

I. TEXAS COMMISSION ON HUMAN RIGHTS ACT

I. Elements of a Claim

An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer:

(1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or terms, conditions, or privileges of employment; or

(2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.

Texas Labor Code § 21.051

II. Case Analysis

The Texas Commission on Human Rights Act (TCHRA) is a comprehensive civil rights statute which prohibits employment discrimination in virtually all aspects of employment in Texas. The express purpose of the TCHRA is to execute the anti-employment discrimination policies embodied in Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Consequently, when reviewing a case brought pursuant to the TCHRA, the courts look not only to the relevant provisions of the state statute, but also to the analogous federal provisions and the federal case law interpreting it.

II. TITLE VII of the CIVIL RIGHTS ACT

I. Elements of a Claim

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(a)

II. Definitions - Protected Classes

1. Race - Identifiable classes of people that can be viewed as genetically separate (i.e. Caucasian American, African American, Asian Pacific American, Native American, and Alaskan Native).

2. Color - The skin pigmentation of a person not classed as white.

3. National Origin - An individual's place of birth, the place of birth of the individual's ancestors or an individual who retains the cultural characteristics and/or language of the individual's ancestor (i.e. Hispanic American).

4. Religion - A set of traditional, sincere beliefs, values, and practices based upon a God or Supreme Power.

5. Sex - Male and Female.

III. Burdens of Proof

A. Disparate Treatment - Circumstantial Evidence:

...sufficient evidence from which a legal inference of discrimination can be drawn; if such inference is left unexplained, it can be concluded that the adverse action complained of was more likely than not motivated by unlawful bias...

1. The complainant must put forth a prima facie case of discrimination by showing (*either*):

a. Hiring/Promotion

- 1) that s/he is in a protected class;
- 2) that s/he applied for and was qualified for the job;
- 3) that s/he was denied the position; and
- 4) that the position remained open and the respondent continued to seek applicants from persons of complainant's qualifications *or* the respondent filled the job with an applicant outside of the complainant's protected class.

or

b. Disciplinary (including discharge)

- 1) that s/he is in a protected class;
- 2) qualified for the job;
- 3) that s/he was disciplined/discharged; and
- 4) that someone similarly situated and outside his or her protected class was treated differently.

2. The respondent then has the burden of production (not the burden of proof) to articulate a legitimate, non-discriminatory reason(s) for the decision. *If the defendant fails to do so, an inference of discrimination arises.*

3. The complainant can keep his or her claim alive only by showing (through his or her burden of proof) that the stated reason(s) was a pretext (or cover up) for discrimination. *To overcome the respondent's rebuttal, the complainant must prove not only that the respondent's proffered reason(s) is false but also that the real reason(s) for the respondent's challenged action was discrimination or conduct otherwise prohibited by Title VII.*

4. Relevant Case Law

- a. *McDonnell Douglas v. Green*, 93 S. Ct. 1817 (1973)
- b. *Texas Dept. of Community Affairs v. Burdine*, 101 S. Ct. 1089 (1981)
- c. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993)
- d. *Sanderson v. Reeves*, 120 S. Ct. 2097 (2000)

B. Disparate Treatment - Direct Evidence

...written or verbal policy or statement made by a respondent or respondents official that on its face demonstrates a bias against a protected group and is linked to the complained of adverse action...

1. The complainant must, through a prima facie case of discrimination, show that the respondent actually relied on an illegitimate/illegal consideration in

making its decision. Said another way, the complainant must show that an impermissible motive played a motivating factor in the adverse employment decision.

a. Hiring/Promotion/Discipline/Discharge

- 1) complainant is in a protected class;
- 2) s/he applied and was qualified for the job;
- 3) s/he was denied the position *or* s/he was disciplined/discharged; and
- 4) respondent relied on an illegitimate/illegal consideration in making its decision.

2. The respondent must by a preponderance of the evidence (burden of proof – no shifting burdens) present a legitimate non-discriminatory reason for its employment decision, absent the illegitimate/illegal motive. The respondent must show that its legitimate reason, standing alone, would have induced it to make the same decision. *In making this decision the respondent must produce proof of a legitimate reason for the action that actually motivated it at the time of the decision. A mere assertion of a legitimate motive, without additional evidence proving that this motive was a factor in the decision and that it would independently have produced the same result, would not be sufficient.*

3. Relevant Case Law

- a. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989)

C. Disparate Impact – Impact Analysis

...focuses on whether the employer has facially neutral policy or qualification that has a disparate impact on members of complainant's protected class. The employer need not intend to discriminate...

1. The complainant must demonstrate that the employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.

2. The respondent must demonstrate that the challenged practice is job related for the position in question and consistent with a business necessity. *Both the burden of proof and persuasion shifts to the respondent.*

3. If the respondent can show business necessity or a legitimate business objective then complainant must show that there was a less discriminatory alternative employment practice and the respondent refused to adopt such alternative employment practice.

4. If a respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity. A respondent may not use

the defense of business necessity for its employment practice if a plaintiff brings a claim of intentional discrimination under the disparate impact theory.

5. Relevant Case Law

- a. *Griggs v. Duke Power*, 91 S. Ct. 849 (1971)

D. Retaliation

...prohibits a respondent from discharging or disciplining a complainant because s/he filed a charge, participated in an investigation or otherwise opposed a discriminatory practice...

1. To establish a prima facie case a complainant must show that:
 - a) s/he engaged in a protected activity;
 - b) an adverse action occurred; and
 - c) but for the protected activity the adverse action would never have occurred.
2. The respondent must articulate a legitimate nondiscriminatory reason for its decision.
3. The complainant can keep his or her claim alive only by showing (through his or her burden of proof) that the stated reason(s) was a pretext (or cover up) for retaliation. *Complainant need not establish that his or her protected activity was the sole factor motivating the termination, his or her burden is to show that “but for” the protected activity he or she would not have been subjected to the action which he or she claims.*
4. Relevant Case Law
 - a. *McDaniel v. Temple ISD*, 770 F. 2d 1340 (5th Cir. 1985)
 - b. *Nowlin v. Resolution Trust Corp.*, 33 F. 3d 498 (5th Cir. 1994)
 - c. *Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995)
 - d. *Mattern v. Eastman Kodiak*, 104 F. 3d 702 (5th Cir. 1997)
 - e. *Shackelford v. Deloitte & Touche*, 190 F.3d 398 (5th Cir. 1999)

E. Religion

1. To establish a prima facie case a complainant must show that:
 - a) s/he has a bona fide religious belief that is in conflict with a requirement of the job;
 - b) s/he has informed the employer of this belief;

c) s/he suffered an adverse action for failing to comply with the conflicting employment requirement.

2. The *respondent* must show that complainant cannot be reasonable accommodated without undue hardship. *Title VII does not require an employer to discriminate against some employees in order to enable others to observe their religious beliefs. The respondent suffers an undue hardship when it is required to bear a greater than de minimus (the minimum) cost or imposition.*

3. Relevant Case Law

- a. *Trans World Airlines, Inc. v. Hardison*, 97 S. Ct. 2264 (1977)
- b. *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F. 2d 1022 (5th Cir. 1984)
- c. *Ansonia Bd. of Education v. Philbrook*, 107 S. Ct. 367 (1986)

F. Sexual Harassment

1. Background

a) Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, even if carried out under the guise of a joke, when:

- 1) Submission to or tolerance of such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
- 2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- 3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance, or creating an intimidating, hostile, or offensive working environment.

b) Illegal employment discrimination based on sex occurs when the unwelcome sexual conduct of a verbal or physical nature results in a quid pro quo and/or hostile work environment.

- 1) Quid pro quo harassment occurs when submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
- 2) Hostile work environment occurs when unwelcome sexual conduct unreasonably interferes with an individual's job performance or creates an intimidating, hostile, or offensive working environment.

c) Sexual harassment based on hostile work environment can constitute sex discrimination even if it leads to no tangible or economic job consequences.

The U.S. Supreme Court has held that sexual harassment that is so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment violates Title VII. In determining whether an environment is sufficiently hostile or abusive, the Supreme Court has instructed courts to consider all the circumstances including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

d) An employer is subject to vicarious (substituted) liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. Employers may be held liable for the actionable harassment of its supervisors because the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor them. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. No affirmative defense is available when the supervisor's harassment culminates in a tangible employment action such as discharge, demotion, or undesirable reassignment.

2. Burdens of Proof

a. Supervisor Harassment – Vicarious Liability

1) Tangible Employment Action – Quid Pro Quo

...a tangible employment action is the means by which the supervisor brings the official power of the enterprise to bear on subordinates. Examples include, hiring and firing; promotion and failure to promote; demotion; undesirable reassignment; a decision causing a significant change in benefits; compensation decisions; and work assignment...

a) The complainant must put forth a prima facie case of discrimination showing:

- (1) complainant belongs to a protected group;
- (2) complainant was subject to unwelcome sexual harassment;
- (3) the harassment was based on sex;
- (4) complainant suffered a tangible employment action from his/her acceptance or rejection of his/her supervisor's sexual harassment;

b) *The respondent does not have the option of proving any defense if the harassment resulted in a tangible employment action.*

Since the employer has no defense in these circumstances, the employer is liable for the conduct of its supervisor. The respondent must produce evidence of a non-discriminatory explanation for the tangible employment action.

c) The complainant must show that the respondent's stated reasons are a pretext to discrimination. *A strong inference of discrimination will arise whenever a harassing supervisor undertakes or has significant input into a tangible employment action affecting the victim, because it can be assumed that the harasser could not act as an objective, non-discriminatory decisionmaker with respect to the complainant.*

2) No Tangible Employment Action – Hostile Environment

a) The complainant must put forth a prima facie case of discrimination showing:

- (1) complainant belongs to a protected group;
- (2) s/he was subject to unwelcome sexual harassment;
- (3) the harassment was based on sex; and
- (4) the actions of the supervisor constitute severe *or* pervasive sexual harassment.

b) If the actions of the supervisor are not severe or pervasive, Title VII imposes no vicarious liability on the employer; but if they are, the employer is vicariously liable, unless the employer can prove both prongs of its affirmative defense and thereby escape liability.

c) Absent a tangible employment action the respondent must prove by a preponderance of the evidence that it:

- (1) exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
- (2) the complainant unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

b. Co-worker Harassment

1) Quid Pro Quo

a) The complainant must put forth a prima facie case of discrimination showing:

- (1) complainant belonged to a protected group;

- (2) complainant was subject to unwelcome sexual harassment;
- (3) the harassment was based on sex;
- (4) complainant's reaction to the harassment affected compensation or other terms and privileges of employment; and
- (5) respondent knew or should have known of the harassment and took no remedial steps.

b) The respondent must put forth evidence that negates complainant's prima facie evidence; specifically that the harassment did not affect compensation or other terms and privileges, and that it did not know or have reason to know of the harassment. The respondent may also produce evidence of a non-discriminatory reason for its action(s).

c) The complainant must prove that the respondent's stated reasons are a pretext (cover up) for discrimination.

2) Hostile Work Environment

a) The complainant must put forth a prima facie case of discrimination showing:

- (1) complainant belonged to a protected group;
- (2) complainant was subject to unwelcome sexual harassment;
- (3) the harassment was based on sex;
- (4) the harassment affected a term or condition or privilege of employment; and
- (5) the employer knew or should have known of the harassment and failed to correct it.

or

(5) the employer had a policy and/or procedure against discrimination and failed to implement and enforce it.

b) The respondent must put forth evidence that negates complainant's prima facie evidence; specifically that the harassment did not affect compensation or other terms and privileges, and that it did not know or have reason to know of the harassment or that it had a policy and/or procedure against harassment. The respondent may also produce evidence of a non-discriminatory reason for its action(s).

c) The complainant must prove that the respondent's stated reasons are a pretext (cover up) for discrimination.

3. Relevant Case Law

- a. *Meritor Savings v. Vinson*, 106 S. Ct. 2399 (1986)
- b. *B.T. Jones v. Flagship International*, 793 F. 2d 714 (5th Cir. 1986)
- c. *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993)
- d. *DeAngelis v. El Paso Mun. Police Officer's Ass'n*, 51 F. 3d 591 (5th Cir. 1995)
- e. *Oncale v. Sundowner*, 118 S. Ct. 998 (1998)
- f. *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998)
- g. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998)
- h. *Casiano v. AT & T Corp.*, 213 F.3d 278 (5th Cir. 2000)

III. AGE DISCRIMINATION IN EMPLOYMENT ACT

I. Elements of a Claim

A. Discrimination

It is unlawful for an employer

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
- (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a)

B. Retaliation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any many in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d)

II. Defenses

A. Bona Fide Occupational Qualification (BFOQ) and Differentiation

It shall not be unlawful for an employer, employment agency, or labor organization-

to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located. 29 U.S.C. § 623(f)(1)

B. Bona Fide Employee Seniority System

It shall not be unlawful for an employer, employment agency, or labor organization-

to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 621(a) of this title because of the age of such individuals. 29 U.S.C. § 623(f)(2)(A)

C. Bona Fide Employee Benefit Plans

It shall not be unlawful for an employer, employment agency, or labor organization-

to observe the terms of a bona fide employee benefits plan-

1. where the actual amount of the payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger person; or
2. that the voluntary early retirement incentive plan is consistent with the relevant purpose of this chapter. 29 U.S.C. § 623(f)(2)(B)

D. Good Cause

It shall not be unlawful for an employer, employment agency, or labor organization to discharge or otherwise discipline an individual for good cause. 29 U.S.C. § 623(f)(3)

III. Burdens of Proof

ADEA claims are subject to the burden-shifting analysis established for Title VII cases.

B. Disparate Treatment - Circumstantial Evidence

...sufficient evidence from which a legal inference of discrimination can be drawn; if such inference is left unexplained, it can be concluded that the adverse action complained of was more likely than not motivated by unlawful bias...

1. The complainant must put forth a prima facie case of discrimination by showing (*either*):

a. Hiring/Promotion

- 1) that he or she is 40 years of age or older;
- 2) that s/he applied for and was qualified for the job;
- 3) that s/he was denied the position; and
- 4) that the position remained open and the respondent continued to seek applicants from persons of complainant's qualifications *or* the respondent filled the job with an applicant outside of the complainant's protected class.

or

b. Disciplinary (including discharge)

- 1) that s/he is 40 years of age or older;
- 2) is qualified for the job;
- 3) that s/he was disciplined/discharged; and
- 4) that someone similarly situated and outside his or her protected class was treated differently.

2. The respondent then has the burden of production (not the burden of proof) to articulate a legitimate, non-discriminatory reason(s) for the decision. *If the defendant fails to do so, an inference of discrimination arises.*

3. The complainant can keep his or her claim alive only by showing (through his or her burden of proof) that the stated reason(s) was a pretext (or cover up) for discrimination. *To overcome the respondent's rebuttal, the complainant must prove not only that the respondent's proffered reason(s) is false but also that the real reason(s) for the respondent's challenged action was discrimination or conduct otherwise prohibited by the ADEA.*

4. Relevant Case Law

- a. *McDonnell Douglas v. Green*, 93 S. Ct. 1817 (1973)
- b. *Texas Dept. of Community Affairs v. Burdine*, 101 S. Ct. 1089 (1981)
- c. *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993)
- d. *Rhodes v. Guilberson Oil Tools*, 39 F.3d 537 (5th Cir. 1996)
- e. *Sanderson v. Reeves*, 120 S. Ct. 2097 (2000)

C. Disparate Treatment - Direct Evidence

...under the context of an age claim the respondent (in addition to an illegitimate consideration) may confess that its reason for rejecting or disciplining plaintiff was based of the complainant's age but assert that the confessed discrimination is protected by one of the ADEA's four legal defenses: BFOQ, BFSS, BFBP and/or good cause...

1. The complainant must show that the respondent actually relied on an illegitimate/illegal consideration in making its decision. Said another way, the complainant must show that an illegitimate/illegal employment decision played a motivating factor in the adverse employment decision.

a. Hiring/Promotion/Discipline/Discharge

- 1) complainant is in a protected class
- 2) s/he applied and was qualified for the job;
- 3) s/he was denied the position *or* s/he was disciplined/discharged; and
- 4) respondent relied on an illegal/illegitimate consideration in making its decision.

2. The respondent must, by a preponderance of the evidence (burden of proof – no shifting burdens), present some objective evidence as to its probable decision in the absence of impermissible motive. The respondent must show that its legitimate reason, standing alone, would have induced it to make the same decision. *In making this decision the respondent must produce proof of a legitimate reason for the action that actually motivated it at the time of the decision. A mere assertion of a legitimate motive, without additional evidence proving that this motive was a factor in the decision and that it would independently have produced the same result, would not be sufficient.*

3. Relevant Case Law

- a. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989)

D. Retaliation

...prohibits a respondent from discharging or disciplining a complainant because s/he filed a charge, participated in an investigation or otherwise opposed a discriminatory practice...

1. To establish a prima facie case a complainant must show that:
 - a) s/he engaged in a protected activity;
 - b) an adverse action occurred; and
 - c) but for the protected activity the adverse action would never have occurred.
2. The respondent must articulate a legitimate nondiscriminatory reason for its decision.
3. The complainant can keep his or her claim alive only by showing (through his or her burden of proof) that the stated reason(s) was a pretext (or cover up) for retaliation. *Complainant need not establish that his or her protected activity was the sole factor motivating the termination, his or her burden is to show that “but for” the protected activity he or she would not have been subjected to the action which he or she claims.*
4. Relevant Case Law
 - a. *McDaniel v. Temple ISD*, 770 F. 2d 1340 (5th Cir. 1985)
 - b. *Nowlin v. Resolution Trust Corp.*, 33 F. 3d 498 (5th Cir. 1994)
 - c. *Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995)
 - d. *Mattern v. Eastman Kodiak*, 104 F. 3d 702 (5th Cir. 1997)
 - e. *Shackelford v. Deloitte & Touche*, 190 F.3d 398 (5th Cir. 1999)

IV. AMERICANS WITH DISABILITIES ACT

I. Elements of a Claim

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a)

II. Definitions

A. Stating a Claim/Terms

1. The term *covered entity* means an employer, employment agency, labor organization, or joint labor-management committee. 42 U.S.C. § 12111(2)

2. The term *qualified individual with a disability* means a) an individual with a disability; b) who can perform the essential functions of the employment position held or desired; c) with or without reasonable accommodation. 42 U.S.C. § 12111(8)

3. The term *disability* means: 1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; 2) a record of such an impairment; or 3) being regarded as having such an impairment. 29 C.F.R. § 1630.2(g)

4. The term *impairment* means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h)

5. The term *major life activity* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i) Other examples of major life activity include, but are not limited to, thinking, concentrating, standing, lifting, eating, caring for oneself, sleeping, performing manual tasks, and reproduction.

6. The term *substantially limits* means: (i) unable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the

condition, manner, or duration under which the average person in the general population can perform that same major life activity. 29 C.F.R. § 1630.2(j)

7. The term *essential function* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term *essential functions* does not include the marginal functions. 29 C.F.R. § 1630.2(n)(1). For the purposes of the ADA, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. 42 U.S.C. § 12111(8)

8. The term *reasonable accommodation* may include: a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C. § 12111(9)

9. The ADA requires an employer to provide reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. 42 U.S.C. §12112(5)(A)

B. Defenses/Terms

1. The term *undue hardship* means an action requiring significant difficulty or expense, when considered in light of the factors set forth.

a) In determining whether an accommodation would impose an undue hardship on a covered entity, factors to consider include:

(1) the nature and cost of the accommodation needed;

(2) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources; or the impact otherwise of such accommodation upon the operation of the facility;

(3) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(4) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity. 42 U.S.C. § 12111(10)

2. The term *direct threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a direct threat shall be based on an individual assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

a) In determining whether an individual would pose a direct threat, the factors to be considered include:

- (1) the duration of the risk;
- (2) the nature and severity of the potential harm;
- (3) the likelihood that the potential harm will occur; and
- (4) the imminence of the potential harm. 29 C.F.R. 1630.2(r)

III. Other Relevant Provisions

A. Impact

The term "discriminate" includes:

1. Utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability. 42 U.S.C. § 12112(b)(3)(A)
2. Using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity. 42 U.S.C. § 12112(b)(6)

B. Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. 42 U.S.C. § 12203

IV. Burdens of Proof

A. Disparate Treatment - Circumstantial Evidence

...sufficient evidence from which a legal inference of discrimination can be drawn; if such inference is left unexplained, it can be concluded that the adverse action complained of was more likely than not motivated by unlawful bias...

1. The complainant must put forth a prima facie case of discrimination by showing that (*either*):

a. Hiring/Promotion

- 1) complainant has a covered disability;
- 2) s/he applied for and was qualified for the job;
- 3) s/he was rejected for the position; and
- 4) the position remained open and the respondent continued to seek applicants from persons of complainant's qualifications *or* the respondent filled the job with an applicant outside of the complainant's protected class.

or

b. Disciplinary (including discharge)

- 1) s/he has a covered disability;
- 2) s/he is qualified for the job;
- 3) s/he was disciplined/discharged; and
- 4) someone similarly situated and outside his or her protected class was treated differently.

2. The respondent then has the burden of production (not the burden of proof) to articulate a legitimate, non-discriminatory reason(s) for the decision. *If the respondent fails to do so, an inference of discrimination arises.*

3. The complainant can keep his or her claim alive only by showing (through his or her burden of proof) that the stated reason(s) was a pretext (or cover up) for discrimination. *The complainant may only prevail by showing that the respondent's proffered explanation is unworthy of credence and persuading the court that a discriminatory reason more likely motivated the respondent.*

4. Relevant Case Law

- a. *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998)
- b. *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999)
- c. *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999)

- d. *Albertson's Inc. v. Kirkinburg*, 119 S. Ct. 2162 (1999)
- e. *Talk v. Delta Airlines*, 165 F. 3d 1021 (5th Cir. 1999)
- f. *EEOC v. R. J. Gallagher Co.*, 181 F.3d 645 (5th Cir. 1999)
- g. *Gonzalez v. City of New Braunfels*, 176 F. 3d 834 (5th Cir. 1999)
- h. *Ivy v. Texas Dept. of Protective and Regulatory Serv.*, 179 F. 3d 834 (5th Cir. 1999)
- i. *McInnis v. Alamo Community College Dist.*, 207 F. 3d 276 (5th Cir. 2000)

B. Disparate Treatment - Direct Evidence

...under the context of a disability claim the respondent (in addition to an illegitimate consideration) may confess that its reason for rejecting or disciplining complainant was based on the complainant's disability but assert that the confessed discrimination is protected by one of the ADA's two legal defenses: undue hardship and/or direct threat...

1. The complainant must, through a prima facie case of discrimination, show that the respondent actually relied on an illegitimate/illegal consideration in making its decision. Said another way, the complainant must show that an illegitimate/illegal employment decision played a motivating factor in the adverse employment decision.

Hiring/Promotion/Discipline/Discharge

- 1) complainant has a covered disability;
- 2) s/he applied and was qualified for the job;
- 3) s/he was denied the position *or* s/he was disciplined/discharged; and
- 4) respondent relied on an illegal/illegitimate consideration in making its decision.

2. The respondent must by a preponderance of the evidence (burden of proof – no shifting burdens) present some objective evidence as to its probable decision in the absence of impermissible motive. The respondent must show that its legitimate reason, standing alone, would have induced it to make the same decision. *In making this decision the respondent must produce proof of a legitimate reason for the action that actually motivated it at the time of the decision. A mere assertion of a legitimate motive, without additional evidence proving that this motive was a factor in the decision and that it would independently have produced the same result, would not be sufficient.*

C. Disparate Impact

...makes unlawful the application of a neutral policy, standard, or criteria which nonetheless has the effect of significantly disproportionately affecting members of a protected group...

1. The plaintiff must establish a prima facie case of discrimination by (typically) presenting statistical evidence that the challenged employer policy or practice has a disproportionate adverse effect. This adverse effect is actionable both with respect to either an individual with a disability, or on a particular class of individuals with disabilities. 29 C.F.R. § 1630.15(b)

2. *Both the burden of proof and persuasion shifts to the respondent.* The employer can relent by establishing that the challenged practice/policy is job related and justified by business necessity. 42 U.S.C. § 12113. This defense under the ADA includes proof that the employer was unable to provide a reasonable accommodation to the person with a disability. 29 C.F.R. § 1630.15(b)

3. Plaintiff may then prevail only by showing that alternative practices or policies existed which the employer could have used, but did not use, to reduce the disparate impact on the protected group.

D. Retaliation

...prohibits a respondent from discharging or disciplining a complainant because s/he filed a charge, participated in an investigation or otherwise opposed a discriminatory practice...

1. To establish a prima facie case a complainant must show that:

- a) s/he engaged in a protected activity;
- b) an adverse action occurred; and
- c) but for the protected activity the adverse action would never have occurred.

2. The respondent must articulate a legitimate nondiscriminatory reason for its decision.

3. The complainant can keep his or her claim alive only by showing (through his or her burden of proof) that the stated reason(s) was a pretext (or cover up) for retaliation. *Complainant need not establish that his or her protected activity was the sole factor motivating the termination, his or her burden is to show that “but for” the protected activity he or she would not have been subjected to the action which he or she claims.*

4. Relevant Case Law

- a. *McDaniel v. Temple ISD*, 770 F. 2d 1340 (5th Cir. 1985)
- b. *Nowlin v. Resolution Trust Corp.*, 33 F. 3d 498 (5th Cir. 1994)
- c. *Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995)
- d. *Mattern v. Eastman Kodiak*, 104 F. 3d 702 (5th Cir. 1997)

e. *Shackelford v. Deloitte & Touche*, 190 F.3d 398 (5th Cir. 1999)

E. Reasonable Accommodation

1. To establish a prima facie case the complainant must show that:
 - a. s/he is a qualified individual with a disability;
 - b. s/he notified his or her employer of the disability and the need for an accommodation; and
 - c. the employer failed to reasonably accommodate him or her.
2. The respondent must show that the complainant cannot be reasonably accommodated without undue hardship.
3. Relevant Case Law
 - a. *Seaman v. CSPH*, 179 F. 3d 297 (5th Cir. 1999)
 - b. *AKZO Nobel Inc.*, 178 F. 3d 731 (5th Cir. 1999)
 - c. *Allen v. Rapids Parish School Bd.*, 204 F. 3d (5th Cir. 2000)