



## An Employer's Guide to Disparate Treatment Employment Discrimination

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### **For Discussion Only**

Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e et seq., as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Title VII prohibits both intentional discrimination (known as “disparate treatment”) as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as “disparate impact”).

This Guidance will address disparate treatment employment discrimination under Title VII only, although this discussion would also apply to the Americans with Disabilities Act, and to some extent the Age Discrimination in Employment Act.

As enacted in 1964, Title VII's principal nondiscrimination provision held employers liable only for disparate treatment. That section retains its original wording today. It makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.” §2000e-2(a)(1); see also 78 Stat. 255. Disparate-treatment cases present “the most easily understood type of discrimination,” *Teamsters v. United States*, 431 U. S. 324, 335, n. 15 (1977), and occur where an employer has “treated [a] particular person less favorably than others because of” a protected trait. *Watson v. Fort Worth Bank & Trust*, 487 U. S. 977, 985–986 (1988).

The words “because of” means “by reason of” or “on account of”. A disparate-treatment plaintiff must establish “that the defendant had a discriminatory intent or motive” for taking a job-related

action. *Id.*, at 986. In other words, the complaining person must demonstrate that his or her protected trait was at least a “motivating factor” in the employer’s decision.

Congress amended Title VII and other federal discrimination laws in 1991 and the Supreme Court of the United States has interpreted Title VII and the 1991 amendment to give complaining persons alternative ways to prove employment discrimination, the central issue will always be whether the employer's actions were motivated by discriminatory intent, which may be proved by either “direct” or “circumstantial” evidence.

Direct evidence is so closely linked to the protected trait that a judge or jury can properly conclude that the employer intentionally discriminated against the employee, either because the evidence references the protected trait itself or because the evidence creates such a strong inference of intentional discrimination.

Direct method evidence cases are rare because direct evidence of discrimination is so obviously improper. For example, it would be direct evidence of discrimination to hear a hiring manager say, "We can't take Employee A because we have too many women already in this office." Similarly, a strong inference of discrimination under the direct method would consist of things like managers claiming that women needed to stay at home with their children, that women were incapable of working long hours because of home commitments, that women weren't as competent in the job as men, and similar remarks.

In *In re Rodriguez* (6th Cir. June 27, 2007), the Sixth Circuit U.S. Circuit Court of Appeals held that a manager’s negative statements about an employee's accent may be deemed to be direct evidence of discrimination when he employee was passed up for a promotion. According to the court, since “accent and national origin are inextricably intertwined” disparaging or negative comments “requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.”

Typically, direct evidence of intentional discrimination consists of discriminatory comments made by management decision makers (or by supervisors who directly influence the decision) in connection with the actual decision (hiring, promotion, firing), thus allowing an inference of a direct link between a protected trait and adverse employment harm.

While managers or supervisors may make discriminatory comments, it is relatively rare for an employee to demonstrate that these biased comments were directly linked to a decision. Therefore, in the majority of cases, where the employee lacks direct evidence of discrimination, he or she can prove discriminatory intent indirectly. The Supreme Court has created a framework for evaluating these types of cases, commonly known as the McDonnell Douglas burden-shifting

formula, which it first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later refined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

The evaluation is as follows: (1) the plaintiff must establish an initial case of discrimination; (2) the employer must then articulate, through admissible evidence, a legitimate, nondiscriminatory reason for its actions; and (3) in order to prevail, the plaintiff must prove that the employer's stated reason is a pretext to hide discrimination. *McDonnell Douglas*, 411 U. S. at 802-04; *Burdine*, 450 U.S. at 252-56. In the Third Circuit Court of Appeals (which includes the district of New Jersey), courts generally analyze disparate treatment cases using this method, although employees may also use the direct method described above.

The elements of the initial case are fairly routine. Generally, the plaintiff need only show (i) membership in a protected class; (ii) that he or she was qualified for the job or performing to expectations; (iii) adverse employment harm (ie: discharge); and (iv) the position remained open or someone else was hired after the discharge.

Once the employee is able to make out the initial case, an inference of discrimination exits, thus shifting the burden onto the employer to articulate a legitimate, non-discriminatory reason for its actions. This too is fairly routine but once the employer meets this burden, the employee has a final opportunity to demonstrate that the employer's non-discriminatory reason cannot be believed. Essentially, what the employee seeks to do at this stage is to create a factual dispute between the employer's non-discriminatory reason and evidence on which a judge or jury can still infer a discriminatory motive. Such evidence could include:

- evidence that similarly situated employees who are not in the plaintiff's protected group were treated more favorably or did not receive the same adverse treatment,
  - discriminatory comments made by decision makers, such as a woman is too distracted because of child rearing responsibilities, but not necessarily in connection with the actual decision,
  - hiring or promoting someone with inferior qualifications,
  - evidence that the plaintiff is being singled out for harsher discipline,
  - deviation from a uniformly applied discipline or termination procedure,
  - being disciplined for something that is not in the person's job description,
- subjective appraisals or undocumented performance problems, or

- evidence that other employees have suffered discrimination, even if it was in a different department with different supervisors.

While the above list is not exhaustive, it represents common evidence that when combined with the plaintiff's initial case, can create an inference of intentional discrimination. In other words, the plaintiff will be able to proceed to a jury determination as to whether the employer's legitimate, non-discriminatory reason for its decision can be believed.

However, that same evidence can arguably also be used to demonstrate that the employer had a "mixed motive" for its decision. In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the Supreme Court held that a mixed-motive plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for the adverse employment harm. In this case, the Court found that the plaintiff's circumstantial evidence of sex discrimination in a series of disciplinary actions ultimately ending in her termination sufficed to merit a mixed-motive instruction. The plaintiff, who was the sole female warehouse worker and heavy equipment operator for a Las Vegas casino, presented evidence that she had been subjected to "stalking" by one of her supervisors, harsher discipline than men for the same conduct, less favorable treatment than men in the assignment of overtime, stacking of her disciplinary record, and sex-based slurs from her supervisors. Although all of this evidence was circumstantial, the Court found that it provided a sufficient basis for a reasonable jury to conclude that sex had been a motivating factor in the employer's decisions to discipline and terminate her.

At that point, the employer must show that it also had a non-discriminatory reason for its decision, but unlike the burden-shifting framework discussed above where the employer can escape liability without some evidence that its decision cannot be believed, in a "mixed motive" case, the employer can only limit the plaintiff's remedies with its such a showing. In other words, even if there is a legitimate, non-discriminatory decision for the employer's decision, if there is also evidence that a discriminatory reason motivated the decision, the employer will be liable for its "mixed motive" decision.

Perhaps the best way to understand this analysis is the following: in *McDonnell Douglas Corp. v. Green* and the other cases explaining the burden-shifting framework, the complaining employee must demonstrate that a protected trait was the "sole reason" for the employer's decision. While this burden is high, various evidence can be used to undermine the employer's non-discriminatory reason.

In contrast, in *Desert Palace, Inc. v. Costa*, the so-called "mixed motive" case, the complaining employee need only show that a protected trait was "a reason" for the employer's decision. In

the “sole reason-type” case, unless the employer’s legitimate, non-discriminatory reason is disbelieved, the employer will not be liable for employment discrimination. However, in the “a reason-type” case, the employer’s non-discriminatory reason can be a perfectly legal one, but evidence that bias also played a part will create liability, although the plaintiff’s remedies will be limited.

What does all this mean?

In a recent federal court of appeals (7th circuit) decision, the court noted that “leaving managers with hiring and firing authority in ignorance of the basic features of the discrimination laws is an extraordinary mistake for a company.” The case arose out of the Age Discrimination in Employment Act, when a 56-year old job applicant made out his initial case of discrimination with evidence of that when asked for the reason why he was not hired he was told by the interviewing manager that the company was looking for "bright, young and aggressive people", that a substantially younger applicant was hired.

The employer explained that the applicant was not qualified but additional evidence revealed that the general manager often noted by hand the ages of applicants on the application form.

With the benefit of the analysis above, it is easy to determine the employer’s liability, because at a minimum, an inference can be drawn that age played a part in the employer’s decision to not hire the plaintiff. The jury awarded him \$50,000 in compensatory damages and \$50,000 in punitive damages. While the company appealed the award of punitive damages, the court of appeals affirmed the award, holding “the jury could have easily concluded that printing this statement on the application but then making no effort to train the hiring managers about the ADEA shows that the company knew what the law required but was indifferent to whether its managers followed the law.” The court also observed that the jury could infer that the company’s “extraordinary mistake” of not training managers was itself evidence of its reckless disregard for the law.