Chapter 2

The Employment Law Toolkit: Resources for Understanding the Law and Recurring Legal Concepts

Learning Objectives

After studying the chapter, you should be able to:

- **LO1** Understand how to read and digest legal cases and citations.
- **LO2** Explain and distinguish the concepts of *stare decisis* and precedent.
- **LO3** Evaluate whether an employee is an at-will employee.
- **LO4** Determine if an at-will employee has sufficient basis for wrongful discharge.
- **LO5** Recite and explain at least three exceptions to employment-at-will.
- **LO6** Distinguish between disparate impact and disparate treatment discrimination claims.
- **LO7** Provide several bases for employer defenses to employment discrimination claims.
- **LO8** Determine if there is sufficient basis for a retaliation claim by an employee.
- **LO9** Identify sources for further legal information and resources.

Opening Scenarios

SCENARIO 1

1 Scenario

Mark Richter is about to retire as a candy salesperson when he closes on a deal the candy company has been trying to land for a long time. Just before Mark is to collect his substantial commission, he is terminated. Does Mark have a basis on which to sue for unlawful termination?

SCENARIO 2

2 Scenario

Jenna Zitron informs her employer that she has been summoned to serve jury duty for a week. Though rescheduling her duties is not a problem, Jenna is told by her employer that, if she serves jury duty rather than trying to be relieved of it, she will be terminated. Jenna refuses to lie to be relieved of jury duty. Does Jenna have a basis on which to sue for unlawful termination?

SCENARIO 3

3 Scenario

Demetria, 5′ 2″, 120 pounds, applies for a position with her local police department. When the department sees that she is applying for a position as a police officer, it refuses to take her application, saying that she doesn't meet the department's requirement of being at least 5 feet 4 inches tall and at least 130 pounds. Is the department's policy legal?

SCENARIO 4

4 Scenario

Jill, an interviewer for a large business firm, receives a letter from a consulting firm inviting her to attend a seminar on Title VII issues. Jill feels she doesn't need to go since all she does is interview applicants, who are then hired by someone else in the firm. Is Jill correct?

Introduction

We understand that this is not a textbook intended to create or enlighten lawyers. In fact, some of you may never have taken a law course before. Thus, we thought it might be useful to take some time up front to introduce you to helpful information that will make your legal journey easier. We have taken out much of the legalese that tends to stump our readers and have tried to make the legal concepts as accessible as we can for the non-legal audience.

In this chapter, we offer several tools to help you navigate the text. As a procedural matter, we offer a guide to reading cases and understanding what it takes to have a legally recognized cause of action. In addition, several of the substantive issues you will face in the chapters ahead will use information that is based on the same legal concepts. Rather than repeat the information in each chapter's discussion, we explain the concept once in this "toolkit" chapter.

There is a corresponding icon used throughout the text. When you see the toolkit icon, know that the text is referring to information that has been covered in this toolkit chapter and, if you need to, refer to this chapter to refresh your recollection. Part one explains how to read the cases and a couple of important concepts to keep in mind for all legal cases. Part two provides information on the concept of employment-at-will, part three discusses the theoretical bases for all employment discrimination actions, and part four describes legal resources for searching for further legal information.

Guide to Reading Cases

Thank you very much to the several students who have contacted us and asked that we improve your understanding by including a guide to reading and understanding the cases. We consider the cases an important and integral part of the chapters. By viewing the court decisions included in the text, you get to see for yourself what the court considers important when deciding a given issue. This in turn gives you as a decision maker insight into what you need to keep in mind when making decisions on similar issues in the workplace. The more you know about how a court thinks about issues that may end up in litigation, the better you can avoid it.

In order to tell you about how to view the cases for better understanding, we have to give you a little background on the legal system. Hopefully, it will only be a refresher of your previous law or civics courses.

LO2

Stare Decisis and Precedent

The American legal system is based on *stare decisis,* a system of using legal precedent. Once a judge renders a decision in a case, the decision is generally written and placed in a law reporter and must be followed in that jurisdiction when other similar cases arise. The case thus becomes precedent for future cases involving that issue.

Most of the cases in our chapters are from federal courts since most of the topics we discuss are based on federal law. Federal courts consist of trial courts (called the U.S. District Court for a particular district), courts of appeal (called the U.S. Circuit Court for a particular circuit), and the U.S. Supreme Court. U.S. Supreme Court decisions apply to all jurisdictions, and once there is a U.S. Supreme Court decision, all courts must follow the precedent. Circuit court decisions are mandatory precedent only for the circuit in which the decision is issued. All courts in that circuit must follow that circuit's precedents. District court precedents are applicable only to the district in which they were made. When courts that are not in the jurisdiction are faced with a novel issue they have not decided before, they can look to other jurisdictions to see how the issue was handled. If such a court likes the other jurisdiction's decision, it can use the approach taken by that jurisdiction's court. However, it is not bound to follow the other court's decision since that court is not in its jurisdiction.

States have court systems parallel to the federal court system. They vary from state to state, but generally there is also a trial court, an intermediate court of appeals, and a state supreme court. For our purposes, the state court system works very much like the federal system in terms of appeals moving up through the appellate system, though some states have more levels. Once the case is decided by the state supreme court, it can be heard by the U.S. Supreme Court if there is a basis for appealing it to that court.

On the federal side, once a case is heard by the U.S. Supreme Court, there is no other court to which it can be appealed. Under our country's constitutionally based system of checks and balances, if Congress, who passed the law the Court

interpreted, believes the Court's interpretation is not in keeping with the law's intended purpose, Congress can pass a law that reflects that determination. This has been done many times. Perhaps the most recent is the Lilly Ledbetter Fair Pay Act of 2009 discussed in the gender chapter. The Supreme Court interpreted Title VII of the 1964 Civil Rights Act barring workplace discrimination on the basis of gender such that even though it was clear that gender-based pay discrimination had occurred, there was no basis for a remedy. Ledbetter did not find out about the pay discrimination for 19 years. By that time, the 180-day statute of limitations had long expired. Congress responded to this Supreme Court decision with the Lilly Ledbetter Fair Pay Act, which allows the statute of limitations to begin to run anew each time an employee receives a paycheck based on discrimination.

LO1

Understanding the Case Information

With this in mind, let's take a look at a typical case included in this book. Each of the cases is an actual law case written by a judge. Choose a case, any case, to go through this exercise. The first thing you will see is the *case name.* This is derived from the parties involved—the one suing (called **plaintiff** at the district court level) and the one being sued (called **defendant** at the district court level). At the court of appeals or Supreme Court level, the first name reflects who appealed the case to that court. It may or may not be the party who initially brought the case at the district court level. At the court of appeals level, the person who appealed the case to the court of appeals is known as the **appellant** and the other party is known as the **appellee**. At the Supreme Court level they are known as the **petitioner** and the **respondent**.

plaintiff
One who brings a civil action in court.

defendant
One against whom a case is brought.

appellant
One who brings an appeal.

appellee
One against whom an appeal is brought.

petitioner
One who appeals a case to the Supreme Court.

respondent
One against whom a case is appealed at the Supreme Court.

Under the case name, the next line will have several numbers and a few letters. This is called a *case citation.* A case citation is the means by which the full case can be located in a law reporter if you want to find the case for yourself in a law library or a legal database such as LEXIS/NEXIS or Westlaw. Reporters are books in which judges' case decisions are kept for later retrieval by lawyers, law students, judges, and others. Law reporters can be found in any law library, and many cases can be found on the Internet for free on Web sites such us Public Library of Law (plol.org) or FindLaw.com.

Take a minute and turn to one of the cases in the text. Any case will do. A typical citation would be "72 U.S. 544 (2002)." This means that you can find the decision in volume 72 of the *U.S. Supreme Court Reporter* at page 544 and that it is a 2002 decision. The U.S. reporters contain U.S. Supreme Court decisions. Reporters have different names based on the court decisions contained in them; thus, their citations are different.

The citation "43 F.3d 762 (9th Cir. 2002)" means that you can find the case decision in volume 43 of the *Federal Reporter* third series, at page 762, and that the decision came out of the U.S. Circuit Court of Appeals for the Ninth Circuit in the year 2002. The *Federal Reporters* contain the cases of the U.S. Circuit Courts of Appeal from across the country.

Similarly, the citation "750 F. Supp. 234 (S.D.N.Y. 2002)" means that you can find the case decision in volume 750 of the *Federal Supplement Reporters,* which

contain U.S. district court cases, at page 234. The case was decided in the year 2002 by the U.S. District Court in the Southern District of New York.

In looking at the chapter cases, after the citation we include a short paragraph to tell you what the case is about, what the main issues are, and what the court decided. This is designed to give you a heads-up to make reading the case easier.

The next line you see will have a last name and then a comma followed by "J." This is the name of the judge who wrote the decision you are reading. The J stands for *judge* or *justice*. Judges oversee lower courts, while the term for them used in higher courts is *justices*. C. J. stands for *chief justice*.

The next thing you see in looking at the chapter case is the body of the decision. Judges write for lawyers and judges, not for the public at large. As such, they use a lot of legal terms (which we call *legalese*) that can make the decisions difficult for a nonlawyer to read. There are also many procedural issues included in cases, which have little or nothing to do with the issues we are illustrating. There also may be many other issues in the case that are not relevant for our purposes. Therefore, we usually give you a shortened, excerpted version of the case containing only relevant information.

If you want to see the entire case for yourself, you can find it by using the citation provided just below the name of the case, as explained above, using the legal resources provided at the end of the chapter. By not bogging you down in legalese, procedural matters, and other issues irrelevant to our point, we make the cases more accessible and understandable and much less confusing, while still giving you all you need to illustrate the matter at hand.

The last thing you will see in the chapter cases is the final decision of the court itself. If the case is a trial court decision by the district court based on the merits of the claim, the court will provide relief either for the plaintiff or for the defendant.

motion to dismiss
Request by a defendant for the court to dismiss the plaintiff's case.

Sometimes, the court does not reach the actual merits of the case, however. If a defendant makes a **motion to dismiss**, the court will decide that issue and say either that the motion to dismiss is *granted* or that it is *denied.* A defendant will make a motion to dismiss when he or she thinks there is not enough evidence to constitute a violation of law. If the motion to dismiss is granted, the decision favors the defendant in that the court dismisses the case. If the motion to dismiss is denied, it means the plaintiff's case can proceed to trial. Notice that this does not mean that the ultimate issues have been determined, but only that the case can or cannot, as the case may be, proceed further. This decision can be appealed to the next court.

motion for summary judgment
Defendant's request for the court to rule on the plaintiff's case based on the documents submitted, alleging there are no triable issues of fact to be decided.

The parties also may ask the court to grant a **motion for summary judgment**. This essentially requests that the court take a look at the documentary information submitted by the parties and make a judgment based on that, as there is allegedly no issue that needs to be determined by a jury. Again, the court will either grant the motion for summary judgment or deny it. If the court grants a motion for summary judgment, it also will determine the issues and grant a judgment in favor of one of the parties. If the court dismisses a motion for summary judgment, the court has determined that there is a need for the case to proceed to trial. This, too, can be appealed.

If the case is in the appellate court, it means that one of the parties did not agree with the trial court's decision. This party, known as the *appellant,* appeals the case to the appellate court, seeking to overturn the decision based on what the appellant alleges are errors of law committed by the court below. The *appellee* is the party against whom an appeal is brought. Cases cannot be appealed simply because one of the parties did not like the facts found in the lower court. The appeal must be based on errors of law.

After the appellate court reviews the lower court's decision, the court of appeals will either *affirm* the lower court's decision and the decision is allowed to stand, or it will *reverse* the lower court's decision, which means the lower court's decision is overturned. If there is work still to be done on the case, the appellate court also will order *remand.* Remand is an order by the court of appeals to the lower court telling it to take the case back and do what needs to be done based on the court's decision.

It is also possible that the appellate court will issue a *per curiam* decision. This is merely a brief decision by the court, rather than a long one, and is not issued by a particular judge. Rather than seeing a judge's name, you will simply see the words *Per Curiam*.

Following the court's decision is a set of questions we developed that is intended to translate what you have read in the case into issues that you would be likely to have to think about as a business owner, manager, or supervisor. The questions generally are included to make you think about what you read in the case and how it would impact your decisions as a manager. They are provided as a way to make you think critically and learn how to ask yourself the important questions that you will need to deal with each time you make an employment decision.

The opening scenarios, chapter cases, and the case-end questions are important tools for you to use to learn to think like a manager or supervisor who avoids unnecessary and costly liability. Reading the courts' language and analyzing and thinking critically about the issues in the opening scenarios and case-end questions will greatly assist you in making solid, defensible workplace decisions as a business owner, manager, or supervisor.

Prima Facie Case

When a legal case is brought, it must be based on legal rights provided by statutes or common law. When an individual's legal rights have been violated, the ability to file a case on that basis is known as having a **cause of action**. Each cause of action has certain requirements that the law has determined constitute the cause of action. In court if it can be shown that those requirements are met, then the party bringing the cause of action is said to have established a ***prima facie* case** for that cause of action. Generally, if the claimant is not able to present evidence to establish a *prima facie* case for his or her claim, the claim will be dismissed by the court, generally based on a motion to dismiss discussed above, asserting that the claimant has not established all the elements of the claim and, therefore, there is no basis for the court to proceed. Sometimes the court

cause of action
Right provided by law for a party to sue for remedies when certain legal rights is violated.

***prima facie* case**
The evidence that fits each requirement of a cause of action.

allows the claimant leave to re-file the claim, depending on what was lacking. If the claimant establishes a *prima facie* case, then the claim may advance to the next step in the proceedings.

Employment-at-Will Concepts

LO3

LO4

Wrongful Discharge and the Employment-at-Will Doctrine

In this part of the chapter, we will examine the common law and statutes that govern the employment relationship between the employer and employee, how they come together to form the relationship, and in some cases, how they come apart. Though it might appear strange or awkward to discuss *ending* the employment relationship so early in the book, when many of the discussions that follow involve what occurs *within* the employment environment, it is vital that we raise these issues at this point. In many of the succeeding chapters, you will read about protections offered to individuals based on their inclusion in particular classes. If we omit to mention what they might be protected *from,* the book's conversation loses a bit of its urgency. In addition, in almost all of the cases that you will read throughout this text, you will need to understand the laws that govern the employment relationship, at-will employment, and discharge, in order to understand the court's judgment of the case.

The American employer–employee relationship was originally based on the English feudal system. When employers were the wealthy landowners who owned the land on which serfs (workers) toiled, employers met virtually all of the workers' needs, took care of disputes that arose, and allowed the workers to live their entire lives on the land, even after they could no longer be the productive serfs they once were. The employer took care of the employees just as parents would take care of their children.

When we moved from an agrarian to an industrialized society, the employee–employer relationship became further removed than before: The employee could work for the employer as long as the employee wished and leave when the employee no longer wished to work for the employer (therefore, the employees worked at their own will). The reverse was also true: The employer employed the employee for as long as the employer wished, and when the employer no longer wished to have the employee in his or her employ, the employee had to leave. This relationship was called **at-will employment**.

at-will employment
An employment relationship where there is no contractual obligation to remain in the relationship; either party may terminate the relationship at any time, for any reason, as long as the reason is not prohibited by law, such as for discriminatory purposes.

Both parties were free to leave at virtually any time for any reason. If, instead, there is a contract between the parties, either as a collective bargaining agreement or an individual contract, the relationship is not governed by the will of the parties, but rather by the contract. Further, government employees generally are not considered at-will employees. Limitations are imposed on the government employer through rules governing the terms and termination of the federal employment relationship. Thus, excluded from at-will employment are government employees, employees under a collective bargaining agreement, or employees who have an individual contract with their employer.

As you might imagine, the employment-at-will relationship has not always been considered the most balanced. Employers have had a bit of an upper hand in terms of the power, and the connection looks less and less like that familial affiliation where employment might have begun and more like the hierarchical structure present in some workplaces today. The at-will environment has spread throughout the United States as each state has sought to attract more employers by offering greater freedoms within the employment context.[1]

When equal employment opportunity legislation entered the equation, the employer's rights to hire and fire were circumscribed to a great extent. While an employer was free to terminate an employee for no particular reason, it could not terminate a worker based on race, gender, religion, national origin, age, or disability. Providing protection for members of historically discriminated-against groups through such laws as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act also had the predictable effect of making all employees feel more empowered in their employment relationships. While virtually no employees sued employers before such legislation, after the legislation was passed employees were willing to challenge employers' decisions in legal actions.

With women, minorities, older employees, disabled employees, and veterans given protection under the laws, it was not long before those who were not afforded specific protection began to sue employers based on their perception that it "just wasn't right" for an employer to be able to terminate them for any reason even though their termination did not violate antidiscrimination statutes! To them it was beside the point that they did not fit neatly into a protected category. They had been "wronged" and they wanted their just due.

However, since our system is one of at-will employment, an employer is only prohibited from terminating employees based on what the law dictates. It does not protect the employee fired because the employer did not like the employee's green socks, or the way the employee wore her hair, or the fact that the employee blew his attempt to get his first account after being hired. There is no recourse for these workers because, since the relationship is at-will, the employer can fire the employee for whatever reason the employer wishes, as long as it is not a violation of the law. Any terminated at-will employee may bring suit against the employer, seeking reinstatement or compensatory and punitive damages for the losses suffered on the basis of *unjust dismissal* or *wrongful termination*. However, if there is a legally prohibited reason for the termination, such as race or gender, the law provides its own means of pursuing those cases, discussed in the Title VII chapter.

Probably because the law also began to recognize certain basic rights in its concept of the employment relationship, and because of the basic unfairness involved in some of the cases that the courts were asked to decide, courts all over the country began making *exceptions* to the at-will doctrine. Since each state is free to make its own laws governing at-will employment, the at-will doctrine developed on a state-by-state basis and varies from state to state. (See Exhibit 2.1, "Exceptions to the Doctrine of Employment-at-Will.") Congress has entertained proposals to deal with the doctrine on the federal level, but as of yet, none has been successful. To bring uniformity, predictability, and consistency to the area, in 1991,

Exhibit 2.1 *Exceptions to the Doctrine of Employment-at-Will*

States vary broadly in terms of their recognition of the exceptions to the doctrine of employment-at-will. Some states recognize one or more exceptions, while others might recognize none at all. In addition, the definition of these exceptions also may vary from state to state.

- Bad faith, malicious, or retaliatory termination may serve as a violation of **public policy**.
- Termination in breach of the **implied covenant of good faith and fair dealing**.
- Termination in breach of some other implied **contract term**, such as those that might be created by employee handbook provisions (in certain jurisdictions).
- Termination in violation of the doctrine of **promissory estoppel** (where the employee reasonably relied on an employer's promise, to the employee's detriment).
- Other exceptions as determined by **statutes** (such as WARN, discussed later).

the Commission on Uniform State Laws issued a model termination act that states may use. This model act, and its status, will be discussed later in the chapter.

The state-by-state approach to addressing the exceptions to the at-will doctrine has created a crazy quilt of laws across the country. (See Exhibit 2.2, "State Rulings Chart.") In some states, the at-will doctrine has virtually no exceptions and, therefore, remains virtually intact. In other states, the courts have created judicial exceptions to the at-will doctrine that apply in certain limited circumstances. In still other states, the state legislature has passed laws providing legislative exceptions to the at-will doctrine. At this time, the at-will doctrine still survives as the default rule in 49 of the 50 states, with Montana remaining as the single state holdout.[2]

LO5

Exceptions to the At-Will Doctrine

Even though an employer can terminate an employee for any legal reason, if the reason is one that falls within an exception to the at-will doctrine, the employee can claim wrongful termination and receive either damages or reinstatement.

Though they are difficult cases for employees to prove, state courts and state legislation have been fairly consistent in holding that exceptions will be permitted where the discharge is in violation of some recognized public policy, where the employer breaches an implied covenant of good faith and fair dealing, or where an implied contract or implied promise to the employee was breached (the latter involves the legal concept of *promissory estoppel*). We will discuss each of these in more detail, below.

Keep in mind that, if the employee and employer have an individual contract or a collective bargaining agreement, then the employment relationship is governed by that agreement. However, the contract, of course, can be one that states simply that the relationship is at-will; that the employer's right to discharge or take any other action is at its discretion; that the relationship may be terminated at any time by either side, with or without cause; and that the employee understands the nature of this arrangement.[3] In addition, if the employer is the government, then the employment relationship regarding dismissals is governed by relevant government regulations. It is the other 65 percent of the workforce that is covered by the employment-at-will doctrine.

Exhibit 2.2 *State Rulings Chart*

Availability of common-law exceptions to the employment-at-will doctrine on state-by-state basis. (Implied contract includes implications through employer policies, handbooks, promises, or other representations.)

	Implied Contract	Public Policy	Good Faith
Alabama	Yes	No	No
Alaska	Yes	Yes	Yes
Arizona	Yes	Yes	Yes
Arkansas	No	Yes	Yes
California	Yes	Yes	Yes
Colorado	Yes	Yes	No
Connecticut	Yes	Yes	Yes
Delaware	Yes	Yes	Yes
District of Columbia	Yes	Yes	No
Florida	No	No	No
Georgia	Yes	No	No
Hawaii	Yes	Yes	No
Idaho	Yes	Yes	Yes
Illinois	Yes	Yes	No
Indiana	Yes	Yes	No
Iowa	Yes	Yes	No
Kansas	Yes	Yes	No
Kentucky	Yes	Yes	No
Louisiana	No	No	No
Maine	Yes	No	No
Maryland	Yes	Yes	No
Massachusetts	Yes	Yes	Yes
Michigan	Yes	Yes	No
Minnesota	Yes	Yes	No
Mississippi	Yes	Yes	No
Missouri	No	Yes	No
Montana	Yes	Yes	Yes
Nebraska	Yes	Yes	No
Nevada	Yes	Yes	No
New Hampshire	Yes	Yes	Yes
New Jersey	Yes	Yes	Yes
New Mexico	Yes	Yes	No
New York	Yes	No	No
North Carolina	Yes	Yes	No
North Dakota	Yes	Yes	No
Ohio	Yes	Yes	No
Oklahoma	Yes	Yes	No
Oregon	Yes	Yes	No
Pennsylvania	Yes	Yes	No
Rhode Island	NC	No	No
South Carolina	Yes	Yes	No
South Dakota	Yes	Yes	No
Tennessee	Yes	Yes	No
Texas	Yes	Yes	No
Utah	Yes	Yes	Yes
Vermont	Yes	Yes	No
Virginia	Yes	Yes	No
Washington	Yes	Yes	No
West Virginia	Yes	Yes	No
Wisconsin	Yes	Yes	No
Wyoming	Yes	Yes	Yes

Source: Reproduced with permission from BNA's Labor & Employment Law Library, IERM 505:51 (2010).

public policy
A legal concept intended to ensure that no individual lawfully do that which has a tendency to be injurious to the public or against the public good. Public policy is undermined by anything that harms a sense of individual rights.

2 Scenario

Violation of Public Policy

One of the most visible exceptions to employment at-will that states are fairly consistent in recognizing, either through legislation or court cases, has been a violation of **public policy**; at least 44 states allow this exception. Violations of public policy usually arise when the employee is terminated for acts such as refusing to violate a criminal statute on behalf of the employer, exercising a statutory right, fulfilling a statutory duty, or reporting violations of statutes by an employer. States vary in terminology for the basis of a cause of action against her or his employer on this basis, and some require that the ex-employee show that the employer's actions were motivated by bad faith, malice, or retaliation.

For instance, a state may have a law that says that qualified citizens must serve jury duty, unless they come within one of the statutory exceptions. The employer does not want the employee to miss work just because of jury duty. The employee serves jury duty and the employer fires the worker. The employee sues the employer for unjust dismissal. The employer counters with the at-will doctrine, which states that the employer can terminate the employee for any reason. The Jury System Improvements Act prohibits employers from discriminating based on jury service in federal courts. States vary in terms of their protection for state and local jury service. Even in states where the protection is less clear, many courts have then held that the employer's termination of the employee under these circumstances would be a violation of public policy. Terminating the employee for fulfilling that statutory duty would therefore be a violation of public policy by the employer.

In a Washington State Supreme Court case, *Gardner v. Loomis Armored, Inc.,*[4] the court ruled that an employer violated public policy when it fired an armored-truck driver after the driver left the vehicle in order to rescue a robbery hostage. In that case, the driver was making a routine stop at a bank. When he saw the bank's manager running from the bank followed by a man wielding a knife, he locked the truck's door and ran to her rescue. While the woman was saved, the driver was fired for violating his employer's policy prohibiting him from leaving his vehicle. The court held that his termination violated the public policy encouraging such "heroic conduct." Understanding the confusion sometimes left in the wake of decisions surrounding public policy (since it did not wish to create a responsibility for people to be Good Samaritans), the court explained that

> [t]his holding does not create an affirmative legal duty requiring citizens to intervene in dangerous life threatening situations. We simply observe that society values and encourages voluntary rescuers when a life is in danger. Additionally, our adherence to this public policy does nothing to invalidate [the firm's] work rule regarding drivers' leaving the trucks. The rule's importance cannot be understated, and drivers do subject themselves to a great risk of harm by leaving the driver's compartment. Our holding merely forbids [the firm] from firing [the driver] when he broke the rule because he saw a woman who faced imminent life-threatening harm, and he reasonably believed his intervention was necessary to save her life. Finally, by focusing on the narrow public policy encouraging citizens to save human lives from life threatening situations, we continue to protect employers from frivolous lawsuits.[5]

On the other hand, while courts often try to be sensitive to family obligations, being there for one's family is not a sufficient public policy interest; and a refusal to work overtime in consideration of those obligations was deemed a legal basis for termination. The termination of an at-will employee for meeting family obligations did not violate a public policy or any legally recognized right or duty of the employee.[6] While the courts that have adopted the public policy exception agree that the competing interests of employers and society require that the exception be recognized, there is considerable disagreement in connection with *what is the public policy* and *what constitutes a violation of the policy*.

Whistle-Blowing Some states have included terminations based on whistle-blowing under the public policy exception. Whistle-blowing occurs when an employee reports an employer's wrongdoing. One of the most infamous cases of whistle-blowing occurred when Sherron Watkins chose to speak up in connection with Enron's wrongdoings with regards to its accounting procedures.

In 1982, Congress enacted the Federal Whistleblower Statute, which prohibits retaliatory action specifically against defense contractor employees who disclose information pertaining to a violation of the law governing defense contracts. The statute is administered by the Department of Defense and is enforced solely by that department; that is, an individual who suffers retaliatory action under this statute may not bring a private, common-law suit. The statute states specifically:

> An employee of a defense contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of the Department of Defense or of Justice information relating to a substantial violation of law related to a defense contract (including the competition for or negotiation of a defense contract).

Additionally, in 1989 Congress amended the Civil Service Reform Act of 1978 to include the Whistleblowers Protection Act, which expands the protection afforded to federal employees who report government fraud, waste, and abuse. The act applies to all employees appointed in the civil service who are engaged in the performance of a federal function and are supervised by a federal official. Employees of federal contractors, therefore, are not covered by the act since they are hired by the contractor and not the government itself. Of course, none of these statutes apply to other private sector workers.

Certain statutes on other subjects or specific professions include whistle-blowing protections. For example, the Health Care Worker Whistleblower Protection Act protects nurses and other health care workers from harassment, demotion, and discharge for filing complaints about workplace conditions. These complaints often report on improper patient care or business methods and can affect the patient care and staff in a positive way. The act also protects employers from disgruntled ex-employees by allowing the employer an opportunity to correct allegations and by having a compliance plan to maintain an internal file for complaints of violations. Twenty-one states have implemented their own form of this act.[7]

At least 43 states, including California, Florida, New York, and Texas, also provide some additional and general form of legislative protection for whistle-blowers. Almost half of these state whistle-blower protection statutes protect both public and private sector employees who report wrongdoings of their employer. Some states limit protection to the reporting of violation of federal, state, or local laws. However, an increasing number of states, including California, Colorado, and Illinois, protect the reporting of mismanagement or gross waste of public funds or of a substantial and specific danger to public health and safety. A few states, such as Alaska, Louisiana, Maine, and Pennsylvania, require that whistle-blowing reports be made in "good faith." (See Exhibit 2.3, "States with Whistle-Blower Protection Statutes.")

Exhibit 2.3 *States with Whistle-Blower Protection Statutes*

STATES WITH WHISTLE-BLOWER PROTECTION STATUTES FOR BOTH PRIVATE AND PUBLIC EMPLOYEES

Alabama, Alaska, Arkansas, California, Connecticut,[1] Delaware, Florida, Hawaii, Kentucky, Louisiana, Maine, Michigan, Minnesota,[2] Montana, New Hampshire,[3] Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania[11] Rhode Island, South Carolina,Tennessee,[4] Vermont, Washington.

STATES THAT OFFER SPECIAL WHISTLE-BLOWER PROTECTIONS ONLY FOR THEIR OWN STATE OR LOCAL GOVERNMENT EMPLOYEES

Alaska,[9] Arizona, California, Colorado, Connecticut, Georgia,[5] Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland,[6] Massachusetts, Missouri, Nebraska,[10] New Mexico, Nevada, Oklahoma, Pennsylvania,[7] South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin.[8]

Separate laws in Nevada cover state employees and peace officers.

Montana also protects public and private sector whistle-blowers through its Wrongful Discharge from Employment Act.

Source: R. A. Guttman et al., *The Law: An Overview* (undated), http://whistleblowerlaws.com/protection.htm (accessed December 7, 2007); Bureau of National Affairs, Inc., *Individual Employment Rights Manual,* No. 133, 505:28–29 (July 2001). http://www.taterenner.com/stchart.htm, http://law.jrank.org/pages/11824/Whistleblower-Statutes.html, http://www.ncsl.org/IssuesResearch/EmploymentWorkingFamilies/StateWhistleblowerLaws/tabid/13390/Default.aspx.

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[1] Connecticut has separate laws extending whistle-blower protection to public service, nuclear-power, and state and local employees who report hazardous conditions.

[2] The laws in Minnesota and New Hampshire specifically exclude independent contractors.

[3] See note 2.

[4] Tennessee has two whistle-blower laws, one that covers only local school-system employees and the other covering any employee who reports, or refuses to participate in, illegal activities.

[5] Georgia and Wisconsin exclude employees of the office of the governor, the legislature, and the courts.

[6] Maryland restricts coverage to employees and classified-service applicants within the executive branch of state government.

[7] Pennsylvania's law excludes teachers, although school administrators are covered. Pennsylvania also has a separate law governing public utility employees.

[8] See note 5.

[9] Arizona SOL 10 days for state employees

[10] Nebraska state employees are covered by the State Government Effectiveness Act- R.R.S. Neb. § 81-2701. SOL 4 years.

[11] Pennsylvania public policy tort recognized where employees have a duty to report or prove actual violation.

If there is a statute permitting an employee to take certain action or to pursue certain rights, the employer is prohibited from terminating employees for engaging in such activity. Examples of this type of legislation include state statutes permitting the employee to file a workers' compensation claim for on-the-job injuries sustained by the employee. Another example is the Sarbanes-Oxley Act, which primarily addresses issues relating to accountability and transparency in corporate governance (such as the issues that arose during the infamous Enron debacle). The act provides protection to employees of publicly traded companies who disclose corporate misbehavior, even if the disclosure was made only internally to management or to the board of directors and not necessarily to relevant government authorities. The *Palmateer* case at the end of the chapter is a seminal one in this area, exploring whether employees who assist law enforcement agencies should be protected as a matter of public policy.

Case 1

In *Green v. Ralee Engineering Co.,*[8] decided after *Palmateer,* an employee was terminated after calling attention to the fact that parts that had failed inspection were still being shipped to purchasers. He sued for wrongful discharge, asserting a public policy exception to the at-will employment rule. The court explored whether public safety regulations governing commercial airline safety could provide a basis for declaring a public policy in the context of a retaliatory discharge action. The court found that the regulations furthered important safety policies affecting the public at large and did not merely serve either the employee's or the employer's personal or proprietary interest; "[t]here is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens." The court agreed that the termination violated public policy.

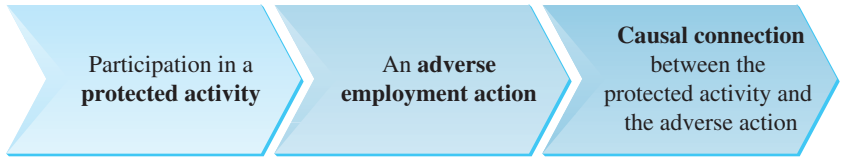
LO8

Retaliatory Discharge Retaliatory discharge is a broad term that encompasses terminations in response to an employee exercising rights provided by law. We will discuss this basis for discharge later as it relates to the areas of discrimination and regulatory protections. However, the basis for the claim remains the same, which is why it is included in this toolkit. Courts are sensitive to claims of retaliation in order to protect an employee's right to protest adverse employment actions. If workers are not protected against retaliation, there would be a strong deterrent to asserting one's rights. On the other hand, if the employer's actions are legitimately based in law, the employer's actions are protected.

In order to prove a retaliatory discharge claim, an employee must show that he or she was participating in a protected activity, there was an adverse employment action toward the employee by the employer, and there is causal connection between the employee's protected activity and the adverse action taken by the employer. (See Exhibit 2.4, "Retaliatory Discharge: *Prima Facie* Case.") For instance, if an employee is given a right to serve jury duty but is terminated by the employer for doing so, with no other apparent reason for the termination, that employee has a basis for a retaliation claim.

In determining whether the adverse action is sufficient to support a claim, courts will look to an objective standard and measure whether a "reasonable employee" would view the retaliatory harm as *significant*. In *Burlington Northern*

Exhibit 2.4 *Retaliatory Discharge:* Prima Facie *Case*



Source: EEOC, "Guidance and Instructions for Investigating and Analyzing Claims of Retaliation," *EEOC Compliance Manual,* www.eeoc.gov/policy/docs/retal.html (May 20, 1998).

& Santa Fe Railway Co. v. White,[9] the U.S. Supreme Court reviewed the context of the retaliatory action and determined that, even though the employee received back pay for a 37-day suspension, that suspension, along with a reassignment to a job that was more physically demanding, would have "dissuaded a reasonable worker from making or supporting a charge of discrimination."[10] The case is viewed as important since it expands retaliatory discharge to include not only "ultimate" employment actions such as refusal to hire, discharge, or demotion, but also any action that satisfies this new standard of "dissuasion." The impact may be that, even in cases where no violation occurred in the original decision, the court might find retaliation against the employee who complained about the alleged violation. You may wish to review the *Herawi* case at the end of the chapter, which demonstrates a fact pattern where motives for the adverse action involved are a bit more complicated since they involve several proposed justifications.

Case 2

Finally, the third element of retaliatory discharge requires a causal connection between the first two elements. Courts often require more than a simple showing of close timing; however, when the adverse employment action happens immediately after the protected activity, courts recognize that there may be no time for any other evidence to amass.[11]

It is important to understand that, if an employee originally claims wrongful behavior on the part of the employer and suffers retaliation, it does not matter whether the employer proves that the original wrongful behavior actually occurred. The question is only whether there was retaliation for engaging in protected activity.

Constitutional Protections Though perhaps it goes without saying, an employer is prohibited from terminating a worker or taking other adverse employment action against a worker on the basis of the worker's engaging in constitutionally protected activities. However—and this is a significant limitation—this prohibition applies only where the employer is a public entity, since the Constitution protects against government action rather than action by private employers.

For instance, a public employer may not terminate a worker for the exercise of free speech (including whistle-blowing, under most circumstances) or based on a

particular political affiliation. So, an employee who refused to participate in an employer's public lobbying campaign is protected. There are exceptions in the private sector when an adverse employment action would violate some recognized expression of public policy, even without state action; but, as mentioned above, these protections vary from state to state.

Breach of Implied Covenant of Good Faith and Fair Dealing

covenant of good faith and fair dealing
Implied contractual obligation to act in good faith in the fulfillment of each party's contractual duties.

Another exception to the presumption of an at-will employment relationship is the implied **covenant of good faith and fair dealing** in the performance and enforcement of the employee's work agreement. This requirement should not be confused with a requirement in some contracts of "good cause" prior to termination. A New York court defined this particular duty as follows:

> In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing. While the public policy exception to the at-will doctrine looks to the law to judge the employer's actions and deems them violations of public policy or not, the breach of implied covenant of good faith looks instead to the actions between the parties to do so.

The implied covenant of good faith and fair dealing means that any agreement between the employer and the employee includes a promise that the parties will deal with each other fairly and in good faith. Imagine a situation where an employer and employee have entered into an employment contract but fail to specify why and when the employee could be terminated. Assume the employee is then terminated and the employee claims that the reason is unwarranted. The court will first look to the contract and will find that the matter is not discussed. If the situation occurs in a state that recognizes the implied covenant, the court will then look to the facts to see whether the termination is in breach of the implied covenant of good faith and fair dealing.

Only 13 states recognize this covenant as an exception to at-will employment. Some states allow the cause of action but limit the damages awarded to those that would be awarded under a breach of contract claim, while other states allow the terminated employee to recover higher tort damages.

In connection with Scenario 1, Mark Richter may have a claim against his employer for breach of the covenant of good faith and fair dealing. Mark's employer is, in effect, denying Mark the fruits of his labor.

Critics of this implied agreement argue that, where an agreement is specifically nondurational, there should be no expectation of guaranteed employment of any length. As long as both parties are aware that the relationship may be terminated at any time (which arguably would be the case if they both signed the contract), it would be extremely difficult to prove that either party acted in bad faith in terminating the relationship. Courts have supported this contention in holding that an implied contract or covenant seems to upset the balance between the employee's interest in maintaining her or his employment and the employer's

interest in running its business as it sees fit. "The absence of good cause to discharge an employee does not alone give rise to an enforceable claim for breach of a condition of good faith and fair dealing." To the contrary, as mentioned, in most states, employers may terminate an individual for any reason, as long as the true reason is not contradictory to public policy, against the law, or in contravention of another agreement. The *Guz* case at the end of the chapter seeks to clarify this distinction.

Breach of Implied Contract

What happens when the employer is not violating an express contractual agreement, nor the implied covenant of good faith and fair dealing, yet it seems to the employee that an injustice was done? Courts might identify instead an **implied contract** from several different sources. Though primarily an implied contract arises from the acts of the parties, the acts leading to the creation of an implied contract vary from situation to situation.

implied contract
A contract that is not expressed but, instead, is created by other words or conduct of the parties involved.

Courts have found contracts implied from off-hand statements made by employers during preemployment interviews, such as a statement that a candidate will become a "permanent" employee after a trial period, or quotes of yearly or other periodic salaries, or statements in employee handbooks. In such cases, when the employee has been terminated in less than the time quoted as the salary (e.g., $50,000 per year), the employee may be able to maintain an action for the remainder of the salary on the theory of this establishing an implied contract for a year's duration. However, these statements must be sufficiently specific to be enforceable. In *Melott v. ACC Operations, Inc.,*[12] the promise of the employee's manager to help her in "any way" he could did not create an implied contract that changed her at-will employment status.

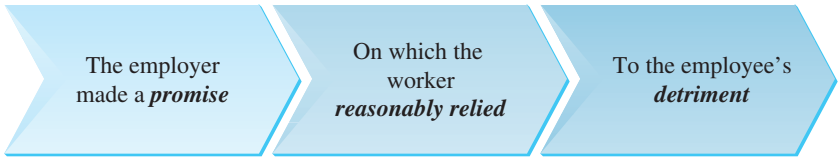
Court rulings finding implied contracts based on statements of employers have caused some employers to restructure terms of agreements, employee handbooks, or hiring practices to ensure that no possible implied contract can arise. Some commentators believe that this may not result in the fairest consequence to employees.[13] The *Guz* case at the end of the chapter highlights the fact that the employer's failure to abide by those policies or documents mentioned above may be the cause of subsequent litigation and liability if an employee is harmed by the employer's failure to do so.

Some employers have tried to avoid the characterization of their employment policies or handbooks as potential contract terms by including in those documents a disclaimer such as the following:

> Our employment relationship is to be considered "at-will" as that term is defined in this state. Nothing in this policy [or handbook] shall be construed as a modification to that characterization and, where there is an apparent conflict between the statements in this policy [or handbook], the policy [or handbook] shall be construed to support a determination of an at-will relationship or shall become null.

Employers should be careful when creating an employment policy manual that includes a statement that employees will only be terminated for good cause,

Exhibit 2.5 *Promissory Estoppel:* Prima Facie *Case*



or that employees become "permanent" employees once they successfully complete their probationary period. This type of language has been held to create binding agreements between the employer and the employee; and the employer's later termination of the employee, if inconsistent with those statements, has resulted in liability.[14]

Exception Based on Promissory Estoppel Promissory estoppel is another exception to the at-will rule. Promissory estoppel is similar to the implied contract claim except that the promise, implied or expressed, does not rise to the level of a contract. It may be missing an element; perhaps there is no mutual consideration or some other flaw; however, promissory estoppel is still a possible exception to an employer's contention of an at-will environment. For a claim of estoppel to be successful, the plaintiff must show that the employer or prospective employer made a *promise* upon which the worker *reasonably relied* to her or his *detriment.* (See Exhibit 2.5, "Promissory Estoppel: *Prima Facie* Case.") Often the case turns on whether it was reasonable for the worker to rely on the employer's promise without an underlying contract. In addition, it is critical to have a clear and unambiguous promise.

Statutory Exceptions to Employment at-Will In addition to the exceptions that have been discussed in this section, and any contractual constraints on discharge to which the parties might have previously agreed, a number of statutory exceptions also exist that limit the nature of employment-at-will. For instance, by legislation, an employer may not terminate an employee for exercising her or his rights to a safe working environment (Occupational Safety and Health Act), fair pay (Fair Labor Standards Act), or being pregnant (Pregnancy Discrimination Act, which amended Title VII). As you will see throughout this text, several statutes exist that serve to guide the employer away from decisions on bases that perpetuate wrongful discrimination such as decisions based on race, sex, national origin, or disability status.[15]

However, though some employers have argued that the list of exceptions makes mockery of the at-will rule, the list itself is actually finite rather than limitless. Employers are, in fact, free to make business decisions based on managerial discretion outside of certain judicially limited and legislatively imposed parameters.

As discussed above, if there is no express agreement or contract to the contrary, employment is considered to be at-will; that is, either the employer or the

employee may terminate the relationship at her or his discretion. Nevertheless, even where a discharge involves no statutory discrimination, breach of contract, or traditional exception to the at-will doctrine discussed above, the termination may still be considered wrongful and the employer may be liable for "wrongful discharge," "wrongful termination," or "unjust dismissal." Therefore, in addition to ensuring that workplace policies do not wrongfully discriminate against employees and do not fall under other exceptions, the employer also must beware of situations in which the employer's policy or action in a termination can form the basis for unjust dismissal. Since such bases can be so diverse, the employer must be vigilant in its attention to this area, and employees should be fully aware of their rights, even though the relationship may be considered at-will.

Constructive Discharge

constructive discharge
Occurs when the employee is given no reasonable alternative but to end the employment relationship; considered an involuntary act on the part of the employee.

The "discharge" addressed throughout this chapter and the remainder of this text may refer either to traditional termination or to an employee's decision to leave under certain intolerable circumstances. **Constructive discharge** exists where the employee sees no alternative but to quit her or his position; that is, the act of leaving was not truly voluntary. Therefore, while the employer did not actually fire the employee, the actions of the employer caused the employee to leave. Constructive discharge usually evolves from circumstances where an employer knows that it would be wrongful to terminate an employee for one reason or another. So, to avoid being sued for wrongful termination, the employer creates an environment where the employee has no choice but to leave. If courts were to allow this type of treatment, those laws that restrict employers' actions from wrongful termination, such as Title VII, would have no effect.

The test for constructive discharge is whether the employer made the working conditions so intolerable that no reasonable employee should be expected to endure. The courts have softened this language somewhat so that an employee need not demonstrate that the environment is literally unbearable but simply that she or he "has no recourse within the employer's organization or reasonably believes there is no chance for fair treatment," then or in the future.[16] The circumstances might present one horrendous event or a number of minor instances of hostile behavior, similar to the standard you will learn for sexual harassment later in the text.

A police officer in *Paloni v. City of Albuquerque Police Department*[17] sued her police department claiming constructive discharge after she had been found in violation of the department's use of force policy and asked to go through a retraining on the practice. Because she could not provide evidence that other officers had lost confidence in her or that the situation was made intolerable because of the retraining, the Tenth Circuit found that there was no constructive discharge. Similarly, when Allstate imposed a new job requirement that agents be present in the office during all operating hours, the agents could not show that this made the position so intolerable that they could not be expected to continue.

On the other hand, in *Nassar v. Univ. of Texas Southwestern Medical Center at Dallas,*[18] Dr. Nassar was subjected to such extreme harassment on the basis of race and national origin that no reasonable employee should have to tolerate within his or her working environment. Nassar, a U.S. citizen of Egyptian origin, was subject to challenges to his work that were unsupported by facts, derogatory statements from his supervisor such as "middle easterners were lazy," and alleged retaliation for his complaints when he tried to get an alternate position. Nassar was awarded more than $3.6 million in both compensatory damages and back pay and has a pending claim of up to $4 million for front pay.

Conditions that one might consider to be traditionally intolerable, such as harassment, are not required to find constructive discharge. Courts have found that a failure to accommodate a disability,[19] or even an employer's offer of a severance package without a release of claims[20] (but be wary of the Older Workers Benefit Protection Act, discussed in a later chapter), is grounds for constructive discharge.

The Worker Adjustment and Retraining Notification Act

In addition to the exceptions to employment-at-will mentioned above, the Worker Adjustment and Retraining Notification (WARN) Act is included in this section because it also places restrictions on an employer's management of its workforce in terms of discharging workers. Before termination, WARN requires that employers with over 100 employees must give 60 days' advance notice of a plant closing or mass layoff to affected employees. A plant closing triggers this notice requirement if it would result in employment loss for 50 or more workers during a 30-day period.

Mass layoff is defined as employment losses at one location during any 30-day period of 500 or more workers, or of 50–499 workers if they constitute at least one-third of the active workforce. Employees who have worked less than 6 months of the prior 12 or who work less than 20 hours a week are excluded from both computations. If an employer does not comply with the requirements of the WARN Act notices, employees can recover pay and benefits for the period for which notice was not given, up to a maximum of 60 days. All but small employers and public employers are required to provide written notice of a plant closing or mass layoff no less than 60 days in advance.

The number of employees is a key factor in determining whether the WARN Act is applicable. Only an employer who has 100 or more full-time employees or has 100 or more employees who, in the aggregate, work at least 4,000 hours per week are covered by the WARN Act. In counting the number of employees, U.S. citizens working at foreign sites, temporary employees, and employees working for a subsidiary as part of the parent company must be considered in the calculation.

There are three exceptions to the 60-day notice requirements. The first, referred to as the *faltering company* exception, involves an employer who is actively seeking capital and who in good faith believes that giving notice to the employees will preclude the employer from obtaining the needed capital. The second exception occurs when the required notice is not given due to a "sudden, dramatic, and unexpected" business circumstance not reasonably foreseen and

outside the employer's control. The last exception is for actions arising out of a "natural disaster" such as a flood, earthquake, or drought.

Wrongful Discharge Based on Other Tort Liability

A *tort* is a violation of a duty, other than one owed when the parties have a contract. Where a termination happens because of intentional and outrageous conduct on the part of the employer and causes emotional distress to the employee, the employee may have a tort claim for a wrongful discharge in approximately half of the states in the United States. For example, in one case, an employee was terminated because she was having a relationship with a competitor's employee. The court determined that forcing the employee to choose between her position at the company and her relationship with a male companion constituted the tort of outrageous conduct.

One problem exists in connection with a claim for physical or emotional damages under tort theories: In many states, an employee's damages are limited by workers' compensation laws. Where an injury is work-related, such as emotional distress as a result of discharge, these statutes provide that the workers' compensation process is a worker's *exclusive* remedy. An exception exists where a claim of injury is based solely on emotional distress; in that situation, many times workers' compensation will be denied. Therefore, in those cases, the employee may proceed against the employer under a tort claim. If an employer seeks to protect against liability for this tort, it should ensure that the process by which an employee is terminated is respectful of the employee, as well as mindful of the interests of the employer.

One tort that might result from a discharge could be a tort action for defamation, under certain circumstances. To sustain a claim for defamation, the employee must be able to show that (1) the employer made a *false and defamatory statement* about the employee, (2) the statement was *communicated* to a third party *without the employee's consent,* and (3) the communication *caused harm* to the employee. Claims of defamation usually arise where an employer makes statements about the employee to other employees or her or his prospective employers. This issue is covered in more detail in Chapter 13 relating to the employee's privacy rights and employer references.

Finally, where the termination results from a wrongful invasion of privacy, an employee may have a claim for damages. For instance, where the employer wrongfully invades the employee's privacy, searches her purse, and consequently terminates her, the termination may be wrongful.

As you can see, employment-at-will is a broad power for both the employer and the employee. However, the most likely challenge in employment-at-will is the employee being terminated rather than the employee quitting the job. There are, however, many bases upon which the employee can challenge what is perceived to be the employer's wrongful termination. If the facts of the termination fall within one of the several exceptions to employment-at-will, then the wrongful termination action can be successful for the employee. It therefore behooves the employer to make sure that there are appropriate safeguards in place that allow terminations that will not bounce back to the employer like a rubber ball.

Employment Discrimination Concepts

In part two of the chapter, we move from the concept of employment-at-will to concepts that will be visited many times in later chapters, that is, employment discrimination under Title VII of the Civil Rights Act of 1964. The chapters on Title VII constitute a good portion of this text and it will be helpful for you to have a single chapter to which you can refer for repeating concepts throughout the chapters. You may find it a bit awkward to be exposed to these concepts before you actually get to the chapters that explain the law itself, but we have worked to make the situation as clear as possible. For now, in reviewing the information in this section, just keep in mind something you already know: Federal law prohibits employment discrimination on the basis of race, color, gender, religion, national origin, age, and disability.

In the chapters on Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, you will find out more of the details of the law, such as to whom it applies, how cases are brought, and so on. You will discover the particulars of what is involved in avoiding costly workplace liability for each of the prohibited categories. However, for our present purposes, we will be concentrating only on the theories used to prove employment discrimination claims under the protective legislation. Since Title VII was the first comprehensive protective legislation for workplace discrimination, most of the law was developed under it, and for that reason we often refer to Title VII. However, as the age discrimination and pregnancy discrimination and disability discrimination law was later passed, the legal considerations were applied to those categories as appropriate. So, in this part of the chapter discussing these concepts, know that the basis of the claim may vary depending on the category, but the underlying legal concepts remain applicable.

In alleging discrimination, an employee plaintiff must use one of two theories to bring suit under Title VII and protective legislation: disparate treatment or disparate impact. The suit must fit into one theory or the other to be recognized under the protective legislation. A thorough understanding of each will help employers make sounder policies that avoid litigation in the first place and enhance the workplace in the process.

LO6

Disparate Treatment

disparate treatment
Treating similarly situated employees differently because of prohibited Title VII factors.

Disparate treatment is the theory of discrimination used in cases of individual and overt discrimination and is the one you probably think of when you think of discrimination. The plaintiff employee (or applicant) bringing suit alleges that the employer treated the employee in a way different from other similarly situated employees based on one or more of the prohibited categories. Disparate treatment is considered intentional discrimination, but the plaintiff need not actually know that unlawful discrimination is the reason for the difference. That is, the employee need not prove that the employer actually said that race, gender, and so on was the reason for the decision. In disparate treatment cases, the employer's policy is discriminatory on its face, such as a

Exhibit 2.6 *Disparate Treatment Discrimination:* Prima Facie *Case*

* Employee belongs to a class protected under Title VII
* Employee applied for and was qualified for a job for which the employer was seeking applicants
* Employee was rejected and, after the rejection, the position remained open
* Employer continued to seek applicants with the rejected applicant's qualifications

policy of not hiring women to load boxes. Keep in mind that it is not the employer's subjective intent that is important. There need not be evil intent to discriminate. It must simply be able to be shown that the difference in treatment occurred and had no sustainable justification, leaving a prohibited category as the only remaining conclusion.

Case 4

As you will see in *McDonnell Douglas Corp. v. Green,* included at the end of the chapter, the U.S. Supreme Court has developed a set of indicators that leaves discrimination as the only plausible explanation when all other possibilities are eliminated. (See Exhibit 2.6, "Disparate Treatment Discrimination.") Under the *McDonnell Douglas* case, in order to make out a *prima facie* case of disparate treatment discrimination, please see Exhibit 2.6.

The effect of the *McDonnell Douglas* inquiries is to set up a legal test of all relevant factors that are generally taken into consideration in making employment decisions. Once those considerations have been ruled out as the reason for failure to hire the applicant, the only factor left to consider is the applicant's membership in one of the prohibited categories (e.g., race, color, gender, religion, national origin or other protected category).

The *McDonnell Douglas* Court recognized that there would be scenarios under the law other than failure to rehire involved in that case (i.e., failure to promote or train, discriminatory discipline, and so on) and its test would not be directly transferrable to them, but it could be modified accordingly. For instance, the issue may not be a refusal to rehire; it may, instead, be a dismissal. In such a case, the employee would show the factors as they relate to dismissal.

If an employer makes decisions in accordance with these requirements, it is less likely that the decisions will later be successfully challenged by the employee in court. Disparate treatment cases involve an employer's variance from the

normal scheme of things, to which the employee can point to show he or she was treated differently. Employers should therefore consistently treat similarly situated employees similarly. If there are differences, ensure that they are justifiable.

Think carefully before deciding to single out an employee for a workplace action. Is the reason for the action clear? Can it be articulated? Based on the information the employer used to make the decision, is it reasonable? Rational? Is the information serving as the basis for the decision reliable? Balanced? Is the justification job related? If the employer is satisfied with the answers to these questions, the decision is probably defensible. If not, reexamine the considerations for the decision, find its weakness, and determine what can be done to address the weakness. The employer will then be in a much better position to defend the decision and show it is supported by legitimate, nondiscriminatory reasons.

Keep in mind that these requirements are modified to conform to the situation forming the basis of the suit, as appropriate. For instance, if it was termination rather than failure to hire, or discipline rather than termination, the requirements would be adjusted accordingly.

Employer's Defense: The employer can defend by showing that the action was taken for a legitimate, nondiscriminatory reason.

Employee's Counter: After the employer's defense, the employee can counter with evidence that the employer's legitimate, nondiscriminatory reason was actually a mere pretext for the employer to discriminate.

Legitimate, Nondiscriminatory Reason Defense

LO7

Even if the employee establishes all the elements of the *prima facie* case of disparate treatment, it is only a rebuttable presumption. That is, establishing the *prima facie* case alone does not establish that the employer discriminated against the employee. There may be some other explanation for what the employer did. As the Court stated in *McDonnell Douglas,* the employer may defend against the *prima facie* case of disparate treatment by showing that there was a legitimate, nondiscriminatory reason for the decision. That reason may be virtually anything that makes sense and is not related to prohibited criteria. It is only discrimination on the basis of prohibited categories that is protected by the law. For instance, the law does not protect the category of jerks. If it can legitimately be shown that the action was taken because the employee was acting like a jerk, then the employee has no viable claim for employment discrimination. However, if it turns out that the only jerks terminated are those of a particular race, gender, ethnicity, and the like, then the employer is in violation Title VII.

Case 4

Even if the employer can show a legitimate, nondiscriminatory reason for the action toward the employee, the analysis does not end there. The employee can then counter the employer's defense by showing that the legitimate, nondiscriminatory reason being shown by the employer is a mere pretext for discrimination. That is, that while on its face the employer's reason may appear legitimate, there is actually something discriminatory going on. For instance, in *McDonnell Douglas,* the employer said it would not rehire Green because he engaged in unlawful activity. This

Exhibit 2.7 *BFOQ Test*

If an employer can answer yes to both of these questions, there may be a legitimate basis for the employer to limit employees to one gender and use the BFOQ defense if sued for discrimination.

1. ***Does the job require that the employee be of one gender only?*** This requirement is designed to test whether gender is so essential to job performance that a member of the opposite gender simply could not do the same job. In our bunny case, being a Playboy bunny requires being female and a male could not be the bunny envisioned by *Playboy* magazine (though we understand that there are males who do a very good job of looking female).
2. ***If the answer to question 1 is yes, is that requirement reasonably necessary to the "essence" of the employer's particular business?*** This requirement is designed to ensure that the qualification being scrutinized is so important to the operation of the business that the business would be undermined if employees of the "wrong" gender were hired. Keep in mind that the BFOQ must be necessary, not just convenient. Here, having bunnies that look like the *Playboy* magazine bunnies is the essence of the employer's business.

Contrast Southwest with Hooters restaurants, where Hooters asserted that its business is serving spicy chicken wings. Since males can serve chicken wings just as well as females, being female is not a BFOQ for being a Hooters server. However, if Hooters had said the purpose of its business is to provide males with scantily clad female servers for entertainment purposes, as it was with the Playboy clubs, then being female would be a BFOQ.

is a perfectly reasonable, legitimate, nondiscriminatory reason. However, if Green could show that the employer had rehired white employees who had engaged in similar unlawful activities, then McDonnell Douglas's legitimate, nondiscriminatory reason for Green's treatment would appear to be a mere pretext for discrimination since white employees who engaged in similar activities had been rehired despite their activity, but Green, who was black, had not.

The Bona Fide Occupational Qualification Defense

LO7

bona fide occupational qualification (BFOQ)
Permissible discrimination if legally necessary for an employer's particular business.

Employers also may defend against disparate treatment cases by showing that the basis for the employer's intentional discrimination is a **bona fide occupational qualification (BFOQ)** reasonably necessary for the employer's particular business. This is available only for disparate treatment cases involving gender, religion, and national origin and is not available for race or color. BFOQ is legalized discrimination and, therefore, very narrowly construed by the courts.

To have a successful BFOQ defense, the employer must be able to show that the basis for preferring one group over another goes to the essence of what the employer is in business to do and that predominant attributes of the group discriminated against are at odds with that business. (See Exhibit 2.7, "BFOQ Test.") The evidence supporting the qualification must be credible, and not just the employer's opinion. The employer also must be able to show it would be impractical to determine if each individual member of the group who is discriminated against could qualify for the position.

For instance, it has been held, based on expert evidence, that, because bus companies and airlines are in the business of safely transporting passengers from one place to another, and driving and piloting skills begin to deteriorate at a certain age, a maximum age requirement for hiring is an appropriate BFOQ for bus drivers and pilots.

As you can see from *Wilson v. Southwest Airlines Company,* included at the end of the chapter, not every attempt to show a BFOQ is successful. Southwest argued that allowing only females to be flight attendants was a BFOQ. However, the court held that the essence of the job of flight attendants is to be able to assist passengers if there is an emergency, and being female was not necessary for this role. Weigh the business considerations in the case against the dictates of Title VII and think about how you would decide the issue.

Make sure that you understand the distinction the court made in *Southwest Airlines* between the essence of *what* an employer is in business to do and *how* the employer chooses to do it. People often neglect this distinction and cannot understand why business owners cannot simply hire whomever they want (or not, as the case may be) if they have a marketing scheme they want to pursue. Marketing schemes go to the "how" of the employer's business, as in how an employer chooses to conduct his or her business or attract people to it, rather than the "what" of the business, which is what the actual business itself is set up to do. Getting passengers safely from one point to another is the "what" in *Southwest.* How the airline chose to market that business to customers is another matter and has little to do with the actual conduct of the business itself. Marketing schemes are not protected by law as BFOQs are. Perhaps the Playboy Club bunnies will make it clearer.

After the success of *Playboy* magazine, Playboy opened several Playboy clubs in which the servers were dressed as Playboy bunnies. The purpose of the clubs was not to serve drinks as much as it was to extend *Playboy* magazine and its theme of beautiful women dressed in bunny costumes into another form for public consumption. *Playboy* magazine and its concept were purely for the purpose of adult male entertainment. The bunnies serving drinks were not so much drink servers as they were Playboy bunnies in the flesh rather than on a magazine page. That is what the business of the clubs was all about. Though it later chose to open up its policies to include male bunnies, being female was a defensible BFOQ for being a bunny server in a Playboy club because having female bunnies was what the club was in business to do. Having sexy female flight attendants was not what Southwest Airlines was in the business to do.

As you saw in *Southwest,* in order for an employer to establish a successful bona fide occupational qualification reasonably necessary for the employer's particular business that will protect the employer from liability for discrimination, the courts use a *two-part test.* The employer has the burden of proving that it had reasonable factual cause to believe that all or substantially all members of a particular group would be unable to perform safely and efficiently the duties of the job involved. This is most effective if the employer has consulted with an expert in the area who provides a scientific basis for the belief—for example, using a doctor who can attest to factors that applicants over 35 years of age for professional driving positions

need at least 15 years to become a really competent driver, but after age 50 would begin to lose physical attributes needed for safe driving. The attributes must occur so frequently within the group being screened out that it would be safe to say the group as a whole could be kept out. The two-part test must answer the following questions affirmatively: (1) Does the job require that the employee be of one gender, and (2) if yes, is that reasonably necessary to the "essence" of the employer's particular business? Keep in mind that since a BFOQ is legalized discrimination, the bar to obtaining it is set very high. (See Exhibit 2.7, "BFOQ Test.")

Disparate Impact

LO6

disparate/adverse impact
Deleterious effect of a facially neutral policy on a Title VII group.

facially neutral policy
Workplace policy that applies equally to all appropriate employees.

While disparate treatment is based on an employee's allegations that she or he is treated differently as an individual based on a policy that is discriminatory on its face, **disparate impact** cases are generally statistically based group cases alleging that the employer's policy, while neutral on its face (**facially neutral**), has a disparate or adverse impact on a protected group. If such a policy impacts protected groups more harshly than others, illegal discrimination may be found if the employer cannot show that the requirement is a legitimate business necessity. This is why the police department's policy fails in the opening scenario. The 5-foot-4, 130-pound policy would screen out many more females than males and would therefore have to be shown to be job-related in order to stand. Statistically speaking, females, as a group, are slighter and shorter than males, so the policy has a disparate impact on females and could be gender discrimination in violation of Title VII. Actually, this has also been determined by courts to be true of males in certain ethnic groups, such as some Hispanics and Asians, who statistically tend to be lighter and shorter than the requirement.

The disparate impact theory was set forth by the U.S. Supreme Court in 1971 in *Griggs v. Duke Power Co.,* included at the end of the chapter. *Griggs* is generally recognized as the first important case under Title VII, setting forth how Title VII was to be interpreted by courts. Even though Title VII was passed in 1964 and became effective in 1965, it was not until *Griggs* in 1971 that it was taken seriously by most employers. *Griggs* has since been codified into law by the Civil Rights Act of 1991. In *Griggs,* the employer had kept a segregated workforce before Title VII as enacted, with African-American employees being consigned to the coal-handling department, where the highest-paid coal handler made less than the lowest-paid white employee in any other department. The day after Title VII became effective, the company imposed a high school diploma requirement and passing scores on two general intelligence tests in order for employees to be able to move from coal handling to any other department. Employees working in all other departments of the company, all of whom were white, were grandfathered in and did not have to meet these requirements.

While the policy looked neutral on its face, the impact was to effectively keep the status quo and continue to keep blacks in coal handling and whites in the other, higher-paying, departments. The Supreme Court struck down Duke Power Company's new requirements as a violation of Title VII due to its disparate impact on African Americans. Notice the difference between the theories in the

Exhibit 2.8 *Disparate Impact Screening Devices*

Court cases have determined that the following screening devices have a disparate impact:

- Credit status—gender, race.
- Arrest record—race.
- Unwed pregnancy—gender, race.
- Height and weight requirements—gender, national origin.
- Educational requirements—race.
- Marital status—gender.
- Conviction of crime unrelated to job performance—race.

Keep in mind that finding that a screening device has a disparate impact does not mean that it will automatically be struck down as discriminatory. The employer can always show that the screening device is based on a legitimate business necessity, as discussed shortly.

Griggs case involving disparate impact and the *McDonnell Douglas* case involving disparate treatment.

Griggs stood as good law until 1989 when the U.S. Supreme Court decided *Wards Cove Packing Co. v. Atonio*.[21] In that case, the Court held that the burden was on the employee to show that the employer's policy was *not* job related. In *Griggs* the burden was on the *employer* to show that the policy *was* job related. This increase in the employee's burden was taken as a setback in what had been considered settled civil rights law. It moved Congress to immediately call for *Griggs* and its 18-year progeny to be enacted into law so it would no longer be subject to the vagaries of whoever was sitting on the U.S. Supreme Court. The Civil Rights Act of 1991 did this.

screening device
Factor used to weed out applicants from the pool of candidates.

Disparate impact cases can be an employer's nightmare. No matter how careful an employer tries to be, a policy, procedure, or **screening device** may serve as the basis of a disparate impact claim if the employer is not vigilant in watching for its indefensible disparate impact. Even the most seemingly innocuous policies can turn up unexpected cases of disparate impact. (See Exhibit 2.8, "Disparate Impact Screening Devices.") Employers must guard against analyzing policies or actions for signs of intentional discrimination, yet missing those with a disparate impact. Ensure that any screening device is explainable and justifiable as a legitimate business necessity if it has a disparate impact on protected groups. This is even more important now that the EEOC has adopted its new E-RACE initiative. The purpose of the initiative is to put a renewed emphasis on employers' hiring and promotion practices in order to eliminate even the more subtle ways in which employers can discriminate. For instance, screening applicants on the basis of names, arrest or conviction records, credit scores, or employment and personality tests may have a disparate impact on people of color.

What Constitutes a Disparate Impact?

We have talked about disparate impact in general, but we have not yet discussed what actually constitutes a disparate impact. Any time an employer uses a factor as a screening device to decide who receives the benefit of any type of employment

decision—from hiring to termination, from promotion to training, from raises to employee benefit packages—it can be the basis for disparate impact analysis.

Title VII does not mention disparate impact. On August 25, 1978, several federal agencies, including the EEOC and the Departments of Justice and Labor, adopted a set of uniform guidelines to provide standards for ruling on the legality of employee selection procedures. The Uniform Guidelines on Employee Selection Procedures takes the position that there is a 20 percent margin permissible between the outcome of the majority and the minority under a given screening device. This is known as the **four-fifths rule**. Disparate impact is statistically demonstrated when the selection rate for groups protected by the law is less than 80 percent, or four-fifths, that of the higher-scoring majority group.

four-fifths rule
The minority must do at least 80 percent, or four-fifths, as well as the majority on a screening device or a presumption of disparate impact arises, and the device must then be shown to be a legitimate business necessity.

For example, 100 women and 100 men take a promotion examination. One hundred percent of the women and 50 percent of the men pass the exam. The men have only performed 50 percent as well as the women. Since the men did not pass at a rate of at least 80 percent of the women's passage rate, the exam has a disparate impact on the men. The employer would now be required to show that the exam is a legitimate business necessity. If this can be shown to the satisfaction of the court, then the job requirement will be permitted even though it has a disparate impact. Even then the policy may still be struck down if the men can show there is a way to accomplish the employer's legitimate goal in using the exam without it having such a harsh impact on them.

For example, suppose a store like Sears has a 75-pound lifting requirement for applicants who apply to work as mechanics in their car repair facilities. A woman who is not hired sues on the basis of gender discrimination, saying the lifting requirement has a disparate impact on women because they generally cannot lift that much weight. The store is able to show that employees who work in the car repair facilities move heavy tools from place to place in the garage. The lifting requirement is therefore a legitimate business necessity. Though the lifting policy screens out women applying for jobs as mechanics at a higher rate than it does men, and, for argument's sake, let's say women only do 20 percent as well as men on the lifting requirement, thus not meeting the four-fifths rule, the employer has provided a legitimate, nondiscriminatory reason for the lifting policy.

But suppose the applicant can counter that if the employer used a rolling tool cart (which is actually sold by Sears), then the policy would not have such a harmful impact on women and would still allow Sears what it needs. Even though Sears has given a legitimate, nondiscriminatory reason for its policy, it has been demonstrated that the policy can be made less harsh by allowing use of the carts.

The four-fifths rule guideline is only a rule of thumb. The U.S. Supreme Court stated in *Watson v. Fort Worth Bank and Trust* [22] that it has never used mathematical precision to determine disparate impact. What is clear is that the employee is required to show that the statistical disparity is significant and has the effect of selecting applicants for hiring and promotion in ways adversely affecting groups protected by the law.

The terminology regarding scoring is intentionally imprecise because the "outcome" depends on the nature of the screening device. The screening device can be

anything that distinguishes one employee from another for workplace decision purposes, such as a policy of hiring only ex-football players as barroom bouncers (most females would be precluded from consideration since most of them have not played football); a minimum passing score on a written or other examination; physical attributes such as height and weight requirements; or another type of differentiating factor. Disparate impact's coverage is very broad and virtually any policy may be challenged.

If the device is a written examination, then the outcomes compared will be test scores of one group (usually whites) versus another (usually African Americans or, more recently, Hispanics). If the screening device is a no-beard policy, then the outcome will be the percentage of black males affected by the medical condition pseudofolliculitis barbae that is exacerbated if they shave, versus the percentage of white males so affected. If it is a height and weight requirement, it will be the percentage of females or members of traditionally shorter and slighter ethnic groups who can meet that requirement versus the percentage of males or majority members who can do so. The hallmark of these screening devices is that they appear neutral on their face. That is, they appear on the surface to apply equally to everyone, yet upon closer examination, they have a harsher impact on a group protected by the law.

Disparate Impact and Subjective Criteria

When addressing the issue of the disparate impact of screening devices, subjective and objective criteria are a concern. *Objective criteria* are factors that are able to be quantified by anyone, such as scores on a written exam. *Subjective criteria* are, instead, factors based on the evaluator's personal thoughts or ideas (e.g., a supervisor's opinion as to whether the employee being considered for promotion is "compatible" with the workplace).

Initially it was suspected that subjective criteria could not be the basis for disparate impact claims since the Supreme Court cases had involved only objective factors such as height and weight, educational requirements, test scores, and the like. In *Watson v. Fort Worth Bank,* mentioned above, the Supreme Court, for the first time, determined that subjective criteria also could be the basis for a disparate impact claim.

In *Watson,* a black employee had worked for the bank for years and was constantly passed over for promotion in favor of white employees. She eventually brought suit, alleging racial discrimination in that the bank's subjective promotion policy had a disparate impact upon black employees. The bank's policy was to promote employees based on the recommendation of the supervisor (all of whom were white). The Supreme Court held that the disparate impact analysis could indeed be used in determining illegal discrimination in subjective criteria cases.

Disparate Impact of Preemployment Interviews and Employment Applications

Quite often questions asked during idle conversational chat in preemployment interviews or included on job applications may unwittingly be the basis for

discrimination claims. Such questions or discussions should therefore be scrutinized for their potential impact, and interviewers should be trained in potential trouble areas to be avoided. If the premise is that the purpose of questions is to elicit information to be used in the evaluation process, then it makes sense to the applicant that if the question is asked, the employer will use the information. It may seem like innocent conversation to the interviewer, but if the applicant is rejected, then whether or not the information was gathered for discriminatory purposes, the applicant has the foundation for alleging that it illegally impacted the decision-making process. (See Exhibit 2.8.) Only questions relevant to legal considerations for evaluating the applicant should be asked. There is virtually always a way to elicit legal, necessary information without violating the law or exposing the employer to potential liability. A chatty, untrained interviewer can innocently do an employer a world of harm.

For example, idle, friendly conversation has included questions by interviewers such as "What a beautiful head of gray hair! Is it real?" (age); "What an interesting last name. What sort of name is it?" (national origin); "Oh, just the one child? Are you planning to have more?" (gender); "Oh, I see by your engagement ring that you're getting married! Congratulations! What does your fiancée do?" (gender). These questions may seem, or even be, innocent, but they can come back to haunt an employer later. Training employees who interview is an important way to avoid liability for unnecessary discrimination claims.

Conversation is not the only culprit. Sometimes it is job applications. Applications often ask the marital status of the applicant. Since there is often discrimination against married women holding certain jobs, this question has a potential disparate impact on married female applicants (but not married male applicants for whom this is generally not considered an issue). If the married female applicant is not hired, she can allege that it was because she was a married female. This may have nothing whatsoever to do with the actual reason for her rejection, but since the employer asked the question, the argument can be made that it did. In truth, employers often ask this question because they want to know whom to contact in case of an emergency should the applicant be hired and suffer an on-the-job emergency. Simply asking who should be contacted in case of emergency, or not soliciting such information until after the applicant is hired, gives the employer exactly what the employer needs without risking potential liability by asking questions about protected categories that pose a risk. That is why in opening Scenario 4, Jill, as one who interviews applicants, is in need of training, just like those who actually hire applicants.

The Business Necessity Defense

LO7

business necessity
Defense to a disparate impact case based on the employer's need for the policy as a legitimate requirement for the job.

In a disparate impact claim, the employer can use the defense that the challenged policy, neutral on its face, that has a disparate impact on a group protected by law is actually job related and consistent with **business necessity**. For instance, an employee challenges the employer's policy of requesting credit information and demonstrates that, because of shorter credit histories, fewer women are hired than men. The employer can show that it needs the policy because it is in the business of handling large sums of money and that hiring only those people with good and

stable credit histories is a business necessity. Business necessity may not be used as a defense to a disparate treatment claim.

In a disparate impact case, once the employer provides evidence rebutting the employee's *prima facie* case by showing business necessity or other means of rebuttal, the employee can show that there is a means of addressing the issue that has less of an adverse impact than the challenged policy. If this is shown to the court's satisfaction, then the employee will prevail and the policy will be struck down.

Knowing these requirements provides the employer with valuable insight into what is necessary to protect itself from liability. Even though disparate impact claims can be difficult to detect beforehand, once they are brought to the employer's attention by the employee, they can be used as an opportunity to revisit the policy. With flexible, creative, and innovative approaches, the employer is able to avoid many problems in this area.

Other Defenses to Employment Discrimination Claims

Once an employee provides *prima facie* evidence that the employer has discriminated, in addition to the BFOQ, legitimate nondiscriminatory reason, and business necessity defenses discussed, the employer may perhaps present evidence of other defenses:

- That the employee's evidence is not true—that is, this is not the employer's policy as alleged or it was not applied as the employee alleges, the employee's statistics regarding the policy's disparate impact are incorrect and there is no disparate impact, or the treatment the employee says she or he received did not occur.
- That the employer's "bottom line" comes out correctly. We initially said that disparate impact is a statistical theory. Employers have tried to avoid litigation under this theory by taking measures to ensure that the relevant statistics will not exhibit a disparate impact. In an area in which they feel they may be vulnerable, such as in minorities' passing scores on a written examination, they may make decisions to use criteria that make it appear as if minorities do at least 80 percent as well as the majority, so the *prima facie* elements for a disparate impact case are not met. This attempt at an end run around Title VII was soundly rejected by the U.S. Supreme Court in *Connecticut v. Teal*.[23] In that case, an employer's written test exhibited a disparate impact on black employees who had already held their supervisory positions on a provisional basis for two years. Without a passing score on the written test, none of their other qualifications mattered and they could not move forward in the promotion process. To avoid liability, Connecticut used an unknown method to render the test scores as not having a disparate impact. The Supreme Court said this was not permissible, as it was equal employment opportunity required by law, not equal employment. Doing something to the test scores so that they no longer exhibited a disparate impact still left the black employees without an equal opportunity for the promotions. Note that this is also very often the reason you hear someone say there are "quotas" in a workplace. They are there *not*

because the law requires them—it doesn't—but rather because the employer has self-imposed them to try to avoid liability. *Not* a good idea. The best policy is to have an open, fair employment process. Manipulating statistics to reach a "suitable" bottom-line outcome is *not* permitted.

Teal demonstrates that protective legislation requires equal employment *opportunity,* not simply equal *employment.* This is *extremely* important to keep in mind. It is *not* purely a "numbers game" as many employers, including the state of Connecticut, interpret the law. Under the Civil Rights Act of 1991, it is an unfair employment practice for an employer to adjust the scores of, or to use different cutoff scores for, or to otherwise alter the results of, an employment-related test on the basis of a prohibited category as was done in *Teal.*

Employers' policies should ensure that everyone has an equal chance at the job, based on qualifications. The *Teal* employees had been in their positions on a provisional basis for nearly two years before taking the examination. The employer therefore had nearly two years of actual job performance that it could consider to determine the applicant's promotability. Instead, an exam was administered, requiring a certain score, which exam the employer could not show to be related to the job. Of course, the logical question is, "Then why give it?" Make sure you ask yourself that question before using screening devices that may operate to exclude certain groups on a disproportional basis. If you cannot justify the device, you take an unnecessary risk by using it.

Accommodation

The next legal concept we will discuss is that of the accommodation requirement. Religious discrimination under Title VII, as well as disability discrimination under the Americans with Disabilities Act (ADA), both require that employers attempt to accommodate workplace conflicts based on these categories. Discrimination is simply prohibited on the basis of race, color, gender, national origin, or age. However, discrimination on the basis of religion or disability is prohibited only as long as trying to accommodate the conflict between the status and the workplace policy does not create an undue hardship for the employer. We only introduce you to the generalities of the concept here, but understand that the considerations are quite different for religious accommodation and accommodation of those with disabilities and they will be discussed in their own chapters. Suffice it to say that in both cases, rather than an out-and-out prohibition against discrimination, the employer must try to accommodate conflicts, but only up to the point that it creates an undue hardship on the employer. What constitutes an undue hardship varies and will be discussed in more detail in the chapters, but the concept of trying to accommodate conflicts is present for both religion and disability discrimination.

Exhaustion of Administrative Remedies

The statutory schemes set out for employment discrimination claims require that claimants first pursue their grievances within the agency created to handle such claims, the Equal Employment Opportunity Commission (EEOC). The EEOC

exhaustion of administrative remedies
Going through the EEOC administrative procedure before being permitted to seek judicial review of an agency decision.

back pay
Money awarded for time an employee was not working (usually due to termination) because of illegal discrimination.

front pay
Equitable remedy of money awarded to a claimant when reinstatement is not possible or feasible.

retroactive seniority
Seniority that dates back to the time the claimant was treated illegally.

make-whole relief
Attempt to put the claimant in position he or she would have been in had there been no discrimination.

compensatory damages
Money awarded to compensate the injured party for direct losses.

punitive damages
Money over and above compensatory damages, imposed by the court to punish the defendant for willful acts and to act as a deterrent.

will be discussed in detail in the Title VII chapter. All of the protective statutes provide for courts to hear employment discrimination claims only after the claimant has done all that can be done at the agency level. This is called **exhaustion of administrative remedies**.

Employment Discrimination Remedies

Title VII and other protective legislation have specific remedies available to employee claimants. Keep in mind that the tort remedies discussed in the employment-at-will part of the chapter are separate from the administrative remedies available to discrimination claimants. Also, these remedies are the basic ones available for winning employees, but some of the statutes may contain variations that you will learn as you read the chapters for those specific categories.

If the employee in an EEOC case is successful, the employer may be liable for **back pay** of up to two years before the filing of the charge with the EEOC; for **front pay** for situations when reinstatement is not possible or feasible for claimant; for reinstatement of the employee to his or her position; for **retroactive seniority**; for injunctive relief, if applicable; and for attorney fees. Until passage of the Civil Rights Act of 1991, remedies for discrimination under Title VII were limited to **make-whole relief** and injunctive relief.

The Civil Rights Act of 1991 added **compensatory damages** and **punitive damages** as available remedies. Punitive damages are permitted when it is shown that the employer's action was malicious or was done with reckless indifference to federally protected rights of the employee. They are not allowed under the disparate/adverse impact or unintentional theory of discrimination (to be discussed shortly) and may not be recovered from governmental employers. Compensatory damages may include future pecuniary loss, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. (See Exhibit 2.9, "Employment Discrimination Remedies.")

There are certain limitations on the damages under the law. Gender discrimination (including sexual harassment) and religious discrimination have a $300,000 cap total on nonpecuniary (pain and suffering) compensatory and punitive damages. There is no limitation on medical compensatory damages. The cap depends on the number of employees the employer has. (See Exhibit 2.10, "Compensatory and Punitive Damages Caps.") Juries may not be told of the caps on liability. Since race and national origin discrimination cases also can be brought under 42 U.S.C. § 1981, which permits unlimited compensatory damages, the caps do not apply to these categories. In 2001, the U.S. Supreme Court ruled that, though compensatory damages are capped by the law, the limitations do not apply to front pay.[24] Also, as previously discussed, the U.S. Supreme Court's *Hoffman* decision[25] foreclosed the ability of undocumented workers to receive post-discharge back pay, and the EEOC rescinded its policy guidance suggesting otherwise.

With the addition of compensatory and punitive damages possible in Title VII cases, litigation increased dramatically. It is now more worthwhile for employees

Exhibit 2.9 *Employment Discrimination Remedies*

These are the basic remedies available, but as mentioned, some of the protective statutes provide additional remedies that will be discussed in those chapters.

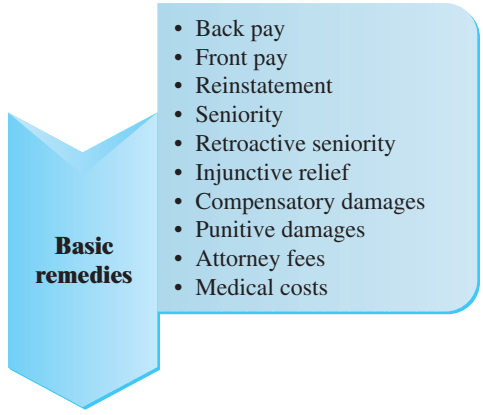


Exhibit 2.10 *Compensatory and Punitive Damages Caps*

For employers with:

to sue and for lawyers to take the cases. The possibility of monetary damages also makes it more likely that employers will settle more suits rather than risk large damage awards. Again, the best defense against costly litigation and liability is solid, consistently applied workplace policies.

Additional Legal Resources

LO9

One of the things students often tell us is that they found this text so helpful that they decided to keep it rather than sell it after the course was over. They later find it quite helpful once they enter the workplace. With this in mind, and because we also understand that the text may not cover every single issue that may be of interest to you, we are including a section on how to find additional legal resources once you have been exposed to the law. Our section is not exhaustive but will give you quite enough to be able to search for additional information when the need arises. With the resources now available to everyone, there is no excuse not to be informed.

Law Libraries

Law libraries can be found everywhere from private firms to public courthouses and can contain only a few necessary legal resources or vast ones. While many of these are closed to the general public, check with your local sources to be certain. If you are lucky enough to live in or near a town that has a law school, there will inevitably be a law library and the legal world is within your reach. In addition to reporters containing law cases, there will also be law journals from around the world, legal treatises on any area of law you can imagine, books on legal issues, legal research updating sources, and local, state, federal and international legal resources. You do not need to be a lawyer or law student to be able to access most libraries and find what you are looking for. Most institutions open their doors to everyone, and that is certainly the case at public institutions. Depending on the nature of your inquiry, you may be able to simply place a call to the law librarian and ask for help with what you need. Law librarians are incredible founts of knowledge about legal resources available, how best to access them, and where to find what you need.

The Internet

One of the most exciting things that has happened since we first began writing this text is the advent of the Internet and its now virtually omnipresent use. We have rejoiced as it has expanded from a time when information was available only if you knew a Web site to which you could go directly, to the present time when search engines can find whatever you want in seconds. This evolution has been very exciting for us to watch as the Internet includes more and more legal databases for public consumption, taking the law out of the hands of the lucky few who could access it as lawyers and law students and giving it to the public at large who could now be much more informed. Such access is imperative for an informed democratic society. If you had not thought so before, surely you did as

you watched the recent political situations unfold in Tunisia, Egypt, Libya, and elsewhere in North Africa and the Middle East. Knowledge is powerful, and the Internet brings unbelievable legal resources to your computer. A few well-chosen search terms can quickly bring you exactly what you are looking for.

We will list a few Web sites on which you can find legal resources for free, but there are also other legal databases that cost to access. Check with your institution or employer to see if they have available for you the legal databases of Westlaw or Lexis/Nexis. Both of these are vast full-service legal databases, but as you will see below, Lexis has limited free public access for at least the cases. In addition, many law firms maintain as part of their Web sites free recent information on issues they deal with. If you enter into a search engine the particular issue you wish to research, you will likely find many resources in addition to the ones listed here. At the end of the listings below, you will find two compilation resources that allow you to stay up to date by subject matter based on many of these resources created by law firms. Of course, we would welcome suggestions by students and faculty alike for general resources to add to this list.

- FindLaw is a great legal research Web site that is easy to navigate and has extensive legal resources. http://www.public.findlaw.com
- The U.S. Supreme Court maintains a Web site that includes access to its decisions. http://www.supremecourt.gov/
- The Oyez Project Web site has easily searchable major U.S. Supreme Court decisions that include media such as the Court's oral arguments. http://www.oyez.org/
- The Government Printing Office maintains a searchable Web site for federal agency regulations in the Code of Federal Regulations. http://www.gpoaccess.gov/cfr/index.html
- Municode.com provides links to municipal codes all over the country in an easily searched format. http://www.municode.com/Library/Library.aspx
- LexisOne is the public Web site adjunct of the Lexis/Nexis legal database and provides a searchable database of free cases. http://law.lexisnexis.com/webcenters/lexisone/
- Government Information Resources maintained by the University of Virginia provides links to administrative agency decisions and actions. http://www2.lib.virginia.edu/govtinfo/fed_decisions_agency.html
- Washlaw is a pretty comprehensive Web site maintained by the Washburn School of Law with free access to the public. http://www.washlaw.edu/uslaw/index.html
- The Social Science Research Network has an extensive library of journal articles and working papers on many topics, including law. http://papers.ssrn.com/sol3/DisplayAbstractSearch.cfm
- The Directory of Open Access Journals provides links to thousands of journals, including legal journals, that do not charge for access. http://www.doaj.org/
- Usa.gov is the opening portal to all types of government resources, including legal. http://www.usa.gov

Management Tips

- You are always allowed to hire the best person for a job; the law merely states that you may not make this decision based on prejudice or stereotypes. In order to avoid a wrongful discharge suit and, more importantly, to ensure the ethical quality of your decisions, do not fire someone for some reason that violates basic principles of dignity, respect, or social justice.
- Make sure that your policies and procedures create a space for employees to voice any concerns and complaints. It is most effective for employees to be able to share these issues with you long before they reach a breaking point. Then, make sure that everyone knows about them through appropriate training.
- You have the right to fire an employee for *any* reason as long as it is not for one of the specific reasons prohibited by law. On the other hand, if you do not have sufficient documentation or other evidence of the appropriate reason for your decision, a court might infer that your basis is wrongful.
- While it is unfortunate, to say the least, when an employee reports wrongdoing occurring at your firm, you may not retaliate against that person. Be sure to avoid even the *appearance* of retaliation, as the actual motivation for employment decisions is often difficult to prove.
- Have termination decisions be subject to internal review. Unilateral decisions to fire an employee may lead to emotion—or the *appearance of emotion*—rather than reason being used to determine terminations. Additional review can protect against this consequence.
- In the event of a layoff:
  - Clearly explain to employees the reasons for the actions taken: Document all efforts to communicate with employees.
  - Prepare the managers who will deliver the message.
  - Speak plainly and do not make promises.
  - Avoid euphemisms such as "We are all family and we will be together again someday."
  - Emphasize that it is not personal.
  - Know how layoffs will affect the demographic breakdown of the staff.
- Make sure employees are aware of their rights under the law regarding any protected category to which they may belong.
- Do not retaliate for employees pursuing legally protected rights!
- Do not forget that certain protected categories must be accommodated to the extent that such accommodation does not present an undue burden on the employer.

Source: Partially adapted from Matthew Boyle, "The Not-So-Fine Art of the Layoff," *Fortune,* March 19, 2001, pp. 209–210.

- The U.S. Senate's Web site can access information on U.S. laws, pending bills and other Senate business. Its Virtual Reference Desk is particularly helpful in accessing information organized around a particular topic. http://www.senate.gov/
- The Web site for the U.S. House of Representatives provides information on all aspects of pending and passed legislation for that body. http://www.house.gov/
- THOMAS is the Library of Congress's Web site that provides a wealth of information on legislation, including laws, treaties, and other legislative matters. http://thomas.loc.gov/
- The Legal Information Institute (LII) at Cornell University is one of the earliest public access legal databases formed with the intention to make the law accessible to all in an understandable way. It contains links to federal, state, and other legal resources. http://www.law.cornell.edu/
- The Congressional Research Service, which prepares reports on virtually any topic for members of Congress, maintains an open Web site to provide these reports to the public. http://opencrs.com/
- The Government Printing Office has a searchable database of all federal agency actions in the Federal Register. http://www.gpoaccess.gov/fr/index.html
- Mondaq provides legal, regulatory, and financial commentaries on recent rulings and other statutory events, organized by subject matter. You can subscribe to e-mail alerts organized by subject matter in order to stay current on those areas of the law that interest you (and related to over 70 countries). http://www.mondaq.com/
- In association with the Association of Corporate Counsel, http://www.lexology.com/ provides a service similar to Mondaq, with a greater focus on legal cases and their implications.

Chapter Summary

- With the concepts and information provided in this chapter, not only will you be able to navigate more easily and efficiently through the subsequent chapters, but you also have resources to use if you wish to know more or even to explore your own legal issues.
- Given the possibility of unlimited compensatory and punitive damage awards in wrongful discharge actions, employers are cautioned regarding their interpretation and implementation of the at-will employment arrangement. Employees' protections from unjust dismissal are not limited to statutes prohibiting employment discrimination based on certain factors. Increasingly, employees are able to rely on promises made by the employer through, for example, the employment policy manual.
- Further, public policy considerations beyond antidiscrimination protections also place limits on the manner in which an employer may terminate an employment relationship. An employer is prohibited from acting in a manner that undermines public policy, however defined.

- In employment discrimination cases, employee's facts must fit within one of two bases in order to be recognized under protective employment legislation. Disparate treatment and disparate impact each have their own unique requirements.
- It is not enough for an employee to simply feel there has been discrimination; the facts must fit within the law.
- Retaliation against an employee for pursuing rights provided by the law is a separate cause of action from the underlying employer action itself and can be found even when the underlying basis is not.
- Given the rise in retaliation claims in the courts and EEOC, it is imperative that employers not take adverse action against their employees for pursuing legitimate legal claims.

Chapter-End Questions

1. Ron and Megan Dible needed some extra money so they decided to charge money for viewing some sexually explicit photographs and videos of themselves that they had posted on the Internet. While this was an otherwise legal act, Ron Dible was a police officer, and after the Chandler Police Department, his employer, learned of his actions, he was terminated. Is his termination in violation of his right to freedom of expression under the First Amendment? [*Dible v. City of Chandler,* 502 F.3d 1040 (9th Cir. 2007).]
2. Think about the following questions from the point of view of violation of public policy or breach of a covenant of good faith and fair dealing, and see what the outcome would be.
   a. A female child care worker alleges that she was unlawfully terminated from her position as the director of a child care facility after continually refusing to make staff cuts. The staff cuts she was asked to make resulted in violation of state regulations governing the minimum ratios betweens staff and child. After the employee was terminated, the employer's child care center was in violation of the staff-to-child ratio. [*Jasper v. H. Nizam, Inc.,* 764 N.W.2d 751, 2009 Iowa Sup.]
   b. A machine operator employee with a major depressive disorder intermittently takes leaves under the Family and Medical Leave Act, resulting in alleged harassment by her employer surrounding her FMLA usage as well as a transfer to various difficult machines after her return from leave. Two months after her last FMLA leave, she is terminated for "improper phone usage." [*Hite v. Vermeer Mfg. Co.,* 361 F. Supp. 2d 935 (S.D. Iowa, 2005).]
   c. A nurse is asked by her employer to sign a backdated Medicare form. She refuses and is terminated that day. As a health care provider, she is required to complete that particular form. [*Callantine v. Staff Builders, Inc.,* 271 F.3d 1124 (8th Cir. 2001).]
   d. A legal secretary to a county commissioner is terminated because of her political beliefs. [*Armour v. County of Beaver,* 271 F.3d 417 (3d Cir. 2001).]
   e. A teacher under contract is terminated after insisting that his superiors report a situation where a student was being physically abused. The teacher refused to commit an illegal act of not reporting the suspected abuse to family services. [*Keveney v. Missouri Military Academy,* 304 S.W.3d 98 (MO 2010).]

f. A recent college graduate found a job with an office supply company as a reverse logistics analyst. Soon after being hired, he found that some practices within the department could be deemed unlawful and unethical. Three specific types of practices were written up in a formal complaint to his supervisor: (1) the issuing of monetary credits to customers without proper documentation, thus overpaying customers without returned goods; (2) the department's knowingly withholding from contract customers by underissuing credits over $25; and (3) the canceling and reissuing of pickup orders that could allow couriers to overbill the company. After his formal complaint and multiple meetings on the procedures of the department, the employee was terminated based on his insubordination and inflexibility. [*Day v. Staples Inc.,* 28 IER Cases 1121 (1st Cir. 2009).]

g. An employee engaged in protected whistle-blowing activity after filing a complaint against his employer for his termination. The employee, a licensed optician, claimed his employer was violating state statute by allowing unlicensed employees to sell optical products without a licensed optician present. There was also a complaint filed to his supervisor about the promoting and hiring of unlicensed employees. [*Dishmon v. Wal-Mart Stores Inc.,* 28 IER Cases 1393 (M.D. Tenn. 2009).]

h. A legal secretary was hired by a law firm. The Letter of Employment stated, "In the event of any dispute or claim between you and the firm . . . including, but not limited to claims arising from or related to your employment or the termination of your employment, we jointly agree to submit all such disputes or claims to confidential binding arbitration, under the Federal Arbitration Act." On his third day of work, the employee informed his superiors that he would not agree to arbitrate disputes. He was told that the arbitration provision was "not negotiable" and that his continued employment was contingent upon signing the agreement. The employee declined to sign the agreement and was discharged [*Lagatree v. Luce, Forward, Hamilton & Scripps,* 74 Cal. App. 4th 1005 (Cal. App. 2d Div. 1 1999).]

i. An employee is licensed to perform certain medical procedures, but he is terminated for refusing to perform a procedure he is not licensed to perform. [*O'Sullivan v. Mallon,* 390 A.2d 149 (N.J. Super. Ct. Law Div. 1978).]

j. An employee was fired from his job as security manager for a medical center because he was suspected of making an obscene phone call to another employee and refused to submit to voice print analysis to confirm or refute the accusation. He sued the employer for wrongful discharge, claiming that the employer's request violated public policy. A state statute prohibits an employer from requiring an employee to submit to a polygraph examination as a condition or precondition of employment. [*Theisen v. Covenant Medical Center,* 636 N.W.2d 74 (Iowa 2001).]

3. Mariani was a licensed CPA who worked for Colorado Blue Cross and Blue Shield as manager of general accounting for human resources. She complained to her supervisors about questionable accounting practices on a number of occasions and was fired. She claims that her termination was in violation of public policy in favor of accurate reporting, as found in the Board of Accountancy Rules of Professional Conduct. BCBS claims that the rules are not an arbiter of public policy as ethics codes are too variable. Who is correct? [*Rocky Mountain Hospital v. Mariani,* 916 P.2d 519 (Colo. 1996).]
4. Patricia Meleen, a chemical dependency counselor, brought charges alleging wrongful discharge, defamation, and emotional distress against the Hazelden Foundation, a

chemical dependency clinic, in regard to her discharge due to her alleged sexual relations with a former patient. Hazelden's written employment policies prohibited unprofessional and unethical conduct, including sexual contact between patients and counselors. A former patient alleged that Meleen had initiated a social and sexual relationship with him within one year of his discharge. A committee appointed by Hazelden told Meleen of the allegation against her and suspended her with pay in spite of Meleen's denial that she was involved in any improper relations or sexual contact with the former patient. Hazelden offered Meleen a nonclinical position, and when she refused, she was dismissed. Is the dismissal wrongful? [*Meleen v. Hazelden Foundation,* 928 F.2d 795 (8th Cir. 1991).]

5. Max Huber was the agency manager at Standard Insurance's Los Angeles office. He was employed as an at-will employee, and his contract did not specify any fixed duration of guaranteed employment. Huber was discharged by the company after eight years because of his alleged negative attitude, the company's increasing expense ratio, and the agency's decreasing recruiting. Huber provided evidence that he had never received negative criticism in any of his evaluations, and that his recruiting had been successful. Huber demonstrated that, even though the company had a decrease in recruitment during his employment, he himself had a net increase of contracted agents of 1,100 percent. Huber claims that he was discharged because he was asked to write a letter of recommendation about his supervisor, Canfield, whose termination was being considered. Johnson, Canfield's supervisor, was disappointed with the positive recommendation that Huber wrote because it made Canfield's termination difficult to execute. Johnson is alleged to have transferred Huber to expedite Canfield's termination, and he eventually discharged Huber in retaliation for the positive letter of recommendation. If Huber files suit, what will the result be? [*Huber v. Standard Insurance Co.,* 841 F.2d 980 (9th Cir. 1988).]
6. A new employer policy at a dental office stated that the employees were unable to leave the office except to use the restroom, even with a patient cancellation. A husband of an employee e-mailed the employer that he had discussed the new rules with an attorney who noted they were in violation of state law. The employer let the employee go soon after the complaint. Does the employee have a claim? [*Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.,* 186 P.3d 80, 2008 Colo.]
7. Althea, black, has been a deejay for a local Christian music station for several years. The station got a new general manager and within a month he terminated Althea. The reason he gave was that it was inappropriate for a black deejay to play music on a white Christian music station. Althea sues the station. What is her best theory for proceeding?
8. An employee files a race discrimination claim against the employer under Title VII. The employee alleges that after filing a claim with the EEOC, her rating went from outstanding to satisfactory and she was excluded from meetings and important workplace communications, which made it impossible for her to satisfactorily perform her job. The court denied the race discrimination claim. Must it also deny the retaliation claim? [*Lafate v. Chase Manhattan Bank,* 123 F. Supp. 2d 773 (D. Del. 2000).]
9. Day Care Center has a policy stating that no employee can be over 5 feet 4 inches because the employer thinks children feel more comfortable with people who are closer to them in size. Does Tiffany, who is 5 feet 7 inches, have a claim? If so, under what theory could she proceed?

End Notes

1. For an expanded discussion of the evolution of the at-will environment, see Richard Bales, "Explaining the Spread of At-Will Employment as an Inter-Jurisdictional Race-to-the-Bottom of Employment Standards," *Tennessee Law Review* 75, no. 3 (2007), p. 1, http://ssrn.com/abstract=989013; Deborah A. Ballam, "Exploding the Original Myth Regarding Employment-at-Will: The True Origins of the Doctrine," *Berkeley Journal of Employment & Labor Law* 17 (1996), p. 91.
2. Bales, op. cit 128 Wash. 2d 931, 913 P.2d 377 (1996).
3. If the employer uses a contract to create the at-will relationship, the contract should state that the written document is their entire agreement and that only modifications in writing and signed by the employer will be valid.
4. 128 Wash. 2d 931, 913 P.2d 377 (1996).
5. Ibid. at 950 (emphasis added).
6. *Upton v. JWP Businessland,* 682 N.E.2d 1357 (Mass. 1997).
7. These states include Arizona, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Maine, Maryland, Minnesota, Nevada, New Jersey, New York, Ohio, Oregon, Texas, Utah, Vermont, Virginia and West Virginia.
8. 78 Cal. Rptr. 2d 16 (Cal. 1998).
9. 126 S. Ct. 2405 (2006).
10. Ibid. at 2415.
11. *Mickey v. Zeidler Tool & Die Co., et al.,* 516 F.3d 516, 525 (6th Cir. 2008).
12. No. 2:05-CV-063, 2006 U.S. Dist. LEXIS 46328 (S.D. Ohio, 2006).
13. For a more detailed discussion of the implications of these holdings, see, e.g., J. W. Fineman, "The Inevitable Demise of the Implied Employment Contract," University of Colorado Law Legal Studies Research Paper No. 07-25 (September 17, 2007), http://ssrn.com/abstract=1015136.
14. See also *Buttrick v. Intercity Alarms, LLC,* No. 08-ADMS-40004, Massachusetts District Court, Appellate Division (June 17, 2009) (held not unreasonable for the employee to regard the employee manual as a binding commitment, thus implied contract).
15. For a comprehensive list, see Littler Mendelson, *The National Employer 2007–2008* (2007), www.littler.com.
16. *Anderson v. First Century Fed. Credit Union,* 738 N.W.2d 40, 46 (S.D. 2007); *Van Meter Industries v. Mason City Human Rights Commission,* 675 N.W.2d 503 (Iowa 2004). A minority of courts hold additional requirements such as that the former employee must also show that the employer created the intolerable working conditions with the specific intent of forcing the employee to quit. However, this intent can be inferred where the employee's departure is a reasonably foreseeable consequence of the employer's actions. *Martin v. Cavalier Hotel Corp.,* 67 FEP Cases 300 (4th Cir. 1995).
17. 2006 U.S. App. LEXIS 31895 (10th Cir. May 22, 2006).
18. Tex., No. 08-1337, jury verdict, May 26, 2010.
19. *Talley v. Family Dollar Stores of Ohio,* 542 F.3d 1099 (6th Cir. 2008).
20. *Coryell v. Bank One Trust,* 2008 Ohio 2698 (C.A. 2008).
21. 490 U.S. 642 (1989).
22. 487 U.S. 997 (1988).

23. 457 U.S. 440 (1982).
24. *Pollard v. E.I. du Pont de Nemours & Co.,* 532 U.S. 843 (2001).
25. *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002).
26. We do not suggest the covenant of good faith and fair dealing has no function whatever in the interpretation and enforcement of employment contracts. As indicated above, the covenant prevents a party from acting in bad faith to frustrate the contract's *actual* benefits. Thus, for example, the covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation already earned. We confront no such claim here.

Cases

Palmateer v. International Harvester Company

85 Ill. 2d 124, 421 N.E.2d 876 (1981)

Ray Palmateer had worked for International Harvester (IH) for 16 years at the time of his discharge. Palmateer sued IH for retaliatory discharge, claiming that he was terminated because he supplied information to local law enforcement authorities regarding a co-worker's criminal activities and for offering to assist in the investigation and trial of the co-worker if necessary. The court agreed and found in favor of Palmateer.

Simon, J.

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[The court discusses the history of the tort of retaliatory discharge in Illinois and explains that the law will not support the termination of an at-will employment relationship where the termination would contravene public policy.] But the Achilles heel of the principle lies in the definition of public policy. When a discharge contravenes public policy in any way, the employer has committed a legal wrong. However, the employer retains the right to fire workers at-will in cases "where no clear mandate of public policy is involved."

There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions. Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharge shows that a matter must strike at the heart of a citizen's

social rights, duties, and responsibilities before the tort will be allowed.

It is clear that Palmateer has here alleged that he was fired in violation of an established public policy. There is no public policy more basic, nothing more implicit in the concept of ordered liberty than the enforcement of a State's criminal code. There is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens.

No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and the prosecution of crime, but public policy nevertheless favors citizen crime-fighters. Public policy favors Palmateer's conduct in volunteering information to the law enforcement agency. Palmateer was under a statutory duty to further assist officials when requested to do so.

The foundation of the tort of retaliatory discharge lies in the protection of public policy, and there is a clear public policy favoring investigation and prosecution of criminal offenses. Palmateer has stated a cause of action for retaliatory discharge.

Case Questions

1. Is there a difference between the court's protection of an employee who reports a rape by a co-worker or the theft of a car, and an employee who is constantly reporting the theft of the company's paper clips and pens?
2. Should the latter employee in the above question be protected? Consider that the court in Palmateer remarked that "the magnitude of the crime is not the issue here. It was the General Assembly who decided that the theft of a $2 screwdriver was a problem that should be resolved by resort to the criminal justice system."
3. What are other areas of public policy that might offer protection to terminated workers?

Herawi v. State of Alabama, Department of Forensic Sciences *311 F. Supp. 2d 1335 (M.D. Ala. 2004)*

Herawi is an Iranian doctor whose employment was terminated. She filed a complaint against the defendant, the state Department of Forensic Sciences, alleging national origin discrimination and retaliation. The state responded that it had legitimate nondiscriminatory reasons for terminating her (insubordination and poor job performance). The district court found that Herawi's national origin discrimination claim would not be dismissed on summary judgment because her supervisor's threat that she would report the doctor's national origin to law enforcement made clear that her supervisor was antagonistic towards her because of her Iranian heritage, and that the timing of the doctor's termination (three weeks after complaining about the supervisor's behavior) suggested that the supervisor's apparent dislike for her national origin may have infected the process of evaluating the doctor. Herawi also prevailed against summary judgment on the retaliatory discharge claim. (Herawi also claimed hostile environment but did not succeed and the discussion of that claim is not included below.)

OPINION BY: Myron H. Thompson, J.

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II. Factual Background

During the relevant time period, Herawi's supervisor in the Montgomery office [of the Alabama Department of Forensic Sciences] was Dr. Emily Ward. Herawi, like all state employees, was a probationary employee for her first six months on the job.

Ward was highly critical of Herawi almost immediately upon her arrival in the Montgomery office. On her first day at work, Ward accused Herawi of being inconsiderate for not offering to help her. Ward looked at Herawi with a "hatred filled stare" and mocked her by repeating her in a high-pitched voice. On or about October 22, 2001, Ward became enraged at Herawi, shouted

at her, accused her of wrongdoing, and said she had had enough of Herawi and that Herawi was the rudest person she had ever met. When Herawi tried to explain her actions, Ward yelled louder and said that she did not like Herawi and that no one else liked her either.

On October 24, Herawi expressed to Craig Bailey, the office director, her concerns about the way Ward was treating her. Bailey later told Herawi that, after his conversation with her, he spoke to Ward to find out if she had a problem with people of Middle Eastern descent. Bailey told Herawi that people from the Middle East were perceived as rude and aggressive.

On November 7, Ward "implied" to Herawi that she was getting calls from people asking about Herawi's background and her accent, and she threatened to expose Herawi's nationality to law enforcement agencies. Ward also said that she was getting calls from people asking who Herawi was, asking why she was there, and stating that she did not belong there.

Herawi had two more run-ins with Ward in December 2001, after Herawi had taken time off in November to visit her mother in California after the death of her father. On December 6, Ward called Herawi into her office, where Bailey yelled at Herawi, accusing her of neglecting the office after her father died and not performing enough autopsies. Bailey also questioned Herawi about whether she was looking for a job in California. On or about December 25, Herawi confronted Ward about whether Ward had spread a rumor that Herawi was looking for a job in California. [The court outlines additional, subsequent circumstances, which it discusses later in this opinion.]

On January 2, 2002, Herawi received an "employee probationary performance appraisal" and an attached narrative performance appraisal, dated November 15, 2001. The narrative performance appraisal states that Herawi "appears to be a very intelligent and dedicated Forensic Pathologist" and that she "seems to have been well trained." The narrative appraisal, however, goes on to state that "her performance has been problematic in four inter-related areas: expectations of co-workers, recognition of and subordination to authority, incessant inquisitiveness, and lack of organization." It also states that Herawi "comes across as very self-centered and projects an 'entitlement complex'"; that she "has also refused to comply with departmental regulations and/or rules if she doesn't agree with them"; and that her "work habits leave room for improvement." The narrative was signed by Ward and Downs, [J.C. Upshaw Downs, the Director of the Alabama Department of Forensic Sciences and the Chief Medical Examiner for Alabama, and others.]

Herawi brought her concerns about Ward to Downs on January 4, 2002. Herawi told Downs that Ward had threatened to expose her nationality; Herawi also told Downs that she felt confused and intimidated. Downs told Herawi that Middle Eastern people were generally facing troubles in the wake of the terrorist attacks on September 11, 2001, and that Herawi should turn the other cheek. However, Downs said he would speak to Ward.

On January 9, 2002, Downs wrote a letter to Thomas Flowers, the state personnel director, requesting that Herawi's probationary period be extended by three months. Downs wrote that Herawi "requires additional training in autopsy procedures to take a more organized approach to the process" and that she "must also learn to use the chain of command."

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Ward alluded to Herawi's nationality again on March 7, 2002. Ward told Herawi that nobody liked her, that everybody complained about her, that she did not belong there, that should leave, and that her English was bad. After this incident, Herawi complained to Downs again on March 21, about Ward's hostility. At this meeting, Downs told Herawi that he would start an investigation, and Herawi told Downs that she had contacted a lawyer. Herawi also complained to Samuel Mitchell, the department chief of staff, on March 25.

Events came to a head on March 28, at a meeting attended by Herawi, Ward, Bailey and Steve Christian, the department's personnel Manager. Herawi claims that she was terminated during the meeting and that when she met with Christian shortly after the meeting, he told her it was unofficial policy that terminated employees could submit a letter of resignation. Memoranda written by Ward, Bailey and Christian present slightly different accounts. According to Ward, she informed Herawi that the situation was not working out and that the department had not seen any improvement in the areas identified in Herawi's performance appraisal. According to Ward, before she could finish, Herawi interrupted her to say she would quit. According to Bailey, Ward requested Herawi's resignation, and Herawi agreed. According to Christian, Ward told Herawi that an offer of permanent employment would not be forthcoming and then told Herawi to speak with him later that day. When they met, according to Christian, he told her it was the department's unofficial policy to allow employees to resign to make it easier to look for work in the future.

Herawi submitted a letter of resignation on April 1, 2002. A letter from Downs, dated April 18, confirmed Herawi's "separation from employment" at the department effective April 19. Downs's letter states that the reason for Herawi's separation is that she continued "to require additional training in autopsy procedures and failure to properly use the chain of command."

III. Analysis

Herawi claims that (1) she was terminated because of her Iranian origin; (2) she was fired in retaliation for her complaints about Ward; and (3) she was harassed because of her national origin [not addressed in this excerpt]. The Forensic Department has moved for summary judgment on the ground that its decision not to offer her a permanent position was based on legitimate, nondiscriminatory reasons. The court will consider Herawi's claims in order.

A. Termination

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iv.

Applying *McDonnell Douglas*, this court concludes that Herawi has met her *prima-facie* burden of producing "evidence adequate to create an inference that [the Forensic Department's] employment decision was based on an [illegal] discriminatory criterion." To establish a *prima-facie* case of discriminatory discharge, she must show the following: (1) she is a member of a protected class; (2) she was qualified for the position at issue; (3) she was discharged despite her qualification; and (4) some additional evidence that would allow an inference of discrimination. [The court evaluates Herawi's evidence of these elements and finds that Herawi satisfies the first three elements; it then continues in its analysis of the fourth requirement, below.]

In this case, Ward made remarks related to Herawi's national origin on three occasions. On November 7, 2001, Ward threatened to report Herawi's national origin to law enforcement agencies. On January 2, 2002, Ward told Herawi that she was getting calls asking who Herawi was and why she was working there; Ward suggested that she was getting these calls because of Herawi's accent. Finally, on March 7, 2002, Ward told Herawi that no one liked her, that she did not belong at the department, that she should leave, and that her English was bad. It is undisputed that Ward was Herawi's direct supervisor when she made these remarks and that Ward had substantial input into the ultimate decision to terminate Herawi. In fact, Ward conducted Herawi's January 2002 performance appraisal, and she wrote the four memoranda in February and March of 2002 documenting incidents involving Herawi. Given this evidence, the court is satisfied that Herawi has raised the inference that her national origin was a motivating factor in the department's decision to terminate her.

The burden thus shifts to the Forensic Department to articulate a legitimate nondiscriminatory reason for its decision to fire Herawi. The department has met this "exceedingly light" burden. It asserts that Herawi was not retained because she "had problems with autopsy procedures and with the chain of command." Plainly, job performance, failure to follow instructions, and insubordination are all legitimate, nondiscriminatory considerations.

Because the department has met its burden, Herawi must show that its asserted reasons are pretextual. The court finds, again, that the evidence of Ward's comments about Herawi's national origin is sufficient for Herawi to meet her burden. Comments or remarks that suggest discriminatory animus can be sufficient circumstantial evidence to establish pretext. "Whether comments standing alone show pretext depends on whether their substance, context, and timing could permit a finding that the comments are causally related to the adverse employment action at issue."

In this case, Ward's comments "might lead a reasonable jury to disbelieve [the department's] proffered reason for firing" Herawi. Ward's threat that she would report Herawi's nationality to law enforcement makes it clear that she was antagonistic towards Herawi because of Herawi's Iranian origin. Ward's later comment that Herawi did not belong in the department, made at the same time she commented on Herawi's accent, further evinced discriminatory animus. Standing alone, this might not be enough evidence to establish a genuine question of pretext, but Ward was Herawi's supervisor, conducted her performance appraisal, and wrote four memoranda containing negative evaluations of her. In this context, the evidence suggests that Ward's evident dislike for Herawi's national origin may have infected the process of evaluating Herawi. The timing of Ward's remarks reinforces this conclusion. The first incident in which Ward referred to Herawi's nationality occurred one week before the narrative performance appraisal of Herawi was written, the second incident occurred on the same day—January 2, 2002—that Ward completed the

performance appraisal form, and her final remarks were made three weeks before Herawi was fired. Because of this close temporal proximity, a jury could reasonably conclude that discriminatory attitude evidence in Ward's remarks motivated the decision to fire Herawi. Accordingly, the court finds that Herawi has met her burden and that summary judgment on her termination claim is not appropriate.

B. Retaliation

Herawi contends that the Forensic Department retaliated against her for complaining to Downs and to Mitchell about Ward's conduct. The department has moved for summary judgment, again, on the basis that its employment decision was motivated by legitimate, nondiscriminatory reasons.

Under Title VII, it is an unlawful employment practice for an employer to discriminate against an employee "because [s]he has opposed any practice made an unlawful employment practice by this subchapter, or because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." The same *McDonnell Douglas* burden-shifting framework that applies to claims of discriminatory discharge applies to claims for retaliation.

The Eleventh Circuit has established broad standards for a *prima-facie* case of retaliation. An individual alleging retaliation under Title VII must establish her *prima-facie* case by demonstrating "(1) that she engaged in statutorily protected activity, (2) that an adverse employment action occurred, and (3) that the adverse action was causally related to [her] protected activities." "The causal link element is construed broadly so that a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated."

Herawi has established the elements of a *prima-facie* case of retaliation. First, she was engaged in protected activity on the two occasions that she spoke with Downs and on the one occasion she spoke to Mitchell. Second, Herawi was terminated. Third, Herawi satisfies the causality requirement because she was terminated only a week after her meeting with Downs and three days after her meeting with Mitchell.

Because Herawi has produced evidence sufficient to meet her *prima-facie* burden, the burden of production shifts to the Forensic Department to produce a legitimate, non-retaliatory reason for its decision. As discussed above, the department has offered legitimate reasons for its decision. The department contends that it fired Herawi because of her problems with autopsy procedure and her problems following the chain of command. The burden thus shifts to Herawi to come forward with evidence sufficient for a reasonable fact finder to conclude that the department's asserted reasons were pretext for retaliation.

Herawi has met this burden. As discussed above, Herawi has presented substantial evidence of Ward's animus towards her and thus raised a very real question about the extent to which the department's assessment of her might have been influenced by Ward's attitude. There is also evidence from which a reasonable fact finder could conclude that Ward's assessment of Herawi was infected by a retaliatory motive. In October 2001, Bailey reported to Ward that Herawi had complained to him about her, and, in January 2002, Downs spoke to Ward about Herawi's complaints. Thus, at the same time that Ward was evaluating and assessing Herawi's job performance in the fall of 2001, and the winter of 2002, she was aware that Herawi had gone to various supervisors to complain about her. The court also considers it relevant to determining pretext that Herawi was dismissed so soon after she complained to Downs and Mitchell. While temporal proximity, standing alone, may not be enough to create a genuine issue of pretext, it is a relevant factor. Thus, taking into consideration the evidence of Ward's discriminatory animus, her possible retaliatory motive, and the extreme closeness in time between Herawi's complaints and her dismissal, the court concludes that Herawi has evidence sufficient for a reasonable fact finder to conclude that the department's asserted reasons for her dismissal were pretextual.

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IV. Conclusion

For the reasons given above, it is ORDERED as follows:

(1) The motion for summary judgment, filed by defendant Alabama Department of Forensic Sciences on November 12, 2003 (doc. no. 20), is granted with respect to plaintiff Mehsati Herawi's hostile-environment claim.

Case Questions

1. Are you persuaded by the state's evidence that it had an individual of a different national origin who was

treated similarly to Herawi? If Ward (or other managers) treated everyone equally poorly, perhaps there is no national origin claim. What if Ward's defense is simply that her poor treatment of Herawi had nothing to do with national origin, but that she just really did not like Hewari, specifically? Would that be an acceptable defense and could it have saved the state's case?

2. The court explains that pretext may be based on comments depending on "whether their substance, context, and timing could permit a finding that the comments are causally related to the adverse employment action at issue." What elements would you look to in order to find pretext, if you were on a jury?
3. The court explains that timing, alone, would not be enough to satisfy the causality requirement of retaliatory discharge. Given the facts of this case, if you were in charge of the department, and if Hewari truly were not performing at an acceptable level and you wished to terminate her after all of these circumstances, how might you have better protected the department from a retaliatory discharge claim?

Guz v. Bechtel National Inc. *100 Cal. Rptr. 2d 352 (Cal. 2000)*

Plaintiff John Guz, a longtime employee of Bechtel National, Inc. (BNI), was terminated at age 49 when his work unit was eliminated as a way to reduce costs. At the time he was hired and at his termination, Bechtel had a Personnel Policy (no. 1101) on the subject of termination of employment which explained that "Bechtel employees have no employment agreements guaranteeing continuous service and may resign at their option or be terminated at the option of Bechtel." Guz sued BNI and its parent, Bechtel Corporation, alleging age discrimination, breach of an implied contract to be terminated only for good cause, and breach of the implied covenant of good faith and fair dealing. The trial court found in favor of Bechtel and dismissed the action. The Court of Appeals reversed and determined that the trial should instead be permitted to proceed. Bechtel appealed to the Supreme Court of California, which in this opinion reverses the judgment of the Court of Appeals based on a finding that no *implied* contract exists and remands only for a determination of whether there are any enforceable *express* contract terms.

Baxter, J.

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III. Implied Covenant Claim

Bechtel urges that the trial court properly dismissed Guz's separate claim for breach of the implied covenant of good faith and fair dealing because, on the facts and arguments presented, this theory of recovery is either inapplicable or superfluous. We agree.

The sole asserted basis for Guz's implied covenant claim is that Bechtel violated its established personnel policies when it terminated him without a prior opportunity to improve his "unsatisfactory" performance, used no force ranking or other objective criteria when selecting him for layoff, and omitted to consider him for other positions for which he was qualified. Guz urges that *even if his contract was for employment at-will,* the implied covenant of good faith and fair dealing precluded Bechtel from "unfairly" denying him the contract's benefits by failing to follow its own termination policies.

Thus, Guz argues, in effect, that the implied covenant can impose substantive terms and conditions beyond those to which the contract parties actually agreed. However, as indicated above, such a theory directly contradicts our conclusions in *Foley v. Interactive Data Corp.* (1988). The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made.* The covenant thus cannot "be endowed with an existence independent of its contractual underpinnings." It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.

. . . The mere existence of an employment relationship affords no expectation, protectable by law, that employment will continue, or will end only on certain conditions, unless the parties have actually adopted such terms. Thus if the employer's termination decisions, however arbitrary, do not breach such a substantive contract provision, they are not precluded by the covenant.

This logic led us to emphasize in *Foley* that "breach of the implied covenant cannot logically be based on a claim that [the] discharge [of an at-will employee] was made without good cause." As we noted, "[b]ecause the implied covenant protects only the parties' right to receive the benefit of their agreement, and, in an at-will relationship there is no agreement to terminate only for good cause, the implied covenant standing alone cannot be read to impose such a duty."

The same reasoning applies to any case where an employee argues that even if his employment was at-will, his arbitrary dismissal frustrated his contract benefits and thus violated the implied covenant of good faith and fair dealing. Precisely because employment at-will *allows* the employer freedom to terminate the relationship as it chooses, the employer does not frustrate the employee's contractual rights merely by doing so. In such a case, "the employee cannot complain about a deprivation of the benefits of continued employment, for the agreement never provided for a continuation of its benefits in the first instance."

At odds with *Foley* are suggestions that independent recovery for breach of the implied covenant may be available if the employer terminated the employee in "bad faith" or "without probable cause," i.e., without determining "honestly and in good faith that good cause for discharge existed." Where the employment contract itself allows the employer to terminate at-will, its motive and lack of care in doing so are, in most cases at least, irrelevant.

A number of Court of Appeal decisions since *Foley* have recognized that the implied covenant of good faith and fair dealing imposes no independent limits on an employer's prerogative to dismiss employees . . . We affirm that this is the law.

Of course, as we have indicated above, the employer's personnel policies and practices may become *implied-in-fact terms* of the contract between employer and employee. If that has occurred, the employer's failure to follow such policies when terminating an employee is a breach of the contract itself.

A breach of the contract may also constitute a breach of the implied covenant of good faith and fair dealing. But insofar as the employer's acts are directly actionable as a breach of an implied-in-fact contract term, a claim that merely realleges that breach as a violation of the covenant is superfluous. This is because, as we explained at length in *Foley,* the remedy for breach of an employment agreement, including the covenant of good faith and fair dealing implied by law therein, is *solely contractual*. In the employment context, an implied covenant theory affords no separate *measure of recovery,* such as tort damages. Allegations that the breach was wrongful, in bad faith, arbitrary, and unfair are unavailing; there is no tort of "bad faith breach" of an employment contract.

We adhere to these principles here. To the extent Guz's implied covenant cause of action seeks to impose limits on Bechtel's termination rights *beyond* those to which the parties actually agreed, the claim is invalid. To the extent the implied covenant claim seeks simply to invoke terms to which the parties *did* agree, it is superfluous. Guz's remedy, if any, for Bechtel's alleged violation of its personnel policies depends on proof that they were contract terms to which the parties actually agreed. The trial court thus properly dismissed the implied covenant cause of action.[26]

Case Questions

1. Based on *Guz,* can the implied covenant of good faith and fair dealing apply to any conditions not actually stated in a contract? In other words, can the covenant apply to anything beyond that which is actually stated in an employment contract? If not, is there no implied covenant as long as someone is at-will without a contract?
2. Explain the distinction between the court's discussion of the covenant of good faith and fair dealing and the possibility of an implied contract term.
3. How might an employer create an "implied-in-fact term" and how could a failure to follow such policies when terminating an employee create a breach of the contract?

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

Green, an employee of McDonnell Douglas and a black civil rights activist, engaged with others in "disruptive and illegal activity" against his employer in the form of a traffic stall-in. The activity was done as part of Green's protest that his discharge from McDonnell Douglas was racially motivated, as were the firm's general hiring practices. McDonnell Douglas later rejected Green's reemployment application on the ground of the illegal conduct. Green sued, alleging race discrimination. The case is important because it is the first time the U.S. Supreme Court set forth how to prove a disparate treatment case under Title VII. In such cases the employee can use an inference of discrimination drawn from a set of inquiries the Court set forth.

Powell, J.

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The critical issue before us concerns the order and allocation of proof in a private, nonclass action challenging employment discrimination. The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. The facts necessarily will vary in Title VII cases, and the specification of the *prima facie* proof required from Green is not necessarily applicable in every respect to differing factual situations.

In the instant case, Green proved a *prima facie* case. McDonnell Douglas sought mechanics, Green's trade, and continued to do so after Green's rejection. McDonnell Douglas, moreover, does not dispute Green's qualifications and acknowledges that his past work performance in McDonnell Douglas' employ was "satisfactory."

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here McDonnell Douglas has assigned Green's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge McDonnell Douglas' burden of proof at this stage and to meet Green's *prima facie* case of discrimination.

But the inquiry must not end here. While Title VII does not, without more, compel the rehiring of Green, neither does it permit McDonnell Douglas to use Green's conduct as a pretext for the sort of discrimination prohibited by Title VII. On remand, Green must be afforded a fair opportunity to show that McDonnell Douglas' stated reason for Green's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against McDonnell Douglas of comparable seriousness to the "stall-in" were nevertheless retained or rehired.

McDonnell Douglas may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races. Other evidence that may be relevant to any showing of pretext includes facts as to McDonnell Douglas' treatment of Green during his prior term of employment; McDonnell Douglas' reaction, if any, to Green's legitimate civil rights activities; and McDonnell Douglas' general policy and practice with respect to minority employment.

On the latter point, statistics as to McDonnell Douglas' employment policy and practice may be helpful to a determination of whether McDonnell Douglas' refusal to rehire Green in this case conformed to a general pattern of discrimination against blacks. The District Court may, for example, determine after

reasonable discovery that "the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices." We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire. In short, on the retrial Green must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover up for a racially discriminatory decision. VACATED and REMANDED.

Case Questions

1. Do you think the Court should require actual evidence of discrimination in disparate treatment cases rather than permitting an inference? What are the advantages? Disadvantages?
2. Practically speaking, is an employer's burden really met after the employer "articulates" a legitimate nondiscriminatory reason for rejecting the employee? Explain.
3. Does the Court say that Green must be kept on in spite of his illegal activities? Discuss.

Wilson v. Southwest Airlines Company

517 F. Supp. 292 (N.D. Tex. Dallas Div. 1981)

A male sued Southwest Airlines after he was not hired as a flight attendant because he was male. The airline argued that being female was a BFOQ for being a flight attendant. The court disagreed.

Higginbotham, J.

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Memorandum Opinion

Southwest conceded that its refusal to hire males was intentional. The airline also conceded that its height–weight restrictions would have an adverse impact on male applicants, if actually applied. Southwest contends, however, that the BFOQ exception to Title VII's ban on gender discrimination justifies its hiring only females for the public contact positions of flight attendant and ticket agent. The BFOQ window through which Southwest attempts to fly permits gender discrimination in situations where the employer can prove that gender is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Southwest reasons it may discriminate against males because its attractive female flight attendants and ticket agents personify the airline's sexy image and fulfill its public promise to take passengers skyward with "love." The airline claims maintenance of its females-only hiring policy is crucial to its continued financial success.

Since it has been admitted that Southwest discriminates on the basis of gender, the only issue to decide is whether Southwest has proved that being female is a BFOQ reasonably necessary to the normal operation of its particular business.

As an integral part of its youthful, feminine image, Southwest has employed only females in the high customer contact positions of ticket agent and flight attendant. From the start, Southwest's attractive personnel, dressed in high boots and hot-pants, generated public interest and "free ink." Their sex appeal has been used to attract male customers to the airline. Southwest's flight attendants, and to a lesser degree its ticket agents, have been featured in newspaper, magazine, billboard, and television advertisements during the past 10 years. According to Southwest, its female flight attendants have come to "personify" Southwest's public image.

Southwest has enjoyed enormous success in recent years. From 1979 to 1980, the company's earnings rose from $17 million to $28 million when most other airlines suffered heavy losses.

The broad scope of Title VII's coverage is qualified by Section 703(e), the BFOQ exception. Section 703(e) states:

(e) Notwithstanding any other provision of this subchapter,

(1) It shall not be an unlawful employment practice for an employer to hire . . . on the basis of his religion, gender, or national origin in those certain instances

where religion, gender, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

The BFOQ defense is not to be confused with the doctrine of "business necessity" which operates only in cases involving unintentional discrimination, when job criteria which are "fair in form, but discriminatory in operation" are shown to be "related to" job performance.

This Circuit's decisions have given rise to a two step BFOQ test: (1) does the particular job under consideration require that the worker be of one gender only; and if so, (2) is that requirement reasonably necessary to the "essence" of the employer's business. The first level of inquiry is designed to test whether gender is so essential to job performance that a member of the opposite gender simply could not do the same job.

To rely on the bona fide occupational qualification exception, an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved. The second level is designed to assure that the qualification being scrutinized is one so important to the operation of the business that the business would be undermined if employees of the "wrong" gender were hired. . . . The use of the word "necessary" in section 703(e) requires that we apply a business necessity test, not a business convenience test. That is to say, discrimination based on gender is valid only when the essence of the business operation would be undermined by not hiring members of one gender exclusively.

Applying the first level test for a BFOQ to Southwest's particular operations results in the conclusion that being female is not a qualification required to perform successfully the jobs of flight attendant and ticket agent with Southwest. Like any other airline, Southwest's primary function is to transport passengers safely and quickly from one point to another. To do this, Southwest employs ticket agents whose primary job duties are to ticket passengers and check baggage, and flight attendants, whose primary duties are to assist passengers during boarding and deboarding, to instruct passengers in the location and use of aircraft safety equipment, and to serve passengers cocktails and snacks during the airline's short commuter flights. Mechanical, nongender-linked duties dominate both these occupations. Indeed, on Southwest's short-haul commuter flights there is time for little else. That Southwest's female personnel may perform their mechanical duties "with love" does not change the result. "Love" is the manner of job performance, not the job performed.

Southwest's argument that its primary function is "to make a profit," not to transport passengers, must be rejected. Without doubt the goal of every business is to make a profit. For purposes of BFOQ analysis, however, the business "essence" inquiry focuses on the particular service provided and the job tasks and functions involved, not the business goal. If an employer could justify employment discrimination merely on the grounds that it is necessary to make a profit, Title VII would be nullified in short order.

In order not to undermine Congress' purpose to prevent employers from "refusing to hire an individual based on stereotyped characterizations of the genders," a BFOQ for gender must be denied where gender is merely useful for attracting customers of the opposite gender, but where hiring both genders will not alter or undermine the essential function of the employer's business. Rejecting a wider BFOQ for gender does not eliminate the commercial exploitation of sex appeal. It only requires, consistent with the purposes of Title VII, that employers exploit the attractiveness and allure of a gender-integrated workforce. Neither Southwest, nor the traveling public, will suffer from such a rule. More to the point, it is my judgment that this is what Congress intended.

Case Questions

1. What should be done if, as here, the public likes the employer's marketing scheme?
2. Do you think the standards for BFOQs are too strict? Explain.
3. Should a commercial success argument be given more weight by the courts? How should that be balanced with concern for Congress's position on discrimination?

Griggs v. Duke Power Co. *401 U.S. 424 (1971)*

Until the day Title VII became effective, it was the policy of Duke Power Co. that blacks be employed in only one of its five departments: the Labor Department. The highest-paid black employee in the Labor Department made less than the lowest-paid white employee in any other department. Blacks could not transfer out of the Labor Department into any other department. The day Title VII became effective, Duke instituted a policy requiring new hires to have a high school diploma and passing scores on two general intelligence tests in order to be placed in any department other than Labor and a high school diploma to transfer to other departments from Labor. Two months later, Duke required that transferees from the Labor or Coal Handling Departments who had no high school diploma pass two general intelligence tests. White employees already in other departments were grandfathered in under the new policy and the high school diploma and intelligence test requirements did not apply to them. Black employees brought this action under Title VII of the Civil Rights Act of 1964, challenging the employer's requirement of a high school diploma and the passing of intelligence tests as a condition of employment in or transfer to jobs at the power plant. They alleged the requirements are not job related and have the effect of disqualifying blacks from employment or transfer at a higher rate than whites. The U.S. Supreme Court held that the act dictated that job requirements which have a disproportionate impact on groups protected by Title VII be shown to be job related.

Burger, J.

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We granted the writ in this case to resolve the question of whether an employer is prohibited by Title VII of the Civil Rights Act of 1964 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.

What is required by Congress [under Title VII] 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 classifications.

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 without meaningful study of their relationship to job performance ability.

The evidence 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.

Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in head winds" for minority groups and are unrelated to measuring job capability.

The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as general measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

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 measured or 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. REVERSED.

Case Questions

1. Does this case make sense to you? Why? Why not?
2. The Court said the employer's intent does not matter here. Should it? Explain.
3. What would be your biggest concern as an employer who read this decision?