PROVING – OR DISPROVING
EMPLOYMENT DISCRIMINATION CLAIMS

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1. BURDENS OF PROOF: ENDA, TITLE VII AND OTHER CONSIDERATIONS

A. ENDA (EMPLOYMENT NON-DISCRIMINATION ACT) AND THE EQUALITY ACT
• Senate Bill 815, the 2013 version of ENDA\(^1\) would prohibit employment discrimination on the basis of sexual orientation or gender identity.

• Currently 21 states, including the District of Columbia, have laws which make it illegal for current and potential employers to discriminate against an individual’s stated or perceived sexual orientation.
Seventeen states, including the District of Columbia, have laws which prohibit current or potential employers from discriminating against employee’s gender identity.
• ENDA would essentially give LGBT Americans full rights under Title VII of the Civil Rights Act of 1964, by making it illegal to discriminate against LGBT individuals in the workplace on a federal level. Although SB 815 passed the Senate, it was killed in committee in the House of Representatives.
The Equality Act, H.R. 2282, S. 1006, was introduced as a bipartisan measure in Congress on May 2, 2017.

The Equality Act would amend existing civil rights law.

It would amend the Civil Rights Act of 1964 to prohibit discrimination in public spaces and services and federally funded programs on the basis of sex.
A fact sheet on ENDA can be found at:
1https://www.transequality.org/sites/default/files/docs/resources/Factsheet_ENDAJan2014_FINAL.pdf.
2See https://www.govtrack.us/congress/bills/115/hr2282/text/ih.
B. Title VII
Courts have established three ways of proving intentional discrimination under Title VII of the Civil Rights Act of 1964:

A. Circumstantial evidence
B. Direct evidence
C. A pattern or practice of discrimination.
*McDonnell Douglas* established that in an employment discrimination case:

1. The plaintiff/employee must first establish a prima facie case of discrimination.

2. The defendant/employer must produce evidence of a legitimate non-discriminatory reason for its actions.

3. The plaintiff must then be allowed a fair opportunity to present facts to show an inference of discrimination.
McDonnell Douglas does not apply if the plaintiff presents direct evidence of discrimination.

- Direct evidence proves the fact of discrimination without inference or presumption.
- Direct evidence includes any statement or written document demonstrating a discriminatory motive on its face.

Once direct evidence is presented, the burden shifts to the employer to establish by a preponderance of the evidence that it would have taken the same action regardless of the forbidden factor.
Pattern or practice does not focus on a particular employment decision. Instead, it focuses on a pattern of decision making.
C. OTHER CONSIDERATIONS
Title VII not only prohibits overt discrimination. An employee establishes a prima facie case of disparate impact by:

- Identifying the specific employment practice being challenged.
- Establishing the disparate impact of the practice(s) on the protected group.
- Demonstrating that the disparity is caused by or the result of one or more identified employee practices.
Once disparate impact is established, the burden shifts to the employer to show that the challenged employment practice is job related and consistent with business necessity. The employee may overcome the business necessity defense by demonstrating the existence of alternative employment practices which do not cause adverse impact which the employer refused to adopt.
Once again, the ultimate burden of proof remains with the plaintiff/employee.
2. SUFFICIENT DOCUMENTATION TO PROVE PRIMA FACIE CASES
The employee’s burden at the prima facie case is not onerous and requires:

- The plaintiff is a member of a protected group, such as race, sex, ethnicity, disability, religion, gender, age.
- Proof of an adverse employment action or injury caused by the defendant.
- The action caused damages to the plaintiff/employee.
Using a baseball analogy, a prima facie case is like getting to first base. To ultimately prevail, however, the runner must cross home plate.
What are adverse employment actions?

• Being turned down for a job for which the applicant is qualified
• Being demoted
• Being fired
• Being placed on administrative leave
• Deprived of ability to take promotional exam
• Loss of pay
• Denial of transfer
• Cut in monthly base salary
• Low rating on job performance review
• Decreased job responsibilities
• Failure to receive promotions
• Negative job reference
• Failure to hire
• Disciplinary suspension
3. HOW EMPLOYERS CAN SATISFY THE BURDEN OF PRODUCTION
The employer need only produce evidence that, if ultimately believed by the trier of fact, establishes a legitimate non-discriminatory reason for its action. In order for the plaintiff to prevail, a judge or jury must be convinced that the employer’s actions were intentionally discriminatory.
The establishment of a prima facie case is rebutted once the employer comes forward with a non-discriminatory reason for its adverse employment action. This is known as the *Burdine Hicks* analysis.

If the defendant carries [its] burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff’s prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.
The Court, in *Reeves v. Sanderson Plumbing Products, Inc.* addressed the kind and amount of evidence necessary to sustain a jury’s verdict in an age discrimination case. Reeves brought an age discrimination action after being terminated. The employer’s stated reasons for terminating Reeves was that he had failed to maintain accurate attendance records.
4. BURDEN OF PERSUASION: ESTABLISHING PRETEXT FOR DISCRIMINATION
The definition of pretext is “a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs.”³

Pretext is generally the single most important issue in employment discrimination cases because the employer usually will be able to articulate a legitimate non-discriminatory reason for its adverse employment action. The employee must then carry its ultimate burden of persuasion by showing that the proffered reason is false.
Pretext is critical at two stages of a discrimination case. First, at the summary judgment stage, and second, before the jury. Both stages require proof that the employer’s reason(s) are false, and the real reason is a discriminatory one.
From the plaintiff’s counsel perspective, it is essential to begin the process of investigation and discovery to gather necessary evidence to raise a fact question if the employer’s counsel moves for summary judgment on the discrimination claim.
Document production requests should be sent to obtain the employer’s records, including electronic communications, such as email, texts, chat messages, in addition to internal memos and more formal written communications. The requests should capture communications up the supervisory chain.
The Court in *McDonnell Douglas* articulated several methods of showing pretext, including:

- Instances in which persons outside the protected class were treated better for comparable offenses.
- The manner in which the employee was treated by the employer while employed.
- The employer’s reaction to “legitimate civil rights activities.”
- Statistics concerning the employer’s employment policy and practice with respect to minority employment insofar as it may suggest a general pattern of discrimination.
5. **HOW EMPLOYER DOCUMENTATION MAKES OR BREAKS DISCRIMINATION CLAIMS**
Vasquez filed an internal complaint of sexual harassment against a co-worker who sent bawdy text messages. She was fired when the co-worker deceived the company’s internal investigators by manipulating other text messages and photos to make it appear that Vasquez was a willing participant.
Many people approach email, text and chat messages very informally, and do not review the content critically before hitting the send button. Discovery of this information may make the critical difference whether an employment discrimination case survives summary judgment or supports a jury finding of discrimination.
6. ADDITIONAL CONSIDERATIONS FOR RETALIATION CLAIMS
Retaliation claims are more likely to survive summary judgment due to the subjective issue of intent, as opposed to discrimination claims. Retaliation claims are also considered to be one of the more difficult claims to defend at trial, because they are built on timing, subjectivity, and inference.
Also, since retaliation claims imply retribution, or conduct that is intentional, blatant, and malicious, there is an increased risk of an award of punitive damages.
The anti-retaliation language of Title VII extends to both employees who have “opposed any practice made an unlawful employment practice” [under the statute] (the “opposition clause”) and to employees who have made a charge, testified, assisted, or participated in any manner in an investigation proceeding or hearing [under the statute] (the “participation clause”).

“Our tolerance is not zero, it’s watch out below.”
Timing is important in retaliation cases. A substantial lapse in time between a protected activity and the adverse employment action may negate an inference of retaliation where the culminating event is the last step in a process that began before the protected activity, an inference of retaliation may be dispelled.
7. CURRENT ISSUES AND UPDATES: LGBT DISCRIMINATION, NATIONAL ORIGIN DISCRIMINATION, ETC.
LGBT Discrimination

By the end of 2016, 20 states, plus Washington D.C., banned discrimination based on sexual orientation and gender identity or expression in employment, housing, and public accommodations. Further, there have been a number of state bills which target transgender persons in their use of appropriate facilities, including restrooms, or restricting transgender student’s ability to fully participate in school.
The Trump administration has angered gay rights activists by having the Justice Department file an amicus brief in a federal appeals court in New York involving gay skydiving instructor Donald Zarda who claimed he was fired from his skydiving firm because he was gay.
In April, 2017, the full bench of the 7th Circuit voted 8-3 to overrule a series of prior decisions which held that sex discrimination did not extend to sexual orientation discrimination. The majority opinion concluded that bias against gays and lesbians amounts to gender discrimination because it treats individuals differently on account of their sex and their failure to conform to gender stereotypes.
National Origin Discrimination

The Immigration Act of 1924, or Johnson-Reed Act, including the National Origins Act, and Asian Exclusion Act, limited the annual number of immigrants who could be admitted from any country based on the % of people from that country who were already living in the U.S. based on U.S. Census. The Act controlled “undesirable” immigration by establishing quotas, and barring immigrants of some specific national origins.
The Trump administration’s proposal was to call a commission to develop policies to “keep immigration levels, measured by population share, within historic norms,” which would signal a return to immigration policies under the National Origins Act.
QUESTIONS??