, 493 (1989). We apply strict scrutiny to all racial classifications to "smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."

With these principles in mind, we turn to the question whether the Law School's use of race is justified by a compelling state interest. Before this Court, as they have throughout this litigation, respondents assert only one justification for their use of race in the admissions process: obtaining "the educational benefits that flow from a diverse student body." In other words, the Law School asks us to recognize, in the context of higher education, a compelling state interest in student body diversity. …

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.

We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body."

Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."

As part of its goal of "assembling a class that is both exceptionally academically qualified and broadly diverse," the Law School seeks to "enroll a 'critical mass' of minority students." The Law School's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." That would amount to outright racial balancing, which is patently unconstitutional. Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce. …

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps … is essential to the military's ability to fulfill its principle mission to provide national security." The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter composed of students already admitted to participating colleges and universities. At present, "the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting." We agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective. …"

Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." The purpose of the narrow tailoring requirement is to ensure that "the means chosen 'fit' the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot "insulate each category of applicants with certain desired qualifications from competition with all other applicants." Instead, a university may consider race or ethnicity only as a "plus in a particular applicant's file," without "insulating the individual from comparison with all other candidates for the available seats." In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."

We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke,* truly individualized consideration demands that race be used in a flexible, nonme-chanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant. …

In summary, the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational

benefits that flow from a diverse student body. The judgment of the Court of Appeals for the Sixth Circuit, accordingly, is affirmed.

[Dissent by Justice Scalia:]

Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anti-constitutional holding that racial preferences in state educational institutions are OK, today's Grutter-Gratz split double header seems perversely designed to prolong the controversy and the litigation. Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant "as an individual," and sufficiently avoids "separate admissions tracks" to fall under Grutter rather than Gratz. Some will focus on whether a university has gone beyond the bounds of a "good faith effort" and has so zealously pursued its "critical mass" as to make it an unconstitutional de facto quota system, rather than merely "a permissible goal." Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity Still other suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in Grutter. (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.) And still other suits may claim that the institution's racial preferences have gone below or above the mystical Grutter-approved "critical mass." Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority "critical mass." I do not look forward to any of these cases. The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.

[Dissent by Justice Thomas:]

> Beyond the harm the Law School's racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination "engenders attitudes of superiority or, alternatively, provokes resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are entitled' to preferences."
>
> It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination. Is this what the Court means by "visibly open"?
>
> Finally, the Court's disturbing reference to the importance of the country's law schools as training grounds meant to cultivate "a set of leaders with legitimacy in the eyes of the citizenry," ibid., through the use of racial discrimination deserves discussion. As noted earlier, the Court has soundly rejected the remedying of societal discrimination as a justification for governmental use of race. For those who believe that every racial disproportionality in our society is caused by some kind of racial discrimination, there can be no distinction between remedying societal discrimination and erasing racial disproportion-alities in the country's leadership

caste. And if the lack of proportional racial representation among our leaders is not caused by societal discrimination, then "fixing" it is even less of a pressing public necessity.

4. Bona Fide Occupational Qualifications: Johnson Controls and Hooter Girls

Congress recognized in Title VII that there might be instances in which an employer had a legitimate and necessary reason to discriminate in hiring. There are some recognized examples, such as hiring female corrections officers to work in certain jobs in a prison for women. Generally speaking, though, a BFOQ (bona fide occupation qualification) is difficult to establish. This section contains material from the Supreme Court's definitive pronouncement on gender BFOQs and a discussion of Hooters restaurants' hiring policies, which excludes men from server jobs. The Supreme Court case involved the Johnson Controls company, which excluded some women from jobs working in a battery locker.[17]

[Justice Blackmun delivered the opinion of the Court:]

In this case we are concerned with an employer's gender-based fetal-protection policy. May an employer exclude a fertile female employee from certain jobs because of its concern for the health of the fetus the woman might conceive?

Johnson Controls, Inc., manufactures batteries. In the manufacturing process, the element lead is a primary ingredient. Occupational exposure to lead entails health risks, including the risk of harm to any fetus carried by a female employee.

Before the Civil Rights Act of 1964, became law, Johnson Controls did not employ any woman in a battery-manufacturing job. In June 1977, however, it announced its first official policy concerning its employment of women in lead-exposure work:

Protection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of

this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons.

Since not all women who can become mothers wish to become mothers (or will become mothers), it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant.

Consistent with that view, Johnson Controls "stopped short of excluding women capable of bearing children from lead exposure," but emphasized that a woman who expected to have a child should not choose a job in which she would have such exposure. The company also required a woman who wished to be considered for employment to sign a statement that she had been advised of the risk of having a child while she was exposed to lead. The statement informed the woman that although there was evidence "that women exposed to lead have a higher rate of abortion," this evidence was "not as clear … as the relationship between cigarette smoking and cancer," but that it was, "medically speaking, just good sense not to run that risk if you want children and do not want to expose the unborn child to risk, however small. …"

Five years later, in 1982, Johnson Controls shifted from a policy of warning to a policy of exclusion. Between 1979 and 1983, eight employees became pregnant while maintaining blood lead levels in excess of 30 micrograms per deciliter. This appeared to be the critical level noted by the Occupational Health and Safety Administration (OSHA) for a worker who was planning to have a family. The company responded by announcing a "policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights. …"

The District Court granted summary judgment for defendant-respondent Johnson Controls. … The Court of Appeals for the Seventh Circuit, sitting en banc, affirmed the summary judgment by a 7-to-4 vote. The majority held that the proper standard for

evaluating the fetal-protection policy was the defense of business necessity; that Johnson Controls was entitled to summary judgment under that defense; and that even if the proper standard was a BFOQ, Johnson Controls still was entitled to summary judgment.

The Court of Appeals first reviewed fetal-protection opinions from the Eleventh and Fourth Circuits. Those opinions established the three-step business necessity inquiry: whether there is a substantial health risk to the fetus; whether transmission of the hazard to the fetus occurs only through women; and whether there is a less discriminatory alternative equally capable of preventing the health hazard to the fetus. The Court of Appeals agreed with the Eleventh and Fourth Circuits that "the components of the business necessity defense the courts of appeals and the EEOC have utilized in fetal protection cases balance the interests of the employer, the employee and the unborn child in a manner consistent with Title VII. …"

Applying this business necessity defense, the Court of Appeals ruled that Johnson Controls should prevail. Specifically, the court concluded that there was no genuine issue of material fact about the substantial health-risk factor because the parties agreed that there was a substantial risk to a fetus from lead exposure. …

Having concluded that the business necessity defense was the appropriate framework and that Johnson Controls satisfied that standard, the court proceeded to discuss the BFOQ defense and concluded that Johnson Controls met that test, too. The en banc majority ruled that industrial safety is part of the essence of respondent's business, and that the fetal-protection policy is reasonably necessary to further that concern. The majority emphasized that, in view of the goal of protecting the unborn, "more is at stake" than simply an individual woman's decision to weigh and accept the risks of employment. …

With its ruling, the Seventh Circuit became the first Court of Appeals to hold that a fetal-protection policy directed exclusively

at women could qualify as a BFOQ. We granted certiorari, 494 U. S. 1055 (1990), to resolve the obvious conflict between the Fourth, Seventh, and Eleventh Circuits on this issue, and to address the important and difficult question whether an employer, seeking to protect potential fetuses, may discriminate against women just because of their ability to become pregnant. …

The bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job. Section 703(a) of the Civil Rights Act of 1964 prohibits sex based classifications in terms and conditions of employment, in hiring and discharging decisions, and in other employment decisions that adversely affect an employee's status. Respondent's fetal-protection policy explicitly discriminates against women on the basis of their sex. The policy excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender.

Nevertheless, the Court of Appeals assumed, as did the two appellate courts who already had confronted the issue, that sex-specific fetal-protection policies do not involve facial discrimination. These courts analyzed the policies as though they were facially neutral, and had only a discriminatory effect upon the employment opportunities of women. Consequently, the courts looked to see if each employer in question had established that its policy was justified as a business necessity. The business necessity standard is more lenient for the employer than the statutory BFOQ defense. The court assumed that because the asserted reason for the sex-based exclusion (protecting women's unconceived offspring) was ostensibly benign, the policy was not sex-based discrimination. That assumption, however, was incorrect.

First, Johnson Controls' policy classifies on the basis of gender and child-bearing capacity, rather than fertility alone. Respondent does not seek to protect the unconceived children of all its employees. Despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson

Controls is concerned only with the harms that may befall the unborn offspring of its female employees. This Court faced a conceptually similar situation in *Phillips v. Martin Marietta Corp.,* 400 U.S. 542 (1971), and found sex discrimination because the policy established "one hiring policy for women and another for men each having pre-school-age children." Johnson Controls' policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing.

Our conclusion is bolstered by the Pregnancy Discrimination Act of 1978 in which Congress explicitly provided that, for purposes of Title VII, discrimination "on the basis of sex" includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." "The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." In its use of the words "capable of bearing children" in the 1982 policy statement as the criterion for exclusion, Johnson Controls explicitly classifies on the basis of potential for pregnancy. Under the PDA, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination. Respondent has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex.

We concluded above that Johnson Controls' policy is not neutral because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females. Moreover, the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination. … The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under 703(a) and thus may be defended only as a BFOQ. …

Under 703(e)(1) of Title VII, an employer may discriminate on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." We therefore turn to the question whether Johnson Controls' fetal-protection policy is one of those "certain instances" that come within the BFOQ exception.

The BFOQ defense is written narrowly, and this Court has read it narrowly. See, e. g., *Dothard v. Rawlinson,* 433 U.S. 321, 332–337 (1977); *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 122–125 (1985). We have read the BFOQ language of 4(f) of the Age Discrimination in Employment Act of 1967 (ADEA) which tracks the BFOQ provision in Title VII, just as narrowly. See *Western Air Lines, Inc. v. Criswell,* 472 U.S. 400 (1985). Our emphasis on the restrictive scope of the BFOQ defense is grounded on both the language and the legislative history of 703.

The wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations. The statute thus limits the situations in which discrimination is permissible to "certain instances" where sex discrimination is "reasonably necessary" to the "normal operation" of the "particular" business. Each one of these terms certain, normal, particular prevents the use of general subjective standards and favors an objective, verifiable requirement. But the most telling term is "occupational"; this indicates that these objective, verifiable requirements must concern job-related skills and aptitudes. …

Johnson Controls argues that its fetal-protection policy falls within the so-called safety exception to the BFOQ. Our cases have stressed that discrimination on the basis of sex because of safety concerns is allowed only in narrow circumstances. In *Dothard v. Rawlinson,* this Court indicated that danger to a woman herself does not justify discrimination. We there allowed the employer to hire only male guards in contact areas of maximum-security male penitentiaries only because more was at stake than the "individual

woman's decision to weigh and accept the risks of employment." We found sex to be a BFOQ inasmuch as the employment of a female guard would create real risks of safety to others if violence broke out because the guard was a woman. Sex discrimination was tolerated because sex was related to the guard's ability to do the job maintaining prison security. We also required in *Dothard* a high correlation between sex and ability to perform job functions and refused to allow employers to use sex as a proxy for strength although it might be a fairly accurate one. …

Similarly, some courts have approved airlines' layoffs of pregnant flight attendants at different points during the first five months of pregnancy on the ground that the employer's policy was necessary to ensure the safety of passengers. … In two of these cases, the courts pointedly indicated that fetal, as opposed to passenger, safety was best left to the mother.

We considered safety to third parties in *Western Airlines, Inc. v. Criswell* in the context of the ADEA. We focused upon "the nature of the flight engineer's tasks," and the "actual capabilities of persons over age 60" in relation to those tasks. Our safety concerns were not independent of the individual's ability to perform the assigned tasks, but rather involved the possibility that, because of age-connected debility, a flight engineer might not properly assist the pilot, and might thereby cause a safety emergency. Furthermore, although we considered the safety of third parties in *Dothard* and *Criswell,* those third parties were indispensable to the particular business at issue. In *Dothard,* the third parties were the inmates; in Criswell, the third parties were the passengers on the plane. We stressed that in order to qualify as a BFOQ, a job qualification must relate to the "essence," or to the "central mission of the employer's business. …"

Third-party safety considerations properly entered into the BFOQ analysis in *Dothard* and *Criswell* because they went to the core of the employee's job performance. Moreover, that performance involved the central purpose of the enterprise. *Dothard,* 433

U. S., at 335 ("The essence of a correctional counselor's job is to maintain prison security"); *Criswell,* 472 U. S., at 413 (the central mission of the airline's business was the safe transportation of its passengers). The unconceived fetuses of Johnson Controls' female employees, however, are neither customers nor third parties whose safety is essential to the business of battery manufacturing. No one can disregard the possibility of injury to future children; the BFOQ, however, is not so broad that it transforms this deep social concern into an essential aspect of battery-making.

Our case law, therefore, makes clear that the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job. This approach is consistent with the language of the BFOQ provision itself, for it suggests that permissible distinctions based on sex must relate to ability to perform the duties of the job. Johnson Controls suggests, however, that we expand the exception to allow fetal-protection policies that mandate particular standards for pregnant or fertile women. We decline to do so. Such an expansion contradicts not only the language of the BFOQ and the narrowness of its exception but the plain language and history of the Pregnancy Discrimination Act. …

We conclude that the language of both the BFOQ provision and the PDA which amended it, as well as the legislative history and the case law, prohibit an employer from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job. We reiterate our holdings in *Criswell* and *Dothard* that an employer must direct its concerns about a woman's ability to perform her job safely and efficiently to those aspects of the woman's job-related activities that fall within the "essence" of the particular business. …

We have no difficulty concluding that Johnson Controls cannot establish a BFOQ. Fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Johnson Controls' professed moral and ethical concerns

about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Congress has mandated this choice through Title VII, as amended by the Pregnancy Discrimination Act. Johnson Controls has attempted to exclude women because of their reproductive capacity. Title VII and the PDA simply do not allow a woman's dismissal because of her failure to submit to sterilization. …

A word about tort liability and the increased cost of fertile women in the workplace is perhaps necessary. One of the dissenting judges in this case expressed concern about an employer's tort liability and concluded that liability for a potential injury to a fetus is a social cost that Title VII does not require a company to ignore. It is correct to say that Title VII does not prevent the employer from having a conscience. The statute, however, does prevent sex-specific fetal-protection policies. These two aspects of Title VII do not conflict.

More than 40 States currently recognize a right to recover for a prenatal injury based either on negligence or on wrongful death. According to Johnson Controls, however, the company complies with the lead standard developed by OSHA and warns its female employees about the damaging effects of lead. It is worth noting that OSHA gave the problem of lead lengthy consideration and concluded that "there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy." Instead, OSHA established a series of mandatory protections which, taken together, "should effectively minimize any risk to the fetus and newborn child." Without negligence, it would be difficult for a court to find liability on the part of the employer. If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best …

> We, of course, are not presented with, nor do we decide, a case in which costs would be so prohibitive as to threaten the survival of the employer's business. We merely reiterate our prior holdings that the incremental cost of hiring women cannot justify discriminating against them.
>
> Our holding today that Title VII, as amended, forbids sex-specific fetal-protection policies is neither remarkable nor unprecedented. Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities. Congress in the PDA prohibited discrimination on the basis of a woman's ability to become pregnant. We do no more than hold that the Pregnancy Discrimination Act means what it says.

So What About Hooters?

The restaurant chain known as "Hooters" has become something of a cultural phenomenon in our time. Hooters gained substantial notoriety in the 1990s with its resistance to the perceived "political correctness" of the EEOC. Hooters then, and Hooters now, hires young women for servers in its restaurants. It does not hire men for these jobs. In fact, the chain's Web site says that only women should apply for the positions.

Is this a legitimate BFOQ? Hardly. Hooters sells food and drink, and the notion that only women can successfully perform the work is preposterous. Hooters gets away with it because it faced down the EEOC when the government tried to force it to hire men applicants for servers. Hooters appealed to its public and got massive support. According to the Hooters Web site, about 500,000 customers sent letters to Congress in 1996 protesting the waste of government resources and 23 members of the House asked the EEOC to drop the case. Hooters believes the EEOC has done so.

A group of men tried to sue the chain using a class-action theory, and Hooters settled that case on favorable terms. The agreement states that "being female is 'reasonably necessary' to the performance of the Hooters Girl's job duties," and Hooters can legally discriminate against men. The Hooters Web site proclaims that its marketing policy is a perfectly legitimate business strategy (http://www.hooters.com/about.aspx). Here is what the company says:

> Sex appeal is legal and it sells. Newspapers, magazines, daytime talk shows, and local television affiliates consistently emphasize a variety of sexual topics to boost sales. Hooters marketing, emphasizing the Hooters Girl and her sex appeal, along with its commitment to quality operations continues to build and contributes to the chain's success. Hooters' business motto sums it up, "You can sell the sizzle, but you have to deliver the steak."

If you visit the Web site, Hooters features a number of pictures of Hooters employees and describes the career opportunities available to its employees.

III. Americans with Disabilities Act of 1990 and the 2009 Amendments

The Americans with Disabilities Act (ADA), signed by President George H. Bush on July 26, 1990, provided sweeping protections for persons with disabilities across a wide spectrum of social life in this country We now have buildings and transportation systems designed to accommodate disabilities, and public thoroughfares are accessible to wheelchairs. Title I of the bill deals with employment; its purpose is to eliminate discrimination against prospective job applicants and employees who have disabilities. As happened with Title VII, the U.S. Supreme Court tried to limit the scope and effectiveness of the act, and Congress responded with legislation undoing the Court's decisions.[18] In its 2009 modification, Congress made the following finding of fact: "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination." As of January 2009, the ADA is an expanded and important domain of employment regulation. Its stated purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." The act applies to all employers having 15 or more employees, but not to the federal government, because it is covered by other laws.

Consistent with the statute's mandate, the key to understanding how the ADA functions in the employment setting is the requirement of "reasonable accommodation." In simple terms, the law imposes a duty on employers to provide reasonable assistance so that a person with a disability can perform a job. Congress said that all individuals who are "qualified" must be considered for employment. It then defined "qualified individuals" in the following language:

> The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

Accordingly, employers must consider an applicant's qualifications for a position without reference to any disability. If the applicant meets the qualifications on that basis, but has a disability, then the employer must consider whether a reasonable accommodation can be made.

Congress set forth a detailed analysis of the term "reasonable accommodation," and the related concept of "undue hardship." If an accommodation involves undue hardship, it is not reasonable. Here is how the statute explains the duty to accommodate:

> The term "reasonable accommodation" may include
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

The law then elaborates on the meaning of "undue hardship" in the following sections:

A) In general, the term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
B) Factors to be considered in determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:
    i. the nature and cost of the accommodation needed under this chapter;
    ii. the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
    iii. the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
    iv. the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

The definition of a "disability" under the ADA is broad. When the Supreme Court decided a case involving a woman with limited arm movement that arose out of her employment, the Court said that was not a disability, because it did not substantially limit a major life activity. In a related decision, the Court found that a person having impaired vision, but whose vision could be corrected, was not a person with a disability.

The 2009 amendments reject the Court's rulings explicitly and thoroughly. The ADA states that the term disability means:

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

The statute continues with a description of major life activities, major bodily functions, the meaning of "regarded as having" an impairment, and a list of rules to interpret the act broadly in light of its purposes.[19]

One of the cases which the Supreme Court correctly decided involved the professional golf association.[20] The relevant facts of the case are straightforward. A golfer named Casey Martin had a promising career as a professional golfer. He also had a physical condition that made it difficult for him to walk. Some, but not all golf events, require that players walk the course. Martin asked for a reasonable accommodation that would allow him to use a golf cart. The Court first had to decide whether the PGA fell under the coverage of the ADA, which the majority answered in the affirmative. It then had to determine if Martins use of a cart could be a reasonable accommodation or if it gave him an unfair advantage over other players. Again, the majority ruled in favor of Martin. The excerpt below gives the majority's reasoning and part of Justice Scalia's dissent.

[Justice Stevens wrote the majority opinion. He begins with an extended discussion of the way golfers can qualify to play in PGA tournaments. Stevens then turns to the rules of golf:]

> Three sets of rules govern competition in tour events. First, the "Rules of Golf," jointly written by the United States Golf Association (USGA) and the Royal and Ancient Golf Club of Scotland, apply to the game as it is played, not only by millions of amateurs on public courses and in private country clubs throughout the United States and worldwide, but also by the professionals in the tournaments conducted by petitioner, the USGA, the Ladies' Professional Golf Association, and the Senior Women's Golf Association. Those rules do not prohibit the use of golf carts at any time.
>
> Second, the "Conditions of Competition and Local Rules," often described as the "hard card," apply specifically to petitioner's professional tours. The hard cards for the PGA TOUR and NIKE TOUR require players to walk the golf course during tournaments, but not during open qualifying rounds. On the SENIOR PGA TOUR, which is limited to golfers age 50 and

older, the contestants may use golf carts. Most seniors, however, prefer to walk.

The basic Rules of Golf, the hard cards, and the weekly notices apply equally to all players in tour competitions. As one of petitioner's witnesses explained with reference to "the Masters Tournament, which is golf at its very highest level … the key is to have everyone tee off on the first hole under exactly the same conditions and all of them be tested over that 72-hole event under the conditions that exist during those four days of the event."

[The opinion says Martin is a talented golfer with an impressive list of accomplishments. It then describes his disability:]

Martin is also an individual with a disability as defined in the Americans with Disabilities Act of 1990 (ADA or Act). Since birth he has been afflicted with Klippel-Trenaunay-Weber Syndrome, a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart. The disease is progressive; it causes severe pain and has atrophied his right leg. During the latter part of his college career, because of the progress of the disease, Martin could no longer walk an 18-hole golf course. Walking not only caused him pain, fatigue, and anxiety, but also created a significant risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly that an amputation might be required. For these reasons, Stanford made written requests to the Pacific 10 Conference and the NCAA to waive for Martin their rules requiring players to walk and carry their own clubs. The requests were granted.

When Martin turned pro and entered petitioner's Q-School, the hard card permitted him to use a cart during his successful progress through the first two stages. He made a request, supported by detailed medical records, for permission to use a golf cart during the third stage. [The PGA] refused to review those records or to waive its walking rule for the third stage. Martin therefore filed this action. A preliminary injunction entered by the District Court made it possible for him to use a cart in the final stage of the Q-School and as a competitor in the NIKE TOUR and PGA

TOUR. Although not bound by the injunction, and despite its support for petitioner's position in this litigation, the USGA voluntarily granted Martin a similar waiver in events that it sponsors, including the U.S. Open. …

At trial, petitioner did not contest the conclusion that Martin has a disability covered by the ADA, or the fact "that his disability prevents him from walking the course during a round of golf." Rather, petitioner asserted that the condition of walking is a substantive rule of competition, and that waiving it as to any individual for any reason would fundamentally alter the nature of the competition. Petitioner's evidence included the testimony of a number of experts, among them some of the greatest golfers in history. Arnold Palmer, Jack Nicklaus, and Ken Venturi explained that fatigue can be a critical factor in a tournament, particularly on the last day when psychological pressure is at a maximum. Their testimony makes it clear that, in their view, permission to use a cart might well give some players a competitive advantage over other players who must walk. They did not, however, express any opinion on whether a cart would give Martin such an advantage.

Rejecting petitioner's argument that an individualized inquiry into the necessity of the walking rule in Martin's case would be inappropriate, the District Court stated that it had "the independent duty to inquire into the purpose of the rule at issue, and to ascertain whether there can be a reasonable modification made to accommodate plaintiff without frustrating the purpose of the rule" and thereby fundamentally altering the nature of petitioner's tournaments. The judge found that the purpose of the rule was to inject fatigue into the skill of shot-making, but that the fatigue injected "by walking the course cannot be deemed significant under normal circumstances." Furthermore, Martin presented evidence, and the judge found, that even with the use of a cart, Martin must walk over a mile during an 18-hole round, and that the fatigue he suffers from coping with his disability is "undeniably greater" than the fatigue his able-bodied competitors endure from walking the course. …

As a result, the judge concluded that it would "not fundamentally alter the nature of the PGA Tour's game to accommodate him with a cart." The judge accordingly entered a permanent injunction requiring petitioner to permit Martin to use a cart in tour and qualifying events. …

[The Court of Appeals for the Ninth Circuit ruled in Martin's favor. It upheld the trial court's finding that Martin's use of a cart would not "fundamentally alter" the game of golf. The Supreme Court concluded that the PGA was subject to the ADA as a public accommodation because it offered golfing opportunities to the public generally. With regard to the use of a golf cart, the Court continued:]

Petitioner [PGA] does not contest that a golf cart is a reasonable modification that is necessary if Martin is to play in its tournaments. Martin's claim thus differs from one that might be asserted by players with less serious afflictions that make walking the course uncomfortable or difficult, but not beyond their capacity. In such cases, an accommodation might be reasonable but not necessary. In this case, however, the narrow dispute is whether allowing Martin to use a golf cart, despite the walking requirement that applies to the PGA TOUR, the NIKE TOUR, and the third stage of the Q-School, is a modification that would "fundamentally alter the nature" of those events.

In theory, a modification of petitioner's golf tournaments might constitute a fundamental alteration in two different ways. It might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally; changing the diameter of the hole from three to six inches might be such a modification. Alternatively, a less significant change that has only a peripheral impact on the game itself might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others and, for that reason, fundamentally alter the character of the competition. We are not persuaded that a waiver of the walking rule for Martin would work a fundamental alteration in either sense.

As an initial matter, we observe that the use of carts is not itself inconsistent with the fundamental character of the game of golf. From early on, the essence of the game has been shot-making—using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible. That essential aspect of the game is still reflected in the very first of the Rules of Golf, which declares: "The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the rules." Over the years, there have been many changes in the players' equipment, in golf course design, in the Rules of Golf, and in the method of transporting clubs from hole to hole. Originally, so few clubs were used that each player could carry them without a bag. Then came golf bags, caddies, carts that were pulled by hand, and eventually motorized carts that carried players as well as clubs. "Golf carts started appearing with increasing regularity on American golf courses in the 1950's. Today they are everywhere. And they are encouraged. For one thing, they often speed up play, and for another, they are great revenue producers." There is nothing in the Rules of Golf that either forbids the use of carts, or penalizes a player for using a cart. That set of rules, as we have observed, is widely accepted in both the amateur and professional golf world as the rules of the game. The walking rule that is contained in petitioner's hard cards, based on an optional condition buried in an appendix to the Rules of Golf, is not an essential attribute of the game itself.

Indeed, the walking rule is not an indispensable feature of tournament golf either. As already mentioned, petitioner permits golf carts to be used in the SENIOR PGA TOUR, the open qualifying events for petitioner's tournaments, the first two stages of the Q-School, and, until 1997, the third stage of the Q-School as well. Moreover, petitioner allows the use of carts during certain tournament rounds in both the PGA TOUR and the NIKE TOUR. In addition, although the USGA enforces a walking rule in most of the tournaments that it sponsors, it permits carts in the Senior Amateur and the Senior Women's Amateur championships. …

[G]olf is a game in which it is impossible to guarantee that all competitors will play under exactly the same conditions or that an individual's ability will be the sole determinant of the outcome. For example, changes in the weather may produce harder greens and more head winds for the tournament leader than for his closest pursuers. A lucky bounce may save a shot or two. Whether such happenstance events are more or less probable than the likelihood that a golfer afflicted with Klippel-Trenaunay-Weber Syndrome would one day qualify for the NIKE TOUR and PGA TOUR, they at least demonstrate that pure chance may have a greater impact on the outcome of elite golf tournaments than the fatigue resulting from the enforcement of the walking rule.

Further, the factual basis of petitioner's argument is undermined by the District Court's finding that the fatigue from walking during one of petitioner's 4-day tournaments cannot be deemed significant. The District Court credited the testimony of a professor in physiology and expert on fatigue, who calculated the calories expended in walking a golf course (about five miles) to be approximately 500 calories—"nutritionally … less than a Big Mac." What is more, that energy is expended over a 5-hour period, during which golfers have numerous intervals for rest and refreshment. In fact, the expert concluded, because golf is a low intensity activity, fatigue from the game is primarily a psychological phenomenon in which stress and motivation are the key ingredients. And even under conditions of severe heat and humidity, the critical factor in fatigue is fluid loss rather than exercise from walking. …

Even if we accept the factual predicate for [the PGA's] argument—that the walking rule is "outcome affecting" because fatigue may adversely affect performance—its legal position is fatally flawed. Petitioner's refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA. As previously stated, the ADA was enacted to eliminate discrimination against "individuals" with disabilities, and to that end Title III of the Act requires without exception that any "policies, practices,

or procedures" of a public accommodation be reasonably modified for disabled "individuals" as necessary to afford access unless doing so would fundamentally alter what is offered. To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration. …

Under the ADA's basic requirement that the need of a disabled person be evaluated on an individual basis, we have no doubt that allowing Martin to use a golf cart would not fundamentally alter the nature of petitioner's tournaments. As we have discussed, the purpose of the walking rule is to subject players to fatigue, which in turn may influence the outcome of tournaments. Even if the rule does serve that purpose, it is an uncontested finding of the District Court that Martin "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking." The purpose of the walking rule is therefore not compromised in the slightest by allowing Martin to use a cart. A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to "fundamentally alter" the tournament. What it can be said to do, on the other hand, is to allow Martin the chance to qualify for and compete in the athletic events petitioner offers to those members of the public who have the skill and desire to enter. That is exactly what the ADA requires. As a result, Martin's request for a waiver of the walking rule should have been granted.

[Justice Scalia's dissenting comments on the point that the rules of golf describe the "essential" game:]

Nowhere is it writ that PGA TOUR golf must be classic "essential" golf. Why cannot the PGA TOUR, if it wishes, promote a new game, with distinctive rules (much as the American League promotes a game of baseball in which the pitcher's turn at the plate

can be taken by a "designated hitter")? If members of the public do not like the new rules—if they feel that these rules do not truly test the individual's skill at "real golf" (or the team's skill at "real baseball") they can withdraw their patronage. But the rules are the rules. They are (as in all games) entirely arbitrary, and there is no basis on which anyone—not even the Supreme Court of the United States—can pronounce one or another of them to be "nonessential" if the rule maker (here the PGA TOUR) deems it to be essential.

If one assumes, however, that the PGA TOUR has some legal obligation to play classic, Platonic golf—and if one assumes the correctness of all the other wrong turns the Court has made to get to this point—then we Justices must confront what is indeed an awesome responsibility. It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government's power "[t]o regulate Commerce with foreign Nations, and among the several States," to decide What Is Golf. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would someday have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot *really* a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a "fundamental" aspect of golf.

Either out of humility or out of self-respect (one or the other) the Court should decline to answer this incredibly difficult and incredibly silly question. To say that something is "essential" is ordinarily to say that it is necessary to the achievement of a certain object. But since it is the very nature of a game to have no object except amusement (that is what distinguishes games from

productive activity), it is quite impossible to say that any of a game's arbitrary rules is "essential." Eighteen-hole golf courses, 10-foot-high basketball hoops, 90-foot baselines, 100-yard football fields—all are arbitrary and none is essential. The only support for any of them is tradition and (in more modern times) insistence by what has come to be regarded as the ruling body of the sport—both of which factors support the PGA TOUR's position in the present case. (Many indeed, consider walking to be *the central feature* of the game of golf—hence Mark Twain's classic criticism of the sport: "a good walk spoiled.") I suppose there is some point at which the rules of a well-known game are changed to such a degree that no reasonable person would call it the same game. If the PGA TOUR competitors were required to dribble a large, inflated ball and put it through a round hoop, the game could no longer reasonably be called golf. But this criterion—destroying recognizability as the same generic game—is surely not the test of "essentialness" or "fundamental-ness" that the Court applies, since it apparently thinks that merely changing the diameter of the *cup* might "fundamentally alter" the game of golf. ….

The statute, of course, provides no basis for this individualized analysis that is the Court's last step on a long and misguided journey. The statute seeks to assure that a disabled person's disability will not deny him *equal access* to (among other things) competitive sporting events—not that his disability will not deny him an *equal chance to win* competitive sporting events. The latter is quite impossible, since the very *nature* of competitive sport is the measurement, by uniform rules, of unevenly distributed excellence. This unequal distribution is precisely what determines the winners and losers—and artificially to "even out" that distribution, by giving one or another player exemption from a rule that emphasizes his particular weakness, is to destroy the game. That is why the "handicaps" that are customary in social games of golf—which, by adding strokes to the scores of the good players and subtracting them from scores of the bad ones, "even out" the varying abilities—are *not* used in professional golf. In the Court's

world, there is one set of rules that is "fair with respect to the able-bodied" but "individualized" rules, mandated by the ADA, for "talented but disabled athletes." The ADA mandates no such ridiculous thing. Agility, strength, speed, balance, quickness of mind, steadiness of nerves, intensity of concentration—these talents are not evenly distributed. No wild-eyed dreamer has ever suggested that the managing bodies of the competitive sports that test precisely these qualities should try to take account of the uneven distribution of God-given gifts when writing and enforcing the rules of competition. And I have no doubt Congress did not authorize misty-eyed judicial supervision of such a revolution.

Notes

1. Various sites reported the story. See, e.g., http://www.theroot.com/buzz/gop-party-member-sends-email-obama-parents-apes.
2. Dr. Boyce Watkins, "Republican Birther Puts Obama's Face on a Chimp …" http://thyblackman. com/2011/04/18/dr-boyce-watkins-republican-birther-puts-obamas-face-on-a-chimp/.
3. Winthrop Jordan, *White over Black: American Attitudes Toward the Negro, 1550-1812* (Chapel Hill: University of North Carolina Press, 1968), p. 233.
4. See, e.g., http://www.nydailynews.com/news/national/2011/04/19/2011-04-19_goper_says_ sorry_again_for_racist_obama_email_claims_to_have_received_threats.html?r=news.
5. *Ricci v. DeStefano,* 129 S. Ct. 2658 (2009).
6. *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978). Justice Marshall cites several well-known studies of black history in his opinion. His footnotes are deleted from the opinion, but the basic works are the following: John Hope Franklin, *From Slavery to Freedom: A History of African Americans* (New York: Alfred A. Knopf, 4th ed. 1974 [8th ed. 2000]); Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America*'s *Struggle for Equality* (New York: Alfred A. Knopf, 1976); C. Vann Woodward, *The Strange Career of Jim Crow* (New York: Oxford University Press, 3rd rev. ed., 1974).
7. For an informative and in-depth look at income inequality in the United States, see Timothy Noah, "The Great Divergence," *Slate,* at http://www.slate.com/id/2266025/entry/2266026/.

8. See http://www.eeoc.gov/employees/lawsuit.cfm for further information.
9. http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm
10. *Stalter v. Wal-Mart Stores,* 195 F.3d 285 (7th Cir. 1999).
11. *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971).
12. *Wards Cove Packing Co. v. Antonio,* 490 U.S. 642 (1989).
13. http://www.eeoc.gov/policy/docs/factemployment_procedures.html
14. http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=29&PART=1607&SECTION=5& YEAR=2000&TYPE=TEXT
15. http://www.dol.gov/opa/media/press/ofccp/OFCCP20110146.htm
16. *Gratz v. Bollinger,* 539 U.S. 244 (2003); *Grutter v. Bollinger,* 539 U.S. 306 (2003).
17. *United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) v. Johnson Controls, Inc.,* 499 US.187 (1991).
18. 42 U.S.C., Ch. 126, Sec. 12101 et seq. (2009). For an in-depth treatment of the statutory language, see http://www.ada.gov/pubs/ada.htm.
19. Section 12102 contains the language added in 2009.
20. *PGA Tour v. Martin,* 532 U.S. 661 (2001).

CHAPTER 2

The Basics of Human Resource Management

I. The Human Resource Management Function: An Overview

Human resource management, or HRM, emerged from historical relations between workers and the owners and managers of firms. As Karl Marx pointed out in his analysis of capitalism, employers do not purchase labor from workers. Rather, they purchase the potential for labor, and then deal with the problem of exchanging wages for actual labor. In one of the most famous passages of *Capital,* Marx described the world of wage labor as a "hidden abode," where employers exploit labor by taking the "surplus" value of work in the form of profit.[1] According to this analysis, owners always pay less in wages than the value of the commodity produced by labor, and this process drives the engine of capitalism by creating accumulated wealth. The wage-labor bargain is not a contract for the outright purchase of a quantity of labor, because the terms of the arrangement are incomplete. Workers are hired to report for work at a given time and date, and the employer subsequently assigns work to be accomplished. Managing workers thus requires monitoring, rewarding, and disciplining them on a routine basis.

The analysis changes when an "independent" contracting arrangement exists, because there is a bargain for both a price (not a wage) and a known quantity of labor. For that reason, managing *employees—as* opposed to a contractor—has always been a crucial dimension of capitalist organization. The law recognizes a crucial distinction between contractors and employees, a subject covered in Chapter One. HR managers may choose to purchase contract labor rather than to enter into an

employment relationship for various reasons, including the regulatory environment that imposes costs on employment. Likewise, the government has an interest in making sure that employees are designated as employees and not as independent contractors so that workers are protected under appropriate laws.

Historically, the term "industrial relations" (IR) described the field of study covering all aspects of employment relations. In an impressive book on the subject, Bruce Kaufman traces the origins of IR to developments in the United States during the beginning of the 20th century, specifically crediting John Commons and John D. Rockefeller, Jr. as the founders of the discipline.[2] Scholars such as Commons and his students at the University of Wisconsin studied labor problems, and developed policies to improve the more destructive consequences of class conflict that were described by Marx.[3] Rockefeller, at one time the richest man on the planet, implemented and popularized a process of organizational justice that is still followed today. The "Colorado Industrial Plan," as it was known, featured a system of employee representation that gave workers a voice in the operation of the firm; disputes were settled by third-party arbitration.

In the aftermath of the Great Depression and the New Deal, organized labor played the dominant role in dealings between labor and management, and "personnel management" performed the function of administering the different components of an employment relationship. Large firms generally managed workers by reference to the terms of the labor agreement, which set out such matters as wages, benefits, working conditions, and disciplinary procedures. Leading firms that were not organized, such as Coca-Cola and IBM, typically followed unionized trends in compensation and benefits. Union influence began to decline in the late 1970s, and personnel management evolved into the field of HRM. During the 1980s, human resource policies focused on "union avoidance" as a means of controlling labor costs; that strategy was so successful that the avidly nonunion Wal-Mart became the model for low-wage employment. By the end of the first decade of the 21st century, unions had only a marginal effect on employment relations. HRM played an increasingly important role in protecting the firm from employment-related lawsuits.

Scholars have differing views on the precise contours of HRM as distinct from its predecessors. A well-known book by Karen Legge suggests that HRM contrasts with personnel management, in that HRM is more strategically integrated within the firm and adds value in its contribution to the firm's overall mission and competencies.[4] Toward this end, HRM emphasizes culture, teamwork, employee motivation, and empowerment as opposed to a reliance on rules, job classification, detailed task assignments, and adherence to systematized work environments. HR managers are therefore concerned with understanding the organization's overall goals, strengths, capabilities, and vision and participating in their development. Regardless of the exact dimensions of HRM, there is general agreement in its major functions, which is the content of this chapter. The table below provides an overview of HR activities.

HRM Category	Description
Hiring	Managing the recruitment process, interviewing, and selecting employees
Compensating	Developing pay and benefit policies, administering the system
Performance Management	Training, promoting, motivating, and stabilizing the workforce
Conflict Resolution	Dealing with disciplinary procedures, providing organizational justice systems, avoiding litigation

II. Recruiting and Selecting

A. *Job Descriptions*

The first step in hiring a workforce is to describe the jobs necessary to accomplish the firm's objectives. Assume, for example, that a group decides to form a company that furnishes medical and personal care for the elderly ("Older Is Okay" or "OO"). The demographics of retirement indicate that there will be more retirees over the next few decades, that they will live longer, and that improved medical care will mean a better quality of life. Among various other jobs, the OO Company wants several occupational therapists on its staff. How would the HR director go about hiring qualified individuals? One starting point is to look at the Occupational Handbook prepared by the Bureau of Labor Statistics. Here is what that document says about occupational therapists.[5]

Significant Points

- Employment is expected to grow much faster than average, and job opportunities should be good, especially for therapists treating the elderly.
- Occupational therapists are regulated in all 50 States; requirements vary by State.
- Occupational therapists are increasingly taking on supervisory roles, allowing assistants and aides to work more closely with clients under the guidance of a therapist.

Nature of the Work

Occupational therapists help patients improve their ability to perform tasks in living and working environments. They work with individuals who suffer from a mentally, physically, developmentally, or emotionally disabling condition. Occupational therapists use treatments to develop, recover, or maintain the daily living and work skills of their patients. The therapist helps clients not only to improve their basic motor functions and reasoning abilities, but also to compensate for permanent loss of function. The goal is to help clients have independent, productive, and satisfying lives.

Occupational therapists help clients to perform all types of activities, from using a computer to caring for daily needs such as dressing, cooking, and eating. Physical exercises may be used to increase strength and dexterity, while other activities may be chosen to improve visual acuity or the ability to discern patterns. For example, a client with short-term memory loss might be encouraged to make lists to aid recall, and a person with coordination problems might be assigned exercises to improve hand-eye coordination. Occupational therapists also use computer programs to help clients improve decision-making, abstract-reasoning, problem-solving, and perceptual skills, as well as memory, sequencing, and coordination—all of which are important for independent living.

Patients with permanent disabilities, such as spinal cord injuries, cerebral palsy, or muscular dystrophy, often need special instruction to master certain daily tasks. For these individuals,

therapists demonstrate the use of adaptive equipment, including wheelchairs, orthoses, eating aids, and dressing aids. They also design or build special equipment needed at home or at work, including computer-aided adaptive equipment. They teach clients how to use the equipment to improve communication and control various situations in their environment.

Some occupational therapists treat individuals whose ability to function in a work environment has been impaired. These practitioners might arrange employment, evaluate the work space, plan work activities, and assess the client's progress. Therapists also may collaborate with the client and the employer to modify the work environment so that the client can succeed at work.

Assessing and recording a client's activities and progress is an important part of an occupational therapist's job. Accurate records are essential for evaluating clients, for billing, and for reporting to physicians and other healthcare providers.

Occupational therapists may work exclusively with individuals in a particular age group or with a particular disability. In schools, for example, they evaluate children's capabilities, recommend and provide therapy, modify classroom equipment, and help children participate in school activities. A therapist may work with children individually, lead small groups in the classroom, consult with a teacher, or serve on an administrative committee. Some therapists provide early intervention therapy to infants and toddlers who have, or are at risk of having, developmental delays. Therapies may include facilitating the use of the hands and promoting skills for listening, following directions, social play, dressing, or grooming.

Other occupational therapists work with elderly patients. These therapists help the elderly lead more productive, active, and independent lives through a variety of methods. Therapists with specialized training in driver rehabilitation assess an individual's ability to drive using both clinical and on-the-road tests. The evaluations allow the therapist to make recommendations for adaptive equipment, training to prolong driving independence, and alternative transportation options. Occupational therapists also work with clients to

assess their homes for hazards and to identify environmental factors that contribute to falls.

Occupational therapists in mental health settings treat individuals who are mentally ill, developmentally challenged, or emotionally disturbed. To treat these problems, therapists choose activities that help people learn to engage in and cope with daily life. Activities might include time management skills, budgeting, shopping, homemaking, and the use of public transportation. Occupational therapists also work with individuals who are dealing with alcoholism, drug abuse, depression, eating disorders, or stress-related disorders.

Work environment. In large rehabilitation centers, therapists may work in spacious rooms equipped with machines, tools, and other devices generating noise. The work can be tiring because therapists are on their feet much of the time. Therapists also face hazards such as back strain from lifting and moving clients and equipment.

Occupational therapists working for one employer full-time usually work a 40-hour week. Around 31 percent of occupational therapists worked part-time. It is not uncommon for occupational therapists to work for more than one employer at multiple facilities, which may involve significant travel time. Those in schools may participate in meetings and other activities during and after the school day.

Occupational therapists help patients learn to perform all types of activities, from using a computer to caring for daily needs such as dressing, cooking, and eating.

Training, Other Qualifications, and Advancement

Occupational therapists are regulated in all 50 States. Individuals pursuing a career as an occupational therapist usually need to earn a post-baccalaureate degree from an accredited college or university or education deemed equivalent.

Education and training. A master's degree or higher in occupational therapy is the typical minimum requirement for entry into the field. In addition, occupational therapists must attend an academic program accredited by the Accreditation Council for

Occupational Therapy Education (ACOTE) in order to sit for the national certifying exam. In 2009, 150 master's degree programs or combined bachelor's and master's degree programs were accredited, and 4 doctoral degree programs were accredited. Most schools have full-time programs, although a growing number are offering weekend or part-time programs as well. Coursework in occupational therapy programs include the physical, biological, and behavioral sciences as well as the application of occupational therapy theory and skills. All accredited programs require at least 24 weeks of supervised fieldwork as part of the academic curriculum.

People considering this profession should take high school courses in biology, chemistry, physics, health, art, and the social sciences. College admissions offices also look favorably on paid or volunteer experience in the healthcare field. Relevant undergraduate majors include biology, psychology, sociology, anthropology, liberal arts, and anatomy.

Licensure. All States regulate the practice of occupational therapy. To obtain a license, applicants must graduate from an accredited educational program and pass a national certification examination. Those who pass the exam are awarded the title "Occupational Therapist Registered (OTR)." Specific eligibility requirements for licensure vary by State; contact your State's licensing board for details.

Some States have additional requirements for therapists who work in schools or early intervention programs. These requirements may include education-related classes, an education practice certificate, or early intervention certification.

Certification and other qualifications. Certification is voluntary. The National Board for Certifying Occupational Therapy certifies occupational therapists through a national certifying exam. Those who pass the test are awarded the title Occupational Therapist Registered (OTR). In some States, the national certifying exam meets requirements for regulation while other States have their own licensing exam.

Occupational therapists are expected to continue their professional development by participating in continuing education

courses and workshops. In fact, a number of States require continuing education as a condition of maintaining licensure.

Occupational therapists need patience and strong interpersonal skills to inspire trust and respect in their clients. Patience is necessary because many clients may not show immediate improvement. Ingenuity and imagination in adapting activities to individual needs are assets. Those working in home healthcare services also must be able to adapt to a variety of settings.

Advancement. Therapists are increasingly taking on supervisory roles in addition to their supervision of occupational therapy assistants and aides.

Occupational therapists may advance their careers by taking on administrative duties at hospitals or rehabilitation centers.

Occupational therapists also can advance by specializing in a clinical area and gaining expertise in treating a certain type of patient or ailment. Therapists may specialize in gerontology mental health, pediatrics, and physical rehabilitation. In addition, some occupational therapists choose to teach classes in accredited occupational therapy educational programs.

Employment

Occupational therapists held about 104,500 jobs in 2008. The largest number of occupational therapist jobs was in ambulatory healthcare services, which employed about 29 percent of occupational therapists. Other major employers were hospitals, offices of other health practitioners (including offices of occupational therapists), public and private educational services, and nursing care facilities. Some occupational therapists were employed by home healthcare services, outpatient care centers, offices of physicians, individual and family services, community care facilities for the elderly, and government agencies.

A small number of occupational therapists were self-employed in private practice. These practitioners treated clients referred by other health professionals. They also provided contract or

consulting services to nursing care facilities, schools, adult day care programs, and home healthcare agencies.

Job Outlook

Employment is expected to grow much faster than average. Job opportunities should be good, especially for occupational therapists treating the elderly.

Employment change. Employment of occupational therapists is expected to increase by 26 percent between 2008 and 2018, much faster than the average for all occupations. The increasing elderly population will drive growth in the demand for occupational therapy services. The demand for occupational therapists should continue to rise as a result of the increasing number of individuals with disabilities or limited function who require therapy services. Older persons have an increased incidence of heart attack and stroke, which will spur demand for therapeutic services. Growth in the population 75 years and older—an age group that suffers from high incidences of disabling conditions—also will increase demand for therapeutic services. In addition, medical advances now enable more patients with critical problems to survive—patients who ultimately may need extensive therapy. However, growth may be dampened by the impact of Federal legislation imposing limits on reimbursement for therapy services.

Hospitals will continue to employ a large number of occupational therapists to provide therapy services to acutely ill inpatients. Hospitals also will need occupational therapists to staff their outpatient rehabilitation programs.

Employment growth in schools will result from the expansion of the school-age population and the federally funded extension of services for disabled students. Therapists will be needed to help children with disabilities prepare to enter special education programs.

Job prospects. Job opportunities should be good for licensed occupational therapists in all settings, particularly in acute hospital, rehabilitation, and orthopedic settings because the elderly receive most

of their treatment in these settings. Occupational therapists with specialized knowledge in a treatment area also will have increased job prospects. Driver rehabilitation, training for the elderly, and ergonomic consulting are emerging practice areas for occupational therapy.

Earnings

Median annual wages of occupational therapists were $66,780 in May 2008. The middle 50 percent earned between $55,090 and $81,290. The lowest 10 percent earned less than $42,820, and the highest 10 percent earned more than $98,310. Median annual wages in the industries employing the largest numbers of occupational therapists in May 2008 were

Home health care services	*$74,510*
Nursing care facilities	*72,790*
Offices of other health care practitioners	*69,360*
General medical and surgical hospitals	*68,100*
Elementary and secondary schools	*60,020*

Based on this information, positions at OO may be difficult and costly to fill. The HR department would need to consider whether less qualified therapists might be able to perform some functions offered by the company. Is there a job description in the handbook for therapists who do not have the education and training of a certified therapist?

As a practical matter, an efficient method to screen and recruit candidates in the case above would be to use a consultant who specializes in health care staffing. An example is "Club Staffing," which provides services to employers and employees seeking work in the field. Their advertisement promises, "Thanks to our vast recruiting network and leading-edge staffing services, we can fill your therapist jobs, medical imaging jobs or laboratory jobs and other allied positions across the country with the most qualified professionals." The site invites employees to submit personal information as a preliminary step in the application process.[6]

B. Finding and Selecting Candidates

Once a job description has been developed, a recruiter might advertise in local media outlets such as newspapers, television, and radio. Relying on the reach of internet technology, some companies such as Monster offer a range of online services to employers and employees (http://www.monster.com/). The Web site provides a range of features, including searchable job databases using keywords, locations, and industries. Monster also has tips for preparing résumés, negotiating salaries, following up on interviews, and other items of interest to job seekers. Prospective employees also can post résumés and complete applications online. For employers, the site offers posting opportunities based on specified fees for different types of jobs.

Many companies maintain their own Web sites for attracting potential employees. In early 2011 *CBS Sunday Morning* featured a story on the Container Store, a company that sells storage devices.[7] Although the company's product is certainly not "trendy," the company itself was characterized as one of the best places to work in the country. If you visit the Web site, prospective employees can find information about careers with the company and testimonials from current employees. The Web site proclaims, "We're a company known for impeccable customer service and expert salespeople. We're a company that insists on having fun. Simply put, **we approach retail differently**. In fact, for these reasons and more, we've been at the top of FORTUNE magazine's list of '100 Best Companies to Work for in America' 11 years in a row."[8]

In addition to soliciting applications, employers are using online programs to perform preliminary screening of applicants. Because there are large numbers of people seeking employment of any kind, firms may be pressed to sort out legitimate and qualified applicants from the pool. According to a recent report, "Employment assessments can range from online exams for a specific computer skill to personality tests intended to predict customer service prowess to extensive evaluations of potential executives. A study published last year by consulting firm Rocket-Hire found that about two-thirds of companies use some form of pre-employment assessment tools." The assessment strategies may extend to performance evaluation and promotion. While there are issues associated with online assessment, such as cheating on a test, software providers continue to improve the product. Most likely, those technological strategies for selection will become widespread.[9]

Based on the materials in Chapter 3, you know that some job qualifications and questions are not legal. An applicant could not be asked, for example, whether they were in excellent health, how old they are, the nature of their religious affiliations, or other information that might violate the protections of the civil rights laws. To avoid those pitfalls, employers typically ask open-ended questions that allow the applicant to shape an answer. Some of the most common are the following:

- What are your long-term career goals?
- Why are you interested in this job (or company)?
- What kind of people would you prefer to work with in a team setting?
- What salary would you require to work here?
- What's the most difficult problem you faced in a work setting and what did you do?
- What personality type would you find most difficult to work with?

The questions are fairly generic, but they allow applicants to express something important about themselves while avoiding legal impediments.

The development of "social media" sites allows employers to acquire more information about prospective employees, but it may also present some risks of legal consequence. Some legal experts characterize an Internet search as being similar to an interview, except the search may reveal the applicant's age, family status, or other kinds of information. One way to avoid the problem is to rely only on information the applicant furnishes. Alternatively, the employer might ask for consent to undertake a search. The extent to which the employer can control an employee's use of social media is discussed later in the chapter.

C. *Verifying Employee Information*

There are different means by which the prospective employee's application can be verified. This is important to avoid liability for negligent hiring, as well as to ensure the credentials are what they appear to be. The potential legal liability arises out of well-established doctrines of negligence. In a recent California case, a plaintiff attempted to get damages from a plumbing company after a former employee shot and killed the plaintiff's mother.

The plaintiff claimed that the plumbing company hired an individual whom they should have known was a threat to the company's clients. The court cited the standard rule as follows: "Liability for negligent hiring is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees." A legal duty exists when the employer "knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes."[10] The plaintiff lost this case, because the company had fired the individual two years before the shooting. Consider the case of a female English teacher, fired after she was caught naked in a public park with a 15-year-old student. She was sentenced to probation and registration as a sex offender.[11] If a school in another state hired her and the same thing happened, should the school be liable to the victim for failing to investigate the teacher's background? What damages could the victim recover?

Conducting a background investigation can be costly and time consuming, but there are firms that will perform a search of public records for the employer. If an employer uses that method of screening, the activity is covered by the federal Fair Trade Commission's (FTC) authority to regulate consumer reports under the Fair Credit Reporting Act. The FTC provides an informative explanation about the regulations on its Web site.[12]

Using Consumer Reports: What Employers Need to Know

Your advertisement for cashiers nets 100 applications. You want credit reports on each applicant. You plan to eliminate those with poor credit histories. What are your obligations?

You are considering a number of your long-term employees for major promotions. Can you check their credit reports to ensure that only financially responsible individuals are considered?

A job candidate has authorized you to obtain a credit report. The applicant has a poor credit history. Although the credit history is considered a negative factor, it's the applicant's lack of relevant experience that's more important to you. You turn down the application. What procedures must you follow?

As an employer, you may use consumer reports when you hire new employees and when you evaluate employees for promotion, reassignment, and retention—as long as you comply with the Fair Credit Reporting Act (FCRA). Sections 604, 606, and 615 of the FCRA spell out your responsibilities when using consumer reports for employment purposes.

The FCRA is designed primarily to protect the privacy of consumer report information and to guarantee that the information supplied by consumer reporting agencies is as accurate as possible. Amendments to the FCRA—which went into effect September 30, 1997—significantly increase the legal obligations of employers who use consumer reports. Congress expanded employer responsibilities because of concern that inaccurate or incomplete consumer reports could cause applicants to be denied jobs or cause employees to be denied promotions unjustly. The amendments ensure (1) that individuals are aware that consumer reports may be used for employment purposes and agree to such use, and (2) that individuals are notified promptly if information in a consumer report may result in a negative employment decision.

What Is a Consumer Report?

A consumer report contains information about your personal and credit characteristics, character, general reputation, and lifestyle. To be covered by the FCRA, a report must be prepared by a consumer reporting agency (CRA)—a business that assembles such reports for other businesses.

Employers often do background checks on applicants and get consumer reports during their employment. Some employers only want an applicant's or employee's credit payment records; others want driving records and criminal histories. For sensitive positions, it's not unusual for employers to order investigative consumer reports—reports that include interviews with an applicant's or employee's friends, neighbors, and associates. All of these types of reports are consumer reports if they are obtained from a CRA.

Applicants are often asked to give references. Whether verifying such references is covered by the FCRA depends on who does the verification. A reference verified by the employer is not covered by the Act; a reference verified by an employment or reference checking agency (or other CRA) is covered. Section 603(o) provides special procedures for reference checking; otherwise, checking references may constitute an investigative consumer report subject to additional FCRA requirements.

Key Provisions of the FCRA Amendments
Written Notice and Authorization
Before you can get a consumer report for employment purposes, you must notify the individual in writing—in a document consisting solely of this notice—that a report may be used. You also must get the person's written authorization before you ask a CRA for the report. (Special procedures apply to the trucking industry.)

Adverse Action Procedures
If you rely on a consumer report for an "adverse action"—denying a job application, reassigning or terminating an employee, or denying a promotion—be aware that:

> Step 1: Before you take the adverse action, you must give the individual a pre-adverse action disclosure that includes a copy of the individual's consumer report and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act"—a document prescribed by the Federal Trade Commission. The CRA that furnishes the individual's report will give you the summary of consumer rights.
>
> Step 2: After you've taken an adverse action, you must give the individual notice—orally, in writing, or electronically—that the action has been taken in an adverse action notice. It must include:
> - The name, address, and phone number of the CRA that supplied the report;
> - A statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and

- A notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished, and his or her right to an additional free consumer report from the agency upon request within 60 days.

Certifications to Consumer Reporting Agencies

Before giving you an individual's consumer report, the CRA will require you to certify that you are in compliance with the FCRA and that you will not misuse any information in the report in violation of federal or state equal employment opportunity laws or regulations.

In 1998, Congress amended the FCRA to provide special procedures for mail, telephone, or electronic employment applications in the trucking industry Employers do not need to make written disclosures and obtain written permission in the case of applicants who will be subject to state or federal regulation as truckers. Finally, no pre-adverse action disclosure or Section 615(a) disclosure is required. Instead, the employer must, within three days of the decision, provide an oral, written, or electronic adverse action disclosure consisting of: (1) a statement that an adverse action has been taken based on a consumer report; (2) the name, address, and telephone number of the CRA; (3) a statement that the CRA did not make the decision; and (4) a statement that the consumer may obtain a copy of the actual report from the employer if he or she provides identification.

In Practice ...

You advertise vacancies for cashiers and receive 100 applications. You want just credit reports on each applicant because you plan to eliminate those with poor credit histories. What are your obligations?

You can get credit reports—one type of consumer report—if you notify each applicant in writing that a credit report may be requested and if you receive the applicant's written consent. Before you reject an applicant based on credit report information, you must make a pre-adverse action disclosure that includes a copy of the credit

report and the summary of consumer rights under the FCRA. Once you've rejected an applicant, you must provide an adverse action notice if credit report information affected your decision.

You are considering a number of your long-term employees for a major promotion. You want to check their consumer reports to ensure that only responsible individuals are considered for the position. What are your obligations?

You cannot get consumer reports unless the employees have been notified that reports may be obtained and have given their written permission. If the employees gave you written permission in the past, you need only make sure that the employees receive or have received a "separate document" notice that reports may be obtained during the course of their employment—no more notice or permission is required. If your employees have not received notice and given you permission, you must notify the employees and get their written permission before you get their reports.

In each case where information in the report influences your decision to deny promotion, you must provide the employee with a pre-adverse action disclosure. The employee also must receive an adverse action notice once you have selected another individual for the job.

A job applicant gives you the okay to get a consumer report. Although the credit history is poor and that's a negative factor, the applicant's lack of relevant experience carries more weight in your decision not to hire. What's your responsibility?

In any case where information in a consumer report is a factor in your decision—even if the report information is not a major consideration—you must follow the procedures mandated by the FCRA. In this case, you would be required to provide the applicant a pre-adverse action disclosure before you reject his or her application. When you formally reject the applicant, you would be required to provide an adverse action notice.

The applicants for a sensitive financial position have authorized you to obtain credit reports. You reject one applicant, whose credit report

shows a debt load that may be too high for the proposed salary, even though the report shows a good repayment history. You turn down another, whose credit report shows only one credit account, because you want someone who has shown more financial responsibility. Are you obliged to provide any notices to these applicants?

Both applicants are entitled to a pre-adverse action disclosure and an adverse action notice. If any information in the credit report influences an adverse decision, the applicant is entitled to the notices—even when the information isn't negative.

Noncompliance

There are legal consequences for employers who fail to get an applicant's permission before requesting a consumer report or who fail to provide pre-adverse action disclosures and adverse action notices to unsuccessful job applicants. The FCRA allows individuals to sue employers for damages in federal court. A person who successfully sues is entitled to recover court costs and reasonable legal fees. The law also allows individuals to seek punitive damages for deliberate violations. In addition, the Federal Trade Commission, other federal agencies, and the states may sue employers for noncompliance and obtain civil penalties.

After reading the government's description of the requirements, do you think it gives employees too much protection? Is it too burdensome for employers? Returning to the case of the English teacher, how else could a school district protect itself against a negligent hiring lawsuit?

III. Compensation and Benefits

According to an article in the *New York Times* on May 19, 2011, job prospects for new college graduates remained bleak.[13] The report stated, "The median starting salary for students graduating from four-year colleges in 2009 and 2010 was $27,000, down from $30,000 for those who entered the work force in 2006 to 2008. … That is a decline of 10 percent, even before taking inflation into account." Declining salaries are only part of the problem. Many of the jobs taken by college graduates did not require a degree,

depending largely on the graduate's disciplinary field. The *Times* found, "Young graduates who majored in education and teaching or engineering were most likely to find a job requiring a college degree, while area studies majors—those who majored in Latin American studies, for example—and humanities majors were least likely to do so." More problematically for the American workforce, college graduates who took lower-level jobs forced individuals without degrees into even worse jobs. The downward ratcheting effect resulted in higher unemployment rates for high school graduates or dropouts. The trend in employment levels and pay exacerbates the three-decade wage stagnation in place before the 2007 recession and affects compensation policies generally, which is the topic of this section.

A leading textbook on compensation uses a framework designed around policies, procedures, and objectives.[14] The first policy involves creating a compensation structure that has internal coherence, and is based on a rational system which can be explained and understood. The second policy is to address the problem of market competitiveness, which ensures that individuals are attracted to the organization and are satisfied with their pay. Following from the first two policies, the third factor is individual rewards that are fair and equitable. Last, the program must be administratively feasible and satisfy legal requirements. A compensation system incorporating the four policies will satisfy the objectives of efficiency, fairness, and compliance. Keeping these points in mind, we can explore the basic structure of pay and related benefits.

A straightforward and understandable way of compensating workers is to describe jobs and attach pay rates to the specific job. Union contracts usually contain such information in an appendix to the agreement. Some common factors associated with rates of pay are skill, physical and mental effort, responsibility and working conditions. So, for example, a union contract in a grocery store may have a job classification called "head meat cutter," a position requiring considerable expertise and responsibility, with a pay rate of about $18.00 per hour, plus benefits. A generic classification of "meat cutter" is hired at a rate of $11.30 per hour and is given raises based on length of service earned in increments of 1,040 hours worked, with a top rate of $17.65. A similar process applies to other classifications, such as seafood clerks, meat wrappers, and delicatessen clerks. This approach satisfies the policies of transparency, competitiveness, fairness, and legal compliance.

What can American workers generally expect in terms of average wages and benefits? The Bureau of Labor Statistics compiles detailed information about pay and benefits for American workers and publishes that information on a regular basis. Below are excerpts from the December 2010 report, published in March 2011.[15] Note how much of total compensation is paid in wages, specific benefits, and differences between private and public sector employment. Some labor costs are mandatory, such as Social Security, workers' compensation, and unemployment insurance, but other benefits are discretionary with employers.

EMPLOYER COSTS FOR EMPLOYEE COMPENSATION—DECEMBER 2010

Private industry employers spent an average of $27.75 per hour worked for total employee compensation in December 2010, the U.S. Bureau of Labor Statistics reported today. Wages and salaries averaged $19.64 per hour worked and accounted for 70.8 percent of these costs, while benefits averaged $8.11 and accounted for the remaining 29.2 percent. Total compensation costs for state and local government workers averaged $40.28 per hour worked in December 2010. Total employer compensation costs for civilian workers, which include private industry and state and local government workers, averaged $29.72 per hour worked in December 2010.

Employer Costs for Employee Compensation (ECEC), a product of the National Compensation Survey, measures employer costs for wages, salaries, and employee benefits for nonfarm private and state and local government workers.

Paid leave costs in private industry

Private industry employer costs for paid leave benefits averaged $1.89 per hour worked.

Private industry paid leave benefit costs were highest for management, professional, and related occupations, $4.17 per hour, or 8.4 percent of total compensation, in December 2010. Costs were lowest among service occupations, 59 cents, or 4.3 percent of total compensation. Included in this amount were employer costs for

vacations, holidays, sick leave, and personal leave. Paid leave benefit costs are often directly linked to wages; therefore, higher paid occupations or industries will typically show higher estimates for this compensation component.

Employer costs for paid leave benefits averaged $2.77 per hour worked for union workers, significantly higher than the $1.79 per hour average for nonunion workers. Paid leave costs in goods-producing industries were $2.11, greater than the average for service-providing industries, $1.84, in December 2010. The average cost per hour worked for paid leave in service-providing industries ranged from $3.87 in information to 40 cents in leisure and hospitality.

Paid leave costs varied widely by establishment size in private industry. Paid leave costs for establishments with fewer than 100 workers were $1.28 per hour worked versus $1.95 for establishments with 100 to 499 employees and $3.44 with 500 employees or more.

Legally required benefits costs in private industry

The average cost for legally required benefits was $2.28 per hour worked in private industry (8.2 percent of total compensation) in December 2010. Social Security comprises the largest legally required benefit cost component at $1.32 per hour or 4.8 percent of total compensation. Legally required benefits such as Social Security and Medicare are often directly linked to wages; therefore, higher paid occupations or industries will typically show higher cost estimates for this compensation component.

Costs for other legally required benefits include Workers' compensation, which averaged 42 cents per hour worked (1.5 percent of total compensation); State unemployment insurance, which averaged 18 cents per hour worked (0.7 percent); and Federal unemployment insurance, which averaged just 3 cents per hour worked (0.1 percent).

Employer costs for legally required benefits varied by occupation, industry, bargaining status, and establishment size. The average cost per hour worked for legally required benefits ranged from $3.43 for management, professional, and related occupations to

$1.42 per hour for service occupations. The proportion of total compensation represented by legally required benefits ranged from 10.2 percent for service and natural resources, construction, and maintenance workers to 6.9 percent for management, professional, and related workers. Worker's compensation employer costs for construction industry workers were especially notable, averaging $1.32 per hour worked in December 2010.

Other benefit categories in private industry

Private industry employer costs averaged $2.22 per hour worked for insurance benefits (life, health, and disability insurance), or 8.0 percent of total compensation. In addition to insurance, the other benefit categories were: supplemental pay (overtime and premium, shift differentials, and nonpro-duction bonuses), which averaged 75 cents per hour worked (2.7 percent); and retirement and savings, which averaged 97 cents per hour (3.5 percent).

The information below provides an overview of compensation in the United States. Firms obviously have broad latitude concerning pay rates

Table A. Relative importance of employer costs for employee compensation, December 2010

Compensation component	Civilian workers (federal)	Private industry	State and local government
Wages and salaries	69.7%	70.8%	65.6%
Benefits	30.3	29.2	34.4
Paid leave	7.0	6.8	7.5
Supplemental pay	2.3	2.7	0.8
Insurance	8.8	8.0	11.9
Health benefits	8.4	7.5	11.6
Retirement and savings	4.5	3.5	8.1
Defined benefit	2.7	1.5	7.3
Defined contribution	1.8	2.0	0.8
Legally required	7.8	8.2	6.0

and methods. Among other techniques, employers can adopt pay for performance plans, which reward employees with bonuses based on meeting certain goals or production quotas. Such programs are particularly useful to compensate managerial employees, such as chief executive officers.

In theory, executives are compensated for their contributions to the enterprise's bottom line, but many studies show that they are rewarded even when the firm's stock declines and the company loses money. The problem came into public focus during the 2008 bailouts of several large financial firms. Tax money was used to prop up the companies, but public opinion forced government officials to cut executive pay. The ongoing debate over that situation centers on the importance of pay to executives and their benefit to the enterprise. Bloggers have devoted considerable energy to the subject.[16] In 2011 the Securities and Exchange Commission proposed rules to give shareholders a greater say on executive compensation and "golden parachutes."[17] Despite the adverse publicity, CEOs are hardly living on the sidewalks.

Consider, for example, the case of Vikram Pandit, the head of the Citigroup banking empire. The company got $45 billion in taxpayer bailouts in 2008, and Pandit generously offered to work for $1 a year at that time. The *New York Times* reported in May 2011 that Pandit would receive "as much as $16.5 million in stock and options as well as a cash payment valued at more than $6.65 million as part of a special profit-sharing program for top executives." Pandit's sacrifice appears to have been magnanimously recompensed. And how did the rest of the pack fare in relation to their efforts toward the well-being of the American economy? The *Times* summed up as follows: "Bank of America's chief executive, Brian T. Moynihan, received about $10.2 million in total compensation for 2010, according to Equilar, a compensation research and consulting firm. Jamie Dimon, JPMorgan's chairman and chief executive, was awarded a $23.6 million pay package last year, making him the highest paid of any Wall Street chief. The heads of Goldman Sachs, Morgan Stanley and Wells Fargo were paid somewhere in between."[18]

With regard to regular workers, pay for performance systems can be complicated to develop and administer, and they require the support of

employees. One of the most successful—and enduring—examples of such compensation schemes was implemented at the Lincoln Electric Company during the depths of the Great Depression in 1934.[19] Lincoln was one of the leading firms to adopt a program of "welfare capitalism" during the 1910s, and the company developed a program of employee representation to ensure worker involvement in the enterprise. Frank Koller, a Canadian journalist, published a book-length study of Lincoln in 2010, tracing the company from its origins to its current standing as the largest manufacturer of electric arc welding equipment in the world. In 2008, Koller reports, Lincoln gave each employee an envelope with a check that "represented roughly 61 percent of each employee's base earnings: The average bonus being handed out was $28,873. Furthermore, no permanent Lincoln Electric employees in the United States were laid off for economic reasons in 2008."[20]

Lincoln continues its progressive employment policies today. On its Web site, the company affirms its commitment to guaranteed job security and human resource policies. Lincoln makes the following statement about its compensation strategies: "The Company is famous for its productive and highly-skilled work force, as well as its unique compensation system, Incentive Management. Incentive Management is widely studied in business schools and industrial management circles. The system compensates and encourages individual and team initiative and responsibility at all levels of employment within the U.S. subsidiary." The statement continues that the firm "has never experienced a work stoppage in its 100-plus year history." For interested applicants, Lincoln provides information about the kinds of jobs and working conditions. An "assembler," to illustrate, is described as follows: "Assembly positions may include either individual or assembly line work. Individual assembly positions involve off-line assembly of finished products or parts that are used in finished products. Pay for individual assembly positions is based on the number of units produced by the individual worker. Assembly line work typically involves working with a group of other employees on the assembly of a finished product."[21] Koller concludes that few companies can match Lincoln's success because "pay for performance" is difficult to sustain over a long period.

IV. Performance Management

Once employees are hired and their compensation is determined, the next important HR function is to train, evaluate, and develop, and if necessary, to discipline the worker. The process is a continuous one, and makes up one of the major tasks of the HRM portfolio. This section takes up the several elements, and discusses the important dimensions of each one.

A. *Training*

As a general rule, every employee is given at least some training. A new employee must be introduced to the company's rules, policies, values, and expectations. An orientation session usually will cover the provisions of the employer's handbook pertaining to an employee's benefits, performance, and behavior on the job. A large food manufacturer furnishes employees with an extensive description of the company's expectations for employees, and what employees can expect from the employer. The handbook begins with a statement of the company's philosophy, which is to recognize and respect the interests of consumers, customers, employees, stockholders, and the community. The company's core values focus on growth, empowered employees, and the creation of responsibility and trust. The handbook continues to set out an employee's benefits, attendance requirements, rules of personal conduct, and the company's disciplinary system. An orientation session gives employees the opportunity to learn about the company and their rights, duties, and privileges as an employee.

Another common method of training takes place on the job. To illustrate the point, recall that an earlier part of this chapter dealt with the job classification of head meat cutter at a grocery store. Reflect a moment on how a head of beef goes from the pasture to your plate in the form of a steak. After cattle are sold to a packing operation, they are processed from a live animal to a consumable commodity sold through a retail grocery outlet. At one time, most grocers had butchers who took whole beef carcasses and cut them into various kinds of meat. Those workers were sufficiently distinct that they had their own craft unions, such as the Amalgamated Butcher Workmen, and performance standards could be negotiated in a labor agreement. Packinghouses began to offer more customized

products, and skilled butchers were less in demand. Large grocery chains still needed some meat cutting expertise, which meant that qualified individuals could find work fairly easily. Workers who had the necessary skills might be assigned training duties to develop new meat cutters. Such on-the-job learning is a common feature of many kinds of work.

Moving to another level of training, consider a common skill that pervades today's workplace: communicating with others through e-mail. Secondary education prepares individuals for certain activities in society, and writing was historically regarded as an essential skill. New forms of communication tended to discount formal writing capabilities, such as correct spelling and grammar, and the result was that employers could no longer rely on a high school diploma, or even some higher education, as a guarantee of literacy. The point had particular relevance to electronic communication, which largely displaced formal written documents. But who wants to be regarded as an illiterate simply because words appear on a screen instead of on paper?

To remedy this particular problem, individual training consultants have stepped in to fill the vacuum. Several good books have been published on the subject, and they provide a background for training courses.[22] The actual instruction may be undertaken by an in-house trainer if a qualified person is available within the company. Alternatively, the employer can hire an outside consultant who specializes in the particular subject. The consultant provides training oriented toward the particular employer, and instructs employees on basic principles such as correct grammar, punctuation, tone, diction, and other elements of writing. The benefit of this method is that employees have expert, but individualized, training carried out by a professional with experience in the activity and knowledge of the topic. The disadvantage is the cost associated with hiring a contractor.

Another option is to send employees for instruction away from the workplaces. A number of management consulting firms offer training courses, sometimes awarding certificates and other indicia of accomplishment. An example of a successful venture along these lines is the Mountain States Employers Council in Denver, Colorado. The organization was founded in the late 1940s to assist employers with their unionized workforces. Member companies paid a set amount of dues, and in return received help with grievances, arbitration, unionizing campaigns, negotiations, and other aspects of labor relations. As unions declined, MSEC

began dealing with other management issues, such as training, legal compliance, and employee relations in general. The firm now has an elaborate course offering covering all aspects of employment (including how to write effective letters, reports, and e-mails) and awards its own certificates of accomplishment. Here is how MSEC advertises its seminar on the legal environment of employment:

> Did you know that employment law claims comprise approximately 15% of all lawsuits filed? In addition, employment law claims are also more likely to go to trial that any other type of claim. Yet human resources, managers and supervisors understandably find that the number of legal issues they need to be aware of can be overwhelming. Courts have weighed in and stated that the failure to train managers and supervisors on basic employment law issues is an "extraordinary mistake."

Their one-day training course covers basic information about employment law. It essentially summarizes the content of the first four chapters of this book. Obviously, some awareness of legal issues is essential for managers.

The final point about training is how training needs can be determined. By looking at the job descriptions used in hiring and compensating, managers can compile information about the specific abilities associated with each job. Returning to the occupational therapist position described earlier, it becomes clear that the job requires continuous training to remain current in the field. Licensing requirements, in fact, may dictate a certain level of training be completed within specified periods. Attorneys have a duty to attend a certain number of training sessions, known as "bar refreshers," to keep their licenses current. Those who fall below the designated amount of training are threatened with removal from the bar. Other training needs may be determined by looking at an employee's job performance, which is the next topic.

B. Evaluating Performance

The standard method of evaluating employees is the "performance appraisal" conducted at various points in the employment continuum. Appraisals are used to reward good performance and correct bad

performance. They may be tied into the company's compensation program so that a positive appraisal leads to a higher raise or a promotion. A negative appraisal, conversely, could lead to disciplinary action to deal with a particular problem, such as poor attendance.

Taking factors from the job description helps to ground the appraisal process. Returning to the example of a meat cutter in a grocery store, the job description may incorporate such tasks as dealing with customers, maintaining an attractive display of meat products, ensuring that products have not exceeded their sale dates, cooperating with related departments such as seafood and deli, and helping to oversee the work of junior employees. Using these general areas, the appraisal could consist of a rating scale of "exceeds expectations" (5 points) to "does not meet expectations" (1 point). By breaking the job duties into various elements, the appraisal form creates a detailed view of performance. For example, the "dealing with customers" factor might include specific behaviors, such as promptly greeting customers, responding to questions fully, maintaining a neat and clean appearance, and so forth. The ratings on each item can be summed up to obtain a numerical score for a general area. If the employee performed poorly on an item, such as putting outdated meat products into a sales case or failing to stock depleted inventory, further managerial action would be warranted.

Some HR specialists have suggested that performance appraisals may not be the best method for dealing with employee performance. One expert points out that regular performance appraisals can create anxiety for both managers and employees and have a number of weaknesses associated with their use, such as subjective evaluations, a tendency to focus on recent events, and a "grouping" effect that lumps employees together.[23] Citing results of a new survey, she says, "More than half (51 percent) of 631 respondents believe reviews don't provide accurate appraisals of their work, and nearly one-fourth dread them" as a part of the job. Instead of appraisals given at a regular interval, employees should have feedback on an ongoing basis emphasizing prompt engagement. The process is facilitated by online technologies that allow immediate, one-to-one interaction between team members and managers.[24]

As the material suggests, evaluating employees is a complicated task. It may depend on such factors as the organizational structure of the company, the demographics of the workforce, and the type of work involved.

Evaluation is also closely related to compensation, and a good compensation plan such as the one at Lincoln Electric may make evaluations unnecessary, because pay is closely tied to performance. In any case, poor performance must be corrected by some system of sanctions. Most employers have safeguards in place to ensure that discipline is fair and consistent. Those safeguards help to reduce the risk of lawsuits challenging disciplinary action. The case below illustrates the possible problems an employer encounters in today's legal environment.

C. *Disciplinary Action: Is "Sexting" on the Job Protected?*

When employers impose discipline on an employee, it may prompt litigation based on the employee's legal protections. Civil rights laws, for example, impose liability on employers for such activities as sexual harassment of a fellow employee in the workplace. Another situation calling for prompt disciplinary action is workplace violence, which has become an important issue for employers. A company could decide to implement a "zero tolerance" approach to threats, physical assaults, and intimidation. Any application of discipline necessarily must consider the specific facts of the case and take into consideration any conflicting evidence raised by the alleged perpetrator. Discharge is the most severe penalty available to employers, and is used to deal with the most egregious offenses.

Handbooks typically spell out the kinds of infractions that will lead to discipline and the procedure for administering it. To illustrate, employees who fail to comply with timekeeping rules such as clocking in and out for breaks and shifts, may be given an initial written reminder. If the problem persists, the employer proceeds through a formal written warning, a short suspension, and finally, termination. Discipline is intended to rehabilitate an employee rather than punish him or her, and it is therefore progressive in nature. By allowing the employee to improve her performance, or to comply with existing rules, the employer avoids the appearance of arbitrary decision making.

Given the expanding scope of employment litigation, policies can be a crucial element in defending against the claims of discharged employees. One of the emerging areas of HRM has to do with electronic media, such as e-mail, text messaging, and Internet usage. Employees may try

to assert a right of privacy when using those communication channels. The Supreme Court recently decided a case involving a California police officer who used equipment provided by the employer to send erotic text messages to his wife, and also to his mistress at the time.[25] Recall that when the government is the employer, the "state action" concept is satisfied and an employee can raise constitutional issues about any discipline.

The officer worked for the City of Ontario, California. The city decided that it would provide pagers to the police force. It had in place a policy stating that the city "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." The plaintiff, Quon, signed a statement that he had read and understood the policy. The city intended to treat text messages as a type of e-mail under the policy, and Quon was instructed on this point.

When Quon exceeded his quota of messages, many of which were not related to work, the city asked the service provider to furnish transcripts of the texts. The city reviewed the record of Quon's transmissions, and Quon was disciplined for violating the policy He then sued, claiming a violation of his right of privacy The Ninth Circuit Court of Appeals ruled in favor of Quon, finding that he had a reasonable expectation of privacy and that the search of his messages was unconstitutional. The U.S. Supreme Court reversed. While conceding that Quon may have had a right of privacy regarding the texts, the city's search of those records was not unreasonable, and therefore did not violate Quon's Fourth Amendment protections.

The Court begins its analysis with a discussion of an employee's expectation of privacy. The opinion conceded that Quon might have an expectation of privacy is his texts, but the Court avoided an explicit ruling on this point. The reason, as the Court explained, is that technology is still developing in this area, and it is unclear what employees might understand to be their rights of access. The opinion states, "The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." Quon might have understood that his texts would not

be reviewed if he paid the overage charges, and under those circumstances, he reasonably could have anticipated they would remain private.

The Court ruled against Quon because it found the search was a reasonable one, even if Quon had a privacy right. The reasonableness of the search turned on the employer's justification for looking at the texts, and the fact that the search was not "unreasonably intrusive." That is, the police department had a legitimate, work-related cause to examine Quon's texts, and it confined the search to only those records. The appellate court was incorrect in holding the search to violate Quon's constitutional rights. The Court added a cautionary observation about the evolving nature of electronic communication and employee rights in the workplace:

> Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one amicus ["friend of the court"] brief notes, many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency. Another amicus points out that the law is beginning to respond to these developments, as some States have recently passed statutes requiring employers to notify employees when monitoring their electronic communications. At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.

The same logic applied to any claimed violation of the Stored Communication Act. The Court dismissed that argument by stating that the plaintiffs "point to no authority for the proposition that the existence of statutory protection renders a search per se unreasonable under the Fourth Amendment." Accordingly, the discipline was appropriate.

In private sector employment, constitutional safeguards do not apply to employees. Employers have more latitude to develop policies and to inform employees that they do not have an expectation of privacy in electronic communications. Still, an overly harsh policy may not suit employees who routinely use social media for personal purposes. According to some commentary, more than half of the office employees in this country spend at least 15 minutes during the workday accessing their social media pages. To discourage all use of the Internet at work could be counterproductive.

Moreover, an overly restrictive policy could negatively affect employee morale, and possibly result in successful litigation. In the case of *Pietrylo v. Hillstone Restaurant Group,*[26] the plaintiffs were awarded damages when a jury found that the employer violated the Stored Communications Act by intentionally and wrongly accessing content on an employee's chat book. The court ruled, "Evidence was presented that Houston's managers accessed the Spec-Tator on several different occasions, even though it was clear on the Web site that the Spec-Tator was intended to be private and only accessible to invited members." That fact indicated the managers acted with knowledge of their wrongdoing. The jury also found that the employer had not violated the employees' common law right of privacy when it terminated the plaintiffs. The court also upheld that finding.

The above materials suggest that a suitable policy should try to accommodate some employee interests in privacy while protecting the employer's interests in ensuring that employees are complying with the company's needs for efficient work practices, and are not disseminating false and malicious information about the employer or other employees. The policy might state, for example, that all electronic communications using company equipment are considered to be the property of the employer, including e-mails, texts, or other media sources, and employees have no expectation of privacy in such communications. At the same time, the employer will not routinely screen or monitor an employee's electronic activity unless there is a job-related justification for doing so.

V. Managing Conflict

Conflict is endemic in any organization. Effective organizations manage conflict so as to avoid any undesirable consequences, such as violence, harassment, intimidation, or inadequate work performance. Toward that end, companies need explicit policies to provide methods for resolving conflict and providing "organizational justice." A large body of research shows that employees who feel the company provides fair procedures for resolving conflict, such as instances of sexual harassment, are less likely to engage in negative behaviors to retaliate against the employer. Conflict resolution involves a number of techniques, ranging from simple complaint procedures up to outside third-party dispute resolution. This

section of the materials briefly surveys two theories of conflict management, and then examines various options, beginning with the least formal and proceeding up to the quasi-judicial forum of arbitration.

A. *Theories of Conflict Management*

What principles should guide an organization when it develops a program of conflict management? One of the most influential perspectives for understanding organizational conflict is to view it as a compromise between the interests of management and the interests of the employee. As the Supreme Court indicated in the Quon case, along with many others, managers in public employment can balance the need for managerial efficiency against the constitutional rights of employees. Even if an employee has a right to engage in free speech, for example, that speech cannot disrupt the workplace and interfere with the activities of other employees. The "managerial grid" developed by two scholars, Robert Blake and Jane Mouton, proposes a similar analysis to resolve conflict. Under this theory, managers take into consideration the needs of the organization in achieving its goals, and balance them with the needs of employees in resolving their conflicts.

A recent paper suggests a different way of looking at conflict.[27] This approach argues that conflict should focus on the needs of employees only. Management needs clear and objective rules to provide justice for all employees. To illustrate, employees may be forbidden from threatening or harassing other employees, or stealing or selling drugs at work, or drinking on the job, or any number of other rules of conduct. As the famous sociologist Max Weber observed, such rules are based on "formal rationality." But Weber went on to say that rules must also be applied with discretion, based on particular circumstances. He called this "substantive rationality," meaning it was justice as administered in a particular case, as opposed to justice in the abstract. Using a model of conflict management based on a balance of objective rules and individual circumstances allows managers to administer discipline clearly and equitably.

An example will show how the process works. A high school student, Jason Tate, became famous for a week in May 2011. He used paper letters pasted on a school wall to invite a girl to go to the prom with him. The

school headmistress punished him by suspending him and banning him from the prom. The case attracted national media attention. Jason was interviewed on the *Today* show, had a Facebook page with thousands of followers, and generated a barrage of hostile e-mail to the school. The headmistress finally gave in and rescinded the punishment after a week of abuse.[28]

Using Weber's framework, the case is simple. The formal rule is that defacement of school property will be severely punished. Punishment could include expulsion, suspension, or exclusion from a school event. But administrators would also take mitigating factors into consideration. If the incident did not attack or demean any student or school employee, or involve permanent marking, or bring the school into disrepute, the penalty could be reduced. Since Tate's prom invitation was in the latter category, his punishment should be lighter. If the headmistress had insisted on the correctness of the policy, but explained why Tate's case fell within the scope of mitigation, she could have avoided the ultimate indignity of backing down in front of national television cameras after days of resistance.

Whatever theory applies to conflict management, there are well-defined procedures used to deal with conflict. They range from processes which are completely controlled by management, to processes in which the ultimate decision making is under the control of someone outside the organization. It may seem intuitively wrong that managers would surrender their discretion to deal with employees, but many large companies now use external systems of conflict resolution. The reason, in a word, is litigation. What follows is a description of different techniques to deal with conflict.

B. Open-Door Policies

As its name implies, the open-door concept invites employees to present an informal complaint through conversation with a manager. The advantage of this technique is that it may result in prompt action without a great deal of effort on the employee's part. If an employee presented a case to a manager that she was underpaid relative to her effort, and she documented her argument, the manager could adjust the matter by raising her salary. This strategy avoids complaints to a federal agency, a lengthy and disruptive process of gathering evidence, and other activities that

consume time and emotional energy. The disadvantage of this process, obviously, is that the manager might dismiss the complaint as unfounded, and the employee would be left without further recourse.

C. *Ombudsperson or Mediator*

Another common method of conflict management is to designate an impartial third person to negotiate an adjustment to a dispute. The third party seeks information from both the complaining party and the managers directly responsible. Using that information, the mediator attempts to negotiate a voluntary settlement of the conflict. Mediation generally is more formal than an "open-door" policy, and the mediator may have some degree of authority to require the parties to attend meetings, provide information, and actively participate in the process.

Mediation is an important tool in labor relations, and the federal government provides services to employers and labor unions in an effort to avoid strikes and reach a negotiated settlement. In the labor arena, mediators offer valuable help in arranging meetings, preparing agendas, communicating information, and evaluating positions. A skilled mediator can help the parties to work through personal issues, retreat from untenable positions, and clarify the underlying intent of a proposal. Similarly, a mediator can assist employees and managers in uncovering the roots of a workplace conflict and propose ways of addressing the problem. An employee who has a personal dislike of her supervisor might be transferred to another department or given different duties, for example. In any event, mediation is often useful in focusing the nature of the dispute.

D. *Impartial Arbitration*

Arbitration has a long history in the American workplace. John D. Rockefeller Jr. introduced the system into the mines owned by Colorado Fuel & Iron to address the adverse publicity from the Ludlow Massacre in 1914. Speaking to miners in Pueblo, Rockefeller promised them competitive wages, the right of individuals to join a union, and a system of arbitration to deal with disputes. The *Denver Post* on October 3, 1915, devoted a front page story to Rockefeller's speech. The *Post* said, "The plan was

presented by Mr. Rockefeller in person to representatives of the miners from every C.FI. & I. camp in the state. The representatives were elected by the workmen themselves at secret meetings, from which all company representatives were barred." The report predicted that the Rockefeller plan would set a standard for industrial relations and observed, "It goes further in its guarantees than many labor unions ever attempted to go." The Rockefeller or Colorado Industrial Plan, as it came to be known, had an important influence on labor relations from World War I up to the Wagner Act in 1935, when "company unions" became illegal.[29]

As unions gained members and economic power, they displaced the dispute procedures implemented by Rockefeller and other employers. Unions negotiated for grievance and arbitration procedures that adopted many of the techniques already in place. Generally, the process requires employees to present a grievance to the union, which then moves it through various levels of management in an effort to resolve the issue. If that fails, the union will demand arbitration.

Typically, the arbiter is a labor relations expert who has sufficient experience to be listed with an agency such as the Federal Mediation and Conciliation Service. When the parties contact the FMCS, they receive a panel containing five or seven names, and they then alternate striking a name from the list until only one person remains. The arbiter arranges a hearing date, and conducts a hearing similar to a trial, but without the same degree of formality. The parties present evidence and make arguments about the case. The arbiter duly renders an award, which settles the dispute. The costs of arbitration are usually shared by the company and the union.

Many large firms, such as the Anheuser-Busch Company, now use third-party arbitration to resolve workplace issues for nonunion employees. In a detailed study of the plan, two legal scholars noted: "The Dispute Resolution Program (the 'program' or 'DRP') combines binding arbitration with a comprehensive dispute resolution process, focusing on early resolution, fairness, and open communication. During its ten years of existence, the program has been very successful at both early resolutions of problems as well as reducing the company's outside legal fees."[30] They emphasize that "Procedurally the company ensures that the program is meticulously fair to employees. Its financial contribution to the process,

its contractual promise of no retaliation, its commitment to early resolution, and its provision of mediation are all examples of the company going beyond the legal requirements of a compulsory arbitration system." As a result, the DRP is "not simply a litigation avoidance strategy, but a comprehensive dispute resolution strategy."

Despite its advantages for both employees and employers, arbitration may have some negative consequences. The most notorious case in this area involves KBR Construction and an employee named Jamie Leigh Jones. The company hired her to perform work in Iraq. Shortly after she arrived on the site, Jones was sexually assaulted by another KBR employee. She attempted to sue KBR for failing to provide sufficient protection against this type of incident, but KBR responded that Jones was bound by an arbitration clause in the agreement. The case worked its way through the judicial system, and is set for presentation to the U.S. Supreme Court in mid-2011. Jones has testified at congressional hearings regarding the abuse of arbitration, and Congress has taken up bills to limit the use of commercial and employment arbitration.[31] The Supreme Court, however, has made several rulings that indicate employees will be bound by an employer's arbitration requirement.[32] As a result, employers may increasingly use this technique to resolve disputes.

Notes

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17. For a good overview on trends, see the following Web site: http://blogs.law.harvard.edu/corpgov/2011/01/16/focus-in-2011-will-remain-on-executive-compensation/
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19. Frank Koller, *Spark: How Old-Fashioned Values Drive a Twenty-First Century Corporation: Lessons from Lincoln Electric's Unique Guaranteed Employment Program* (New York: Public Affairs, 2010).
20. Koller, p. xii.
21. https://lincolnelectric.selectrakonline.com/Recruitment/Recruit.aspx
22. David Shipley and Will Schwalbe, *Send: The Essential Guide to Email for Office and Home.* New York: Knopf, 2007).
23. Rita Pyrillis, "Is Your Performance Review Underperforming?" Workforce Management. Online: http://www.workforce.com/archive/feature/hr-management/is-your-performance-review-underperforming/index.php.
24. One such software provider is Rypple, which believes that performance management has outlived its usefulness in the modern workplace. According to its Web site, "Rypple embeds the best management practices into social software. It focuses on people, not process. It connects goals, recognition, feedback and coaching to everyday work. It keeps us engaged and on track." You can visit their company at http://rypple.com/tour.

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27. Michael Gross, Raymond Hogler, and Christine Henle, "Process, People, and Conflict Management in Organizations: A Viewpoint Based on Weber's Formal and Substantive Rationality," *International Journal of Conflict Management* (in press).
28. CBS News, "CT Teen Who Posted Sign on School Allowed to Attend Prom," Online at: http:// newyork.cbslocal.com/2011/05/14/ct-teen-who-posted-sign-on-school-allowed-to-attend-prom/.
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30. Richard A. Bales and Jason N. W Plowman, "Compulsory Arbitration as Part of a Broader Employment Dispute Resolution Process: The Anheuser-Busch Example," *Hofstra Labor and Employment Law Journal,* vol. 26 (2008), pp. 1–32.
31. Jones's testimony can be viewed at http://www.youtube.com/watch?v=jn6yG-_ KqnI&feature=related. Senator Al Franken, one of the leading advocates of restricting arbitration, questioned an employment lawyer about the process. This material is available at http://www.youtube.com/watch?v=g-OCEzoTy1A. A discussion of the proposal is at http:// www.civilrights.org/archives/2011/05/1185-arbitration-fairness.html.
32. For example, in *14 Penn Plaza v. Pyett,* 129 S.Ct. 1456 (2009), the Court said that a union contract required the grievant to submit his age discrimination claim to the arbiter. Another case, *Rent-A-Center, West, Inc., v. Jackson,* 130 S.Ct. 2772 (2010), the Court held that the plaintiff's claim that the arbitration agreement was unenforceable should be made to the arbiter. The Court's rulings indicate that Jones will be forced to submit her case to arbitration, although an arbiter might rule that some parts of the claim were not sufficiently connected to her employment to be subject to arbitration.

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Civil Rights, Employee Discrimination, and Human Resource Management

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