

Welcome to the 2009 Legal Issues Webinar Series



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Disparate Treatment and Disparate Impact Claims Under the ADA:

What are They and Why are They Important?

Presented by:

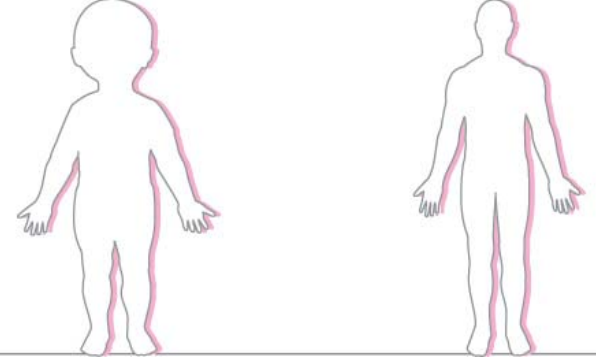
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Equip for Equality

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Webinar Outline



- I. Overview of Employment Discrimination Law
- II. Disparate Treatment Under the ADA
 - A. Elements of a Disparate Treatment Case
 - B. Case Analysis
 - C. Practice Tips
- III. Disparate Impact Under the ADA
 - A. Elements of a Disparate Impact Case
 - B. Case Analysis
 - C. Practice Tips
- IV. Cases with Multiple Issues
 - A. Name That Claim Game
- V. Resources for Future Reference

Overview of Employment Discrimination Law



Overview of Earth

Protected Classes

Protected classes Under Title VII of the Civil Rights Act, the ADA, and Other Laws Include:

- Race / Color (Title VII)
- National Origin / Ancestry (Title VII)
- Sex / Gender (Title VII)
- Religion (Title VII)
- Pregnancy (Title VII – As Amended by the PDA)
- Age (ADEA)
- Disability (ADA & Rehabilitation Act)

Legal Theories of Employment Discrimination

There are three basic legal theories of liability under employment discrimination law :

1. **Disparate treatment:** An individual claims they suffered an adverse employment action based on belonging to a protected class.
2. **Disparate impact:** An individual claims that a workplace rule that is neutral on its face, has a discriminatory impact on members of a protected class.
3. **Failure to provide reasonable accommodation:** Applies to religion and disability cases.

Practical Tip: Properly Identify The Theory of the Case.

Explanation of Terms – *Prima Facie* Case

- ***Prima facie* case:** Evidence that is sufficient to establish the claim raised, if it is not contradicted.

Black's Law Dictionary

- A *prima facie* case of employment discrimination is not “rigid, mechanized, or ritualistic.”

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

- “[A] *prima facie* case cannot be established on a one-size-fits-all basis.”

Jones v. School Dist. of Philadelphia, 198 F.3d 403 (3rd Cir. 1999).

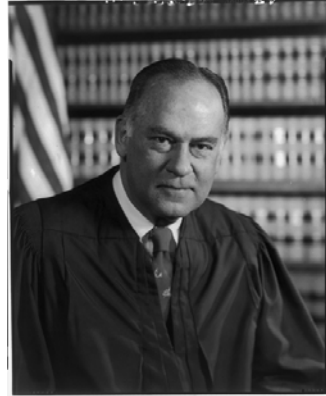
More Explanations of Terms

- **Burden of Proof:** A party's burden to persuade the finder of fact that all the elements of the case have been proven. The employee has the initial burden of proof in employment discrimination cases.
- **Preponderance of the Evidence:** Evidence that shows that the fact sought to be proved is more probable than not. Evidence that is of greater weight or more convincing than the evidence in opposition.
- **Pretext:** Asserting a false reason or motive as a cover for the real reason or motive.

Disparate Treatment Under the ADA



Disparate Treatment – In General



- **Justice Stewart:** “Disparate treatment’...is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.”
 - ❖ **Note:** Or on the basis of another protected class
- “Proof of discriminatory motive is critical”
 - ❖ In some situations, motive “can be inferred from the mere fact of differences in treatment.”

Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

Disparate Treatment Under the ADA – A *Prima Facie* Case

- Under the ADA, liability in a disparate treatment case depends on whether disability actually motivated the employer's decision.
- An ADA plaintiff must first establish a *prima facie* case of discrimination. The elements of a *prima facie* case are:
 - ❖ The employee has a disability under the ADA;
 - ❖ The employee is a qualified individual, ...;
 - ❖ The employee was subject to an adverse employment action; and
 - ❖ The circumstances indicate that it is more likely than not that disability was the reason for the adverse employment action.

Hernandez v. Hughes Missile Corp., 298 F.3d 1030 (9th Cir. 2002)

Proving Disparate Treatment Under the ADA

After a prima facie case is established, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for its action, such as:

- The employee was not a person with a disability;
- The employee was not qualified, and no reasonable accommodation would enable them to be qualified, *e.g.*,;
 - ❖ Unable to meet legitimate attendance requirements;
 - ❖ Unable to meet legitimate performance expectations;
 - ❖ The employee violated a consistently enforced policy that was job-related and consistent with business necessity.
- The employee posed a direct threat ...;
- The company had a reduction in force.

Proving Disparate Treatment Under the ADA

- If the employer meets this burden, the presumption of intentional discrimination disappears but...
- The plaintiff can still prove disparate treatment by showing that the employer's explanation is pretextual.
 - ❖ “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons ... that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.”

Trujillo v. PacifiCorp, 524 F.3d 1149, 1158 (10th Cir. 2008).

Proving Pretext – Burden Shifting & *McDonnell Douglas*

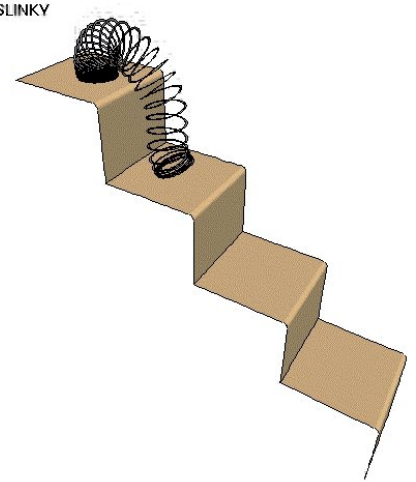
- **Step 1:** Employee must show they suffered an adverse employment action based on disability. In disparate treatment cases, adverse actions may include:
 - ❖ Failure to hire
 - ❖ Discipline / Demotion / Termination
 - ❖ Harassment
 - ❖ Retaliation
 - ❖ Loss of status or pay
 - ❖ Forced leave or reassignment



McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973);

September 22, 2009 Webinar will be on Pretext.

Proving Pretext – Steps 2 & 3



- **Step 2:** Employer may rebut proof of disparate treatment by showing a legitimate, nondiscriminatory motive for its actions.
- **Step 3:** The plaintiff can still prove disparate treatment by showing that the employer's explanation is pretextual by using:
 - ❖ Testimony of witnesses;
 - ❖ Cross-examination of witnesses;
 - ❖ Documentary evidence;
 - ❖ Other produced evidence.

Proving Disparate Treatment – Direct and Indirect Evidence

Disparate Treatment May Be Proved By Direct or Indirect Evidence

- **Direct Evidence:** Evidence that stands on its own to prove an alleged fact.
 - ❖ Employer comments, emails, observations, memos, ...
- **Indirect Evidence:** Utilizes inferences drawn from the evidence. Also called “circumstantial evidence”
 - ❖ Inconsistent Discipline, lack of employees with disabilities, increased oversight after seeking reasonable accommodations, unfair negative performance reviews related to disability, ...
- Employers may also have a “mixed motive” for a decision.

Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003)

Disparate Treatment in Co. Policies – *Taylor v. Rice*, 451 F.3d 898 (D.C. Cir. 2006).



- Plaintiff's application to be an officer with the Foreign Service was rejected due to his positive HIV status.
- Policy prohibited hiring people with HIV if there may be travel to places lacking necessary medical treatment.
- Trial court: Plaintiff potentially a direct threat to himself.
- D.C. Circuit Court reversed – may be reasonable accommodations that would reduce the direct threat -
 - ❖ *E.g.*, Limiting locations for assignment or allowing use of leave.
 - ❖ Court used a direct threat analysis.
- In February 2008, the State Department lifted the ban.
- *See also, Davidson v. AOL*, coming up in Part II.

Disparate Treatment – Tips for Employees With Disabilities

- Address employer's conduct and complain to supervisor in cases of harassment.
- Keep good documentation of any conduct that seems motivated by disability.
- Provide proof of any injuries arising from an employer's wrongful conduct that was incurred during employment.
- Be aware of statute of limitations and filing requirements.
- Allege all possible applicable claims.
 - ❖ A plaintiff may waive "any failure-to-accommodate employment claim ... by calling his claim a disparate treatment claim."

Timmons v. General Motors Corp., 469 F.3d 1122 (7th Cir. 2006)


Disparate Treatment – Tips For Employers

- Make sure managers are trained on the ADA, especially new hires.
- Properly defining essential job functions is important.
- Modify any anti-discrimination or anti-harassment training to include disability training.
- Have disability accommodation and harassment policies with appropriate grievance procedures.
- Document all performance and safety issues.
- Be Consistent.
 - ❖ Centralized decision making can avoid inconsistent actions.
 - ❖ Be ready to make reasonable accommodations.


Disparate Impact

Celebrate International Women's Day

DISPARATE HOUSEWIVES LUNCHEON



Fundraising for abused women (supported by the WCDVS)

 **WHEN?** Wednesday 8 March 2006 11.30am - 3pm
WHERE? Grand River Ballroom, Sheraton Perth Hotel
3 Course Gourmet Meal complimented by Sanalford Wines

Guest speaker: Carla van Raay, author of "God's Call Girl"
One woman's life journey from Nun to Call Girl

Fashion Parade by Michele Fashion,
accompanied by KORO Jewellery

Momentum
Women's Forum

MEN ARE WELCOME

Disparate Impact – In General



- Disparate impact cases involve employment practices that are **facially neutral** in their treatment of different groups, but have a significantly adverse effect on a protected group compared to others.
- Proof of a discriminatory motive is not required.
- 3-part proof process codified in Civil Rights Act of 1991:
 1. Employee establishes a disparate impact on a protected class.
 2. Employer must demonstrate a “business necessity” for the practice; it is “job-related” or mandated by “business necessity.”
 3. If employer carries its burden of proof, the burden shifts back to the plaintiff to prove the reason is pretext for discrimination.
 - A. Or a reasonable accommodation or alternative process is required.

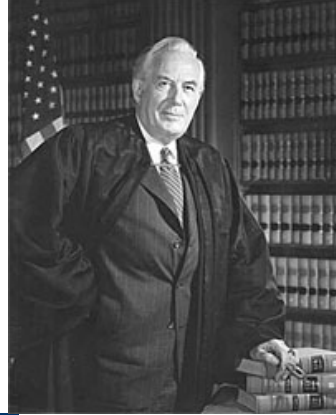
Disparate Impact – In General

Griggs v. Duke Power Co.

Disparate Impact was first recognized by the U.S. Supreme Court in a Title VII case (*Griggs*).

- Employer required job applicants for certain positions to have a H.S. degree or pass a standard intelligence test.
- African Americans were disqualified at a “substantially higher rate” than “white applicants” due to this policy.
- Only white employees have historically held the jobs.
- There was no showing of a “discriminatory purpose.”
- There was also no showing that the standard was “significantly related to successful job performance.”

Disparate Impact – *Griggs*



- Lower courts found no discrimination absent a showing of discriminatory intent.
- The U.S. Supreme Court reversed the lower courts.
- **Chief Justice Burger:** “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.”

Disparate Impact Under the ADA

- Specifically, employers may not use: qualification standards, employment tests or other selection criteria that **screen out or tend to screen out** an individual with a disability or a class of individuals with disabilities...
- unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

42 U.S.C. § 12112(b)(6)(emphasis added);

See also, *Raytheon v. Hernandez*, 540 U.S. 44 (2003).

EEOC Guidance on Use of Selection Criteria

- **Purpose:** Ensure a fit between job criteria and an applicant's or employee's actual ability to do the job.
- Job criteria that even *unintentionally* screen out ... individuals with disabilities because of their disability may not be used unless...those criteria are used in a manner that is job-related to the position and are consistent with business necessity.
- Selection criteria that ... do not concern an essential job function would not be consistent with business necessity.

Policies that May Have A Disparate Impact if Not Reasonably Modified

- Requiring a driver's license as ID when driving is not an essential job function.
 - ❖ See, *EEOC Enforcement Guidance on the Application of the ADA to Contingent Workers Placed by Temporary Agencies...*
- Using the MMPI Personality Test for Applicants.
 - ❖ *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831 (7th Cir. 2005).
- Must Be “100% healed” or “fully healed” to Return to Work
 - ❖ *Henderson v. Ardco Inc.*, 6th Cir., No. 99-6407 (April 2001).
- Return to work after 1 year on leave or be terminated.
 - ❖ *Garcia-Ayala v. Lederle ..., Inc.*, 212 F.3d 638, (1st Cir. 2000).

Note: Many of ADA cases use a reasonable accommodation analysis even if the case may fit a disparate impact situation.

What About Policies? –

- Granting reassignment based on seniority.
- Forbidding hiring former employees who were terminated for cause (or resigned in lieu of termination).
- Requiring that drivers of small trucks meet DOT large truck standards.
- Requiring tech support staff to be able to work online and on the phone even if no phone work is required for some tech support positions.

What About Policies ? –



- Requiring that prison chaplains meet physical fitness requirements.
- Assigning work-stations on a first come, first served basis.
- Requiring that entry level applicants complete a lengthy, somewhat complex, online pre-employment test that may not be job specific.
 - ❖ *See, Karraker.*

Granting Reassignment Based on Seniority – *Barnett*



- **Issue:** Must a policy granting reassignment based on seniority be modified as a reasonable accommodation?
- **Held:** Not necessarily but sometimes.
 - ❖ Neutral rules do not automatically trump reasonable accommodation requests – following congressional intent .
 - ❖ The policy does not need to be modified if uniformly applied.
 - ❖ A person must show the seniority provision was not strictly followed in other cases in order to prevail.
 - ❖ Otherwise, the seniority policy trumps reassignment.
- Reasonable accommodations - “special” & “preferential.”
- Court uses reasonable accommodation analysis.

U.S. Airways v. Barnett, 535 U.S. 391 (2002)

Barnett – Reassignment and Seniority Policies



- Court never mentions the phrase, “disparate impact” although it discusses “neutral” workplace rules.
- Court pointed to examples of problems of giving neutral workplace rules veto power over accommodations.
 - ❖ Neutral office assignment rules would prevent accommodation of an employee whose limitations require work on the ground floor.
 - ❖ Neutral "break-from-work" rules would prevent the accommodation of an individual who needs additional breaks from work, perhaps for medical visits.
 - ❖ Neutral furniture budget rules would prevent the accommodation of an individual who needs a different kind of chair or desk.

Hendricks-Robinson – A Whole Host of Policies



- A meat packing company had the following policies:
 - ❖ Reserving light-duty positions for employees with temporary medical restrictions;
 - ❖ Removing employees from light duty when restrictions deemed permanent and placing them on medical leave;
 - ❖ Terminating employees after one year on leave – no rehire;
 - ❖ Requiring that applicants are qualified have equal “physical fitness” as other candidates.
 - ❖ Telling employees they are being automatically bid for non-production (lighter) jobs when they are not.

Hendricks-Robinson v. Excel Corp., 154 F.3d 685 (7th Cir. 1998).

Court Holding in *Hendricks-Robinson*

- Reserving light-duty positions for employees with temporary medical restrictions - **Was OK**;
 - ❖ **Tip:** It is best to designate these positions as temporary.
- Forcing working employees who are able to do their current jobs onto medical leave – **Violated the ADA**;
- Requiring that applicants are qualified have equal “physical fitness” as other candidates – **Not OK**. Applicants were already deemed “qualified.” No individualized assessment.
 - ❖ *But see, Fuzy v. S&B Eng'rs & Constructors, Ltd.*, 332 F.3d 301 (5th Cir. 2003), a weight lifting requirement of 100# for a pipe fitter was “job-related” as it was based on DOL standards.

Court Holding in *Hendricks-Robinson*

- Terminating employees after 1 yr. on leave – **Not OK**;
- The court used a reasonable accommodation analysis in reaching its conclusions.
- Employer did not engage in “interactive process.”
 - ❖ Employees had almost no access to info on non-production jobs.
 - ❖ Employees were deceived about being automatically bid for non-production positions.

Hendricks-Robinson v. Excel Corp., 154 F.3d 685 (7th Cir. 1998).

Timeliness Issues & Reasonable Accommodations – *Convergys*

- Co. had strict tardiness policy.
- Policy allocated workstations - first-come, first-served.
- Employee who used a wheelchair was often late due to a lack of accessible parking & trouble finding a workstation.
- Employee requested an accommodation of being allowed extra time to return from lunch.
- Allowing the employee an extra 15 minutes to return from lunch did not require the employer to eliminate the essential job function of punctuality - only created a different time for returning.

EEOC v. Convergys Cust. Mgmt. Grp., Inc., 491 F.3d 790 (8th Cir. 2007).

A Combination of Issues Under the ADA



Raytheon v. Hernandez, 540 U.S. 44 (2003)



- Employee was forced to resign after testing positive for cocaine, a violation of workplace conduct rules.
- More than two years later, after successful rehabilitation, he applied to be rehired.
- Employer claimed an **unwritten** policy against rehiring employees terminated for workplace misconduct or who quit in “lieu of discharge.”

Note: The ADA does not protect individuals due to current use of illegal drugs. People with a history of illegal drug use may be protected if they meet the ADA’s definition of disability.

Raytheon v. Hernandez, 540 U.S. 44 (2003).

Raytheon v. Hernandez,

What Did You Know and When Did You Know It?

- HR decision-maker claimed not to know Hernandez was a former drug user when rejecting his application.
 - ❖ Appellate Court decision noted that the decision-maker testified that: “she pulled his personnel file... [O]nce she saw that he “quit-in-lieu of discharge,” she concluded that he was ineligible for rehire.
 - ❖ Appellate Court also noted that the personnel file contained the drug test results ...
 - ❖ And his recent application had a reference letter from a counselor at Alcoholics Anonymous.

Henandez v. Hughes Missile Corp., 298 F.3d 1030 (9th Cir. 2002).

Raytheon's HR "Manager of Diversity Development" (MODD)

- MODD to EEOC: "Application was rejected based on his demonstrated drug use ... and the complete lack of evidence indicating successful drug rehabilitation."
- "The Company maintains it's [*sic*] right to deny re-employment to employees terminated for violation of Company rules and regulations"
- Employee filed at EEOC claiming discrimination based on his "record of drug addiction" and/or because he was regarded as being a "drug addict."
 - ❖ EEOC found "reasonable cause."

Hernandez v. Hughes Missile Corp. – But First - Life In the Appellate Court

- Disparate Impact Claim: Barred as it was not pled in the complaint nor raised prior to the close of discovery.
 - ❖ Employer apparently 1st raised policy in motion for S/J.
- Disparate Treatment Claim:
 - ❖ Hernandez established a *prima facie* case.
 - ❖ Because the neutral, unwritten, policy can result in discrimination, “it is not a ‘legitimate, nondiscriminatory reason’ for its rejection of Hernandez's application.”
 - The second step of the analysis for disparate treatment claims. (3rd step – was there pretext?)

Raytheon v. Hernandez – And Now the Supreme Court



- Justice Thomas described the issue: “Whether the ADA confers preferential rehire rights on disabled employees lawfully terminated for violating ... conduct rules.”
 - **Query:** Is that a proper phrasing of the issue?
- **Held:** Both disparate treatment and disparate impact claims “are cognizable” under the ADA.
- Disparate impact claim was barred – raised too late.
- The 9th Circuit improperly applied a disparate impact analysis to a disparate treatment claim.
 - ❖ Looked at effect of policy, not motive behind it.
 - ❖ Policy was “quintessential” legitimate, nondiscriminatory reason.

Raytheon v. Hernandez – Queries

- Did the Diversity Manager’s statements demonstrate a disparate treatment motive for not rehiring Hernandez?
- When should Hernandez have raised a disparate impact claim if the employer did not assert the “unwritten policy” as a defense until summary judgment?
- Would Hernandez have won if the Court felt that the disparate impact claim was properly raised?
- How can an employee know the real motivation for an employer’s decision not to hire them?
- Was the employer insulated from liability as the decision maker claimed she did not know of a disability?
 - ❖ Did the HR decision-maker really not know of his disability?



AOL – Qualified Issues - Analysis of an ADA Case

- Jobs available for external hire in tech support were voicephone positions. (Cheaper labor in the Philippines).
- 1997 AOL policy required that staff in non-voicephone positions have voicephone experience.
 - ❖ Previously people who were deaf also handled these jobs.
- An applicant who is deaf desired one of the tech support, non-voicephone positions.
- AOL claimed positions are only available internally.
- **Issue:** Is voicephone experience an essential function of the non-voicephone positions?

Davidson v. America Online, 337 F.3d 1179 (10th Cir. 2003).

AOL – Qualified Issues - Analysis of an ADA Case



- **Court:** “Three distinct types of ADA discrimination”:
 1. **Disparate Treatment:** “Treating ‘a qualified individual with a disability’ differently because of the disability...”
 2. **Disparate Impact:** “Qualification standards... or other selection criteria that screen out or tend to screen out...”
 3. “Not making **reasonable accommodations** ...,”
- In all theories: “a plaintiff must establish ... he is qualified.”
- “This case involves a claim of disparate treatment.”
 - ❖ *McDonnell Douglas* “burden shifting analysis generally applies...”

Query: Is this also a disparate impact situation?

AOL – Essential Function Issues



- “*McDonnell Douglas* burden shifting approach is unnecessary ... the employer's intent has been admitted and the plaintiff has direct evidence of discrimination...”
- “Thus, the key to our decision is whether Davidson is a ‘qualified individual,’ ... a factual dispute that is resolved through traditional methods of proof.”
 - ❖ Looked at jobs “held or desired” (non-voicephone).
- **Note:** Qualified Issues involve consideration of:
 - ❖ Reasonable Accommodations
 - ❖ Essential Job Functions
 - ❖ Safety Concerns

Jeffrey v. Ashcroft – Essential Function Issues



- **Facts:** Bureau of Prisons terminated a chaplain with chronic pulmonary disease - failed physical abilities test.
- “Both parties have struggled to present their arguments within the analytical framework for ‘disparate treatment’ or ‘disparate impact’ cases.”
- Neither paradigm, however, is pertinent here. *See, AOL.*
 - ❖ Not disparate impact – “the criterion is not facially neutral insofar as disabilities are concerned.”
 - ❖ Disparate treatment: *McDonnell Douglas* burden shifting analysis “does not make sense where the employer's reliance upon the employee's physical or mental impairment is obvious.”

Jeffrey v. Ashcroft, 285 F. Supp. 2d 583 (M.D. Pa. 2003).

Jeffrey v. Ashcroft – Essential Function Issues



- Court used Framework from *Davidson v. AOL* – Reasonable Accommodation / Qualified Analysis
 - ❖ Treatment of others in the same position is relevant.
 - ❖ Insufficient evidence to show that passing the test was related to an essential job function.
 - ❖ Chaplains hired pre-1997 - not required to take test
 - ❖ Evidence that the PAT requirement for another applicant in a different institution was relevant.
 - ❖ Requirement previously waived for this chaplain.

Safety-Related Qualifications – *Bates v. UPS* 511 F.3d 974 (9th Cir. 2007).



- For small trucks, UPS used DOT hearing standard for large trucks.
- Class of hard of hearing and deaf UPS employees & applicants challenged the policy.
- Plaintiffs won a jury trial in district court.
 - ❖ UPS was barred from using blanket policy.
 - ❖ Individualized assessments were required.
- **Appellate Court:** ADA's business necessity defense may be asserted against disparate treatment, disparate impact, and failure to accommodate claims...
- “Facially discriminatory” - burden shifting is inappropriate.

Safety Reasons – Business Necessity Defense

- Employer must show the standard, test, or criteria are job-related and consistent with business necessity, and...
- Performance cannot be accomplished by reasonable accommodation...”
- “The ‘business necessity’ standard is quite high, and is not to be confused with mere expediency.”
 - ❖ Analysis is “fact-intensive and requires close analysis.”
- Because UPS has linked hearing with safe driving, UPS “bears the burden to prove that nexus.”
- For safety-based qualification standards - use a direct threat analysis.

Bates v. UPS – Employer's Burden



- “[E]mployer must validate the test or exam... for job-relatedness to the specific skills & physical requirements of the ... position.”
 - ❖ “Qualification standard fairly & accurately measures the individual's actual ability to perform... essential functions...”
 - ❖ “Must demonstrate a predictive or significant correlation between the qualification and performance of essential functions [and]... must put forth evidence establishing those functions.”
 - ❖ Standard “substantially promote[s]” the business's needs.”
 - ❖ Government safety standard provides “some evidence...”

***Bates v. UPS* – Employee's Burden**

- The employees must show that they are qualified to perform the essential function of safely driving.
 - ❖ The district court did not make a finding regarding plaintiffs' ability to drive package cars safely.
- The employee does not bear the burden to invalidate the employer's safety-based qualification standard.
- “[A]n employee who ... meets the basic qualifications for the package-car driver position (seniority, twenty-one years of age, and holding a valid driver's license) and can drive a package car safely, including having a clean driving record and passing the driving test, is an otherwise qualified individual.”

Disparate Impact – Tips for Employees With Disabilities

- Inform employers when a policy or procedure negatively impacts you.
- Request the policy be rescinded or that it be reasonably modified to avoid discrimination.
 - ❖ Explain why you are negatively impacted.
 - ❖ You may need to medical documentation if the disability or need for the accommodation is not apparent.
 - ❖ Ask for a timely response.
- Be aware of filing requirements and timelines.

Disparate Impact – Tips for Employees With Disabilities

- Allege all possible claims flowing from the facts.
 - ❖ An EEOC Charge alleging an employer said, “We don't hire disabled people” raises a disparate treatment claim.
 - ❖ Not “reasonably related” to charges of: disparate impact, failure to hire, accommodate, or prohibited inquiries.
 - ❖ Due to exhaustion requirements, charges not raised at the appropriate stage are waived.
 - This is true even if an investigation may lead to evidence of other violations not listed in the Charge.

Boldridge v. Tyson Foods, Inc., 280 Fed.Appx. 723 (10th Cir. 2008)(unpublished).

Disparate Impact – Tips For Employers

- Be prepared to use a qualified / reasonable accommodation type of analysis.
 - ❖ Is the person a qualified individual with a disability?
 - ❖ Is the accommodation request reasonable?
 - ❖ Is the employer’s reason for denying it, “job-related and consistent with business necessity.”
 - ❖ In disparate impact situations, also be prepared to show the policy is “job-related and consistent with business necessity”
 - Document the reasons for, and effectiveness of, the policy.
- Be prepared to reasonably modify or rescind policies or procedures that have a discriminatory effect, even if the discriminatory effect is inadvertent.

Disparate Impact – EEOC Tips For Employers

EEOC Fact Sheet on Employment Tests and Selection Procedures

- Ensure employment tests and other selection procedures are properly validated for positions & purposes.
 - ❖ Test vendor’s documentation supporting validity is helpful, but employer is still responsible for ensuring validity under UGESP (Uniform Guidelines on Employee Selection Procedures).
- The test or selection procedure must be job-related.
 - ❖ Shown by demonstrating “that successful completion of the test is necessary to the safe and efficient performance of the job.”
 - ❖ Test is predictive of success

Testing – EEOC Fact Sheet

- Ensure that tests and selection procedures are not adopted casually by managers who know little about these processes.
- A test or selection procedure can be an effective management tool...
 - ❖ But should not be implemented without understanding its effectiveness, limitations for the organization, appropriateness for a specific job, and whether it can be appropriately administered.
- If a test has an adverse impact, ... use an equally effective alternative selection procedure.

Name That Claim Game – Disparate Impact, Disparate Treatment, Both, Neither, or ...?

- A person with a disability is denied reassignment due to a seniority policy.
- A worker's supervisor often calls him "blind bastard."
- Employer says: "We don't hire disabled people."
- An employer refuses access to a job coach as only employees are allowed on co. property.
- A job applicant who is deaf is told that he cannot do the dishwashing job as it is a "verbal position."

Name That Claim Game – Disparate Impact, Disparate Treatment, Both, Neither, or ...?

- Employee seeks to work at home - no policy allowing it.
 - ❖ A company does not require purchasing accessible software even though an employee requires it.
- Policy requires a fitness for duty exam for all persons returning from medical leave.
- A person with MS, for whom driving is an essential job function, is asked to undergo a fitness for duty after an accident with his scooter.
- A person with mental illness requests a modified work schedule but the request is denied.

Resources



- **DBTAC: Great Lakes ADA Center:** www.adagreatlakes.org
- **Equip For Equality:** www.equipforequality.org
- **Illinois ADA Project:** www.ADA-IL.org
- **EEOC:** www.EEOC.gov
 - ❖ http://www.eec.gov/policy/docs/factemployment_procedures.html
 - ❖ http://www.eec.gov/foia/letters/2008/titleviiandada_applicant_interview.html
- **Job Accommodation Network:** www.jan.wvu.edu
- **ADA Technical Assistance –** www.adatac.org

**Disparate Treatment and Disparate Impact
Claims Under the ADA:
What are They and Why are They Important?**

THE END



Presented by:
DBTAC: Great Lakes
ADA Center &
Equip for Equality



Thank you for Participating In Today's Session



Please join us for the next session in this series:

April 28, 2009

Major Life Activity Update

Session Evaluation

Your feedback is important to us. Please fill out the on-line evaluation form at:

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