

Lesson 4: Affirmative Action and Race Discrimination

In this lesson, we will examine the most controversial tool that has been used to achieve equal employment opportunity: affirmative action. We will also take an in-depth look at racial discrimination. We will analyze the types of actions that can constitute racial discrimination and how a case is proved. In addition, we will review racial harassment and color discrimination, as well as the special considerations involved in these situations.

LEARNING OBJECTIVES

- ✓ **Objective 1** Discuss the history behind affirmative action.
- ✓ **Objective 2** Distinguish between a goal and a quota.
- ✓ **Objective 3** Describe the concept of reverse discrimination.
- ✓ **Objective 4** Summarize amendments that have been made to Title VII.
- ✓ **Objective 5** Identify the elements of racial discrimination, racial harassment, and color discrimination.

Text Readings

Employment Law: New Challenges in the Business Environment, Chapters 8 and 9

Additional Readings

Supplemental Readings

- U.S. Department of Labor(<https://www.dol.gov/>)
- Find a Lawyer(<https://www.findlaw.com/>)

Lecture Notes

Welcome to Lesson 4! By the time you complete this assignment you will have reached the halfway mark in the course. Here, we will explore the difficult and controversial topic of affirmative action in employment. You probably have an opinion on whether affirmative action is good or bad, right or wrong. Most people do. Unfortunately, many of those opinions are based on misconceptions and misinformation. Human Resource professionals have an obligation to understand the concepts involved and have accurate facts at their disposal before forming their professional opinions and taking actions.

Affirmative Action

Affirmative Action refers to efforts to make job opportunities available to previously underrepresented or underutilized minorities and women. Actions in connection with these efforts range from special recruitment and training programs to voluntary and court-ordered race or gender-conscious numerical remedies. Title VII, by its terms, does not require any employer to take affirmative action, but it permits employers to undertake voluntary affirmative action given proper circumstances. It also authorizes courts to order affirmative action as a remedy for past discrimination. Those employers who have intentionally discriminated or who have been guilty of creating a workplace environment wherein a *disparate impact* exists against a class of people of race, color, religion, sex, or national origin may receive a court order mandating that the employer establish an affirmative action plan to remedy the discrimination.

President Johnson got the ball rolling to remedy some of these injustices by signing Executive Order 11246, which imposed affirmative action obligations on employers who have contracts with the federal government. Executive Order 11246 affects roughly 20% of the workforce. In the absence of a court order, the only employers subject to affirmative action requirements are federal contractors. Note that these employers are subject to the requirements only because they choose to do business with the federal government.

It is important for you to appreciate the distinction between goals and quotas within the context of affirmative action. A *goal* is an appropriate representation of women and minorities in the workplace, based on their availability in the workforce from which they are drawn. A goal is not mandatory or rigid. A *quota* sets aside a number of positions for women and minorities or requires a number of women and minorities to be hired or promoted. Quotas are seriously frowned upon, and the only time they are permitted is when there has

been a longstanding *intentional* violation of the law and there is little other recourse for a court to draw upon to remedy the violation.

Equal Employment Opportunity Act

The Equal Employment Opportunity Act of 1972 provides that all employment decisions "... shall be made free from any discrimination based on race, creed, color, religion, sex, or national origin." The Equal Employment Opportunity Act presumes that an equal percentage of all groups seek promotions. Overcoming this legal presumption is a difficult task for any employer. When a possibility exists within a company for a promotion or transfer, the employer must post the job along with its description in a conspicuous manner, and a formal evaluation procedure must be followed. Every candidate must be uniformly assessed for the promotion or transfer opportunity. The managers who are in charge of recommending candidates for promotion must be judged on the basis of their recommendations to determine whether they are acting in conformity with equal employment opportunity guidelines. Finally, the racial, ethnic, and gender composition of the manager will be examined when a breach of equal opportunity employment is alleged.

Title VII

Title VII permits employers to adopt *voluntary affirmative action* plans that are designed to eliminate conspicuous imbalances in traditionally segregated job categories. The plan must also be reasonable in light of this purpose, it must be temporary, and it must not unnecessarily harm the interests of white or male employees. Thus, a plan may not require the termination of whites and their replacement with black hires, and it may not create an absolute bar to the advancement of male employees.

Government employers undertaking affirmative action must satisfy additional standards under the Constitution. Unlike private employers under Title VII, government employers must make some showing of prior discrimination by the governmental unit involved in order to demonstrate the compelling governmental interest necessary to sustain the use of race or ethnic classifications under the Constitution.

These public entity affirmative action efforts are the source of the most controversy today. Many of the cases concern admissions programs to public universities, but the outcome of these cases impacts the employment arena as well. One of your assigned readings is *Grutter v. Bollinger*, 539 U.S. 306 (2003), a 2003 case in which the justices were split 5/4, with the dissenters issuing harsh words against the majority opinion and the University of Michigan's law school admissions policy. The majority held that race-conscious admissions policies are constitutional only if they are "holistic, flexible, and individualized." Universities are forbidden from establishing quotas for minority applicants or evaluating their applicants using "separate admissions tracks" (Moran, J. J., 2014). Read *Grutter* before reading the other affirmative action cases in your textbook because it is the seminal case upon which the others rely.

In *Regents of the University of California v. Bakke*, a 1978 *reverse discrimination* case that is also referenced in your reading materials, the Court rejected group treatment and insisted that universities focus instead on the individual applicant. As you can see from reading this cluster of cases,

individualized assessment is key. Human Resource professionals should stay informed of developments in this important area.

In 1991, Congress amended the provisions of Title VII to allow plaintiffs access to jury trials. As a rule, juries tend to be more sympathetic to plaintiffs than trial court judges. So this was a victory for employees. Employees now can also seek damages for emotional distress. The amendment also permitted juries to award punitive damages against employers. *Punitive damages* exceed *actual damages* and are intended to punish those employers whose actions are found to be especially egregious.

Although Title VII was enacted primarily in response to discrimination against blacks, the law applies equally to all races. The Supreme Court made it clear many years ago that Title VII protects whites as well as other races. *Racial discrimination* often takes the form of treating an employee of one race less favorably than an employee of another race in similar circumstances. Thus, a black employee may be disciplined more harshly by management than a white employee. If the circumstances that led to the discipline are similar, this may constitute racial discrimination. It is therefore a critical responsibility of management and Human Resource professionals to ensure that policies, especially those for discipline and corrective action, are applied consistently to all employees.

Racial Harassment

Another key form of race discrimination is *racial harassment*. It occurs in the workplace and exists when the conduct of an employee's coworkers, superiors, or the company itself has created a hostile work environment in which the victimized employee's ability to do his or her job has been impaired. Evidence of the severity of the incident(s) is equally as important as the frequency. When an employee claims that a coworker is racially harassing him or her, the employee must notify the employer. The employer must not condone this activity and must investigate the complaint in a timely fashion. If the employer finds a reasonable basis for believing that the harassment exists, it must take corrective action immediately; otherwise it will be held liable.

When the harassment originates with the employer itself, then notification is needed. The employer will be held liable. To be considered illegal, racial harassment must be severe, pervasive, unwelcome, and based on race. As with racial discrimination in general, many people are in denial about the existence of racial harassment in today's workplace. What examples of Title VII discrimination or harassment have you witnessed in your own employment experiences?

References

Moran, J. J. (2014). *Employment Law: New Challenges in the Business Environment* (6th ed.). Upper Saddle River, NJ: Prentice Hall.

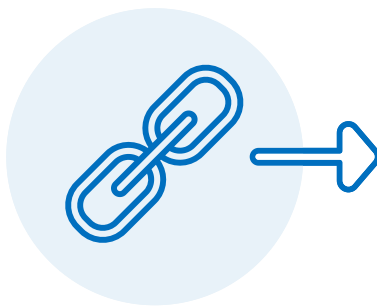
PowerPoint Lecture Notes

Use the lecture notes available in PowerPoint as you study this chapter by **CLICKING THE LINK BELOW**. These notes will help you identify main concepts and ideas presented in this chapter.

If you do not have PowerPoint on your computer, you can download a free viewer from Microsoft by clicking

here(<http://www.microsoft.com/downloads/details.aspx?FamilyID=048dc840-14e1-467d-8dca-19d2a8fd7485&DisplayLang=en>).
Chapter 8(https://courses.portal2learn.com/content/enforced/9112-R01V_20_1/course-system-files/Lesson_04/../../V3/PowerPoints/chapter08.ppt).
Chapter 9(https://courses.portal2learn.com/content/enforced/9112-R01V_20_1/course-system-files/Lesson_04/../../V3/PowerPoints/chapter09.ppt).

[04] Assignment 4



Open Link