CHAPTER III

EQUALITY & DISCRIMINATION IN EMPLOYMENT

INTRODUCTION

The previous chapter reviewed various conceptions of inequality and their legal proof structures. Those conceptions and proof structures will resonate in the following chapters as we begin to examine contextually how issues of inequality and equality are addressed by different legal systems. As you read the materials in this chapter, think about the role that concepts of second class citizenship, unconscious and cognitive bias, and other conceptions of inequality are addressed by employment discrimination laws. How do the legal rules account for the various types of inequality discussed in Chapter II? What vision or visions of equality do they promote? What do the laws, and the history of their development, tell us about how a particular society views its most persistent forms of inequality? Consider the following problems as you read the materials in this chapter.

PROBLEMS

- An employer forbids pregnant women from working in positions which might pose a danger to their unborn children. The employer justifies this policy by pointing to recent scientific studies that indicate that exposure to certain chemicals carries the risk of contracting a rare disease if exposed in vitro. The employer fears being held legally responsible for harm to the child of a worker born with this disease after being exposed to chemicals in its workplace. Can the employer legally exclude pregnant women from certain positions based on a well-founded risk to their unborn children?

- A theater wants to hire an actor to play a historical figure in a forthcoming production about the country’s founding. Can the theater hire only white Americans if in the United States? Only white Frenchmen or women if in France? Only Han Chinese if in China?

- An employer has a history of not inviting back for follow-up job interviews candidates with a heavy foreign accent. The employer denies that it is using race or ethnicity to screen job applicants but admits that communication ability is central to the job requirement since the positions at issue requiring ongoing contact with customers. Is this an adequate justification for relying on someone’s accent as a proxy for good communication skills?

- An employer rejects all job applicants who have a poor credit history. Statistical studies demonstrate, however, that this practice tends to disproportionately exclude members of an ethnic or racial minority group from qualification for the jobs at issue. Can the employer
defend this practice by arguing that the criterion (poor credit history) is a neutral one and is not intended to exclude any particular group?

- A senior manager at a top finance company constantly remarks to his colleagues that women are “dumb” and “bimbos” but that he puts up with them because he “loves” and “worships” women. Most of his colleagues ignore him and think that he is just trying to draw attention to himself. In fact, many of them note, he has gone out of his way to promote women into management positions. One female employee, however, takes offense at his remarks finding them distressing and demeaning. Because he is very loud, she does not feel that she is able to escape hearing them throughout the day. Is this a form of prohibited sexual harassment?

A. THE UNITED STATES

The Fourteenth Amendment to the United States Constitution provides that “No state shall... deny to any person within its jurisdiction the equal protection of the laws.” Pursuant to this equality provision, as well as the Commerce Clause, the United States Congress has passed a number of laws prohibiting discrimination in employment against its citizens on the basis of a number of personal characteristics. The first of these laws was passed in the late nineteenth century, following the freeing of slaves upon the signing of the Emancipation Declaration in 1863 and the passage of the Thirteenth Amendment abolishing slavery. During this period of “Reconstruction,” Congress passed the first Civil Rights Acts which gave the newly freed slaves the right to the same freedoms as white persons enjoyed, including the freedom to “make and enforce contracts.” (e.g. employment contracts). See Civil Rights Act of 1866, 42 United States Code Section 1981.

Following the period of legalized racial segregation in the early and mid-twentieth century, Congress again passed a number of Civil Rights Acts to address the inequalities suffered by African Americans in society. These Acts prohibited discrimination across a variety of contexts, including employment. The relevant language of the most prominent U.S. employment discrimination law, Title VII of the 1964 Civil Rights Act, provides: “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.” Section 703(a) of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U.S.C. § 2000e–2(a). Title VII applies to both public and private employers.

The term “discriminate” is not defined by the Act but, as we have seen in Chapter II and will see here, the U.S. Supreme Court has interpreted the term to prohibit a variety of forms of conduct and practices by employers.
They include disparate treatment (or direct discrimination), disparate impact (or indirect discrimination), pattern and practice discrimination, and sexual harassment, among others. The crux of any discrimination claim under U.S. antidiscrimination laws is that the plaintiff must prove not only that she or he was discriminated against but that such discrimination was “because of” the individual’s race, color, religion, sex of national origin. Discrimination claims require courts to evaluate whether and how a particular personal or group characteristic has influenced an employer’s decision-making process and/or its outcomes. The following cases are examples of how the U.S. Supreme Court reasons through this evaluative process across a variety of employment discrimination claims.

1. Disparate Treatment

Price Waterhouse v. Hopkins
490 U.S. 228 (1989)

Justice Brennan announced the judgment of the Court and delivered an opinion, in which Justice Marshall, Justice Blackmun, and Justice Stevens join.

I

At Price Waterhouse, a nationwide professional accounting partnership, a senior manager becomes a candidate for partnership when the partners in her local office submit her name as a candidate. * * *

Ann Hopkins had worked at Price Waterhouse’s Office of Government Services in Washington, D.C., for five years when the partners in that office proposed her as a candidate for partnership. Of the 662 partners at the firm at that time, 7 were women. Of the 88 persons proposed for partnership that year, only one—Hopkins—was a woman. Forty-seven of these candidates were admitted to the partnership, 21 were rejected, and 20—including Hopkins—were “held” for reconsideration the following year. Thirteen of the 32 partners who had submitted comments on Hopkins supported her bid for partnership. Three partners recommended that her candidacy be placed on hold, eight stated that they did not have an informed opinion about her, and eight recommended that she be denied partnership. * * *

The partners in Hopkins’ office praised her character as well as her accomplishments, describing her in their joint statement as “an outstanding professional” who had a “deft touch,” a “strong character, independence and integrity.” Clients appear to have agreed with these assessments.

* * * Virtually all of the partners’ negative remarks about Hopkins—even those of partners supporting her—had to do with her “interpersonal
skills.''

Both "[s]upporters and opponents of her candidacy," stressed [District Court] Judge Gesell, "indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff.''

There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as "macho"; another suggested that she "overcompensated for being a woman"; a third advised her to take "a course at charm school . . . ." But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the coup de grace: in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." * * *

II

The specification of the standard of causation under Title VII is a decision about the kind of conduct that violates that statute. According to Price Waterhouse, an employer violates Title VII only if it gives decisive consideration to an employee's gender, race, national origin, or religion in making a decision that affects that employee. On Price Waterhouse's theory, even if a plaintiff shows that her gender played a part in an employment decision, it is still her burden to show that the decision would have been different if the employer had not discriminated. In Hopkins' view, on the other hand, an employer violates the statute whenever it allows one of these attributes to play any part in an employment decision. Once a plaintiff shows that this occurred, according to Hopkins, the employer's proof that it would have made the same decision in the absence of discrimination can serve to limit equitable relief but not to avoid a finding of liability. We conclude that, as often happens, the truth lies somewhere in between.

A

In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees. Yet, the statute does not purport to limit the other qualities and characteristics that employers may take into account in making employment decisions. The converse, therefore, of "for cause" legislation, Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice. This balance between employee rights and employer prerogatives turns out to be decisive in the case before us.

Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, the statute forbids an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or 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 . . . sex.” 42 U.S.C. §§ 2000e–2(a)(1), (2) (emphasis added). We take these words to mean that gender must be irrelevant to employment decisions. To construe the words “because of” as colloquial shorthand for “but-for causation,” as does Price Waterhouse, is to misunderstand them.

But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way. The present, active tense of the operative verbs of § 703(a)(1) (“to fail or refuse”), in contrast, turns our attention to the actual moment of the event in question, the adverse employment decision. The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision at the moment it was made. Moreover, since we know that the words “because of” do not mean “solely because of,” we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was “because of” sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account. * * *

We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words “because of,” Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.

Our interpretation of the words “because of” also is supported by the fact that Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a “bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.” 42 U.S.C. § 2000e–2(e). The only plausible inference to draw from this provision is that, in all other circumstances, a person’s gender may not be considered in making decisions that affect her. Indeed, Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities. An employer may not, we have held, condition employment opportunities on the satisfaction of facially neutral tests or qualifications that have a disproportionate, adverse impact on members of protected groups when those tests or qualifications are not required for performance of the job.

To say that an employer may not take gender into account is not, however, the end of the matter, for that describes only one aspect of Title VII. The other important aspect of the statute is its preservation of an employer’s remaining freedom of choice. We conclude that the preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to
The central point is this: while an employer may not take gender into account in making an employment decision (except in those very narrow circumstances in which gender is a BFOQ), it is free to decide against a woman for other reasons. We think these principles require that, once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role. This balance of burdens is the direct result of Title VII’s balance of rights.

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “‘[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’” [citations omitted]. An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be evidence that gender played a part. In any event, the stereotyping in this case did not simply consist of stray remarks. On the contrary, Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board’s decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations. This is not, as Price Waterhouse suggests, “discrimination in the air”; rather, it is, as Hopkins puts it, “discrimination brought to ground and visited upon” an employee.

As to the employer’s proof, in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. Moreover, proving “‘that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.’” [citations omitted]. An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate
and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The very premise of a mixed-motives case is that a legitimate reason was present, and indeed, in this case, Price Waterhouse already has made this showing by convincing Judge Gesell that Hopkins’ interpersonal problems were a legitimate concern. The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

JUSTICE WHITE, concurring in the judgment.

* * * Hopkins was not required to prove that the illegitimate factor was the only, principal, or true reason for petitioner’s action. Rather, as Justice O’CONNOR states, her burden was to show that the unlawful motive was a substantial factor in the adverse employment action. The District Court, as its opinion was construed by the Court of Appeals, so found . . . and I agree that the finding was supported by the record. The burden of persuasion then should have shifted to Price Waterhouse to prove “by a preponderance of the evidence that it would have reached the same decision . . . in the absence of” the unlawful motive.

JUSTICE O’CONNOR, concurring in the judgment.

I agree with the plurality that, on the facts presented in this case, the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision concerning Ann Hopkins’ candidacy absent consideration of her gender . . . . I thus concur in the judgment of the Court. My disagreement stems from the plurality’s conclusions concerning the substantive requirement of causation under the statute and its broad statements regarding the applicability of the allocation of the burden of proof applied in this case.

* * * The legislative history of Title VII bears out what its plain language suggests: a substantive violation of the statute only occurs when consideration of an illegitimate criterion is the “but-for” cause of an adverse employment action. The legislative history makes it clear that Congress was attempting to eradicate discriminatory actions in the employment setting, not mere discriminatory thoughts. Critics of the bill that became Title VII labeled it a “thought control bill,” and argued that it created a “punishable crime that does not require an illegal external act as a basis for judgment.”

Thus, I disagree with the plurality’s dictum that the words “because of” do not mean “but-for” causation; manifestly they do. The question for decision in this case is what allocation of the burden of persuasion on the issue of causation best conforms with the intent of Congress and the purposes behind Title VII.

* * * There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. As Senator Clark put it, “[t]he bill simply eliminates consideration of color [or other forbidden criteria] from the decision to hire or promote.” Reliance on such factors is exactly what the threat of Title VII liability was meant to deter. While the main concern of the statute was with employment oppor-
tunity, Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one’s race or sex. This Court’s decisions under the Equal Protection Clause have long recognized that whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual. [citation omitted]. At the same time, Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor caused a tangible employment injury of some kind.

Where an individual disparate treatment plaintiff has shown by a preponderance of the evidence that an illegitimate criterion was a substantial factor in an adverse employment decision, the deterrent purpose of the statute has clearly been triggered. More importantly, as an evidentiary matter, a reasonable factfinder could conclude that absent further explanation, the employer’s discriminatory motivation “caused” the employment decision. The employer has not yet been shown to be a violator, but neither is it entitled to the same presumption of good faith concerning its employment decisions which is accorded employers facing only circumstantial evidence of discrimination. Both the policies behind the statute, and the evidentiary principles developed in the analogous area of causation in the law of torts, suggest that at this point the employer may be required to convince the factfinder that, despite the smoke, there is no fire.

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Civil Rights Act of 1991
(amending Title VII of the Civil Rights Act of 1964)

SEC. 107. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) IN GENERAL—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) (as amended by sections 105 and 106) is further amended by adding at the end the following new subsection:

(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(b) ENFORCEMENT PROVISIONS—Section 706(g) of such Act (42 U.S.C. 2000e–5(g)) is amended—

* * *(3) by adding at the end the following new subparagraph:

(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—‘(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and’(ii) shall not award damages or issue an order requiring any admission,
reinstatement, hiring, promotion, or payment, described in subparagraph (A).’

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International Union, United Automobile Workers v. Johnson Controls, Inc.

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we are concerned with an employer’s gender-based fetal-protection policy. May an employer exclude a fertile female employee from certain jobs because of its concern for the health of the fetus the woman might conceive?

I.

Respondent Johnson Controls, Inc., manufactures batteries. In the manufacturing process, the element lead is a primary ingredient. Occupational exposure to lead entails health risks, including the risk of harm to any fetus carried by a female employee. Before the Civil Rights Act of 1964, 78 Stat. 241, became law, Johnson Controls did not employ any woman in a battery-manufacturing job. In June 1977, however, it announced its first official policy concerning its employment of women in lead-exposure work: “[P]rotection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons . . . . Since not all women who can become mothers wish to become mothers (or will become mothers), it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant.”

Consistent with that view, Johnson Controls “stopped short of excluding women capable of bearing children from lead exposure,” but emphasized that a woman who expected to have a child should not choose a job in which she would have such exposure. The company also required a woman who wished to be considered for employment to sign a statement that she had been advised of the risk of having a child while she was exposed to lead. The statement informed the woman that although there was evidence “that women exposed to lead have a higher rate of abortion,” this evidence was “not as clear . . . as the relationship between cigarette smoking and cancer,” but that it was, “medically speaking, just good sense not to run that risk if you want children and do not want to expose the unborn child to risk, however small . . . .”

Five years later, in 1982, Johnson Controls shifted from a policy of warning to a policy of exclusion. Between 1979 and 1983, eight employees became pregnant while maintaining blood lead levels in excess of 30 micrograms per deciliter. This appeared to be the critical level noted by the Occupational Safety and Health Administration (OSHA) for a worker who
was planning to have a family. The company responded by announcing a broad exclusion of women from jobs that exposed them to lead:

"... [I]t is [Johnson Controls'] policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights."

The policy defined "women ... capable of bearing children" as "[a]ll women except those whose inability to bear children is medically documented." It further stated that an unacceptable work station was one where, "over the past year," an employee had recorded a blood lead level of more than 30 micrograms per deciliter or the work site had yielded an air sample containing a lead level in excess of 30 micrograms per cubic meter.

II

In April 1984, petitioners filed in the United States District Court for the Eastern District of Wisconsin a class action challenging Johnson Controls' fetal-protection policy as sex discrimination that violated Title VII of the Civil Rights Act of 1964, as amended. Among the individual plaintiffs were petitioners Mary Craig, who had chosen to be sterilized in order to avoid losing her job, Elsie Nason, a 50-year-old divorcee, who had suffered a loss in compensation when she was transferred out of a job where she was exposed to lead, and Donald Penney, who had been denied a request for a leave of absence for the purpose of lowering his lead level because he intended to become a father. Upon stipulation of the parties, the District Court certified a class consisting of "all past, present and future production and maintenance employees" in United Auto Workers bargaining units at nine of Johnson Controls' plants "who have been and continue to be affected by [the employer's] Fetal Protection Policy implemented in 1982." * * *

III

The bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job.... Respondent's fetal-protection policy explicitly discriminates against women on the basis of their sex. The policy excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender. * * *

First, Johnson Controls' policy classifies on the basis of gender and childbearing capacity, rather than fertility alone. Respondent does not seek to protect the unconceived children of all its employees. Despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees.... This Court faced a conceptually similar situation in Phillips v. Martin Marietta Corp., 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971), and found sex discrimination because the policy established "one hiring policy for women and another for men-each having pre-school-age children." Johnson Controls' policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing.
Our conclusion is bolstered by the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k), in which Congress explicitly provided that, for purposes of Title VII, discrimination “‘on the basis of sex’” includes discrimination “because of or on the basis of pregnancy, childbirth, or related medical conditions.” “The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman’s pregnancy is, on its face, discrimination because of her sex.” [citation omitted]. In its use of the words “capable of bearing children” in the 1982 policy statement as the criterion for exclusion, Johnson Controls explicitly classifies on the basis of potential for pregnancy. Under the PDA, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination. Respondent has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex.

We concluded above that Johnson Controls’ policy is not neutral because it does not apply to the reproductive capacity of the company’s male employees in the same way as it applies to that of the females. Moreover, the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination. * * *

In sum, Johnson Controls’ policy “does not pass the simple test of whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’” [citation omitted]. We hold that Johnson Controls’ fetal-protection policy is sex discrimination forbidden under Title VII unless respondent can establish that sex is a “bona fide occupational qualification.”

IV

Under § 703(e)(1) of Title VII, an employer may discriminate on the basis of “religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” [citation omitted]. We therefore turn to the question whether Johnson Controls’ fetal-protection policy is one of those “certain instances” that come within the BFOQ exception.

The BFOQ defense is written narrowly, and this Court has read it narrowly. We have read the BFOQ language of § 4(f) of the Age Discrimination in Employment Act of 1967 (ADEA), which tracks the BFOQ provision in Title VII, just as narrowly. Our emphasis on the restrictive scope of the BFOQ defense is grounded on both the language and the legislative history of § 703. The wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations. The statute thus limits the situations in which discrimination is permissible to “certain instances” where sex discrimination is “reasonably necessary” to the “normal operation” of the “particular” business. Each one of these terms—certain, normal, particular—prevents the use of general subjective standards and favors an objective, verifiable
requirement. But the most telling term is “occupational”; this indicates that these objective, verifiable requirements must concern job-related skills and aptitudes.

* * *

Johnson Controls argues that its fetal-protection policy falls within the so-called safety exception to the BFOQ. Our cases have stressed that discrimination on the basis of sex because of safety concerns is allowed only in narrow circumstances. In *Dothard v. Rawlinson*, this Court indicated that danger to a woman herself does not justify discrimination. We there allowed the employer to hire only male guards in contact areas of maximum-security male penitentiaries only because more was at stake than the “individual woman’s decision to weigh and accept the risks of employment.” We found sex to be a BFOQ inasmuch as the employment of a female guard would create real risks of safety to others if violence broke out because the guard was a woman. Sex discrimination was tolerated because sex was related to the guard’s ability to do the job-maintaining prison security. We also required in *Dothard* a high correlation between sex and ability to perform job functions and refused to allow employers to use sex as a proxy for strength although it might be a fairly accurate one. Similarly, some courts have approved airlines’ layoffs of pregnant flight attendants at different points during the first five months of pregnancy on the ground that the employer’s policy was necessary to ensure the safety of passengers. [citations omitted]. In two of these cases, the courts pointedly indicated that fetal, as opposed to passenger, safety was best left to the mother.

We considered safety to third parties in *Western Airlines, Inc. v. Criswell*, supra, in the context of the ADEA. We focused upon “the nature of the flight engineer's tasks,” and the “actual capabilities of persons over age 60” in relation to those tasks. Our safety concerns were not independent of the individual’s ability to perform the assigned tasks, but rather involved the possibility that, because of age-connected debility, a flight engineer might not properly assist the pilot, and might thereby cause a safety emergency. Furthermore, although we considered the safety of third parties in *Dothard* and *Criswell*, those third parties were indispensable to the particular business at issue. In *Dothard*, the third parties were the inmates; in *Criswell*, the third parties were the passengers on the plane. We stressed that in order to qualify as a BFOQ, a job qualification must relate to the “‘essence,’” or to the “‘central mission of the employer’s business.’”

* * * Justice White attempts to transform this case into one of customer safety. The unconceived fetuses of Johnson Controls’ female employees, however, are neither customers nor third parties whose safety is essential to the business of battery manufacturing. No one can disregard the possibility of injury to future children; the BFOQ, however, is not so broad that it transforms this deep social concern into an essential aspect of battery making.

Our case law, therefore, makes clear that the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee’s ability to perform the job. This approach is consistent with the
language of the BFOQ provision itself, for it suggests that permissible distinctions based on sex must relate to ability to perform the duties of the job. Johnson Controls suggests, however, that we expand the exception to allow fetal-protection policies that mandate particular standards for pregnant or fertile women. We decline to do so. Such an expansion contradicts not only the language of the BFOQ and the narrowness of its exception, but also the plain language and history of the PDA.

The PDA’s amendment to Title VII contains a BFOQ standard of its own: Unless pregnant employees differ from others “in their ability or inability to work,” they must be “treated the same” as other employees “for all employment-related purposes.” This language clearly sets forth Congress’ remedy for discrimination on the basis of pregnancy and potential pregnancy. Women who are either pregnant or potentially pregnant must be treated like others “similar in their ability ... to work.” In other words, women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job. * * *

We conclude that the language of both the BFOQ provision and the PDA which amended it, as well as the legislative history and the case law, prohibit an employer from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job. We reiterate our holdings in Criswell and Dothard that an employer must direct its concerns about a woman’s ability to perform her job safely and efficiently to those aspects of the woman’s job-related activities that fall within the “essence” of the particular business.

V

We have no difficulty concluding that Johnson Controls cannot establish a BFOQ. Fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Johnson Controls’ professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Congress has mandated this choice through Title VII, as amended by the PDA. Johnson Controls has attempted to exclude women because of their reproductive capacity. Title VII and the PDA simply do not allow a woman’s dismissal because of her failure to submit to sterilization.

Nor can concerns about the welfare of the next generation be considered a part of the “essence” of Johnson Controls’ business. Judge Easterbrook in this case pertinently observed: “It is word play to say that ‘the job’ at Johnson [Controls] is to make batteries without risk to fetuses in the same way ‘the job’ at Western Air Lines is to fly planes without crashing.”

Johnson Controls argues that it must exclude all fertile women because it is impossible to tell which women will become pregnant while working with lead. This argument is somewhat academic in light of our conclusion that the company may not exclude fertile women at all; it perhaps is worth noting, however, that Johnson Controls has shown no “factual basis for believing that all or substantially all women would be unable to perform
safely and efficiently the duties of the job involved.’’ [citation omitted].
Even on this sparse record, it is apparent that Johnson Controls is
concerned about only a small minority of women. Of the eight pregnancies
reported among the female employees, it has not been shown that any of
the babies have birth defects or other abnormalities. The record does not
reveal the birth rate for Johnson Controls’ female workers, but national
statistics show that approximately nine percent of all fertile women become
pregnant each year. The birthrate drops to two percent for blue collar
workers over age 30. Johnson Controls’ fear of prenatal injury, no matter
how sincere, does not begin to show that substantially all of its fertile
women employees are incapable of doing their jobs. * * *

VII

Our holding today that Title VII, as so amended, forbids sex-specific
fetal-protection policies is neither remarkable nor unprecedented. Concern
for a woman’s existing or potential offspring historically has been the
excuse for denying women equal employment opportunities. Congress in
the PDA prohibited discrimination on the basis of a woman’s ability to
become pregnant. We do no more than hold that the PDA means what it
says.

It is no more appropriate for the courts than it is for individual
employers to decide whether a woman’s reproductive role is more impor-
tant to herself and her family than her economic role. Congress has left this
choice to the woman as hers to make.* * *

■ JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join,
concurring in part and concurring in the judgment.

The Court properly holds that Johnson Controls’ fetal-protection policy
overtly discriminates against women, and thus is prohibited by Title VII of
the Civil Rights Act of 1964 unless it falls within the bona fide occupational
qualification (BFOQ) exception, set forth at 42 U.S.C. § 2000e–2(e). The
Court erroneously holds, however, that the BFOQ defense is so narrow that
it could never justify a sex-specific fetal-protection policy. * * *

Prior decisions construing the BFOQ defense confirm that the defense
is broad enough to include considerations of cost and safety of the sort that
could form the basis for an employer’s adoption of a fetal-protection policy.* * *

In enacting the BFOQ standard, “Congress did not ignore the public
interest in safety.” [citation omitted]. The Court’s narrow interpretation of
the BFOQ defense in this case, however, means that an employer cannot
exclude even pregnant women from an environment highly toxic to their
fetuses. It is foolish to think that Congress intended such a result, and
neither the language of the BFOQ exception nor our cases require it.
* * *

■ JUSTICE SCALIA, concurring in the judgment.

I generally agree with the Court’s analysis, but have some reserva-
tions, several of which bear mention.
First, I think it irrelevant that there was “evidence in the record about the debilitating effect of lead exposure on the male reproductive system” [citation omitted]. Even without such evidence, treating women differently “on the basis of pregnancy” constitutes discrimination “on the basis of sex,” because Congress has unequivocally said so. Pregnancy Discrimination Act, 92 Stat. 2076, 42 U.S.C. § 2000e(k).

Second, the Court points out that “Johnson Controls has shown no factual basis for believing that all or substantially all women would be unable to perform safely ... the duties of the job involved,” [citation omitted]. In my view, this is not only “somewhat academic in light of our conclusion that the company may not exclude fertile women at all,” it is entirely irrelevant. By reason of the Pregnancy Discrimination Act, it would not matter if all pregnant women placed their children at risk in taking these jobs, just as it does not matter if no men do so. As Judge Easterbrook put it in his dissent below: “Title VII gives parents the power to make occupational decisions affecting their families. A legislative forum is available to those who believe that such decisions should be made elsewhere.” * * *

Last, the Court goes far afield, it seems to me, in suggesting that increased cost alone—short of “costs ... so prohibitive as to threaten the survival of the employer’s business,”—cannot support a BFOQ defense. I agree with Justice White’s concurrence, that nothing in our prior cases suggests this, and in my view it is wrong. I think, for example, that a shipping company may refuse to hire pregnant women as crew members on long voyages because the on-board facilities for foreseeable emergencies, though quite feasible, would be inordinately expensive. In the present case, however, Johnson has not asserted a cost-based BFOQ. [citations omitted]

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2. DISPARATE IMPACT

Wards Cove Packing Co. v. Atonio

490 U.S. 642 (1989)

Justice White delivered the opinion of the Court.

[From Court Syllabus: Jobs at petitioners’ Alaskan salmon canneries are of two general types: unskilled “cannery jobs” on the cannery lines, which are filled predominantly by nonwhites; and “noncannery jobs,” most of which are classified as skilled positions and filled predominantly with white workers, and virtually all of which pay more than cannery positions. Respondents, a class of nonwhite cannery workers at petitioners’ facilities, filed suit in the District Court under Title VII of the Civil Rights Act of 1964, alleging, inter alia, that various of petitioners’ hiring/promotion practices were responsible for the work force’s racial stratification and had denied them employment as noncannery workers on the basis of race. The District Court rejected respondents’ claims, finding, among other things, that nonwhite workers were overrepresented in cannery jobs because many]
of those jobs were filled under a hiring hall agreement with a predominantly nonwhite union. The Court of Appeals ultimately reversed in pertinent part, holding, inter alia, that respondents had made out a prima facie case of disparate impact in hiring for both skilled and unskilled noncannery jobs, relying solely on respondents’ statistics showing a high percentage of nonwhite workers in cannery jobs and a low percentage of such workers in noncannery positions. The court also concluded that once a plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer to prove the challenged practice’s business necessity.]

* * * Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), construed Title VII to proscribe “not only overt discrimination but also practices that are fair in form but discriminatory in practice.” Under this basis for liability, which is known as the “disparate-impact” theory and which is involved in this case, a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer’s subjective intent to discriminate that is required in a “disparate-treatment” case. * * *

II

In holding that respondents had made out a prima facie case of disparate impact, the Court of Appeals relied solely on respondents’ statistics showing a high percentage of nonwhite workers in the cannery jobs and a low percentage of such workers in the noncannery positions. Although statistical proof can alone make out a prima facie case, see Teamsters v. United States, 431 U.S. 324, 339 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299, 307–308 (1977), the Court of Appeals’ ruling here misapprehends our precedents and the purposes of Title VII, and we therefore reverse.

* * * The “proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market.” Ibid. It is such a comparison—between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs—that generally forms . . . the proper basis for the initial inquiry in a disparate-impact case. Alternatively, in cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics—such as measures indicating the racial composition of “otherwise-qualified applicants” for at-issue jobs—are equally probative for this purpose. See, e.g., New York City Transit Authority v. Beazer, 440 U.S. 568, 585 (1979).

It is clear to us that the Court of Appeals’ acceptance of the comparison between the racial composition of the cannery work force and that of the noncannery work force, as probative of a prima facie case of disparate impact in the selection of the latter group of workers, was flawed for several reasons. Most obviously, with respect to the skilled noncannery jobs at issue here, the cannery work force in no way reflected “the pool of qualified job applicants” or the “qualified population in the labor force.” Measuring alleged discrimination in the selection of accountants, managers, boat captains, electricians, doctors, and engineers—and the long list of other “skilled” noncannery positions found to exist by the District Court,
by comparing the number of nonwhites occupying these jobs to the number of nonwhites filling cannery worker positions is nonsensical. If the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners’ fault), petitioners’ selection methods or employment practices cannot be said to have had a “disparate impact” on nonwhites.

The Court of Appeals’ theory, at the very least, would mean that any employer who had a segment of his work force that was—for some reason—racially imbalanced, could be haled into court and forced to engage in the expensive and time-consuming task of defending the “business necessity” of the methods used to select the other members of his work force. The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work force deviated in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII. See 42 U.S.C. § 2000e–2(j); ... The Court of Appeals’ theory would “leave the employer little choice ... but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII.”

The Court of Appeals also erred with respect to the unskilled noncannery positions. Racial imbalance in one segment of an employer’s workforce does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer’s other positions, even where workers for the different positions may have somewhat fungible skills (as is arguably the case for cannery and unskilled noncannery workers). As long as there are no barriers or practices deterring qualified nonwhites from applying for noncannery positions, ... if the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer’s selection mechanism probably does not operate with a disparate impact on minorities. Where this is the case, the percentage of nonwhite workers found in other positions in the employer’s labor force is irrelevant to the question of a prima facie statistical case of disparate impact. As noted above, a contrary ruling on this point would almost inexorably lead to the use of numerical quotas in the workplace, a result that Congress and this Court have rejected repeatedly in the past.

Moreover, isolating the cannery workers as the potential “labor force” for unskilled noncannery positions is at once both too broad and too narrow in its focus. It is too broad because the vast majority of these cannery workers did not seek jobs in unskilled noncannery positions; there is no showing that many of them would have done so even if none of the arguably “deterring” practices existed. Thus, the pool of cannery workers cannot be used as a surrogate for the class of qualified job applicants, because it contains many persons who have not (and would not) be noncannery job applicants. Conversely, if respondents propose to use the cannery workers for comparison purposes because they represent the “qualified labor population” generally, the group is too narrow, because there are obviously many qualified persons in the labor market for noncannery jobs who are not cannery workers.
The peculiar facts of this case further illustrate why a comparison between the percentage of nonwhite cannery workers and nonwhite non-cannery workers is an improper basis for making out a claim of disparate impact. Here, the District Court found that nonwhites were “overrepresented” among cannery workers because petitioners had contracted with a predominantly nonwhite union (local 37) to fill these positions. See App. to Pet. for Cert. I–42. As a result, if petitioners (for some permissible reason) ceased using local 37 as its hiring channel for cannery positions, it appears (according to the District Court’s findings) that the racial stratification between the cannery and noncannery workers might diminish to statistical insignificance. Under the Court of Appeals’ approach, therefore, it is possible that, with no change whatsoever in their hiring practices for noncannery workers—the jobs at issue in this lawsuit—petitioners could make respondents’ prima facie case of disparate impact “disappear.” But if there would be no prima facie case of disparate impact in the selection of noncannery workers absent petitioners’ use of local 37 to hire cannery workers, surely petitioners’ reliance on the union to fill the cannery jobs not at issue here (and its resulting “overrepresentation” of nonwhites in those positions) does not—standing alone—make out a prima facie case of disparate impact. Yet it is precisely such an ironic result that the Court of Appeals reached below.

Consequently, we reverse the Court of Appeals’ ruling that a comparison between the percentage of cannery workers who are nonwhite and the percentage of noncannery workers who are nonwhite makes out a prima facie case of disparate impact. Of course, this leaves unresolved whether the record made in the District Court will support a conclusion that a prima facie case of disparate impact has been established on some basis other than the racial disparity between cannery and noncannery workers. This is an issue that the Court of Appeals or the District Court should address in the first instance.

III

* * * Because we remand for further proceedings, however, on whether a prima facie case of disparate impact has been made in defensible fashion in this case, we address two other challenges petitioners have made to the decision of the Court of Appeals.

A

First is the question of causation in a disparate-impact case. The law in this respect was correctly stated by Justice O’CONNOR’S opinion last Term in Watson v. Fort Worth Bank & Trust, 487 U.S., at 994:

“[W]e note that the plaintiff’s burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer’s work force. The plaintiff must begin by identifying the specific employment practice that is challenged . . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.” * * *
(A) Title VII plaintiff does not make out a case of disparate impact simply by showing that, “at the bottom line,” there is racial imbalance in the work force. As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff’s *prima facie* case in a disparate-impact suit under Title VII.

Here, respondents have alleged that several “objective” employment practices (e. g., nepotism, separate hiring channels, rehire preferences), as well as the use of “subjective decision making” to select noncannery workers, have had a disparate impact on nonwhites. Respondents base this claim on statistics that allegedly show a disproportionately low percentage of nonwhites in the at-issue positions. However, even if on remand respondents can show that nonwhites are underrepresented in the at-issue jobs in a manner that is acceptable under the standards set forth in Part II, *supra*, this alone will not suffice to make out a *prima facie* case of disparate impact. Respondents will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites. To hold otherwise would result in employers being potentially liable for “the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.”

Consequently, on remand, the courts below are instructed to require, as part of respondents’ *prima facie* case, a demonstration that specific elements of the petitioners’ hiring process have a significantly disparate impact on nonwhites.

B

If, on remand, respondents meet the proof burdens outlined above, and establish a *prima facie* case of disparate impact with respect to any of petitioners’ employment practices, the case will shift to any business justification petitioners offer for their use of these practices. This phase of the disparate-impact case contains two components: first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternative practices to achieve the same business ends, with less racial impact. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S., at 425. We consider these two components in turn.

(1)

Though we have phrased the query differently in different cases, it is generally well established that at the justification stage of such a disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. . . . The touchstone of this inquiry is a reasoned review of the employer’s justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no
requirement that the challenged practice be “essential” or “indispensable” to the employer’s business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils we have identified above. * * *

In this phase, the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff. * * *

(2)

Finally, if on remand the case reaches this point, and respondents cannot persuade the trier of fact on the question of petitioners’ business necessity defense, respondents may still be able to prevail. To do so, respondents will have to persuade the factfinder that “other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate [hiring] interest[s]”; by so demonstrating, respondents would prove that “[petitioners were] using [their] tests merely as a ‘pretext’ for discrimination . . . .” If respondents, having established a prima facie case, come forward with alternatives to petitioners’ hiring practices that reduce the racially disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons.

Of course, any alternative practices which respondents offer up in this respect must be equally effective as petitioners’ chosen hiring procedures in achieving petitioners’ legitimate employment goals. Moreover, “[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer’s legitimate business goals.” Watson, supra, at 998 (O’Connor, J.). “Courts are generally less competent than employers to restructure business practices,” Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978); consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff’s alternative selection or hiring practice in response to a Title VII suit.

IV

For the reasons given above, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion. * * *

* * *

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

* * * Today a bare majority of the Court takes three major strides backwards in the battle against race discrimination. * * * It bars the use of internal workforce comparisons in the making of a prima facie case of discrimination, even where the structure of the industry in question renders any other statistical comparison meaningless. And it requires practice-by-practice statistical proof of causation, even where, as here, such proof would be impossible.
The harshness of these results is well demonstrated by the facts of this case. The salmon industry as described by this record takes us back to a kind of overt and institutionalized discrimination we have not dealt with in years: a total residential and work environment organized on principles of racial stratification and segregation, which, as Justice Stevens points out, resembles a plantation economy. This industry long has been characterized by a taste for discrimination of the old-fashioned sort: a preference for hiring nonwhites to fill its lowest level positions, on the condition that they stay there. The majority’s legal rulings essentially immunize these practices from attack under a Title VII disparate impact analysis.

Sadly, this comes as no surprise. One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was.

Justice Stevens, with whom Justice Brennan, Justice Marshall, and Justice Blackmun join, dissenting.

Fully 18 years ago, this Court unanimously held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., prohibits employment practices that have discriminatory effects, as well as those that are intended to discriminate. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Federal courts and agencies consistently have enforced that interpretation, thus promoting our national goal of eliminating barriers that define economic opportunity not by aptitude and ability, but by race, color, national origin, and other traits that are easily identified but utterly irrelevant to one’s qualification for a particular job. Regrettably, the Court retreats from these efforts in its review of an interlocutory judgment respecting the “peculiar facts” of this lawsuit. Turning a blind eye to the meaning and purpose of Title VII, the majority’s opinion perfunctorily rejects a longstanding rule of law and underestimates the probative value of evidence of a racially stratified workforce. I cannot join this latest sojourn into judicial activism.

* * *

The District Court’s findings of fact depict a unique industry. Canneries often are located in remote, sparsely populated areas of Alaska.

Most jobs are seasonal, with the season’s length and the cannery’s personnel needs varying not just year to year, but day to day. To fill their employment requirements, petitioners must recruit and transport many cannery workers and noncannery workers from States in the Pacific Northwest. Most cannery workers come from a union local based outside Alaska or from Native villages near the canneries. Employees in the noncannery positions—the positions that are “at issue”—learn of openings by word of mouth; the jobs seldom are posted or advertised, and there is no promotion to noncannery jobs from within the cannery workers’ ranks.

In general, the District Court found the at-issue jobs to require “skills,” ranging from English literacy, typing, and “ability to use seam micrometers, gauges, and mechanic’s hand tools” to “good health” and a driver’s license. All cannery workers’ jobs, like a handful of at-issue positions, are unskilled, and the court found that the intensity of the work during canning season precludes on-the-job training for skilled noncannery positions. It made no findings regarding the extent to which the cannery workers already are qualified for at-issue jobs; individual plaintiffs testified
persuasively that they were fully qualified for such jobs, but the court neither credited nor discredited this testimony. Although there are no findings concerning wage differentials, the parties seem to agree that wages for cannery workers are lower than those for noncannery workers, skilled or unskilled. The District Court found that “nearly all” cannery workers are nonwhite, while the percentage of nonwhites employed in the entire Alaska salmon canning industry “has stabilized at about 47% to 50%.” The precise stratification of the workforce is not described in the findings, but the parties seem to agree that the noncannery jobs are predominantly held by whites.

Petitioners contend that the relevant labor market in this case is the general population of the “external” labor market for the jobs at issue.” Brief for Petitioners 17. While they would rely on the District Court’s findings in this regard, those findings are ambiguous. At one point, the District Court specifies “Alaska, the Pacific Northwest, and California” as “the geographical region from which [petitioners] draw their employees,” but its next finding refers to “this relevant geographical area for cannery worker, laborer, and other nonskilled jobs,” [citations omitted]. There is no express finding of the relevant labor market for noncannery jobs.

Even assuming that the District Court properly defined the relevant geographical area, its apparent assumption that the population in that area constituted the “available labor supply,” ibid., is not adequately founded. An undisputed requirement for employment either as a cannery or noncannery worker is availability for seasonal employment in the far reaches of Alaska. Many noncannery workers, furthermore, must be available for preseason work. [citations omitted]. Yet the record does not identify the portion of the general population in Alaska, California, and the Pacific Northwest that would accept this type of employment.... This deficiency respecting a crucial job qualification diminishes the usefulness of petitioners’ statistical evidence. In contrast, respondents’ evidence, comparing racial compositions within the workforce, identifies a pool of workers willing to work during the relevant times and familiar with the workings of the industry. Surely this is more probative than the untailored general population statistics on which petitioners focus. * * *

Evidence that virtually all the employees in the major categories of at-issue jobs were white, whereas about two-thirds of the cannery workers were nonwhite, may not by itself suffice to establish a prima facie case of discrimination. But such evidence of racial stratification puts the specific employment practices challenged by respondents into perspective. Petitioners recruit employees for at-issue jobs from outside the workforce, rather than from lower paying, overwhelmingly nonwhite cannery worker positions. [citations omitted]. Information about availability of at-issue positions is conducted by word of mouth; therefore, the maintenance of housing and mess halls that separate the largely white noncannery workforce from the cannery workers ... coupled with the tendency toward nepotistic hiring are obvious barriers to employment opportunities for nonwhites. Putting to one side the issue of business justifications, it would be quite wrong to conclude that these practices have no discriminatory consequence. Thus, I agree with the Court of Appeals ... that, when the District Court
makes the additional findings prescribed today, it should treat the evidence of racial stratification in the workforce as a significant element of respondents' *prima facie* case. * * *

### Civil Rights Act of 1991

(**amending Title VII of the Civil Rights Act of 1964**)


**SEC. 105. BURDEN OF PROOF IN DISPARATE IMPACT CASES.**

(a) Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) is amended by adding at the end the following new subsection:

‘(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent’s decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the 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.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of ‘alternative employment practice’.

2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title. * * *

### 3. SEXUAL HARASSMENT

**Meritor Savings Bank v. Vinson**

477 U.S. 57 (1986)

*Justice Rehnquist* delivered the opinion of the Court.

This case presents important questions concerning claims of workplace "sexual harassment" brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*
In 1974, respondent Mechelle Vinson met Sidney Taylor, a vice president of what is now petitioner Meritor Savings Bank (bank) and manager of one of its branch offices. When respondent asked whether she might obtain employment at the bank, Taylor gave her an application, which she completed and returned the next day; later that same day Taylor called her to say that she had been hired. With Taylor as her supervisor, respondent started as a teller-trainee, and thereafter was promoted to teller, head teller, and assistant branch manager. She worked at the same branch for four years, and it is undisputed that her advancement there was based on merit alone. In September 1978, respondent notified Taylor that she was taking sick leave for an indefinite period. On November 1, 1978, the bank discharged her for excessive use of that leave.

Respondent brought this action against Taylor and the bank, claiming that during her four years at the bank she “had constantly been subjected to sexual harassment” by Taylor in violation of Title VII. She sought injunctive relief, compensatory and punitive damages against Taylor and the bank, and attorney’s fees.

At the 11-day bench trial, the parties presented conflicting testimony about Taylor’s behavior during respondent’s employment. Respondent testified that during her probationary period as a teller-trainee, Taylor treated her in a fatherly way and made no sexual advances. Shortly thereafter, however, he invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of losing her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women’s restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions. These activities ceased after 1977, respondent stated, when she started going with a steady boyfriend.

Respondent also testified that Taylor touched and fondled other women employees of the bank, and she attempted to call witnesses to support this charge. But while some supporting testimony apparently was admitted without objection, the District Court did not allow her “to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief, but advised her that she might well be able to present such evidence in rebuttal to the defendants’ cases.” [citation omitted]. Respondent did not offer such evidence in rebuttal. Finally, respondent testified that because she was afraid of Taylor she never reported his harassment to any of his supervisors and never attempted to use the bank’s complaint procedure.
Taylor denied respondent’s allegations of sexual activity, testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her, and never asked her to do so. He contended instead that respondent made her accusations in response to a business-related dispute. The bank also denied respondent’s allegations and asserted that any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval.

The District Court denied relief, but did not resolve the conflicting testimony about the existence of a sexual relationship between respondent and Taylor. It found instead that

“[i]f [respondent] and Taylor did engage in an intimate or sexual relationship during the time of [respondent’s] employment with [the bank], that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution.”

The court ultimately found that respondent “was not the victim of sexual harassment and was not the victim of sexual discrimination” while employed at the bank. * * *

The Court of Appeals for the District of Columbia Circuit reversed. [citation omitted]. [T]he court stated that a violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. The court drew additional support for this position from the Equal Employment Opportunity Commission’s Guidelines on Discrimination Because of Sex, 29 CFR § 1604.11(a) (1985), which set out these two types of sexual harassment claims. Believing that “Vinson’s grievance was clearly of the [hostile environment] type . . .” and that the District Court had not considered whether a violation of this type had occurred, the court concluded that a remand was necessary. * * *

II

* * *

The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong.Rec. 2577–2584 (1964). The principal argument in opposition to the amendment was that “sex discrimination” was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. See id., at 2577 (statement of Rep. Celler quoting letter from United States Department of Labor); id., at 2584 (statement of Rep. Green). This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on “sex.”

Respondent argues, and the Court of Appeals held, that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII. Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor “discrimi-
A. THE UNITED STATES

nate[s]” on the basis of sex. Petitioner apparently does not challenge this proposition. It contends instead that in prohibiting discrimination with respect to “compensation, terms, conditions, or privileges” of employment, Congress was concerned with what petitioner describes as “tangible loss” of “an economic character,” not “purely psychological aspects of the workplace environment . . . .” In support of this claim petitioner observes that in both the legislative history of Title VII and this Court’s Title VII decisions, the focus has been on tangible, economic barriers erected by discrimination.

We reject petitioner’s view. First, the language of Title VII is not limited to “economic” or “tangible” discrimination. The phrase “terms, conditions, or privileges of employment” evinces a congressional intent “to strike at the entire spectrum of disparate treatment of men and women” in employment. [citation omitted]. Petitioner has pointed to nothing in the Act to suggest that Congress contemplated the limitation urged here.

Second, in 1980 the EEOC issued Guidelines specifying that “sexual harassment,” as there defined, is a form of sex discrimination prohibited by Title VII. As an “administrative interpretation of the Act by the enforcing agency,” these Guidelines, “‘while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,’” [citations omitted]. The EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII.

In defining “sexual harassment,” the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” [citation omitted]. Relevant to the charges at issue in this case, the Guidelines provide that such sexual misconduct constitutes prohibited “sexual harassment,” whether or not it is directly linked to the grant or denial of an economic quid pro quo, where “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.” * * *

Nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited. The Guidelines thus appropriately drew from, and were fully consistent with, the existing case law.

Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. As the Court of Appeals for the Eleventh Circuit wrote in Henson v. Dundee, 682 F.2d 897, 902 (1982):

“Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a
living can be as demeaning and disconcerting as the harshest of racial epithets.”

Of course ... not all workplace conduct that may be described as “harassment” affects a “term, condition, or privilege” of employment within the meaning of Title VII. See Rogers v. EEOC, supra, at 238 (“mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee” would not affect the conditions of employment to sufficiently significant degree to violate Title VII); Henson, 682 F.2d, at 904 (quoting same). For sexual harassment to be actionable, it must be sufficiently severe or pervasive “to alter the conditions of [the victim’s] employment and create an abusive working environment.” Ibid. Respondent’s allegations in this case—which include not only pervasive harassment but also criminal conduct of the most serious nature—are plainly sufficient to state a claim for “hostile environment” sexual harassment. * * *

Petitioner contends that even if this case must be remanded to the District Court, the Court of Appeals erred in one of the terms of its remand. Specifically, the Court of Appeals stated that testimony about respondent’s “dress and personal fantasies,” [citation omitted] which the District Court apparently admitted into evidence, “had no place in this litigation.” [citation omitted]. The apparent ground for this conclusion was that respondent’s voluntariness vel non in submitting to Taylor’s advances was immaterial to her sexual harassment claim. While “voluntariness” in the sense of consent is not a defense to such a claim, it does not follow that a complainant’s sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant. The EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of “the record as a whole” and “the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.” [citation omitted]. Respondent’s claim that any marginal relevance of the evidence in question was outweighed by the potential for unfair prejudice is the sort of argument properly addressed to the District Court. In this case the District Court concluded that the evidence should be admitted, and the Court of Appeals’ contrary conclusion was based upon the erroneous, categorical view that testimony about provocative dress and publicly expressed sexual fantasies “had no place in this litigation.” [Citation omitted.] While the District Court must carefully weigh the applicable considerations in deciding whether to admit evidence of this kind, there is no per se rule against its admissibility.

[Court’s section on employer liability omitted].

IV

In sum, we hold that a claim of “hostile environment” sex discrimination is actionable under Title VII, that the District Court’s findings were insufficient to dispose of respondent’s hostile environment claim, and that the District Court did not err in admitting testimony about respondent’s sexually provocative speech and dress. As to employer liability, we conclude that the Court of Appeals was wrong to entirely disregard agency principles
and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.

[Concurring Opinion by JUSTICE MARSHALL, JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS omitted].

Sexual Harassment Law in the United States, the United Kingdom and the European Union: Discriminatory Wrongs and Dignitary Harms


LINDA CLARKE

It is generally accepted that, although the behaviour it describes has been around for a very long time, the term ‘sexual harassment’ was first coined during a brainstorming session involving three feminist activists at Cornell University in 1975. One of those activists, Lynn Farley, wrote a book on the subject and activists and lawyers began to take cases on behalf of women forced out of jobs because of sexual harassment at work. But the key legal development was the argument that sexual harassment was not just individualized bad behaviour, or simply ‘personal’, but that it was sex discrimination, and unlawful under Title VII of the Civil Rights Act 1964. Catherine MacKinnon argued forcefully that:

sexual harassment perpetuates the interlocked structure by which women have been kept sexually in thrall to men and at the bottom of the labour market. Two forces of American society converge: men’s control over women’s sexuality and capital’s control over employees’ work lives.

MacKinnon rejected the idea of using traditional tort-based actions, such as intentional infliction of emotional distress, because ‘by treating the incidents [of sexual harassment] as if they are outrages particular to an individual woman rather than integral to her social status as a woman worker, the personal approach on the legal level fails to analyze the relevant dimensions of the problem’. For MacKinnon, it was essential to recognize that sexual harassment was a group harm, a form of discrimination against women as women.

Her arguments were successful: by 1980 the Equal Employment Opportunity Commission (EEOC) had issued guidelines declaring that sexual harassment was a breach of section 703(a)(1) of Title VII of the Civil Rights Act 1964 and in 1986 the Supreme Court confirmed that sexual harassment was actionable sex discrimination. Public awareness of sexual harassment increased following the intensive media coverage of the allegations of sexual harassment made by Anita Hill against Clarence Thomas during the course of his nomination hearings for appointment to the Supreme Court, and in 1991, Congress extended Title VII relief to include compensatory and punitive damages. In 1998 the Supreme Court clarified employer liability, holding that employers were strictly liable where sexual harassment had tangible employment consequences, such as demotion or dismiss-
al, though in ‘hostile environment’ cases, where there were no tangible employment actions, employers would have a defence where they had acted reasonably to prevent harassment, and the employee had unreasonably failed to take advantage of any preventative or corrective action.

* * * Exactly why is sexual harassment sex discrimination? This key question troubled some feminist legal scholars early on, as they tried to find an adequate theoretical basis for the assertions so readily accepted by the courts. Katherine M. Franke identified three different explanations. Firstly, sexual harassment violates the equality principle, in that a woman is treated differently from a man, and would not have been so treated ‘but for’ her sex. Early cases involved arguments that the issue was about sexual attraction, not sex discrimination: had the (male) harasser been attracted to a male employee, he would have subjected the man to exactly the same treatment as the woman. This was firmly quashed in Barnes v. Costle [citation omitted] in 1977 when Judge Spottiswood Robinson noted that the heterosexual (male) supervisor would not have demanded sexual relations from a male employee as a condition of keeping his job. Franke sees this as ‘the central judicial conception’ of sexual harassment.

Secondly, sexual harassment is sex discrimination simply because the conduct is sexual in nature: ‘sex’ equals ‘sexual’. Franke has shown that after a while the courts began to ignore the ‘because of sex’ element whenever the conduct was explicitly sexual. It was the sexual nature of the conduct, doled out by (heterosexual) men to women, that the courts began to look for. Vicki Schultz has also argued that US case law has placed sexual conduct (rather than sex discriminatory conduct) at the heart of ‘hostile environment’ harassment in the United States. But the question then becomes, why is sexual conduct per se a form of sex discrimination?

Thirdly, sexual harassment is sex discrimination because it is an example of the subordination of women by men. This theory, for MacKinnon, best articulates sex discrimination as being concerned with inequality rather than difference. Under this approach, what is wrong with sexual harassment is that ‘it participates in the systemic social deprivation of one sex because of sex’. Sexual harassment becomes a tool which men as a group use to subordinate women.

The weaknesses of each of these theoretical accounts were exposed by the difficulties the courts experienced in adjudicating cases of same-sex harassment. When the issue finally came before the Supreme Court in 1998 in Oncale v. Sundowner Offshore Services the court was forced to attempt to articulate more clearly why sexual harassment was actionable sex discrimination. Joseph Oncale was working on an offshore oil platform when he was subjected to sex-related humiliating conduct, sexual assault, and threat of rape, by male co-workers, two of whom were in a supervisory position. Was this sex discrimination, and if so, why?

The Supreme Court began by noting that lower courts had taken ‘a bewildering variety of stances’ to same-sex harassment claims, and identified three main approaches, which broadly follow those identified by Franke. Firstly, some courts held that same-sex sexual harassment could never be actionable as sex discrimination. This could, very loosely, be seen as endorsing MacKinnon’s approach that sexual harassment is about the
the subordination of women by men. Secondly, some courts found that such harassment was actionable only if the harasser was homosexual, presumably motivated by sexual desire. This adopts the ‘but for’ approach, assuming the harasser would not have approached someone of the opposite sex. Thirdly, other courts suggested that workplace harassment that is sexual in nature is always actionable, regardless of the harasser’s sex, sexual orientation, or motivations.

Justice Scalia, delivering the opinion of a unanimous court, ruled that same-sex harassment could be actionable as sex discrimination, if courts and juries were able to draw the inference that it was sex discrimination: ‘whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed’. This inference could be drawn in three situations: where the harasser was homosexual (presumably motivated by desire); where ‘for example, a female victim is harassed by another woman so as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace’; and if the plaintiff can offer ‘direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace’. All of these are variations on the ‘but for’ explanation: the harassment would not have occurred if the victim had been of the opposite sex. Although commentators broadly welcomed the result in Oncale, the reasoning itself has been criticized for continuing to fail to explain why exactly, and when, sexual harassment is sex discrimination, and for ignoring broader theories about gender roles.

* * * The difficulties of fitting harassment within a discrimination framework have also arisen in UK law. In Porcelli v. Strathclyde Regional Council, the first British case on harassment to go to a higher court, two newly appointed male laboratory workers mounted a campaign of harassment against a female colleague, for no apparent reason. Although the harassment involved some sexual comments and behaviour, most of it did not, consisting of matters such as hiding her keys, emptying out her drawers, upsetting experiments and blocking her path. The employer’s defence was that the behaviour was not motivated by any reason connected with Mrs. Porcelli’s sex, but by dislike: the two men would have also harassed a male employee similarly disliked. This argument was successful before the Industrial Tribunal, but on appeal, the Court of Session held that because the form of the treatment involved (some) sex-specific conduct, and was ‘very different in a material respect from that which would have been inflicted on a male colleague’, there was sex discrimination. The men had used ‘a sexual sword’.

Porcelli can be read as a very sophisticated understanding of gender relationships, with its concentration on the effect of the conduct on the victim, rather than the motive of the harassers, and the way in which sexualized conduct and language is used as a particularly effective way of putting women in their place. But it was a difficult case in other respects for the ‘sex discrimination’ framework: much of the harassment was not sexual or sex-specific, the Court of Session spoke of ‘the equality of overall unpleasantness’, and accepted that the men disliked Mrs Porcelli as a person, not as a woman. Nor was this a case of male employees harassing a
new female employee in a previously male environment. In later cases, some of the reasoning in Porcelli was criticized, and tribunals refused to accept that the same treatment (such as the display of pornography in a workplace, or the use of foul language) was sex discrimination simply on the grounds that the treatment might have different effects or consequences for men and women. In Pearce v. Mayfield School the House of Lords firmly quashed the idea that harassment consisting of sex-specific language was sex discrimination: instead tribunals should treat it as part of the evidence, in determining whether the reason for the treatment was ‘on the ground of her sex’.

So the problem is that, although some sexual harassment is clearly sex discrimination (such as where male workers use sexual insults and sexualized behaviour with the explicit aim of driving women out of previously male working environments), it is not always easy to explain why other forms of sexual harassment are sex discriminatory, though instinctively one may feel this is so.

* * *

Aside from these theoretical concerns, it has also been argued in the United States that, on a pragmatic and practical level, sexual harassment law has not been the great success story for women’s rights at work as claimed in the past. Much of the criticism focuses on the apparent need for plaintiffs to show sexual conduct and sexualized behaviour, rather than sex discriminatory behaviour. In a comprehensive examination of hostile environment claims in the US, Vicki Schultz has demonstrated that the courts look for sexual conduct alone to establish hostile environment harassment. This has led to the law being both under-inclusive and over-inclusive. It is under-inclusive, in that it either ignores non-sexualized discriminatory harassment, or subjects it to the stricter requirements of a disparate impact claim. It is over-inclusive, in that it has encouraged employers, fearful of expensive sexual harassment suits, to prohibit ‘a broad range of relatively harmless sexual conduct, even where that conduct does not threaten gender equality on the job’. Schultz argues that the courts have missed an important link between gender discrimination and gender segregation, and that ‘hostile work environment harassment is driven not by a need for sexual domination but by a desire to preserve favoured lines of work as masculine’.

* * * There are a number of consequences to this over-inclusiveness. Firstly, if all forms of sexual expression are suspect, this can lead to overzealous disciplinary measures being taken against transgressors. This has been a particular issue in the United States, where the vast majority of employees work under so-called ‘fire at will’ contracts, with no legal protection against an unfair or unreasonable dismissal. The very success of sexual harassment claims in the United States has meant that employers are well advised to fire an alleged harasser, rather than risk an expensive hostile environment claim. Schultz also demonstrates that management in the United States have sometimes seized upon sexual harassment issues as a subterfuge for getting rid of employees who violate the norm of asexuality, regardless of whether such conduct is sex discriminatory: ‘[I]n some cases, the accused’s offence is so small, its connection to any sexist
motivation or pattern so slight, and the managerial response so overblown, that it is hard to resist the conclusion that management is using sexual harassment as a justification for punishing an employee they want to punish for other reasons. These sanctions have been used disproportionately against non-white men, gay men, and older men.

* * * There are also concerns that sexual harassment policies can actually increase sex segregation and make it more difficult for women to achieve workplace equality. Recent research from the United States has identified a ‘glass partition’, a barrier to cross-sex friendship at work, which has arisen partly as a result of increased awareness of sexual harassment: 75 per cent of the male participants in the survey reported that they think about sexual harassment issues when interacting with women at work. Further, this ‘glass partition’ disadvantages women in gaining access to information, networking and mentoring opportunities. Schultz notes that some employers resort to informal sex-segregation policies to avoid potential sexual harassment suits: ‘If the presence of sex is a problem, then one way to deal with it is to segregate “the sexes”’. Quinn’s research demonstrates that ‘the mere fear of sexual harassment charges is used to further isolate women and to justify men’s hostility towards them’.

An approach to harassment that emphasizes the sexual nature of harassing conduct also perpetuates a damaging stereotype: ‘the belief that sexual expression is demeaning to women invites legal protection for the wrong reasons. It positions women as a sexually pure and vulnerable victim class whose virtue or special sensibilities require protection from men, positioned as natural sexual predators’.

This moralistic, puritanical approach to sexual conduct has also been attacked by post-modern and queer theorists. Cohen, describing post-modern feminist theory, notes that ‘[t]he ideology that women’s sexuality is nonexistent or shameful accounts for why sexualization can become a means to discredit and silence them. It also deprives women of their own legitimate sexual expression’. Janet Halley questions the alleged ‘harm’ of sexual harassment, asking whether women are really more injured ‘when a male supervisor asks to sleep with us than when he forgets to sign us up for a reskilling conference or power lunch’? Katherine M. Franke has noted that ‘when it comes to sex, [legal feminists] have done a more than adequate job of theorizing the right to say no, but we have left to others the task of understanding what it might mean to say yes’.

It has also been suggested that much of the ‘success’ of sexual harassment law in the United States might be explained as much by its appeal to the business mindset of American capitalism as to American values of equality and non-discrimination. Prohibiting sexual conduct at work falls neatly within the neo-Taylorist project of advancing efficiency within the workplace by excluding irrational and emotional behaviour, argues Schultz, and this is a major reason why American employers have embraced anti-sexual harassment policies so readily, whilst ignoring issues such as maternity rights and equal pay. Saguy, comparing American and French attitudes to sexual harassment, and sexuality at work, noted that American respondents frequently used a ‘business frame’, saying that
sexual relations were 'bad for business', without tying sexual behaviour to gender inequality.

NOTES

1. The U.S. Supreme Court’s jurisprudence on Title VII, including allocation of burdens of proof and employer defenses, has been used as a model for other civil rights statutes which cover characteristics such as age and disability. Although these other statutes are not covered in this chapter, it is important to note the conceptual and practical links between Title VII and those other statutes. Like Title VII, most employment discrimination statutes cover various forms of discrimination, many of which we have seen in Chapter II—including disparate treatment discrimination, disparate impact discrimination, harassment, and reasonable accommodation. Moreover, courts’ interpretation of the type of discrimination covered under Title VII, and the evidentiary requirements to prove each type of discrimination, has shaped the drafting and interpretation of other employment discrimination statutes. The Age Discrimination in Employment Act (“ADEA”) of 1967 prohibits discrimination in hiring, promotion, wages, termination and layoffs against anyone over the age of 40 years old. 29 U.S.C. section 621–634. It also prohibits discrimination in benefits for older workers and prohibits mandatory retirement based on age in most employment sectors (one exception is certain executives over 65 in high policy-making positions). Age discrimination is allowable, as it is under Title VII, if age is a “bona fide occupational qualification reasonably necessary to the normal operation of the particular business.” Id.

2. The Americans with Disabilities Act (“ADA”) of 1990 prohibits discrimination against individuals with a disability in various sectors of life. 42 U.S.C. Chapter 26. An individual with a disability is defined as a person who has (or has a history of having) a physical or mental impairment that substantially limits one or more major life activities or a person who is perceived by others as having such an impairment. 42 U.S.C. section 12102. The Act does not define what kinds of impairments constitute a disability and this has been the subject of a number of important Supreme Court cases interpreting the Act. See e.g. Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002) (interpreting “substantial limitation” of “major life activities” to mean that claimants must demonstrate permanent or long-term impairment in ability to perform “activities that are of central importance to most people’s daily lives.”). Title I of the ADA prohibits discrimination in employment and explicitly prohibits both disparate treatment and disparate impact discrimination and, additionally, requires that employers make reasonable accommodations to the known physical or mental limitations of otherwise qualified individuals with disabilities, unless it results in undue hardship to the employer. 42 U.S.C. section 12112.

3. Title VII prohibits most employers from discriminating on the basis of religion. The term “religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee’s or prospective
employee’s religious observance or practice without undue hardship on the conduct of the employer’s business. 42 U.S.C. section 2000e(j). The Supreme Court has interpreted the reasonable accommodation requirement in a fairly de minimis way, and highly sensitive to the cost such accommodations impose on employers. See e.g. TWA v. Hardison, 432 U.S. 63 (1977) (to require the employer to expend more than a de minimis cost to give the plaintiff his Sabbath off would be an undue hardship); Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986) (neither the statute nor the legislative history require an employer to accept a particular accommodation; once an employer has reasonably accommodated an employee’s needs, the statutory inquiry is at an end and the employer does not have to show that the other desired accommodations would cause undue hardship).

4. The Equal Pay Act of 1963 prohibits sex discrimination in the payment of wages and requires employers to pay men and women equally for doing the same work—equal pay for equal work. 29 U.S.C. § 206. Congress passed the Act to invalidate blatant discriminatory practices that resulted in paying women lower wages and to rectify the wage disparity between men and women. Even as those practices have been swept aside, however, the pay gap between men and women has persisted into the 21st Century. In 2009, President Obama signed the Lily Ledbetter Fair Pay Restoration Act, which allows victims of pay discrimination to file a complaint with the government against their employer within 180 days of their last paycheck. Previously, victims were only allowed 180 days from the date of the initial discriminatory decision by the employer under a Supreme Court ruling. See Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

5. There is no law forbidding discrimination on the basis of sexual orientation in the United States, at least on the federal level. Members of Congress have introduced the Employment Non–Discrimination Act (“ENDA”) many times over the past decade and each time it has fallen short of the votes needed for passage. The current version of the Bill would provide workplace protections on the basis of both sexual orientation and gender identity, but it would exempt a number of employers—including small businesses, religious organizations and the military. Twenty one states and the District of Columbia currently have laws which prohibit discrimination in employment based on sexual orientation. Fifteen states and the District of Columbia also prohibit discrimination based on gender identity. According to the prominent gay rights advocacy organization, the Human Rights Campaign, hundreds of companies have enacted policies protecting their lesbian, gay, bisexual and transgender employees. As of March 2011, 433 (87 percent) of the Fortune 500 companies had implemented non-discrimination policies that include sexual orientation, and 229 (46 percent) had policies that include gender identity. http://www.hrc.org/laws_and_elections/enda.asp.

6. Consider the following assessment of courts’ treatment of discrimination claims based on national origin under Title VII:

“Despite its parallel status and equal longevity in Title VII, the prohibition against “national origin” discrimination remains, as it began, largely undeveloped and ineffective. For example, what is usual-
ly referred to as the legislative history of the “national origin” term consists of a few un-illuminating paragraphs of the House debate that discuss what national origin meant.” The national origin term ended up in Title VII because it was part of the “boilerplate” statutory language of fair employment in executive orders and legislation preceding the Civil Rights Act of 1964. At the time, Congress gave no serious thought to the content of the national origin term nor to its proper scope. Since that time, as well, there has been a remarkable scarcity of analysis regarding the “national origin” term and whether it remains adequate for the forms of discrimination common today.

Courts have been largely unsympathetic to claims of discrimination as experienced by persons whose “ethnicity” differs from that of the majority. Thus Mexican American employees must endure insults such as “wetback” and demeaning labor which “Americans [do] not have to do.” Employees may be fired or disciplined for speaking languages other than English in the workplace, even if employees are doing their jobs at the time or if their conversations do not interfere with job performance. Persons who speak with “foreign” accents may be denied employment, despite excellent qualifications and verbal skills, because of the discomfort and displeasure they cause interviewers. African American women may be denied the ability to express their ethnic identity by wearing their hair in cornrows. All of these situations occur, and recur, despite Title VII’s prohibitions against national origin and race discrimination.”


7. Some courts have also interpreted Title VII as not prohibiting discrimination on the basis of “voluntary” behaviors that workers may perceive to be an essential part of their racial or ethnic identity. For instance, an employer may ban certain kinds of hairstyles—such as braids or dreadlocks—from a workplace even though such a ban effectively screens out large numbers of blacks from the employment pool. Or an employer may adopt a grooming policy that forbids employees from wearing head wraps, even if those wraps are required by their religious beliefs. The judicial tolerance for these kind of employer policies is, some scholars have argued, indicative of courts’ tendency to embrace biological conceptions of race and ethnicity and to exempt from protection the “performative” aspects of racial and ethnic identity, even though discrimination on the basis of these racial proxies can be based on racial bias and animus. See e.g. Camille Gear Rich, *Performing Racial And Ethnic Identity: Discrimination By Proxy And The Future Of Title VII*, 79 N.Y.U. Law Review 1134 (2004).

8. What is the effect of the Civil Rights Act of 1991, excerpted above (and also known as the Civil Rights Restoration Act), passed by Congress partially in response to the Price Waterhouse and Wards Cove decisions? In what ways, if any, does the Act change the law of those cases?

9. What is the relationship between the structure of proof set out in Section 107 of the 1991 act for proving discrimination and the burden of proof structure set out in cases like *McDonnell Douglas* and *Hicks*, covered in Chapter II, as it relates to how a plaintiff demonstrates that s/he was
discriminated against “because of” race, sex, or other prohibited characteristic? It may be that the two proof structures merge together after the Civil Rights Act of 1991. That is, the McDonnell Douglas/Hicks evidentiary framework can still be employed to raise an inference, circumstantially, that an illegitimate consideration (e.g. race or sex) was part of the employer's decision making process. Once this is demonstrated, either by circumstantial or direct evidence, the employer has available to it the defense made available by Price Waterhouse and the 1991 Act—that it would have made same decision even if the prohibited characteristic had played no role in the employment decision. See Desert Palace v. Costa, 539 U.S. 90 (2003).

10. Note that Title VII tolerates classification on basis of religion, sex or national origin in those certain instances where religion, sex or national origin is a BFOQ—a trait that is reasonably necessary to the normal operation of a particular business enterprise. What it is about race that makes it different from sex, national origin, or religion that there would never be a legitimate reason for an employer to only hire people of one race? Might there be a BFOQ defense if a theater decided to hire only women to fulfill female roles, or only men to fulfill male roles, but not blacks to fill only a black role or whites to fill only a white role? What about if it decided to hire French or Cuban person to fill, respectively, a French or Cuban role; or a Jewish person to fill a Jewish role? Are there some roles for which the theater could argue that national origin or religion are reasonably necessary or essential to the role. Note that regulations promulgated by the Equal Employment Opportunity Commission (EEOC) indicate that the BFOQ exception “shall be strictly construed.” 29 Code Federal Regulations section 1606.4 (2010).

11. In the Vinson case the Court held that “While “voluntariness” in the sense of consent is not a defense to [a claim of sexual harassment], it does not follow that a complainant’s sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant.” In what way is it relevant?

12. The Supreme Court in Harris v. Forklift, 510 U.S. 17 (1993), considered the question ‘whether conduct, to be actionable as ‘abusive work environment’ harassment (no quid pro quo harassment issue is present here), must ‘seriously affect [an employee’s] psychological well being’ or lead the plaintiff to ‘suffer[r] injury.’ The Court unanimously held that sexual harassment need not lead to psychological harm in order for it to be actionable under Title VII. Rather, sexual harassment occurs when “the environment would reasonably be perceived, and is perceived, as hostile or abusive” even if such conduct would not seriously affect a reasonable person’s psychological well being. The Court also gave further guidance on how to evaluate a sexual harassment claim:

“[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances. These may include 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. The effect on the employee’s psychological well being is,
of course, relevant to determining whether the plaintiff actually found
the environment abusive. But while psychological harm, like any other
relevant factor, may be taken into account, no single factor is re-
quired.”

Id. at 23.

B. Europe

Article 13 of the Treaty of Amsterdam, ratified by the member states of
the European Union in 1999, introduced the power of the European
Council (“EC”) to adopt measures to combat discrimination based on sex,
racial or ethnic origin, religion or belief, disability, age or sexual orienta-
tion. Pursuant to this Treaty, the Council has established a number of
“Directives” prohibiting employment discrimination in each of the grounds
listed above. Each member state is obligated to conform its national law to
the terms of the EC Directives. These Directives set a minimum standard,
or floor, below which each member state cannot go. States may adopt
antidiscrimination measures that go above the standards set by the Di-
rectives. The European Court of Justice (ECJ) may determine that a
member state has failed to comply with a Directive, either by failing to
conform its laws to the Directives or by failing, through its national courts,
to properly enforce the Directives. In this regard, recall the relationship
between the EC and the ECJ (European Court of Justice), discussed briefly
in chapter II.

This section is organized by the various Directives which cover employ-
ment discrimination at the European Community level. These Directives
separately cover antidiscrimination prohibitions by sex (76/207/EEC) and
race (2000/43/EC), and there is a general employment Directive which
covers age, disability, religion or belief, and sexual orientation (2000/78/
EC). Each of the Directives prohibit direct and indirect discrimination, as
well as harassment on the basis of the covered characteristic. Unlike Title
VII under U.S. law, the Directives are very specific about what kind of
discrimination is outlawed and neither courts nor member states have had
to define the term “discrimination.” In other ways, however, the Directives
leave open important questions about their reach—specifically, how far do
they go to define and enforce racial, gender and other forms of equality?

The grounds of discrimination covered in the various Directives largely
mirror those prohibited by the EU Charter on Fundamental Rights, which
is also binding on members states pursuant to the Treaty of Lisbon. Article
12(1) of that charter prohibits any discrimination on the grounds of age,
race, color, ethnic or social origin, genetic features, language, religion or
belief, political or any other opinion, membership of a national minority,
property, birth, disability, age or sexual orientation. As with the EC
Directives, discrimination under the EU Charter is adjudicated by the
European Court of Justice (ECJ) in Luxemburg; the European Court of
Human Rights (ECtHR) in Strasbourg also has jurisdiction (or “compe-
tence”) over discrimination, but only when it violates the European Con-
vention of Human Rights. A point worth noting is that fundamental rights
protection in Europe has been a sphere of law which is particularly open to judicial cross-fertilization. The Strasbourg Court has been referring more and more frequently to the EU Charter of Fundamental Rights, and the Luxemburg Court has always been quite receptive to the European Convention on Human Rights. Antidiscrimination law is thus a good example of this dialogue between courts since it has produced similar case law on certain discrimination issues and some cases on discrimination have even been tried by both courts.

1. SEX DISCRIMINATION

The principle of equality between men and women was an original principle contained in the Treaty of Rome (1957) which required, among other things, Member states to ensure that men and women should receive equal pay for equal work. The Treaty of Rome’s principle of equality contained the twin aims of seeking equality both as a matter of market conditions and as a matter of human rights and social policy. The European Council has since adopted a number of Directives aimed at implementing the principle of equal treatment between men and women in a variety of contexts. Due to the long history of recognizing the equal treatment principle between men and women, its legal status is much more developed than other areas of non-discrimination law in Europe. Key concepts of non-discrimination law—such as the concepts of direct and indirect discrimination as well as the rules on burden of proof in discrimination cases—were developed within the context of sex equality laws.

Much of the jurisprudence developed over time has been incorporated into the Directives as they are amended by the Council. The latest Directive, excerpted below, amends earlier Directives prohibiting sex discrimination in employment and “recasts” them in one Directive. The Directive incorporates much of the jurisprudence interpreting earlier Directives and thus is quite specific about the type of discrimination covered as well as the scope of the prohibition. The Directive contains provisions to implement the equal treatment principle in relation to (a) access to employment, including promotion, and to vocational training; (b) working conditions, including pay; and (c) occupational social security schemes. Following the Directive is an example of a recent case which raises new questions regarding the reach of sex discrimination laws.

(on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast))

THE COUNCIL OF THE EUROPEAN UNION
Preamble
Whereas:
(2) Equality between men and women is a fundamental principle of Community law under Article 2 and Article 3(2) of the Treaty and the case-law of the Court of Justice. Those Treaty provisions proclaim equality between men and women as a ‘task’ and an ‘aim’ of the Community and impose a positive obligation to promote it in all its activities.

(3) The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

(8) The principle of equal pay for equal work or work of equal value as laid down by Article 141 of the Treaty and consistently upheld in the case-law of the Court of Justice constitutes an important aspect of the principle of equal treatment between men and women and an essential and indispensable part of the **acquis communautaire**, including the case-law of the Court concerning sex discrimination. It is therefore appropriate to make further provision for its implementation.

(11) The Member States, in collaboration with the social partners, should continue to address the problem of the continuing gender-based wage differentials and marked gender segregation on the labour market by means such as flexible working time arrangements which enable both men and women to combine family and work commitments more successfully. This could also include appropriate parental leave arrangements which could be taken up by either parent as well as the provision of accessible and affordable child-care facilities and care for dependent persons.

(21) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of one sex. Such measures permit organisations of persons of one sex where their main object is the promotion of the special needs of those persons and the promotion of equality between men and women.

Article 2—

1. For the purposes of this Directive, the following definitions shall apply: (a) ‘direct discrimination’: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation; (b) ‘indirect discrimination’: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary; (c) ‘harassment’: where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment; (d) ‘sexual harassment’: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment; (e)
2. For the purposes of this Directive, discrimination includes: (a) harassment and sexual harassment, as well as any less favourable treatment based on a person’s rejection of or submission to such conduct; (b) instruction to discriminate against persons on grounds of sex; (c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.

Article 4—

For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated. In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

Article 5—

Without prejudice to Article 4, there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards: (a) the scope of such schemes and the conditions of access to them; (b) the obligation to contribute and the calculation of contributions; (c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.

Article 6—

This Chapter shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.

Article 14—

1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to: (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals, as well as pay . . . (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.
2. Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

Article 15—

A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.

Article 16—

This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

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Commission of the European Communities v. Republic of Austria
Case C–203/03, 1 February 2005

European Court of Justice (Grand Chamber)

1. By its application, the Commission of the European Communities requests the Court to declare that, by maintaining, contrary to the provisions of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment ... a general prohibition of the employment of women, with a limited number of exceptions, in the sector of the underground mining industry and in Articles 8 and 31 of the Druckluft-und TaucherarbeitenVerordnung (Regulation on work in high-pressure atmosphere and diving work) of 25 July 1973 (BGBl. 501/1973, ‘the regulation of 1973’), a general prohibition of the employment of women in that kind of work, the Republic of Austria has failed to fulfil its obligations under Articles 2 and 3 of that directive and under Articles 10 EC and 249 EC, and to order the Republic of Austria to pay the costs.

Legal context

The relevant provisions of international law
3. Article 2 of Convention No 45 of the International Labour Organisation (‘the I.L.O.’) of 21 June 1935 concerning the employment of women on underground work in mines of all kinds, ratified by the Republic of Austria in 1937, stipulates that: ‘No female, whatever her age, shall be employed on underground work in any mine.’

4. In accordance with Article 3 of that Convention: ‘National law or regulations may exempt from the above prohibition: (a) females holding positions of management who do not perform manual work; (b) females employed in health and welfare services; (c) females who, in the course of their studies, spend a period of training in the underground parts of a mine; and (d) any other females who may occasionally have to enter the underground parts of a mine for the purpose of a non-manual occupation.’

5. Article 7 of that Convention stipulates: ‘1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director–General of the International Labour Office for registration . . . . 2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.’


7. Convention No 176 of the I.L.O. of 22 June 1995 on safety and health in mines does not refer to men only but lays down rules on safety and health irrespective of the worker’s sex.

8. The Republic of Austria ratified that convention on 26 May 1999, but it has not denounced Convention No 45 of the I.L.O.

The relevant provisions of Community law

9. The first and second paragraphs of Article 307 EC provide: ‘The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.’

10. Article 2(1) to (3) of Directive 76/207 provides: ‘1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status. 2. This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the
worker constitutes a determining factor. 3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.'

11. Under Article 3 of that directive: ‘1. Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy. 2. To this end, Member States shall take the measures necessary to ensure that: (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished,’ * * *

The relevant provisions of national law

18. Article 16 of the Arbeitszeitordnung (rules on working time) of 30 April 1938 (Deutsches RGBl. I, p. 447; GBl.f.d.LÖ 231/1939, ‘the 1938 rules’) provided: ‘Prohibited employment (1) Female workers shall not be employed in mines, saltworks, processing plants, underground quarries or opencast mines, nor shall they be employed above ground in extraction, except processing (separation and washing), transport or loading. (2) Female workers shall further not be employed in coking plants or in the transport of raw materials for any type of construction. (3) The Minister for Employment may totally prohibit the employment of female workers, or make it dependent on certain conditions, for particular types of undertakings or work which entails particular risks for health and morality.’

19. In 1972 that provision was repealed, except where applicable to underground mines.

20. With effect from 1 August 2001 the employment of women in the underground mining industry has been regulated by the Regulation of 2001.

21. Article 2 of that regulation, headed ‘Employment in the underground mining industry’, is worded as follows: ‘(1) Female workers shall not be employed in the underground mining industry. (2) Paragraph 1 shall not apply to: 1. female workers with management or technical responsibilities who do not carry out strenuous physical work; 2. female workers who work in a social or health service; 3. female workers who must do vocational training as part of their studies or comparable instruction, for the duration of that training; 4. female workers who are employed only on an occasional basis in the underground mining industry in an occupation which is not physically strenuous.’ * * *

23. Article 8 of the regulation of 1973 provides: ‘(1) Only male workers aged 21 or over who are fit for it from the point of view of health may be employed in work in a hyperbaric atmosphere. . . . (2) . . . Where the health requirement in paragraph 1 is satisfied, female workers aged 21 or over may also be employed as supervisory staff or in other work in a hyperbaric atmosphere which does not involve any greater physical effort. . . .’

24. Under Article 31 of the regulation of 1973: ‘(1) Only those male workers aged 21 or over who are fit for it from the point of view of health
and who possess the specialised knowledge and professional experience necessary for health and safety purposes may be employed as divers.

The pre-litigation procedure

25. Being of the view that both the prohibition laid down in the 1938 rules of the employment of women in the underground mining industry and the similar prohibition concerning work in a hyperbaric atmosphere and diving work were contrary to Community law, the Commission initiated the proceedings under Article 226 EC. Having given the Republic of Austria notice to submit its observations, the Commission issued a reasoned opinion on 7 February 2002 inviting that State to take the measures necessary to comply therewith within a period of two months from its notification. So far as employment in the underground mining industry was concerned, that opinion referred to the 1938 rules and not to the regulation of 2001 which forms the subject-matter of this action and which was cited for the first time in the Austrian Government’s reply to the reasoned opinion.

26. Considering that the information imparted by the Austrian authorities showed that the failure to fulfill obligations invoked in the reasoned opinion still subsisted, the Commission decided to bring this action.

Concerning the action

* * *

The prohibition of the employment of women in the underground mining industry

Concerning Directive 76/207

—Arguments of the parties

33. The Commission maintains that Article 2 of the regulation of 2001, which authorises women to be employed in the underground mining industry only in respect of certain restricted activities, is contrary to Article 3(1) of Directive 76/207. In so far as the directive itself contains various restrictions of the prohibition of discrimination, the Commission submits that it cannot be prayed in aid in order to justify the prohibition of employment at issue.

34. According to the Commission, the activity carried on in the sector of the underground mining industry does not relate to an occupation of the kind referred to in Article 2(2) of that directive.

35. With regard to the derogation from the principle of equal treatment for men and women provided for by Article 2(3) of Directive 76/207, the Commission argues that the risks to which women are exposed in the underground mining industry are not, generally, different in kind from those to which men are equally exposed.

36. The Austrian Government, relying on that last provision, contends that Article 2 of the regulation of 2001 is in keeping with Directive 76/207.
37. According to that Government, working in the underground mining industry involves permanent stress on the locomotory system, in a strained position, linked to work often carried out with the arms raised, in an atmosphere heavy with, inter alia, quartz dust, nitrogen oxide and carbon monoxide with values for temperature and humidity which are most often above average. The consequence for the workers concerned is frequent diseases of the lungs, joints and spinal column (miners’ knee, damage to the intervertebral discs, muscular rheumatism).

38. On average, mass and muscular strength, vital capacity, absorption of oxygen, blood volume and the number of red blood cells are less in women than they are in men. Women bearing strong physical stresses in their place of work would be exposed to higher risks of abortion and also of osteoporosis when menopausal and would suffer more migraines.

39. Since women have on average smaller vertebrae, they run more risks than men when carrying heavy loads. Moreover, when they have given birth several times there is an increased risk of injury to the lumbar vertebrae.

40. According to the Austrian Government, it is clear, therefore, that on account of the morphological differences to be found on average between men and women very strenuous physical labour in the underground mining industry exposes women to more risks, in contrast to the situation with respect, for example, to night work, which exposes women and men to the same stresses.

41. On this point, the Commission argues in particular that the Austrian Government itself declared during the pre-litigation procedure that ‘the range of energy variables is wide, there are considerable areas of overlap with values for men and an individual assessment ought to be carried out’.

—Findings of the Court

42. In accordance with Article 3(1) of Directive 76/207, application of the principle of equal treatment means that there is to be no discrimination whatsoever on grounds of sex in the conditions for access to all jobs or posts. It is not disputed that Article 2(1) of the regulation of 2001 treats men and women differently so far as employment in the mining industry is concerned. Since the Austrian Government has pleaded the derogation provided for by Article 2(3) of that directive, it has to be considered whether such a difference in treatment is covered by that provision and is therefore authorised.

43. As the Court pointed out in Case C–394/96 Brown [1998] ECR I–4185, paragraph 17, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with ‘pregnancy and maternity’, Article 2(3) of Directive 76/207 recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman’s biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth.
44. It is precisely because certain activities may present a specific risk of exposure to hazardous agents, processes or working conditions for a pregnant worker or for one who is breast-feeding or who has recently given birth that the Community legislature, by adopting Directive 92/85, introduced the requirement to evaluate and communicate risks, and a prohibition of the exercise of certain activities.

45. Nevertheless, Article 2(3) of Directive 76/207 does not allow women to be excluded from a certain type of employment solely on the ground that they ought to be given greater protection than men against risks which affect men and women in the same way and which are distinct from women's specific needs of protection, such as those expressly mentioned (see, to this effect, Case 222/84 Johnston [1986] ECR 1651, paragraph 44, and Case C–285/98 Kreil [2000] ECR I–69, paragraph 30).

46. Nor may women be excluded from a certain type of employment solely because they are on average smaller and less strong than average men, while men with similar physical features are accepted for that employment.

47. In this case, while it is true that the regulation of 2001 does not prohibit the employment of women in the underground mining industry without having provided exceptions to that prohibition, the fact nevertheless remains that the ambit of the general prohibition in Article 2(1) of that regulation is very wide, inasmuch as it excludes women even from work that is not physically strenuous and that does not, therefore, present any specific risk to the preservation of a woman's biological capacity to become pregnant and to give birth, or to the safety or health of the pregnant worker or for one who is breast-feeding or who has recently given birth, or to the fetus.

48. The exception provided for by Article 2(2)(1) of that regulation in fact refers only to management posts and technical tasks undertaken by women with management responsibilities who are therefore situated at a high grade in the hierarchy. The exception contained in Article 2(2)(2) concerns only female workers employed in the social or health services, and Article 2(2)(3) and (4) deal only with specific situations limited in time.

49. Such legislation goes beyond what is necessary in order to ensure that women are protected within the meaning of Article 2(3) of Directive 76/207.

50. It follows that the general prohibition of the employment of women in the underground mining industry laid down in Article 2(1) of the regulation of 2001, even though read in conjunction with subparagraph 2 of that article, does not constitute a difference in treatment permissible under Article 2(3) of Directive 76/207.

Concerning Article 307 EC and Convention No 45 of the I.L.O.

—Arguments of the parties

51. The Austrian Government argues that, irrespective of the medical reasons relied on, restrictions on the employment of women in the underground mining industry, within the limits laid down by the new legislation,
are also justified by the fact that the Republic of Austria is bound by Convention No 45 of the I.L.O., which it ratified in 1937.

52. According to that Government, having regard to Case C–158/91 Levy [1993] ECR I–4287, paragraph 17 et seq., and Case C–13/93 Minne [1994] ECR I–371, paragraph 19, it is in any case licit for the Member States to assert the rights conferred on them by such treaties. It follows that the Austrian Government, being bound to transpose into domestic law the prohibition of employment laid down in Convention No 45 of the I.L.O., is not obliged to apply in this respect Articles 2 and 3 of Directive 76/207.

53. The Commission argues that the conclusion drawn by the Austrian Government from Levy and Minne is too general.

54. According to the Commission, the interpretation of Article 307 EC given by the Court in Case C–84/98 Commission v. Portugal [2000] ECR I–5215, paragraphs 51 and 53, can be transposed direct to the present case. Article 7 of Convention No 45 of the I.L.O. contains a denunciation clause. It is unarguable that the Republic of Austria could have denounced that convention with effect from 30 May 1997, that is to say, a date after that on which the directive became binding on it by reason of the ratification of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3). The Republic of Austria was, in the Commission’s view, required to denounce the convention pursuant to Article 3(2) of Directive 76/207.

55. The Austrian Government counters that it could not have known that the law applicable in that field in Austria was contrary to Community law, or that the Commission considered the provisions in question to be contrary to Community law. The Commission’s first letter on the subject was dated 29 September 1998. It follows that Convention No 45 of the I.L.O. could be denounced on 30 May 2007 at the earliest.

56. Commission v. Portugal does not, according to the Austrian Government, impose any general obligation on the Member States to denounce international agreements when they are contrary to Community law. That interpretation, it argues, follows also from Case C–475/98 Commission v. Austria [2002] ECR I–9797, paragraph 49, in which the Court held, concerning ‘open skies’ agreements, that in the case of amendments to such an agreement concluded before accession, the Member States are prevented not only from contracting new international commitments but also from maintaining such commitments in force if they infringe Community law. If there existed a general obligation to denounce agreements contrary to Community law, it would not have been necessary to establish that the entire agreement was confirmed when certain parts of it were amended.

—Findings of the Court

57. It follows from the third paragraph of Article 307 EC that the obligations arising from agreements concluded, by acceding States before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, are not affected by the provisions of the EC Treaty.
58. The Republic of Austria, which acceded to the European Community with effect from 1 January 1995, ratified Convention No 45 of the I.L.O. before that date. Article 2 of that convention contains a general prohibition of the employment of women in underground work in mines and Article 3 permits a few exceptions of the same kind as those provided for in the regulation of 2001. It is common ground that that regulation implements the obligations imposed by the convention without going beyond the restrictions on the employment of women laid down therein.

59. In those circumstances, while it is true that the Republic of Austria may, in principle, rely on the first paragraph of Article 307 EC to maintain in force the provisions of domestic law implementing the above-mentioned obligations, the fact remains that the second paragraph of that article states that, to the extent that earlier agreements within the meaning of the first paragraph of the article are not compatible with the Treaty, the Member State or States concerned are to take all appropriate steps to eliminate the incompatibilities established.

60. In light of the conclusion reached by the Court in paragraph 50 above, the obligations imposed on the Republic of Austria by Convention No 45 of the I.L.O. are incompatible with Articles 2 and 3 of Directive 76/207.

61. As is apparent from paragraph 50 of Case C–62/98 Commission v. Portugal [2000] ECR I–5171, the appropriate steps for the elimination of such incompatibility referred to in the second paragraph of Article 307 EC include, inter alia, denunciation of the agreements in question.

62. None the less, it must be noted that the only occasion on which the Republic of Austria could, following its accession to the European Community, have denounced Convention No 45 of the I.L.O. was, in accordance with the rules laid down in Article 7(2) of the convention, during the year following 30 May 1997. At that time, the incompatibility of the prohibition laid down by that convention with the provisions of Directive 76/207 had not been sufficiently clearly established for that Member State to be bound to denounce the convention.

63. It may appropriately be added that, as Article 7(2) of Convention No 45 of the I.L.O. makes clear, the next opportunity for the Republic of Austria to denounce the convention will occur on the expiry of another period of ten years running from 30 May 1997.

64. It follows that, by maintaining in force national provisions such as those contained in the regulation of 2001, the Republic of Austria has not failed to fulfill its obligations under Community law.

65. It follows from the foregoing considerations that the action must be dismissed in so far as it concerns the prohibition of the employment of women in the sector of the underground mining industry.

—Arguments of the parties

66. The Commission considers that its observations on the prohibition of the employment of women in the underground mining industry
apply in the same way to the prohibition of the employment of women in work to be carried out in a high-pressure atmosphere and in diving work. A general prohibition of the employment of women laid down without any individual assessment cannot be justified by women’s alleged special needs of protection.

67. In the Austrian Government’s opinion, the restrictions on employment contained in Articles 8 and 31 of the regulation of 1973 are also justified on medical grounds relating specifically to women’s activity.

68. That Government argues that in most cases work to be carried out in a high-pressure atmosphere and diving work involve significant physical stress, for example, in the construction of underground railways in a high-pressure atmosphere or in the carrying out of under-water repairs to bridges. Prohibiting the employment of women in physically very demanding work in a high-pressure atmosphere and their employment in diving work is justified because their respiratory capacity is less than men’s and because they have a lower red blood cell count.

Findings of the Court

69. An absolute prohibition of the employment of women in diving work does not constitute a difference in treatment permitted under Article 2(3) of Directive 76/207.

70. The range of diving work is wide and includes, for instance, activity in the fields of biology, archaeology, tourism and police work.

71. The absolute prohibition laid down in Article 31 of the regulation of 1973 excludes women even from work that does not involve significant physical stress and thus clearly goes beyond what is necessary to ensure that women are protected.

72. With regard to employment in a high-pressure atmosphere, the regulation of 1973 excludes women from work that places excessive strain on their bodies.

73. In so far as the Austrian Government claims that women have lesser respiratory capacity and a lower red blood cell count in order to justify such exclusion, it relies on an argument based on measured average values for women to compare them with those for men. However, as that Government itself acknowledged during the pre-litigation procedure, as regards those variables there are significant areas of overlap of individual values for women and individual values for men.

74. In those circumstances legislation that precludes any individual assessment and prohibits women from entering the employment in question, when that employment is not forbidden to men whose vital capacity and red blood count are equal to or lower than the average values of those variables measured for women, is not authorised by virtue of Article 2(3) of Directive 76/207 and constitutes discrimination on grounds of sex.

75. In light of the foregoing considerations, it must be declared that, by maintaining in Articles 8 and 31 of the regulation of 1973 a general prohibition of the employment of women in work in a high-pressure atmosphere and in diving work, providing a limited number of exceptions
in the former case, the Republic of Austria has failed to fulfill its obligations under Articles 2 and 3 of Directive 76/207.

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**Sexual Harassment Law in the United States, the United Kingdom and the European Union: Discriminatory Wrongs and Dignitary Harms**


**LINDA CLARKE**

The law of sexual harassment in the United Kingdom also originated in sex discrimination law, but has not provoked the same level of debate. Continental Europe has generally been less receptive to arguments about the discriminatory harms of sexual harassment, although general anti-bullying measures designed to combat behaviour, usually described as ‘mobbing’ or ‘moral harassment’ have hit a popular chord as an affront to human dignity, and led to legal prohibition.

* * * Although there was no specific legal wrong of ‘sexual harassment’ [in the U.K.], it was accepted early on that such behaviour fell within the general provisions of the Sex Discrimination Act 1975 if it could be shown that a woman had been treated less favourably than a comparable man, on the grounds of her sex. Tribunals were generally very ready to find ‘less favourable treatment’, particularly where the behaviour consisted of sexual demands or sexual comments.

[In contrast to the U.S.], continental European civil law systems did not offer the same opportunities for a litigation strategy, and the demands for new laws against sexual harassment have instead been made in the political and legislative spheres. Kathrin S. Zippel has charted how sexual harassment slowly emerged as an issue in Germany in the 1980s, with pressure coming from feminist groups, politicians, ‘femocrats’ (state Women’s Officers), and the European Union, with the law playing a very limited role. Abigail Saguy has shown how in France, it was necessary for feminists to campaign for the introduction of new criminal statutes in order to tackle sexual harassment. Although in both Germany and France, feminists and others recognize the way in which sexual harassment operates as a tool in women’s oppression, nevertheless mainstream opinion did not see sexual harassment as sex discrimination in the way that that happened in the USA and the UK. Indeed, as both Zippel and Saguy show, there was considerable antipathy towards perceptions of the law of sexual harassment in the United States, with Americans portrayed as puritanical, unsophisticated about sexual matters, over-litigious, and motivated by greed. Instead, sexual harassment was seen either through a ‘violence’ framework, as individualized criminal behaviour akin to rape, sexual assault and sexual exposure, or as simply one type of harassment that occurs in the workplace. It is this latter perspective that has been most influential in shaping the legal and social response to harassment.

In Sweden in 1984 the psychologist Dr Heinz Leymann first used the term ‘mobbing’ to describe adult behaviour in the workplace, the term
having previously been used for animal behaviour. Concern over ‘mobbing’ spread throughout continental Europe in the 1990s, and in 1998 the French psychotherapist Marie–France Hirigoyen published her book *Le Harcèlement moral: la violence perverse au quotidien* which had an enormous impact in France. Hirigoyen’s ‘moral harassment’ focused on the psychological impact of harassment at work, defining ‘moral harassment’ as: any abusive conduct—whether by words, looks, gestures or in writing—that [through repetition or systematization] infringes upon the personality, the dignity, or the physical or psychical integrity of a person: also behaviour that endangers the employment of the said person or degrades the climate of the workplace.

But although Hirigoyen linked the practice to the United States’ concept of ‘sexual harassment’, she interpreted ‘moral harassment’ as ‘a form of interpersonal violence’ and it has been argued that her title ‘contained an implicit polemic against the American notion that the primary form of harassment was sexual’.

The book generated both large sales and considerable media discussion, and caught the popular imagination in a way that ‘sexual harassment’ had failed to do. Following publication, the French Labour Code was amended in 2001, and the French Penal Code in 2002, to prohibit ‘moral harassment’. The debates over moral harassment in France also led to amendment of the sexual harassment provisions in the Labour Code, so that the restriction to conduct involving hierarchical relationships was removed, in line with the provisions on moral harassment.

In Germany also, ‘mobbing’ has proved to be a greater concern for employers, unions and employees than sexual harassment. The Federal Employee Protection Act 1994 prohibited sexual harassment in the workplace, but treated the issue as a breach of the contract between employer and employee, rather than a violation of a civil right. However, the law ‘lacked effective implementation and enforcement mechanisms’ and has been little used by victims of sexual harassment, with 80 per cent of the cases heard in the labour courts involving men claiming unfair dismissal, following accusations of sexual harassment. After the introduction of the 1994 Act, employers adopted anti-mobbing policies, rather than sexual harassment policies: as in France, this has proved to be a more powerful concept for unions, workers and employers to rally around than sexual harassment as a form of sex discrimination.

The harm caused by mobbing, or ‘moral harassment’, is not characterized as discrimination on grounds of sex, or race, or some other prohibited ground, but rather as a violation of dignity. The definition of moral harassment in the French Penal Code refers to conduct ‘liable to harm his rights and his dignity’. Sexual harassment is defined in German law as ‘any wilful sexual behaviour that violates the dignity of employees at their place of work’. ‘Dignity’ has a long history as a European value but has been described as recently having ‘a meteoric rise to the top of the European Union’s value system’. The concept of dignity as a legal value can be traced back to Roman law in the delict of *inuria* but its modern incarnation, both in national and international legal texts, is generally ascribed to Europe’s (and more specifically Germany’s) reaction to Nazism: ‘... the basic right
to human dignity is understood as an explicit answer to the Holocaust—the "never again" in constitutional law', though this account has been challenged.

Whatever its origins, the concept of dignity is now firmly at the centre of the European Union’s legal framework, though what exactly is meant (or perhaps more accurately, understood) by the concept of dignity is less clear. As Millns has noted, 'With no precise definition, dignity is simply announced'. Dignity is generally viewed as a value which underlies other human rights, rather than a right in itself, and Brownsword has argued that 'it is the duty to respect human dignity that is fundamental', rather than any ‘right’ to dignity. This duty is something that is owed to others. Further, consent is deemed irrelevant for those wishing to protect dignity, something which may be problematic in treating harassment as a dignitary harm, as existing definitions always refer to behaviour which is unwanted or unwelcome.

* * * But 'dignity' also has its critics. James Q. Whitman has argued that, rather than having its origins in a reaction to the horrors of Nazism, the legal protection of dignity, honour and status in continental Europe stems instead from seventeenth- and eighteenth-century etiquette codes: rather than 'dignity' expressing some grand vision of humanity and the inviolability of the human spirit, it is more concerned with insults to honour and status. Whitman links this with the European conception of privacy, concerned primarily with personal integrity and autonomy, an attachment to dignity and a concern for one’s position in society. As a result, European privacy law is concerned with matters such as preventing press intrusion, controlling one’s image and respecting privacy in the workplace. In the United States, however, privacy is seen as an application of liberty, and in particular, freedom from intervention by the state. * * *

European Union involvement with the issue of harassment at work was originally only concerned with harassment on grounds of sex but following the Treaty of Amsterdam in 1998, Directives were issued which required Member States to outlaw harassment on grounds of race, ethnic origin, disability, sexuality, religion or belief and age. This was then followed by an amended Equal Treatment Directive which explicitly outlawed harassment on grounds of sex.

These Directives all treat harassment as a third form of discrimination, separate from direct or indirect discrimination: harassing conduct, on the specified grounds, is deemed to be unlawful discrimination. It is no longer necessary to point to a similarly situated comparator who has not been harassed. The Directives define harassment as unwanted conduct, related to the prohibited grounds, which has the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, or humiliating or offensive environment. Dignity and discrimination are thus linked: the harasser’s conduct must be related to the victim’s race, disability, etc., and the conduct must both violate the victim’s dignity and create an intimidating etc. working environment. It is unclear whether the need for a 'violation of dignity' adds anything other than a rhetorical flourish: it is difficult to think of examples where conduct created an intimidating, hostile, degrading, or humiliating or offensive environment without also
violating dignity (although the concept of ‘violating dignity’ is nowhere defined).

However, the Equal Treatment Directive, dealing with sex discrimination, does something more. In addition to outlawing harassing conduct related to the sex of the victim (retaining the discrimination framework), it also outlaws a specific type of conduct, which need not be related to the sex of the victim in any way at all. Rather, where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, then this too is outlawed conduct.

Although Article 2.3 deems both forms of harassment to be prohibited discrimination on the grounds of sex, the second form does not contain any element of a discrimination framework: there is no need to show that a comparable man would have been treated differently, or that the behaviour was linked in some way to the sex of the complainant. Instead, sexual conduct is singled out, and is unlawful where it is unwanted, and violates a person’s dignity. The use of the words ‘in particular’, rather than ‘and’, suggests that where the unwanted conduct is sexual in nature, there is no essential requirement to show also that the working environment is affected. This looks like a purely dignitary harm.

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2. RACIAL DISCRIMINATION


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(implementing the principle of equal treatment between persons irrespective of racial or ethnic origin)

| THE COUNCIL OF THE EUROPEAN UNION |
Article 2—

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1: (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin; (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

Article 3—

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to: (a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals and pay; (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations; (e) social protection, including social security and healthcare; (f) social advantages; (g) education; (h) access to and supply of goods and services which are available to the public, including housing.

2. This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.
Article 4—

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Equal Rights Versus Special Rights? Minority Protection and the Prohibition of Discrimination


KRISTIN HENRARD

Part II—Racial Equality Directive

2.1 Reach of the Prohibition of Discrimination

* * * It should be pointed out that while the title of the Directive refers to the principle of equal treatment, this is equated in article 2(1) with the prohibition of discrimination.

As there is no case law yet of the ECJ which clarifies the actual meaning of provisions of the Racial Equality Directive, relevant interpretative questions will be identified, and likely scenarios will be outlined, based on the existing case law in terms of the prohibition of gender discrimination. It is generally accepted that the ECJ will base its reasoning vis-à-vis other grounds, like racial and ethnic origin, on its gender jurisprudence, while it is also acknowledged that the textual divergencies and the different social contexts provided by these different grounds, might make it unlikely that the case law can (and will) be transposed just like that.

As the full title of the Racial Equality Directive demonstrates, it is concerned with equal treatment on the basis of racial or ethnic origin. It is striking though that neither the Directive itself, nor the Explanatory Memorandum contains a definition of these concepts. The preamble only indicates that the Union rejects theories with attempt to determine the existence of separate human races. Since ‘ethnic origin’ is also explicitly addressed, the relevance of the Racial Equality Directive for ethnic groups, including ethnic minorities is however obvious and is confirmed by the reference to ethnic minorities in recital 8. Nevertheless, the failure to define these concepts in the Racial Equality Directive has been criticized, inter alia because it would play in the cards of member states that deny the existence of races (and racism) at a conceptual level.

Since minorities are often defined in terms of their own language and/or own religion, it is important to determine to what extent differentiations on the basis of language or religion are qualified as indirect racial discrimination by the ECJ. The fact that religion as prohibited ground of
discrimination is taken up in Directive 2000/78 and has been left out of the Racial Equality Directive may make it 'more difficult to argue that discrimination which is primarily based on religion can be formulated as racial or ethnic origin discrimination. Nevertheless recital 10 acknowledges that religion may play a part in defining ethnicity.

In regard to the scope of application ratione personae it should be highlighted that recital 13 of the preamble explicitly states that it applies to third country nationals. However, article 3(2) shows that when sensitive issues arise, like immigration, states are getting anxious, potentially problematic exclusions are made. Article 3(2) reads as follows: 'this directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to entry into and residence of third-country nationals and stateless persons on the territory of the Member States, and to any treatment which arises from the legal status of third-country nationals and stateless persons'. In relation to the exclusion of differentiations on the basis of nationality it is generally known that there is an extensive overlap in most countries between ethnic origin (and race) and foreign nationality. Hence, targeted restrictions on the basis of nationality could amount to indirect discrimination on grounds of race and ethnicity. Arguably, to the extent that there would not be an objective and reasonable justification for differentiations on the basis of nationality, they should be qualified as indirect racial discrimination. * * *

2.2 Opening Towards Substantive Equality?

Prior to reviewing the provisions of the Racial Equality Directive, it seems appropriate to point out that it is widely agreed that the prohibition of discrimination does not require identical treatment, in other words, not every differentiation amounts to a prohibited discrimination. Consequently, it is important to know what are the criteria used to determine whether a differentiation amounts to a prohibited discrimination or, in other words, what is an acceptable justification for a differential treatment. By way of starting point, it can be put forward that a differentiation of treatment would amount to a prohibited discrimination when and in so far as there would not be a reasonable and objective justification for this differentiation. Such a justification is often further broken down in a requirement of a legitimate aim and a proportionality test. The proportionality test in the broad sense has at least two components. First, proportionality requires there to be a reasonable relation between the legitimate aim on the one hand and the differential treatment (and the underlying interests which it interferes with) on the other hand. In other words, the differential treatment should not go beyond what is necessary in order to achieve the goal. This first component is also called the proportionality test in the narrow sense. A more specific aspect of the proportionality test concerns the subsidiarity test. This test implies an investigation of whether there are no alternatives which can achieve the desired legitimate aim while implying less of an interference with the right to equal treatment.

* * * It should be highlighted that in terms of EU law, the above general justification possibility is only accepted in relation to indirect discrimination. Direct differentiations are only considered to be legitimate
(in that they would not amount to a prohibited discrimination) when there is an explicit ground in the treaties or secondary legislation, and in addition the demands of the proportionality principle would be met. In view of the fact that the Racial Equality Directive only allows two exceptions to the prohibition of direct discrimination, the protection against explicit differentiations on the basis of racial or ethnic origin is considerable.

2.2.1 Indirect Discrimination

Notwithstanding the absence of a generally accepted definition of indirect discrimination in terms of international law, there is a broad understanding of the core of this concept, which addresses measures that without differentiating explicitly on a certain ground, (are likely to) have a disproportionate impact on a group defined according to that ground, without objective justification.

There are arguably two related reasons why indirect discrimination is relevant for minorities and an adequate minority protection. First of all, and this is inherent in the description of the phenomenon, the prohibition of indirect discrimination reflects a concern for the underlying reality, or better for the actual effect of certain policies and rules. When the effects of an at first sight neutral rule are disproportionate, in the sense that it has a disparate negative impact on a particular group without reasonable and objective justification, this would be illegitimate. In other words, prohibiting such indirect discrimination tends to contribute to the realization of full or real equality, of crucial importance for minorities. The prohibition of indirect discrimination tends to further the accommodation of diversity, by revealing that apparently neutral criteria de facto favour the dominant culture. A second reason why this prohibition of indirect discrimination is important, is because of the inherent group focus it has, ....

The extent to which a legal system provides protection against indirect discrimination, arguably depends on several issues, including whether the concept of indirect discrimination is acknowledged, and what is needed for a *prima facie* case of indirect discrimination. In the framework of EC equality law, the concept of indirect discrimination was early on accepted, and the case law of the ECJ has acknowledged several times that the concept of indirect discrimination is vital for the effective protection against discrimination. However, ample confusion and uncertainty remained as to the latter issue.

The case law of the ECJ in terms of gender discrimination was essentially codified in Article 2(2) of the Burden of Proof Directive (Council Directive 97/80/EC on the Burden of Proof in cases of Discrimination based on Sex) and required proof of actual disparity, while this ‘disparity’ would have to concern a ‘disadvantage of a substantially higher level’. The definition of indirect discrimination in the Racial Equality Directive (article 2(2)(b)) in several respects represents an improvement in that it facilitates the burden (of proof) on the victim (claimant).

First of all, the level of disparate impact required has been lowered in that there is no longer a reference to specific proportions. It suffices that it concerns a ‘particular disadvantage’. Furthermore, and this is really a remarkable progress, it is no longer necessary to proof that this disadvan-
tage has actually occurred. It suffices that the measure is of such a nature that would put a certain group at a disadvantage. This seems to negate the need for statistical evidence in terms of EC law, which is especially important in regard of racial or ethnic origin as statistics are unlikely to be obtainable.

Unfortunately, recital 15 of the Directive indicates that national legislation or practice concerning proof may still provide ‘in particular for indirect discrimination to be established by any means including on the basis of statistical evidence’. This arguably implies that the directive still allows national legislation to require statistical evidence. The ECJ’s future case law will reveal to what extent this new approach to indirect discrimination actually facilitates the case for victims and leads to higher levels of protection against indirect discrimination.

2.2.2. Duty to Differentiate?

An obligation to differentiate in terms of the demands of equality can be traced back to Aristotle’s formula that unequal or different things should be treated differently to the extent of the difference. The underlying vision of equality is clearly substantive equality. To the extent that more recently such an obligation to differentiate is being identified in terms of non-discrimination, this development would equally imply an opening towards substantive or real, full equality.

There is a steady line of jurisprudence of the ECJ in terms of both the general principle of equal treatment which it has developed in its case law and which is argued to be embodied in the Racial Equality Directive, and of the prohibition of discrimination, that when people find themselves in substantially different circumstances, they should be treated differently, unless ‘same’ treatment is objectively justified by the pursuit of a legitimate aim and is appropriate and necessary to achieve that aim.

* * * The famous Groener case [Case C 379/87, Groener, 1989, ECR 1967, para 19 and 23] already showed that a general application of language requirements (affecting the free movement of workers) can be denounced as indirectly discriminatory on the basis of nationality, when these requirements do not pursue a legitimate objective and/or are not proportionate to that objective. According to de Schutter, ‘a similar obligation to treat differently situations which are substantively different may be derived from the definition of indirect discrimination in article 2(2)(b) of the Racial Equality Directive’. * * *

* * * It is important to realize that this type of differential measures are not necessarily temporary (in contrast to affirmative action measure). In view of the need for enduring differential treatment in order to protect and promote the separate identity of minorities, this jurisprudential line is especially relevant for minorities, for example in relation to language rights in communications with public authorities.
rate) the broad definition in article 1 of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), including colour, descent and national or ethnic origin. While suggestions were made to consider the extensive UK case law on the meaning of ‘ethnic group’, this seems questionable in view of the problematic distinctions this has entailed: Jews and Gypsies are considered to be ethnic groups, while Muslims and Rastafarians are not. The fact that in the Austrian legal system a more culturally oriented view of racial and ethnic discrimination prevails, is arguably in line with recital 6 of the Racial Equality Directive, in which the existence of separate legal races is rejected.

As was highlighted in Chapter 2, it seems commendable that the exclusion of differentiations on the basis of nationality from the scope of the Racial Equality Directive (and implementing legislation) should be narrowly constructed because of the danger that an important category of indirect discrimination on the basis of race ‘escapes’ scrutiny. Fortunately, this is a position which is acknowledged and taken on board in various countries. In regard to the Danish legal system it was pointed out that the Act on Ethnic Equality does not cover unequal treatment due to citizenship, but it was immediately added that ‘discrimination in the labour market on account of citizenship must not indirectly reflect discrimination due to, for instance, national origin (which is covered by the definition of racial discrimination in ICERD, incorporated in the Danish legal system). This is also nicely captured in the Austrian country report, where it is pointed out that the ‘issue of protection against discrimination on the basis of nationality or citizenship is crucial for the Austrian situation as most of the racist discourse is not labeled with terms like race or ethnic origin, but the scapegoats and concept of the enemies is to a very large extent about ‘foreigners’, ‘asylum seekers’, ‘asylum frauds’. While the Equal Treatment Act itself takes up a provision like article 3(2) Racial Equality Directive, the Explanatory Notes to the Act underline that ‘this exception can not be used to legitimate discriminations on the grounds covered in this act. The prohibition of discrimination also protects third country nationals’. It should be acknowledged though that case law and interpretations by the courts, that will clarify the actual amount of protection against possible indirect racial discrimination, are awaited. * * *

It should also be highlighted that the prohibition of discrimination on the basis of nationality is especially important in countries where many residents do not have citizenship. This point was explicitly made by the Advisory Committee (FCNM) when it reviewed the periodic state report of Estonia, in relation to the draft equality legislation. In this respect, Thematic Comment no 3 of the EU Network of Independent Experts on Fundamental Rights highlights that in these circumstances it cannot be ruled out that the very conditions for granting nationality could constitute indirect discrimination on the basis of racial or ethnic origin.* * *

4.2 Case Law

In view of the importance of an effective protection against discrimination for persons belonging to minorities, it is important that also potential (in the sense of not actually materialized) discrimination would be covered
by the prohibition. In this respect, an interesting case in Belgium can be highlighted, in which the court accepts that public statements of a discriminatory nature by employers might result in a finding of discrimination, even in the absence of any proven instance in which a practice or policy has been implemented vis-à-vis a particular person.

It was highlighted in chapter 2 that certain differentiations on the basis of language could potentially be qualified as indirect racial discrimination, which would be of obvious importance for linguistic minorities. A few national examples bear this out. A Swedish Labour Court decision of October 2005 might not have found indirect racial discrimination on the facts, it did acknowledge that language requirements for a position would amount to indirect racial discrimination if they were not objective justified, adequate and necessary for an adequate performance of the position at hand. Similarly, the Belgian Centre of Equality of Chances and the Fight against Racism indicated to the Flemish Government that an obligation to pass a Dutch course in order to become eligible for social housing would amount to a prohibited indirect discrimination on the basis of racial or ethnic origin.

A judgment of the House of Lords should be singled out as it demonstrates the prevalence of discrimination on the basis of racial or ethnic origin in the immigration context, which in light of article 3(2), unfortunately, runs the risk of falling outside the scope of application of the Racial Equality Directive. [Regina v. Immigration Officer at Prague Airport and another ex parte European Roma rights Centre and others] concerns the treatment of Roma in the pre-clearance procedure by UK authorities in Prague airport. Evidence was produced that Roma were subjected to longer, more intensive interviews and were 400 times more likely to be refused leave (to go to the UK). The House of Lords qualified this as less favourable treatment on racial grounds, and underscored that it would not be possible to justify this direct discrimination. A stronger confirmation of the need to be attentive for cases of indirect racial discrimination in this context will be difficult to find.

Finally, the tremendous amount of case law in relation to Roma and discriminatory access not only to employment, but also to public facilities, like restaurants, bars and discotheques is striking, and confirms clearly the relevance of the inclusion of article 3(1)(h) in the scope of the Racial Equality Directive.

3. RELIGION, DISABILITY, AGE, AND SEXUAL ORIENTATION DISCRIMINATION

As we have seen, sex equality between men and women has been the predominant focus of anti-discrimination law in Europe for the past 30 years. However, recently with the newer Directives, other forms of discrimination are now receiving increased attention. One of the most important Directives to emerge in recent years is the “general framework” Directive,
2000/78/EC, which covers many other forms of discrimination in employment and occupation.


(establishing a general framework for equal treatment in employment and occupation)

■ THE COUNCIL OF THE EUROPEAN UNION

WHEREAS * * *

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation. * * *

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission. * * *

(31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation. * * *

Article I—Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

The 2000/78 Directive specifically does not cover differences of treatment based on nationality. Article 3. This Directive prohibits both direct or indirect discrimination, as well as harassment, on the basis of religion or
belief, disability, age or sexual orientation. The definitions of direct, indirect and harassment track closely those definitions in the Race and Gender Directives. The Directive applies to both the public and private sectors but has some important limitations—including its inapplicability to social security and benefit systems and its inapplicability to the armed forces where disability and age are concerned. Article 3.

A. Religion

There is a long history of religious conflict in Europe and this history inevitably shapes equality law in the EU. Many of the major Treaties speak to freedom of religion—including the EU Charter on Fundamental Rights and the European Convention on Human Rights, among others. See Chapters VII and VIII. In the 1990s, “belief” was added to the already protected category of religion and is reflected in the 2000/78 Directive’s coverage of “religion or belief” as a prohibited grounds of employment discrimination. The use of “belief” was to ensure that non-religious beliefs such as atheism were covered similarly to religious beliefs. Religion or belief is a unique protected category compared with the other grounds protected by Article 13 of the Amsterdam Treaty in that it is the only one which also appears as a positive freedom in the European Convention on Human Rights.

The 2000/78 Directive does not define the terms “religion or belief,” nor do other international human rights treaties (including the ECHR). Thus, there are a number of questions left open by the Directive, including whether the definitional tests used in other legal contexts should be applicable to the Directive. There is also a question whether political beliefs fall under the protection of the Directive. Another question commentators have raised is whether the covered categories of “religion or belief” will be judged objectively by a court or subjectively according to the conscience of the individual worker.

There do not appear to be any cases interpreting the scope of “religion or belief” under the 2000/78 Directive. However, there are a number of decisions by the European Court of Human Rights that adjudicate the rights of religious minorities in Europe to express their religion and beliefs, particularly when it involves wearing religious garments (e.g. Muslim headscarf). See Chapter VIII.

Discrimination on the basis of religion and belief is sometimes permitted under the Directive. One exception is where religion or belief is a genuine and determining occupational requirement for the job. Article 4(1). The second is for organizations the “ethos” of which is based on religion or belief and the nature of the job requires that a person’s religion or belief is a genuine, legitimate and justified occupational requirement. Article 4(2).

B. Disability

The 2000/78 general framework Directive imposes a positive duty to provide reasonable accommodation to persons with disabilities. Specifically, employers are required to “take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.”
Article 5. Although there is no EU case law on the scope of the reasonable accommodation duty, the European Commission, in response to a question asked of it regarding 2000/78, stated: “[i]n practical terms such accommodation includes measures to adapt the workplace for people with disabilities, for example adapting premises and equipment, patterns of working time in order to facilitate their access to employment.” See Written Question E–2112/03, by Proinsias De Rossa (PSE) to the Commission (25 June 2003). See generally Richard Whittle, The Framework Directive for Equal Treatment in Employment and Occupation: An Analysis From a Disability Rights Perspective, 27 European Law Review 303 (2002).

The Directive also does not define what constitutes a “disability,” thus leaving considerable flexibility to member states to craft the scope of their disability anti-discrimination laws. However, two EU cases interpreting the directive provide some guidance. In Chacon Navas v. Eurest Colectividades SA, the Court dismissed a case in which an employee argued that dismissal on the basis of her sickness constituted disability discrimination under the 2000/78 Directive. Case C–13/05 (Grand Chamber, 11 July 2006). The Court ruled that the concept of “disability” within the meaning of the Directive must be understood as referring to a limitation which results from physical, mental or psychological impairments and which hinders the participation of the person in professional life over a long period of time; as such, the Court refused to equate the concepts of “disability” and “sickness.” Paras 43–47. In Coleman v. Law & Law, the Court considered as disability discrimination the dismissal of an employee who is not himself disabled but whose child is disabled. Case C–303/06 (Grand Chamber, 17 July 2008). The Court interpreted the general 2000/78 Directive’s prohibition on harassment on the basis of disability as not limited to those who themselves are disabled, so long as it is disability that is the basis of less favorable treatment. Paras 48–51.

C. Age

The preamble to the 2000/78 Directive emphasizes the need to pay particular attention to supporting older workers, in order to increase their participation in the European labour force and to encourage diversity in the workforce. Paras 8 and 25. Age discrimination is justified, however, in certain circumstances. In addition to potentially constituting a genuine and determining occupational requirement, “differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.” Article 6(1). According to the Directive, age discrimination may be justified, for example, under the following circumstances:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

Article 6(1). In addition, the Directive provides that:

Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

Article 6(2). The exceptions to age discrimination provided by Article 6 of the 2000/78 Directive have sometimes been interpreted narrowly and sometimes more loosely using a proportionality test. Thus the scope of age discrimination has been defined negatively, through what it is not.

Courts have given fairly wide deference to member states in setting national policy in employment and retirement matters based on age. Age discrimination law does not prohibit age distinctions within retirement or employment policies based on age as long as they are justified by objective aims and the means of achieving those aims are necessary and proportionate. The Mangold case was the first to apply the exception provided by article 6 of the Directive to employment policies for older workers. Mangold v. Rudiger Helm, Case C–144/04 (2005). There, the Court found that Article 6(1) must be interpreted as precluding a provision of domestic law that allows for the conclusion of fixed-term contracts of employment once the worker has reached the age of 52. Two other cases, the Palacio and Age Concern judgments, further clarify the standard to apply to the exception of age distinctions with regards to retirement policies. In both cases, the Court gives considerable latitude and deference to member states in determining the legitimacy of age restrictions in retirement policies. In Palacios de la Villa, Case C–411/05 (2007), the Court held that compulsory retirement clauses contained in collective agreements are lawful where such clauses provide as sole requirements that workers must have reached retirement age, set at 65 years by the national legislation, and must fulfil the other social security conditions for entitlement to draw a contributory retirement pension. In Age Concern England, Case C–388/07 (2009), the Court interpreted Article 6(1) as allowing a national measure that does not contain a precise list of the aims justifying derogation from the principle prohibiting age discrimination. More recent cases continue the trend of deference to member states, beyond retirement policies, to allow member states to set the maximum age for recruitment to certain career posts and to set maximum ages for compulsory retirement. See Wolf v. Stadt Frakfurt am Main, Case C–229/08 (2010) and Vasil v. Tenicheski universitet-Sofia, filial Plovdiv, Joined Cases C–250/09 and C–258/09 (2010).
D. Sexual Orientation

Recognition of sexual orientation in the 2000/78 framework mirrors its recognition by the ECtHR and the ECJ as a subject of human rights law. A number of cases by the ECtHR have vindicated the rights of gays and lesbians to be treated in equal terms in a variety of contexts. In recent rulings, the ECtHR has decriminalized homosexual acts between consenting adults (Dudgeon v. the United Kingdom, application no. 7525/76, judgment of 24 February 1983), banned sexual orientation discrimination in custody rights and family life (Salgueiro da Silva Mouta v. Portugal, application no. 33290/96, judgment of 21 December 1999), and prohibited discrimination in adoption on the basis of sexual orientation (E. B. v. France, application no. 43546/02, judgment 22 January 2008). More generally, it is noteworthy that in several cases the ECtHR required serious reasons to justify discrimination based on sexual orientation. In some occasions, the ECtHR even went as far as to compare discrimination based on sexual orientation to discrimination based on sex or on race.

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**Maruko v. Versorgungsanstalt der deutschen Buhnen**

Case C–276/06, 1 April 2008

European Court of Justice (Grand Chamber)

[Mr. Maruko filed an action against the pension fund of his deceased life partner. Mr. Maruko and his partner had a gay relationship recognised under the German Law on registered life partnerships. This law applied to gay relationships only, while marriage was open to heterosexual couples only. Mr. Maruko’s deceased partner was a costume designer who had worked in the theatre sector. He was therefore a member of the German Theatre Pension Fund, which was created under the framework of the Collective Agreement for Germany’s theatres. At the death of his partner, Mr. Maruko asked the pension fund for a widower’s pension. The pension fund, however, refused this request on the grounds that, according to its own regulations, such a pension was only granted to a widow or a widower who had been legally married. Mr. Maruko alleged that this refusal constituted discrimination based on sexual orientation and therefore violated the 2000/78 Directive. On the specific issue of whether the refusal of the pension to Mr. Maruko violated the prohibition of discrimination based on sexual orientation, as provided by Directive 2000/78/EC, the Court ruled as follows:]

62. (…) [T]he referring court seeks to know whether the combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor’s benefit equivalent to that granted to a surviving spouse, even though, like spouses, the life partners have been living in a union of mutual support and assistance which had been formally constituted for life.
Observations submitted to the Court

63. Mr Maruko and the Commission maintain that refusal to grant the survivor’s benefit at issue in the main proceedings to surviving life partners constitutes indirect discrimination within the meaning of Directive 2000/78, since two persons of the same sex cannot marry in Germany and, consequently, cannot qualify for that benefit, entitlement to which is reserved to surviving spouses. In their opinion, spouses and life partners are in a comparable legal situation which justifies the granting of that benefit to surviving life partners.

64. According to the VddB [the German theatre pension fund], there is no constitutional obligation to treat marriage and life partnership identically, so far as concerns the law of social security or pensions. Life partnership is an institution sui generis and represents a new form of civil status. It cannot be inferred from the German legislation that there is any obligation to grant equal treatment to life partners, on the one hand, and spouses, on the other.

The Court’s reply

65. In accordance with Article 1 thereof, the purpose of Directive 2000/78 is to combat, as regards employment and occupation, certain forms of discrimination including that on grounds of sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment.

66. Under Article 2 of Directive 2000/78, the ‘principle of equal treatment’ means that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of the Directive. According to Article 2(2)(a) of Directive 2000/78, direct discrimination occurs where one person is treated less favourably than another person who is in a comparable situation, on any of the grounds referred to in Article 1 of the Directive. Article 2(2)(b)(i) states that indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

67. It is clear from the information provided in the order of reference that, from 2001—the year when the LPartG [the German law on Law on registered life partnerships], in its initial version, entered into force—the Federal Republic of Germany altered its legal system to allow persons of the same sex to live in a union of mutual support and assistance which is formally constituted for life. Having chosen not to permit those persons to enter into marriage, which remains reserved solely to persons of different sex, that Member State created for persons of the same sex a separate regime, the life partnership, the conditions of which have been gradually made equivalent to those applicable to marriage.

68. The referring court observes that the Law of 15 December 2004 contributed to the gradual harmonisation of the regime put in place for the life partnership with that applicable to marriage. By that law, the German legislature introduced amendments to Book VI of the Social Security
Code—statutory old age pension scheme, by adding inter alia a fourth paragraph to Paragraph 46 of that Book, from which it is clear that life partnership is to be treated as equivalent to marriage as regards the widow’s or widower’s pension referred to in that provision. Analogous amendments were made to other provisions of Book VI.

69. The referring court considers that, in view of the harmonisation between marriage and life partnership, which it regards as a gradual movement towards recognising equivalence, as a consequence of the rules introduced by the LPartG and, in particular, of the amendments made by the Law of 15 December 2004, a life partnership, while not identical to marriage, places persons of the same sex in a situation comparable to that of spouses so far as concerns the survivor’s benefit at issue in the main proceedings.

70. However, the referring court finds that entitlement to that survivor’s benefit is restricted, under the provisions of the VddB [the theatre pension fund] Regulations, to surviving spouses and is denied to surviving life partners.

71. That being the case, those life partners are treated less favourably than surviving spouses as regards entitlement to that survivor’s benefit.

72. If the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor’s benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78.

73. It follows from the foregoing that the answer to the third question must be that the combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor’s benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor’s benefit. It is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor’s benefit provided for under the occupational pension scheme managed by the VddB.

[...]
partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor’s benefit. It is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor’s benefit provided for under the occupational pension scheme managed by the Versorgungsanstalt der deutschen Bühnen.

NOTES

1. What are the key similarities and differences between the structure of U.S. and E.U. employment discrimination law? How do the defenses under the E.U. directives compare with U.S. law?

2. The Belgium case referenced by the Henrad excerpt seems to be the one major case in which the European Court of Justice addressed the issue of race and ethnic origin employment discrimination, and more specifically Directive 43/2000. In that case, a company looking to hire employees stated that it would not employ ‘immigrants’ ‘because its customers were reluctant to give them access to their private residences for the period of the work.’ Case C–54/07 Centrum voor Gelijkheid van Kansen en voor Racismebestrijding [Case Centre for Equal Opportunities and Fight Against Racism] v. Firma Feryn NV, 2008 ECR I–5187 ¶ 16. The court held that this was direct discrimination as it would likely strongly dissuade certain candidates from applying, which would ultimately hinder their access to the labor market. Id. at ¶ 15. The court also found that it did not matter that there was no ‘identifiable victim.’" Id.

3. Compare the Wards Cove reasoning and Hernard’s analysis regarding the reach of disparate impact or “indirect” discrimination under equality law in the U.S. and Europe, respectively. What assumptions are embedded in each about the operation of race discrimination in the respective society (United States, Europe) and its prevalence in each society?

4. Would a law similar to the employer’s policy in the Johnson Controls case (U.S. Supreme Court) be upheld by the European Court of Justice under the ruling in Commission of European Council v. Austria? Compare the Courts’ reasoning in both cases. What are the key similarities in their reasoning? What are the differences, if any?

5. Compare Article 15 of the 2006 Directive on Sex Discrimination with the gender-neutral U.S. Family and Medical Leave Act (“FMLA”) of 1993. The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Eligible employees are entitled to: twelve workweeks of leave in a 12–month period for the birth of a child and to care for the newborn child within one year of birth; the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement; to care for the employee’s spouse, child, or parent who has a serious health condition; a
serious health condition that makes the employee unable to perform the essential functions of his or her job; any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;" or twenty-six workweeks of leave during a single 12–month period to care for a covered servicemember with a serious injury or illness who is the spouse, son, daughter, parent, or next of kin to the employee (military caregiver leave). 29 U.S.C. sec. 2601 (as amended by the 2008 National Defense Authorization Act). The Department of Labor administers the FMLA. For additional information, see http://www.dol.gov/dol/topic/benefits-leave/fmla.htm

The FMLA specifically recognizes that "the primary responsibility for family caregiving often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men," but it does not specifically target working mothers or otherwise seek to alter workplace structures which continue to favor non-caregivers. See Laura Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, And The Limits Of Economic And Liberal Legal Theory*, 34 U. Mich. J.L. Ref. 371, 386–389 (2001). Does this mean that the FMLA should not be considered a part of the antidiscrimination framework, as compared to the inclusion of provisions for work leave in the sex discrimination EC Directive?

6. In 1998, the European Commission issued a comprehensive overview of the problem of sexual harassment in the European Union. See *generally* European Commission, *Sexual Harassment in the Workplace in the European Union* (1998). The Commission compiled the results of many studies on sexual harassment performed in eleven northern European countries, and concluded that the scope of the problem was staggering. *Id.* at 9. The studies found that "approximately 30% to 50% of women" experience some form of sexual harassment. *Id.* at 13. Also, the studies found that "the most common forms were verbal forms such as 'sexual jokes' and 'sexual remarks about body, clothes and sex life'; physical forms as 'unsolicited physical contact', and nonverbal forms such as 'staring and whistling'." European Commission *Id.* at 5. There were more severe forms of sexual harassment found, such as 'quid quo pro,' experienced by 10% to 26% of the employees, and 'sexual assault or rape' experienced by 1% to 6% of the women. *Id.* at 5.

7. French law has long prohibited upper age limits for recruitment. See Article 311–4 of the (previous) Labor Code. However the oil crisis brought about massive lay-offs in companies and exclusion of older workers who were systematically offered early retirement incentives. As a result, France has a very low employment rate of workers over 50. With the aging of the population, and to deal with its future financial burden on the retirement system, the government started to promote employment of older workers with the adoption of the first reform of the retirement system in 2004. The European 2000/78 Framework Directive which covers age discrimination gave France the impetus to adopt the law of November 16, 2001 which introduced age as a prohibited ground of discrimination which is included in the current article L 1132–1 and article L 1133–2 of the Labor Code. The law of November 27, 2008 modified article L 1133–2 to
include the same examples of exceptions as article 6 of the 2000/78 Directive. The widespread practice of massive early retirement of older workers from the workforce could have meant courts would resist applying age discrimination legislation, even more so than other forms of discrimination. Curiously, French case law has actually been quite quick at applying European case law and even recognizing antidiscrimination based on age as a principle, inspired by ECJ case law.

8. Consider whether EU law embraces a hierarchy of discrimination between the categories:

Age differs from other non-discrimination grounds covered under EU law in certain important aspects. To begin with, there appears to be a great range of circumstances where age may constitute a rational and legitimate reason for distinguishing between different groups of persons than is the case for the other non-discrimination grounds. Age-based distinctions are often based upon stereotypes and prejudice. However, the use of such distinctions may also at times be rooted in rational considerations and serve valuable social and economic objectives: the same is rarely true of the other non-discrimination grounds such as sexual orientation, gender, race or religion.

In particular, age may be a useful and fair method of selecting which groups of individuals may benefit from particular measures, or to identify groups for differential treatment, especially when age serves as a rational “proxy” or indicator that particular groups possess certain characteristics in general, such as experience, maturity, good physical capability, or financial stability. Age is often used in such cases to categorise groups in very general and sweeping terms; however, such generalisations are often necessary in the field of social and employment policy and experience indicates that it is harder to avoid the use of age in making these generalisations than it is for the other non-discrimination grounds. As a result, age discrimination legislation must establish a framework for distinguishing between circumstances where use of age to differentiate between individuals is justified, and when it is not. That framework is provided by Article 6 of the Directive (2000/78).....

*Palacios* and *Age Concern* are important judgments. They confirm the Court's general approach to the age discrimination provisions of the Directive that was initially set out in Mangold. In both cases, the ECJ has clarified that age discrimination is to be treated similarly as other forms of discrimination, and the objective justification test is to be applied with similar rigour across the different discrimination grounds. However the Court also made it clear in both cases that the specific nature of age discrimination would be taken into account in applying this objective justification test, and Members States enjoy wide discretion in areas where legitimate aims relating to national employment policy and other general interests were at issue. Age is thus treated as both similar and different to the other discrimination grounds: it is treated as a “suspect” category which warrants the rigorous application of the objective justification test, but nevertheless
the special nature of age and the potential for age-based distinctions to serve rational ends is also factored into the application of the test.”


9. The boldness of the Maruko ruling comes, arguably, from the Court’s surprising move in ruling that the differential treatment of married couples and partnered couples constitutes direct discrimination. In this ruling, the Court goes beyond what the plaintiff and the Commission had argued. They alleged the existence of indirect discrimination only—since there was no provision that made explicit reference to sexual orientation. They argued that it could be considered an “apparently neutral provision”, one that puts persons having a particular sexual orientation at a particular disadvantage, without objective justification. But the Court considers that the discrimination is directly based on sexual orientation, since “life partners are treated less favourably than surviving spouses” and marriage is only open to heterosexual couples, while life partnerships are only for gay couples.

10. Notice the interplay of the Directive and national law in the Maruko case. On the one hand, the Court states that, even if family law (“civil status”) is a competence of Member States, in the exercise of that competence Members States must comply with European Union law. On the other hand, it leaves for the German court to decide whether or not spouses and gay life partners are in a comparable situation for the purposes of the concrete pension in question. If the German court decides that they are in a comparable position, then the European Court of Justice says that the different treatment is direct discrimination on the grounds of sexual orientation, prohibited under Directive 2000/78. The European Court of Justice gives a clear indication on how the German court should decide the case. But since it is for the latter to make a decision, the former cannot be accused of violating national competence. In practice, meanwhile, the highest German courts have progressively accepted the similarity of the situation of married couples and gay partners. However, what would the European Court of Justice rule if the case concerned Italy or Poland, for example, where the law does not accept gay marriage, nor even recognise gay partnerships? Would it make sense to give clear indications about the ideal outcome of the case and, subsequently, leave it for the national court to decide the main issue: whether or not gay and married couples are in a similar position?

C. **Hong Kong**

Much like the E.U., Hong Kong has fairly extensive and defoiled employment discrimination laws in place, codified in four Ordinances on the subject. The Ordinances provide protection against: family status discrimination, race discrimination, disability discrimination, and sex discrimination. The Ordinances were created in two waves. The first wave occurred in 1996–1997, when the sex, disability, and family status Ordinances were enacted. It took more than ten years for Hong Kong to add a race discrimination ordinance, which they did in 2008. Each of these
Ordinances protects against broad types of discrimination, and includes a section on employment discrimination in the third part of each respective Ordinance. Enforcement of these Ordinances is the primary responsibility of the Equal Opportunities Commission (EOC). The Commission receives complaints and can give legal assistance, or can bring the proceeding in their own name.

There are a few notable items of commonality among the Ordinances. Each Ordinance provides that if an action is taken for more than one reason, prohibited discrimination occurs so long as one of those reasons is based on sex, disability, family status, or race. Family Status Discrimination Ordinance, No. 527 (1997) Part I, Section 4; Race Discrimination Ordinance, No. 602 (2008) Part II, Section 9; Disability Discrimination Ordinance, No. 487 (1996) Part I, Section 3; Sex Discrimination Ordinance, No. 480 (1996) Sex Part I, Section 4. Another commonality is that prohibited discrimination applies to the hiring and firing of an employee, and promotion opportunities, transfers, training, or any benefits, services, or facilities, while that person is an employee. Family Status Discrimination Ordinance, No. 527 (1997) Part III, Section 1–2; Race Discrimination Ordinance, No. 602 (2008) Part III, Section 1–2; Disability Discrimination Ordinance, No. 487 (1996) Part III, Section 1–2; Sex Discrimination Ordinance, No. 480 (1996) Sex Part III, Section 1–2. Finally, none of the Ordinances define discrimination, leaving it to “Codes of Practice” created to enforce each Ordinance to do so. These codes specifically prohibit direct and indirect discrimination as well as various forms of harassment.

Each Ordinance has a corresponding Code of Practice that is designed to help guide employers in aligning themselves with the dictates of each Ordinance. The Codes themselves do not create any additional legal duties, but failure to follow the recommendations in the Codes can be used as evidence in court. “Thus, while not technically enforceable, the Codes will have the practical effect of imposing duties on employers—duties which reflect the Commission’s application of the laws to specific facts and which therefore are often more specific and detailed than the general duties stated in the actual laws.” Carole Petersen, Hong Kong’s First Anti-Discrimination Laws and Their Potential Impact on the Employment Market, 27 HONG KONG L.J. 324, 334 (1997).

The text below offers a general overview of the scope of the Ordinances on Sex, Race and Disability Discrimination and excerpts from their corresponding Codes.

1. Sex Discrimination

The sex discrimination Ordinance applies to women as well as men. Sex Discrimination Ordinance, No. 480 (1996) See Part II Section 5 and 6. It also applies to discrimination against persons because they are married, or a woman because she is pregnant. Part II Section 7 and 8. The Ordinance has one exception or defense—when “sex is a genuine occupational qualification.” Part III, Section 12. It lists the “only” situations where being a man is a genuine occupational qualification for a job, and the
situations are: where the job calls for a man “for reasons of physiology” or “in dramatic performances or other entertainment;” where the job “needs to be held by a man to preserve decency or privacy;” where workers live on site and there are no facilities for women; where the nature of the establishment requires it; where personal services are provided and these services “can most effectively be provided by a man;” where travel is involved to countries that would not allow a women to fully perform the job requirements. *Id.* at Part III, Section 12(2).

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**Excerpts from the Code of Practice on Employment Under the Sex Discrimination Ordinance**

3.1. In line with the SDO, the Code stipulates equal protection for men and women. For practical purposes, listed below are the definitions of discrimination (direct and indirect), sexual harassment and victimisation that apply throughout this document.

3.1.1. *Direct discrimination* means treating a person less favourably than another person in comparable circumstances, because of a person’s sex, marital status or pregnancy.

3.1.2. *Indirect discrimination* consists of applying the same treatment as between the sexes, persons with different marital status and persons who are pregnant or not, but is in practice discriminatory in its effect.

For example, applying a certain minimum height or weight requirement to applicants could exclude a large proportion of female applicants and could be to their detriment. This would constitute indirect discrimination unless there was justification for a minimum height or weight requirement in the particular job.

3.1.3. *Sexual harassment* consists of any unwelcome sexual behaviour in circumstances where a reasonable person would have anticipated that the harassed person would be offended, humiliated or intimidated. It includes unwelcome sexual advances, unwelcome requests for sexual favours, and other unwelcome conduct of a sexual nature. It also includes creating a sexually hostile work environment.

6.1. Under the SDO, sexual harassment in employment is unlawful. Without limiting the meaning of sexual harassment as defined in the SDO, the following behaviour can be regarded as sexual harassment:

6.1.1. unwelcome sexual advances—e.g. leering and lewd gestures; touching, grabbing or deliberately brushing up against another person;

6.1.2. unwelcome requests for sexual favours—e.g. suggestions that sexual co-operation or the toleration of sexual advances may further a person’s career;

6.1.3. unwelcome verbal, non-verbal or physical conduct of a sexual nature—e.g. sexually derogatory or stereotypical remarks; persistent questioning about a person’s sex life; and
6.1.4. conduct of a sexual nature that creates a hostile or intimidating work environment—e.g. sexual or obscene jokes around the workplace; displaying sexist or other sexually offensive pictures or posters.

6.3. A series of incidents may constitute sexual harassment. However, depending on the circumstances, it is not necessary for there to be a series of incidents. One incident may be sufficient to constitute sexual harassment.

6.4. On the other hand, an employee may be the victim of a hostile work environment where he or she is harassed in a pattern of incidents that may not be, in and of themselves, offensive, but when considered together amount to sexual harassment.

10.6. Sex discrimination by an employer in recruiting for a job, or in providing opportunities for promotion or transfer to, or training for, a job is not unlawful where a person’s sex is a genuine occupational qualification (GOQ) for the job. The criteria for determining whether a person’s sex is a GOQ for a particular job are set out in the SDO and are explained below:

10.6.1. the essential nature of the job calls for a man or woman for reasons of (i) physiology (excluding physical strength or stamina); or (ii) authenticity in dramatic performances or other entertainment, e.g. actors and actresses, artists’; models and fashion models;

10.6.2. the job calls for a man or a woman to preserve decency or privacy, e.g. changing room or bathroom attendants for the respective sexes;

10.6.3. the job is likely to involve the employee working or living in someone else’s house and have significant physical or social contact with the person living there;

10.6.4. the nature or location of the establishment makes it impracticable for the employee to live somewhere else other than in the premises provided by the employer and no suitable premises are available, e.g. a resident janitor at a single-sex school where there are no separate accommodation or sanitary facilities for the other sex;

10.6.5. the employing establishment is a hospital, prison or other establishment for persons requiring special supervision or attention (only that part of the establishment dealing with such persons may claim sex as a GOQ);

10.6.6. the holder of the job provides individuals with personal services promoting their welfare or education, or similar personal services, and those services can most effectively be performed by one sex, e.g. a female counsellor at a shelter home for battered women; and

10.6.7. the job needs to be held by a man because it is likely to involve the performance of duties outside Hong Kong in a place where the customs or laws are such that the duties could not be performed effectively by a woman, e.g. a sales manager who is required to spend considerable time in countries where customs forbid the involvement of women in this type of work.
10.7. The GOQ is not an automatic exception for general categories of jobs; in every case it will be necessary for the employer to show, if the exception is to be claimed, that it applies to the particular job in question.

2. RACE DISCRIMINATION

Race is quite broadly construed in Hong Kong employment discrimination law. Race means “the race, colour, descent, national or ethnic origin of the person.” Race Discrimination Ordinance, No. 602 (2008) Part II, Section 8. There are three major exceptions to the Race Discrimination Ordinance. Id. at Part III, Sections 11, 12, 13. The first is an exception for genuine occupational qualification. Id. at Part III, Section 11. The ordinance states that being of a particular racial group is a genuine occupational qualification only where:

a) the job involves participation in a dramatic performance or other entertainment in a capacity for which a person of that racial group is required for reasons of authenticity;

b) the job involves participation as an artist or photographic model in the production of a work of art, visual images or sequence of visual images for which a person of that racial group is required for reasons of authenticity;

c) the job involves working in a place where food or drink is (for payment or not) provided to and consumed by members of the public or a section of the public in a particular setting for which, in that job, a person of that racial group is required for reasons of authenticity;

d) the holder of the job provides persons of that racial group with personal services promoting their welfare, and those services can most effectively be provided by a person of that racial group; or

e) the job involves providing persons of that racial group with personal services of such nature or in such circumstances as to require familiarity with the language, culture and customs of and sensitivity to the needs of that racial group, and those services can most effectively be provided by a person of that racial group. Id. at Part III, Section 11(2).

Next is the exception for employment intended to “provide training in skills to be exercised outside Hong Kong.” Part III, Section 12. This exception exempts an act that is done by an employer to benefit a non-resident of Hong Kong, or if an employee is trained in Hong Kong, but the skills will be exercised “wholly outside Hong Kong.” Part III, Section 12. The last exception is the exception for employment of persons with “special skills, knowledge or experience.” Part III, Section 13. The ordinance does not apply if “the employment requires special skills, knowledge or experience not readily available in Hong Kong” and the “person possesses those skills, knowledge or experience; and is recruited or transferred from a place outside Hong Kong.” Part III, Section 13.
Excerpts from Code of Practice on Employment Under the Race Discrimination Ordinance

2.1 What is meant by race under the RDO

2.1.1 The RDO provides that race means a person’s “race”, “colour”, “descent”, “national” or “ethnic origin”. A racial group is a group of persons defined by reference to these characteristics. In this respect, the RDO is in line with the meaning of racial discrimination in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

2.1.2 The RDO further elaborates on the meaning of “descent” by providing that discrimination on the ground of descent means discrimination against members of communities based on forms of social stratification such as a caste system or similar systems of inherited status which nullify or impair their equal enjoyment of human rights.

2.1.3 There is no elaboration in the RDO relating to the meaning of “race”, “colour”, “national” or “ethnic origin”. In applying these terms, the following are useful references: (1) ICERD and related documents (2) Case law and other materials in other jurisdictions (for example, common law jurisdictions).

2.1.4 The above reference materials indicate that:

(1) Racism and racial discrimination are the result of social processes that seek to classify people into different groups with the effect of marginalizing some of them in society. In this context, the words “race”, “colour”, “national” or “ethnic origins” in discrimination laws have broad popular meanings. They are not mutually exclusive and a person may fall into more than one racial group. For example, identifying people as Asian is an act done on the ground of race. The same is true of identifying people as having Chinese origin. A person living in Hong Kong may be in the Asian racial group as well as in the Chinese origin group.

(2) National origin includes origin in a nation that no longer exists or a nation that was never a nation state in the modern sense. National origin is not the same thing as nationality. The national origin of a person can be different from his nationality or citizenship. For example, a person living in Hong Kong of Indian origin may have Malaysian nationality.

(3) A group is an ethnic group (and its members having the ethnic origin of the group) if it is a distinct segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a long common history or presumed common history. On this basis, Jews and Sikhs have been held to be ethnic groups. Other groups in the same nature will also be regarded as ethnic groups.
2.2 Religion

2.2.1 Religion in itself is not race. A group of people defined by reference to religion is not a racial group under the RDO. The RDO does not apply to discrimination on the ground of religion. But requirements or conditions having an impact on people's religious practices may indirectly discriminate against certain racial groups, and when this is so the RDO applies (see for example the blanket ban on beards in Illustration 9 below may indirectly discriminate against ethnic groups whose religious practice or custom is to wear beards).

2.3 Language

2.3.1 As language used by people is often associated with their race, treatment based on language may discriminate against certain racial groups or may amount to racial harassment. Since language issues may arise in different aspects of employment matters, they will be mentioned and dealt with in different parts of the Code below * * *

2.4 What is not regarded as an act done on the ground of race under the RDO

2.4.1 The RDO provides that acts done on the ground of the matters specified in section 8(3) are not acts done on the ground of race under the RDO. Acts done on the ground of these matters also do not constitute requirements or conditions within the definition of indirect discrimination under the RDO. These matters are:—

(1) Whether or not a person is an indigenous villager;
(2) Whether or not a person is a permanent resident, or has the right of abode or right to land, or is subject to any restriction or condition of stay, or has permission to land and remain in Hong Kong;
(3) How long is a person's length of residency in Hong Kong;
(4) Whether or not a person has a particular nationality and citizenship.

2.4.2 Although acts done on the grounds of the above matters would not constitute discrimination under the RDO because they do not come within the meaning of race under the RDO, these matters should not be used as a mask to hide what is in fact race discrimination under RDO. Where there is in fact race discrimination, the person discriminated against may bring legal proceedings in Court or complain to the EOC for investigation and conciliation.

Illustration 1:—A Hong Kong resident of Pakistani origin applies for a job as a manager with a company. She meets all the requirements of the job, but she is not a permanent resident in Hong Kong. The company declined to consider her application and told her that it only employs people who are permanent residents in Hong Kong. In fact, the company does not employ only people who are permanent residents in Hong Kong and there are managers working in the company who are of various national or ethnic origins and who are not permanent residents in Hong Kong. Although whether or not a person is a permanent resident is not a ground of race under the RDO, on the information above, the court
can draw an inference that the real reason for declining to consider the job applicant’s application was on the ground of her Pakistani origin, which is a ground of race under the RDO.

6.1 Types of discrimination under the RDO

The RDO defines different types of discrimination. They are:

6.1.1 Racial discrimination

Racial discrimination occurs in the following situations under the RDO:

(1) Direct discrimination. Direct discrimination occurs when person A treats person B (belonging to one racial group) less favourably than person C (belonging to a different racial group) on the ground of person B’s race, when person B and person C are in same or materially similar situation.

Illustration 7:—A person of Pakistani origin who speaks fluent Cantonese and has adopted a Chinese name applies by telephone for the job of a sales person and is invited for an interview. But, because his appearance indicates that he is of Pakistani origin, when he turns up to the interview he is falsely told that someone else has already been hired and the interview is declined. This is less favourable treatment on the ground of race if another job seeker not of Pakistani origin would not have been declined.

Illustration 8:—A manager of Chinese origin is treated less favourably on the ground of race (directly discriminated against), if a manager of English origin is paid a higher amount of salary than the manager of Chinese origin on the ground of their difference in origin, when they are both in the same or materially similar employment situation (such as they both do the same job and have similar experience and their performance are both good).

The following points should be noted:—(a) RDO section 9 provides that if an act is done for more than one reason and one of the reasons is the race of a person (whether or not it is the dominant or substantial reason), then it is taken to be done for the reason of the race of the person; (b) RDO section 4(3) provides that segregation of a person on the ground of his or her race from other persons is direct discrimination; for example, segregation occurs if employees of non-Chinese origins are required to have their meals in a separate part of the staff canteen from employees of Chinese origin; (c) A person’s command of a language, including the accent, can be related to his or her race, and employers should ensure that employees and workers are not treated less favourably because of their accent or language.

(2) Indirect discrimination. Indirect discrimination occurs when a person applies an apparently non-discriminatory requirement or condition to everyone of all racial groups, but:—(a) Only a considerably smaller proportion of people from a particular racial group can meet the requirement or condition than the proportion of people not from that racial group; (b) The person applying the requirement or condition cannot show the requirement or condition to be justified on non-racial grounds; (c) The requirement or condition is to the detriment of a person of that particular racial group because he or she cannot meet it.
Illustration 9:—A blanket ban on beards for health and safety reasons in a food packaging factory is a requirement or condition that indirectly discriminates ethnic groups such as the Sikhs (who by their custom have to keep a beard), when compared to other racial groups, if information shows that the blanket ban is not justifiable as face masks could have been used satisfactorily to meet health and safety standards.

The following points should be noted:—

(i) Preferences and factors to be taken into account (as opposed to an absolute requirement or condition for achieving an objective) are not within the meaning of requirement or condition under the RDO.

(ii) A requirement or condition cannot be met if a person cannot meet it consistently with the customs and cultural conditions of his or her racial group.

(iii) RDO section 4(2) provides that a requirement or condition is justifiable if it serves a legitimate objective and bears a rational and proportionate connection to the objective.

(iv) Reference case law indicates that requirement or conditions in relation to work times and appearance can lead to claims of indirect discrimination. To determine whether a requirement or condition is justifiable, each case has to be examined on its own merits, considering any discriminatory effects against any significant degree of increased cost, decreased efficiency, or serious safety problem in accommodating individuals from particular racial groups.

Illustration 10:—A blanket ban on beards in a food packaging factory in Illustration 9 above is justifiable if information shows that face masks could not satisfactorily meet health and safety standards.

Illustration 11:—An employer who decides not to accommodate Jewish employees (who have to observe Sabbath and cannot work on Saturdays) but requires them to work on Saturdays is able to justify this requirement with information showing that accommodation would lead to a significant degree of increased safety risk, increased cost and decreased efficiency.

Illustration 12:—A requirement to wear protective headgear in a repair workshop, even if indirectly discriminatory for Sikhs (who by their custom have to wear a turban), is justifiable given information on the risk of injury, and the possibility of liability on the employers, and that the requirement would be more difficult to enforce if an exception is made for one person.

(v) Reference case law also indicates that requirement or condition in relation to academic or language standard can lead to claims of indirect discrimination. Employers must be able to justify any such requirement or condition by showing that it is relevant to and not more demanding than what is required for doing the job. Each case
depends on its own facts and Illustration 13 below is for reference only.

Illustration 13:—For a job as a clerical officer or clerical assistant in a government department in the UK, successful applicants would be required to deal with inquiries from the public in person and by telephone. An ability to understand and communicate in English was a prime requirement, and a requirement that candidates must possess an English Language “O” Level or equivalent was overall fair and not arbitrary. Such a requirement is justified on grounds unconnected with race because it bears a rational and proportionate connection to the objective of communication in English which is legitimate and required for the job.

6.1.2 Discrimination on the ground of near relative’s race. Discrimination on the ground of the race of a near relative happens when person A treats person B less favourably than other people on the ground of person B’s near relative’s race. A near relative means a person’s spouse, parent or child (including born out of wedlock, adopted or step child), grandparent or grandchild, sibling and in-laws.

Illustration 14:—A manager is discriminated against on the ground of his near relative’s race when he applies for promotion to the post of director but is declined because the company considered he and his wife are not suitable for company social functions on the ground that his wife is of Indonesian origin, and another manager whose wife is not of Indonesian origin is appointed.

6.3.2 Harassment on the ground of race occurs in the following situations under the RDO:—

(1) Unwelcome conduct harassment. Person A engages in unwelcome conduct (which may include an oral or a written statement) towards person B on the ground of person B’s race or person B’s near relative’s race, in circumstances where a reasonable person would have anticipated that person B would be offended, humiliated or intimidated. There is liability for harassment even if there is no intention or motive to offend, humiliate or intimidate.

(2) Hostile environment harassment. Person A engages, on the ground of person B’s race or person B’s near relative’s race, in conduct alone or together with other persons that create a hostile environment for person B.

3. Disability Discrimination

The term “disability” is broadly defined in the Ordinance. Disability Discrimination Ordinance, No. 487 (1996) Part I, Definition of disability. It means: “totally or partial loss of the person’s bodily or mental functions; total or partial loss of part of the person’s body; the presence in the body of organisms causing disease or illness; the presence in the body of organism capable of causing disease or illness; malfunction, malformation or disfig-
urement of a part of the person’s body; a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or a disorder, illness or disease that affects a person’s thought process, perception of reality, emotions, or judgment or that results in disturbed behavior.” Also included in the definition, if the above is met, is a disability that “presently exists; previously existed but no longer exists; may exist in the future; or is imputed to a person.”

The Disability Discrimination Ordinance has an “[e]xception where absence of disability is a genuine occupational qualification.” Part III, Section 12. This section allows an employer, when considering a person with a disability, to consider whether they “would be unable to carry out the inherent requirements of the particular employment; or would, in order to carry out those requirements, require services or facilities that are not required by persons without a disability and the provision of which would impose an unjustifiable hardship on the employer.” Part III, Section 12(2)(c)(i)–(ii).

Excerpts from the Code of Practice on Employment
Under the Disability Discrimination Ordinance

3.1 “Disability” is an evolving concept; it results from the interaction between persons with disabilities and attitudinal and environmental barriers that hinders full and effective participation of persons with disabilities in society on an equal basis with others. The Convention on the Rights of Persons with Disabilities (the CRPD) marks a major shift in attitudes and approaches to persons with disabilities. Adopting a rights-based approach, persons with disabilities are no longer regarded as objects of charity, medical treatment and social protection; but as subjects with rights, who are capable of being active members of society. The CRPD also affirms the right of persons with disabilities to work on an equal basis with others.

3.2 Recognising the progression in disability rights, in particular the diversity of persons with disabilities, the DDO adopts a fairly broad definition of disability to encompass most situations where a person should be regarded as having a disability and thus effectively protected by the law.

4.1 There are two forms of disability discrimination, namely direct discrimination and indirect discrimination. **Direct discrimination** arises from a differential and less favourable treatment accorded to job applicant(s) or employee(s) because of their disability. See paragraphs 4.12–4.22 below: An employer refused to hire persons on wheelchair because he thought persons with mobility disability were more prone to work injuries. Because of this stereotypical assumption, F, a candidate with mobility disability, was refused an opportunity to have an interview. F has therefore been discriminated against on the ground of her disability by being deprived of a chance to an interview.

4.2 **Indirect discrimination** involves imposing a seemingly neutral condition or requirement on everyone, but such condition or requirement has a
disproportionate adverse effect on persons with disability(ies) and the
application of such condition or requirement is not justified in the relevant
circumstances. See paragraphs 4.23–4.28 below: All job applicants for a
clerical position were required to pass a physical fitness test before further
consideration for employment opportunity. Although passing the physical
fitness test was a requirement applicable to all who were interested in the
job, persons lacking the physical fitness because of particular disabilities
would more likely to be screened out. This would give rise to indirect
discrimination unless the requirement was imposed with justifiable cause.

4.3 **Disability harassment** is an unwelcome conduct towards an employ-
ee in relation to his/her disability in circumstances where a reasonable
person would have anticipated that the person being harassed would feel
offended, humiliated or intimidated. Name calling and mimicking gesture
are common examples of disability harassment.

4.12 Section 6(a) of the DDO stipulates that: a person discriminates
against another person in any circumstances relevant for the purposes of
any provision of the DDO if on the ground of that other person’s disability
he treats that other person less favourably than he treats or would treat a
person without a disability.

4.13 In short, direct disability discrimination in employment means treat-
ing an employee with a disability less favourably than another employee
without a disability or without the same disability in comparable circum-
stances on the ground of the former’s disability. There are three compo-
nents of this definition which are essential: 1) cause of treatment (on the
ground of), 2) comparator in relevant circumstances (comparable circum-
stances), and 3) detriment (less favourable treatment).

4.15 The “But-for-Test” is an objective test that helps to determine the
cause of treatment. To apply this test, one needs to look into the incident
as a whole from an objective point of view and ask the question: Would the
aggrieved person have received the same treatment but for his/her disabili-
ty? Compare the following two scenarios:

Employee K has recovered from depression. The supervisor doubted
Employee K’s ability to handle the stress and workload in a more
senior position and therefore did not recommend her for promotion
despite her good appraisal ratings in the past years. Ask the question:
Would Employee K have been recommended for promotion but for her
having depression in the past? It appears that Employee K was passed
over in the promotion exercise because of her past disability. The
employer’s decision would constitute direct discrimination on the
ground of Employee K’s disability.

Employee L who suffered from migraine headache had a record of
repeated tardiness and neglect of duties. He has been warned numer-
ous times of his poor performance both verbally and in writing. The
employer finally dismissed him after no improvement was shown on
his part. Would Employee L have been dismissed but for his disability?
It appears that L was dismissed because of his substandard perform-
ance. His disability was part of the background information irrelevant
to his dismissal.
4.16 Section 3 of the DDO provides that if an act is done for two or more reasons and one of the reasons is the disability of a person then the act is taken to be done for the reason of a person’s disability. The disability of that person does not have to be shown as the only reason for the unlawful discrimination.

It suffices if it is one of the reasons amongst others, whether or not it is the dominant or a substantial reason for doing the unlawful act. Genuine performance issues should be dealt with in a fair and clear manner so as to avoid misunderstanding.

4.17 It is not necessary to show that an employer has intended to commit an act of discrimination. It can be an unintended result of a decision or an action. Sometimes, it could even be a well intended see R v. Birmingham City Council ex parte Equal Opportunities Commission [1989] IRLR 173 HL 23 gesture on the employer’s part that the treatment is done in the interest of the employee with a disability.

4.18 Direct discrimination requires a comparison between the aggrieved person and another person who does not have a disability or the same disability, in the same or not materially different circumstances. This means that there must be a sufficient degree of similarity or common features to form the basis of an appropriate comparison. The purpose is to ascertain whether the disability in question is the ground on which the aggrieved person is discriminated.

4.21 One of the crucial components of the definition of direct discrimination is that of “less favourable treatment”. The term “less favourable treatment” entails a detriment suffered by the employee with a disability. In establishing detriment, it is not necessary to show financial loss. Items such as injury to feeling, training and career opportunities could also qualify as detriment in discrimination claims. Whether a treatment is detrimental to the person affected depends on an objective assessment of the relevant circumstances on a case by case basis.

4.22 One needs to bear in mind that subjective reasoning on the part of employer for the differential treatment may neither be a defence nor be relevant if it is objectively detrimental to the person affected.

4.24 Emanating from Section 6(b) of the DDO, indirect discrimination means 1) imposing the same requirement or condition which is applicable to everyone else, 2) where the proportion of persons with disabilities who can comply is considerably smaller than persons without disabilities, 3) which requirement or condition concerned cannot be objectively justified, and 4) as a result the person with disability suffers a detriment.

Company Q required all employees not to be regularly absent from work for operational reasons. Employee R had a chronic illness and had taken sick leave for an extended period of time. The employer decided to terminate R’s employment because R could not meet the company’s operational needs. The company claimed that their operational needs required all employees “not to be regularly absent from work” and they would dismiss any employee who could not meet this requirement. The uniform requirement applying to all employees was the condition “not to be regularly absent from work”. It is likely that
persons on valid extended period of sick leave would encounter difficulty in satisfying such attendance requirement. The onus would then be on the employer to justify the imposition of such a requirement.

4.25 The initial step in the analysis of an indirect discrimination claim is the identification of the “requirement” or “condition” which is applicable to all. It also requires a determination that the requirement or condition cannot be complied with by the person with disability in the relevant situation. These are factual matters which need to be established.

4.26 Establishing the proportion of people who can comply may require complex statistical or other technical information if a comprehensive analysis is to be undertaken. The consideration would be relatively less complicated where the comparison between the proportion of persons with disabilities who cannot comply with the requirement and the proportion of people who can is obvious. For instance, it would not be difficult to demonstrate that persons who have serious illness require taking longer sick leave and that it is proportionally more difficult for them to comply with a full attendance requirement. A common sense approach should be adopted in determining proportionality, and whether the comparison between pools of persons in a particular situation would make natural sense.

4.27 A balancing exercise of reasonableness weighing the following factors is relevant in determining the justifiability of imposing a requirement or condition:

4.27.1 Effect on the person with a disability or group of persons with the particular disability;
4.27.2 Effect on the employer’s operations including the resources of the business and administrative efficiency;
4.27.3 Reasonableness of the alternative arrangements that could be provided to the person with a disability.

5.1 Some disabilities are so serious making the persons having them genuinely incapable of carrying out the inherent requirement(s) of the jobs concerned. Most disabilities, however, could be overcome with workplace adjustments and reasonable accommodation by the employer and the employer is encouraged to make the necessary adjustment and accommodation unless there is unjustifiable hardship on his part in doing so.

5.3 The DDO recognises that in some situations, a person because of his/her disability would not be able to carry out the inherent requirement(s) of the job even with reasonable accommodation. It would be unrealistic to expect an employer to recruit or continue employing a person in a job for which requirements he/she cannot fulfill.

5.18 Although there is no legal obligation on an employer to provide accommodation in order for the employee with a disability to fulfill the inherent requirement(s) of a job, the court would consider whether services or facilities have been considered or reasonably afforded to the employee with a disability before an employer could successfully avail itself of the defence of inability to perform the inherent requirement and/or unjustifiable hardship.
5.21 In determining hardship on the employer’s part, the court would have to consider all aspects in the particular circumstances of individual cases. For example, while costly alteration to premises’ access to accommodate an employee in wheelchair may seem unreasonable, its benefits to other users/occupants and hence the potential for cost sharing by others could well be taken into account.

NOTES

1. The Ordinance on Family status is not discussed here but it covers much of the same conceptual ground as the other Ordinances in outlawing various types of discrimination on the basis of family status. Family status, according to the ordinance, “means the status of having responsibility for the care of an immediate family member.” Immediate family member “means a person who is related to the person by blood, marriage, adoption or affinity.” Family Status Discrimination Ordinance, No. 527 (1997) Part I, Immediate Family Member defined.

2. Compare the definition and scope of the BFOQ defense under Hong Kong law with its counterpart in the United States? Which is more restrictive?

3. What does the Code on Race Discrimination mean when it says, under the definition of indirect discrimination, that “preferences and factors to be taken into account (as opposed to an absolute requirement or condition for achieving an objective) are not within the meaning of requirement or condition under the RDO”? 6.11(2)(i). What is the significance of this language for someone wanting to prove that indirect discrimination has occurred?

4. There is currently no legal prohibition of sexual orientation-based employment discrimination in Hong Kong’s private sector, but such legislation has been proposed. The first major attempt to pass such legislation occurred in 1994, when legislator Anna Wu proposed a comprehensive antidiscrimination law that would have included sexual orientation. In 2001, Hong Kong’s Legislative Council established a Subcommittee to study sexual orientation discrimination, but the Subcommittee never introduced a bill for consideration. The Hong Kong government has, however, launched public education campaigns to confront sexual orientation discrimination, issued non-binding declarations against sexual orientation discrimination in the workplace, and established its Gender Identity and Sexual Orientation Unit (GISOU). GISOU takes complaints of sexual orientation and gender identity discrimination and seeks to mediate claims of discrimination. However, GISOU does not offer enforceable remedies. See generally Holning Lau & Rebecca L. Stotzer, Employment Discrimination Based on Sexual Orientation: A Hong Kong Study, EMPLOY RESPONS. RIGHTS J. (Springer, 2010).

5. As was mentioned, the employment discrimination laws in Hong Kong were enacted in two waves. It was a struggle to enact these ordinances as Hong Kong had long “pursued a policy known as ‘positive non-
interventionism,’” which meant “that the government provides an impartial legal system and the infrastructure necessary for industry and commerce, but avoids enacting legislation that would be viewed as unduly burdensome to business.” Carole Petersen, *Hong Kong’s First Anti-Discrimination Laws and Their Potential Impact on the Employment Market*, 27 *Hong Kong L.J.* 324, 324 (1997). Hong Kong attributed much of its economic success to this non-interventionism practice, which became an obstacle to passage of the employment discrimination ordinances. “The business community was firmly opposed to [employment discrimination laws], viewing them as interventionist, costly to enforce, and unnecessary,” and the Hong Kong government backed this position. *Id.* at 325. It took very smart political maneuvering and a strong women’s movement to essentially force the government into enacting the first wave of anti-discrimination laws. *Id.* at 329–333. The fight over the Sex Discrimination Ordinance made it an easier fight to pass the Disability Discrimination Ordinance, and presumably the Family Status Ordinance. *Id.* at 349.

6. There has been a struggle with racial discrimination in Hong Kong for a long time and, as such, Hong Kong was quite slow in passing the Race Discrimination Ordinance. Consider this brief history: The government of Hong Kong asserted that their city was the “Manhattan of Asia” and at the “forefront of developed societies,” which led the government to deny “the existence of significant [racial] discrimination despite strong evidence of its substantiality.” Barry Sautman, *The Politics of Racial Discrimination in Hong Kong*, MARYLAND SERIES IN CONTEMPORARY ASIAN STUDIES, Number 2 at 3 (2002). In 1998, just a few years after the other ordinances were enacted, a survey was done which showed “that two-thirds of ethnic minority respondents had witnessed or been victims of discrimination.” *Id.* The response from the government was that, compared to other cities of comparable size, this level of discrimination was not that bad. *Id.* at 6.

**D. SOUTH AFRICA**

On April 27, 1994, South Africa adopted a revolutionary Constitution, ending the era of apartheid. The final version of the Constitution became effective on February 4th 1997. Chapter 2, Section 9 of the South African Constitution created the foundation for the country to implement very strong employment discrimination laws, and, more generally, to protect against inequality. Chapter 2 is the Bill of Rights for the country, and Section 9 is the provision on “Equality.” Section 9 provides that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law.” It also provides for the power of the state to “promote the achievement of equality” through “legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.” The latter part of this provision has been interpreted to allow for various forms of affirmative action. *See* Chapter IV on Affirmative Action. Finally, Article 9 protects against discrimination against anyone because of: “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” Discrimination on one or
more of these grounds is “unfair unless it is established that the discrimi-
nation is fair.”

A few years after the South African Constitution was put into effect, the Employment Equity Act was made law. Employment Equity Act, No. 55 of 1998. This Act specifically protects against employment discrimination, but it also requires that employers implement affirmative action measures “for people from designated groups” in the Act. The scope of the Employment Equity Act has three main components worth highlighting at the outset. First, according to Chapter 1, Section 4, the prohibition of unfair discrimination “applies to all employees and employers.” Second, the categories that are protected, which are very broad and largely mirror those in the Constitution, are listed under Chapter 2, Section 6(1), as: “race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.” Third, under Chapter 2, Section 11, “whenever unfair discrimination is alleged in terms of this act, the employer against whom the allegation is made must establish that it is fair.” This appears to put the burden squarely on the employer.

1. The Employment Equity Act

Employment Equity Act, No. 55 of 1998
1998 SA Labour 55

Preamble.—Recognising—that as a result of apartheid and other discrimi-
natory laws and practices, there are disparities in employment, occupation
and income within the national labour market; and that those disparities
create such pronounced disadvantages for certain categories of people that
they cannot be redressed simply by repealing discriminatory laws,
Therefore, in order to—promote the constitutional right of equality and the
exercise of true democracy; eliminate unfair discrimination in employment;
ensure the implementation of employment equity to redress the effects of
discrimination; achieve a diverse workforce broadly representative of our
people; promote economic development and efficiency in the workforce; and
give effect to the obligations of the Republic as a member of the Interna-
tional Labour Organisation,
* * *

CHAPTER II—PROHIBITION OF UNFAIR DISCRIMINATION

5. Elimination of unfair discrimination.—Every employer must take steps
to promote equal opportunity in the work—place by eliminating unfair
discrimination in any employment policy or practice.

6. Prohibition of unfair discrimination.—(1) No person may unfairly dis-
criminate, directly or indirectly, against an employee, in any employment
policy or practice, on one or more grounds, including race, gender, sex,
pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination to—

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

2. THE CONSTITUTIONAL COURT

The Constitutional Court was established in 1994 by the new Constitution and is the highest court in South Africa. As in the United States, the Court is the final interpreter of the Constitution, the supreme law of the land, and has the power to overturn Acts of Parliament that it deems unconstitutional. On matters of constitutional law, it may review decisions of the “High Court of South Africa.” The Constitutional Court has ruled only once in a case applying Section 9 of the Constitution [equality] to an allegation of employment discrimination. In *Hoffmann v. South Africa Airways* 2001 (1) SA 1 (CC) (S.Afr.), South African Airways refused to hire Jacques Hoffman because of his HIV positive status. South African Airways had an employment practice that “required the exclusion from employment as cabin attendant of all persons who were HIV positive.” The rationale given by the Airline for these practices was based on medical and operational grounds. The medical rationale was that people with HIV might have a bad reaction to yellow fever vaccination, and might contract and transmit other diseases to passengers. The operational rationale was that the short life expectancy of people with HIV makes the airline unable to recoup the training costs. The High Court of South Africa (the appellate court) found merit in these arguments, but on an appeal to the Constitutional Court, the High Court was overturned.

The Constitutional Court went to some length to describe the injustice and vulnerability facing people living with HIV and AIDS before turning its attention to the constitutional standard for equality:

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**Hoffman v. South African Airways**

Constitutional Court of South Africa, Case CCT 17/00, 28 September 2000

- Ngcobo J:

  * * *

  [23] Transnet is a statutory body, under the control of the state, which has public powers and performs public functions in the public
interest. It was common cause that SAA is a business unit of Transnet. As such, it is an organ of state and is bound by the provisions of the Bill of Rights in terms of section 8(1), read with section 239, of the Constitution. It is, therefore, expressly prohibited from discriminating unfairly.

[24] This Court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.

[25] Mr Trengove sought to apply this analysis to SAA’s employment practice in the present case. He contended that the practice was irrational because: first, it disqualified from employment as cabin attendants all people who are HIV positive, yet objective medical evidence shows that not all such people are unsuitable for employment as cabin attendants; second, the policy excludes prospective cabin attendants who are HIV positive but does not exclude existing cabin attendants who are likewise HIV positive, yet the existing cabin attendants who are HIV positive would pose the same health, safety and operational hazards asserted by SAA as the basis on which it was justifiable to discriminate against applicants for employment who are HIV positive. * * *

[27] At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim.

[28] The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society’s response to them has forced many of them not to reveal their HIV status for fear of
prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law.

[29] There can be no doubt that SAA discriminated against the appellant because of his HIV status. Neither the purpose of the discrimination nor the objective medical evidence justifies such discrimination. * * *

[30] SAA refused to employ the appellant saying that he was unfit for world-wide duty because of his HIV status. But, on its own medical evidence, not all persons living with HIV cannot be vaccinated against yellow fever, or are prone to contracting infectious diseases—it is only those persons whose infection has reached the stage of immunosuppression, and whose CD4 count has dropped below 350 cells per microlitre of blood. Therefore, the considerations that dictated its practice as advanced in the High Court did not apply to all persons who are living with HIV. Its practice, therefore, judged and treated all persons who are living with HIV on the same basis. It judged all of them to be unfit for employment as cabin attendants on the basis of assumptions that are true only for an identifiable group of people who are living with HIV. On SAA’s own evidence, the appellant could have been at the asymptomatic stage of infection. Yet, because the appellant happened to have been HIV positive, he was automatically excluded from employment as a cabin attendant. * * *

[32] The fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify the exclusion from employment as cabin attendants of all people who are living with HIV. * * *

[34] Legitimate commercial requirements are, of course, an important consideration in determining whether to employ an individual. However, we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests. The greater interests of society require the recognition of the inherent dignity of every human being, and the elimination of all forms of discrimination. Our Constitution protects the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected. * * *

[37] Prejudice can never justify unfair discrimination. This country has recently emerged from institutionalised prejudice. Our law reports are replete with cases in which prejudice was taken into consideration in denying the rights that we now take for granted. Our constitutional democracy has ushered in a new era—it is an era characterised by respect for human dignity for all human beings. In this era, prejudice and stereo-
typing have no place. Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly. * * *

[40] Having regard to all these considerations, the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination.* * *

[41] I conclude, therefore, that the refusal by SAA to employ the appellant as a cabin attendant because he was HIV positive violated his right to equality guaranteed by section 9 of the Constitution. The third enquiry, namely whether this violation was justified, does not arise. We are not dealing here with a law of general application. This conclusion makes it unnecessary to consider the other constitutional attacks based on human dignity and fair labour practices.

* * *.

NOTES

1. Consider the 2011 annual report on the effect of the Employment Equity Act. The report reveals that: whites, who make up only 12.1% of the economically active population, continue to occupy 73.1% of ‘top management’ positions. African people, who make up 73.6% of the population, occupy only 12.7%. http://www.workinfo.co.za/Articles/34394_cee_annual_report_2011a.pdf.

2. The Constitution and the Employment Equity Act are the two main devices used to prevent employment discrimination, but another act worth mentioning is the Labour Relations Act of 1995. Labour Relations Act, No. 66 of 1995 (S. Afr.). This Act was South Africa’s attempt, before the Constitution and Employment Equity Act, to reform South Africa’s labour laws. The Act contains one main area dealing with employment discrimination. Paragraph 187 “Automatically Unfair Dismissals” states:

‘A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5, if the reason for the dismissal is—

* * *

(e) the employee’s pregnancy, intended pregnancy, or any reason related to her pregnancy;

(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;’

This Act protects many of the same categories as the Employment Equity Act. The Employment Equity Act protects two more areas against discrimination as compared to the Labour Relations Act—HIV Status and Birth.
D. SOUTH AFRICA

3. The problem of sex discrimination in South Africa is evident when looking at the disparity in pay between men and women. According to a South African newspaper, “South African men are earning up to 65 percent more than their female counterparts—for doing the same job.” Equality for all? Not by a Long Shot—Statistics; Men are Earning Up to 65% More than Their Female Counterparts, THE STAR (South Africa), Oct. 06, 2010, at E1. The disparity is even worse for women with children. Id. Does anything in the Employment Equity Act prohibit a disparity in pay between men and women?

4. National origin discrimination is also evident in South Africa, in part because, after the end of Apartheid, the nation was not prepared for “the flood of people who would descend on the country in search of that same better life.” Mondli Makhanya, We Must Now Get to Grips with the New, Diverse South African Family, SUNDAY TIMES (South Africa), May 18, 2008, at 20. These immigrants were fighting for the same jobs as the South Africans, but some felt the immigrants “were willing to work longer hours for less money and in less conducive conditions.” Id. In May 2008, the country exploded with violence against immigrants. The riots left 62 people dead; at least 670 wounded; dozens of women raped; and at least 100,000 people displaced. Int’l Organization for Migration, Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa, 01/2009, at 2 (February 2009). The University of Cape Town’s Graduate School of Business released a study, focusing “on the negative psychological effects which foreign employees experience” and it found that xenophobia is rampant throughout the South African workplace. Kurt April, Reactions to Discrimination: Exclusive Identity of Foreign Workers in South Africa, in EQUALITY, DIVERSITY AND INCLUSION AT WORK: A RESEARCH COMPANION 216 (ed. M.F. Özbilgin 2009). Could xenophobia in the workplace be prohibited under the Employment Equity Act or the South African constitution?

5. Changes have been proposed in employment law through bills which would amend the Employment Equity Act, the Labour Relations Act, The Basic Conditions of Employment Act, and create an Employment Services Act. However, there is resistance. “The four bills, which were proposed last year, have met with resistance from business and civil society groups. Critics argue the bills will make South African labour legislation even more constraining than it already is, thereby deterring companies from hiring and from retaining people already in jobs.” Alistair Anderson, World Bank Warns about too Many Labour Rules, BUSINESS DAY (South Africa), Mar. 4, 2011. The only bill that would have significant impact on employment discrimination is the Employment Equity Amendment Bill. This Bill would add an equal pay for work of equal value clause. Meaning that employers would be prohibited from paying employees who do “the same or substantially the same work” differently. The bill would also strengthen enforcement and compliance with the Employment Equity Act by empowering “the Director General to impose fines on non-complying employers as a percentage of the annual turnover of the company, at two percent for first contraventions, escalating to a maximum of ten percent for repeated contraventions.” Media Briefing on the Bills Amending the Labour Relations Act, http://www.labour.gov.za/media-desk/media-statements/2010/media-briefing-on-the-bills-amending-the-labour-relations-act-the-basic-conditions-of-employment-act-employment-equity-act-and-the-employment-services-bill–2010.
6. The Employment Equity Act prohibits harassment in Chapter 2, Section 3 where it states: “[h]arassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).” Subsection (1) includes sex and other grounds for discrimination, which make sexual harassment illegal. It appears that the labour courts are quite plaintiff friendly in their sexual harassment jurisprudence. The major case in the field is Ntsabo v. Real Security CC (2003) 24 ILJ 2341 (LC). In this case the plaintiff’s supervisor touched, grabbed, and even simulated a sex act on her. The court believed the plaintiff’s story. The court interpreted the statute favorably for the plaintiff in two ways. First, it interpreted section 60 of the Employment Equity Act, which requires “immediate” reporting if the employer is to be liable, as:

“The requirement that the reporting procedure be reported immediately cannot be construed to mean within minutes of the incident complained of. There are circumstances of which one is reminded in such considerations. It is trite that such a requirement is regarded as being complied with when it has been done within a reasonable time in the circumstances.” *Id.*

The court also found that since her employer did not take any action after the plaintiff complained about the sexual harassment, the employer was guilty of discrimination based on sexual harassment by omission. The Court held that: “For the purpose of the EEA, failure of the Respondent to attend to the problem brings the whole issue within the bounds of discrimination. The nub of the complaint laid with the Respondent involved sexual harassment. Its failure to attend to the matter is by definition as envisaged by section 6(3) read with section 6(1) of the EEA, discrimination based on sexual harassment.” *Id.*

**E. Brazil**

Brazil, like many other Latin American countries, makes employment discrimination a crime. There are two main pieces of anti-discrimination legislation. Lei No. 1.390, enacted in 1951, was the first piece of legislation to confront the problem of discrimination in Brazil. The law established acts resulting from “race or color prejudice” as a criminal misdemeanor, including denial of employment, service, lodging or admittance. The focus of this law was on race and color, and these were the only protected categories for forty years in Brazil. A subsequent anti-discrimination law, Lei No. 7.716, offered additional protection against discrimination. Lei No. 7.716 adds three more prohibited categories—ethnicity, religion, and national origin—and increases the punishment of a violation beyond a simple misdemeanor. This provision specifies that “crimes resulting from prejudice or discrimination of race, color, ethnicity, religion, or national origin,” including “to deny or obstruct employment in private enterprise,” are offenses punishable by two to five years imprisonment. *See* Benjamin Hensler, *Nao Vale a Pena? (Not Worth the Trouble?)* Afro-Brazilian Work-

There is a high evidentiary standard to use one of these statutes to bring a criminal claim of overt discrimination. It is such a high standard that even direct expressions of prejudice do not necessarily trigger judicial scrutiny. Most judges in Brazil require that three prongs are met for a “viable allegation of racial discrimination”; they are: (1) the discriminatory act, (2) the defendant’s prejudice toward the complainant, and (3) the causal relationship between the prejudice and the act. While the defendant can argue any or all the prongs are not met as a defense, the third prong is particularly hard to meet because judges typically require direct evidence of causality rather than inferring causality. As an example, a “defendant cannot simply disparage black Brazilians, but must reveal his action to have been motivated by the prejudicial attitude, ‘that I will not hire you because you are black.’” See Seth Racusen, The Ideology of the Brazilian Nation and the Brazilian Legal Theory of Racial Discrimination, 10 Social Identities 775, 783–784 (2004).

Another protection against employment discrimination is the Brazilian Constitution. Brazil’s Constitution explicitly states that “all persons are equal before the law, without any distinction whatsoever.” Chapter 1, Article 5. It also declares that “men and women have equal rights and duties” and generally prohibits discrimination. Paragraph 41 of Article 5 adds that “the law will punish any discrimination which would offend rights and fundamental liberties,” while paragraph 42 states that the “practice of racism constitutes an unbailable crime, subject to the punishment of imprisonment, under the terms of the law.” Also, Article 7, paragraph 30, of the Constitution prohibits “difference of salary, exercise of functions, and criteria of admission for motive of sex, age, color or civil status.” For employment cases brought under the Constitution, there is the possibility of a type of burden shifting analysis which can, according to scholars, reach a broader range of discriminatory practices than if brought under the criminal anti-discrimination laws. The requirement of direct evidence of prejudicial motive under the two Leis make it difficult to shift the burden to the employer. Racusen, supra at 780.

NOTES

1. The choice between criminal enforcement of the prohibition against employment discrimination and constitutional claims of employment discrimination will depend on the resources dedicated to enforcement, as well as the presence of enforcement incentives in the laws. As one commentator notes:

The vast majority of Latin American countries have mandates against race discrimination in their constitutions. However, most lack either legislation to implement the antidiscrimination policy or a governmental agency dedicated to enforcing them. In fact, an examination of civil rights structures in six Latin American countries, sponsored by the Inter-American Development Bank, characterizes Latin American countries as generally lacking government agencies dedicated to handling or investigating charges of discrimination. The few countries with
enabling statutes have tended to focus on criminal law provisions as the primary vehicle for combating acts of discrimination, in part because the criminal law venue does not require an investment of financial resources on the part of the victim.

While criminal law enforcement carries a strong normative statement about the evils of racism, it has proven a poor means for handling incidents of race discrimination. In the case of Brazil, for example, because the criminal justice system is overloaded with traditional crimes involving physical harm to individuals and property, few race discrimination allegations are investigated. In turn, the few allegations that are investigated encounter a judicial system that is reluctant to impose the sanction of prison for such a harm. The aforementioned survey of legal systems also notes that Latin American civil rights structures are hampered by the lack of provisions for attorney’s fees and other financial incentives for client representation, as well as the absence of an active civil rights bar.”


2. Another set of laws that can be used for employment discrimination are the Consolidacao das Leis Trabalhistas (CLT), Brazil’s extensive labor code which established the country’s Labor Courts and which regulate every aspect of the employment relationship. The CLT was amended in 1999. The 1999 amendments make it a violation of the CLT for employers to consider sex, age, color or marital status as: (1) a qualification for hiring; (2) a reason for termination or denying promotion; (3) a variable for determining compensation, qualifications or opportunities for advancement; or (4) a criteria for taking or passing job-related examinations. Cases brought under this law enjoy a few advantages, such as beneficial burden-shifting, the lack of a requirement to prove discriminatory intent (as required under the criminal laws), and an accessible venue for workers to bring claims not likely to be pursued by prosecutors. However, there are also restrictions to bringing claims under the CLT. Most Afro-Brazilian workers who are most likely to bring such a claim are employed informally and thus are not covered by these laws (although these workers can challenge discriminatory hiring practices that bar access to the formal sector). The CLT is also most useful as a tool for after a person is terminated but has less usefulness if a claim is brought during the course of employment. Hensler, supra, at 318–319.

3. That civil claims are a more friendly and viable alternative is demonstrated by recent cases in which the Labor Courts have granted relief to claimants subjected to discriminatory treatment. Consider the following two cases, as detailed in Seth Racusen, A Mulato Cannot Be Prejudiced: The Legal Construction of Racial Discrimination in Contemporary Brazil (June 2002) 306 (unpublished Ph.D. dissertation, Massachusetts Institute of Technology, http://hdl.handle.net/1721.1/31104). Vicente Espirito do Santo was fired after three witnesses overheard his supervisor saying “[l]et’s clean the department and fire that crioulo.” A “crioulo” is a person of African descent. The case was brought to the Public Prosecutor, but the
prosecutor argued that because white people were dismissed at the same time as Vicente the dismissal “was economic and not racially motivated.” *Id.* at 306. The claim was then brought to Brazil’s Labor Courts, a distinct forum from the civil or criminal courts, composed of three judges selected by employers, labor representatives, these courts, and the judiciary. Most Brazilians view the Labor Courts as a more sympathetic forum than the criminal courts. *Id.* at 303. The Regional Labor Court (on appeal from a lower Labor Court) found that “the dismissal process did not stand up to [constitutional] scrutiny.” *Id.* at 308. The Court asked how a large firm could possibly determine which 2,000 employees to dismiss on technical grounds without issuing a written record of those technical criteria—“evaluations of the technical capacities of all workers, and a method to indicate the relative assessments.” *Id.* The Court did not find definitely that the dismissal was racist but nevertheless concluded that the dismissal process was “discretionary” and likely made with “racial motivation.” *Id.* The judge ordered that the plaintiff be reinstated. *Id.*

In a different case, a supervisor made an extremely racist comment about an employee, when he “was overheard calling him a ‘worthless Black’ who should return to the tronco (slave quarters).” *Id.* at 308. The plaintiff had been reassigned to another department, which paid 10% less than he was making, and protested this reassignment as a violation of company policy. He then was subjected to harassment by a supervisor and was subsequently fired. *Id.* at 309. After an appeal from an unsuccessful claim brought in the Regional Labor Court, the Superior Labor Tribunal reinstated the plaintiff and awarded back pay. *Id.* at 310. The court found that there was documented evidence of a prejudicial motive, and this was the reason for the reassignment and dismissal of the plaintiff. *Id.* “In support of its holding about the discriminatory nature of [the supervisor’s] behavior, the court cited four constitutional clauses, including the clause protecting against employment discrimination, and two international conventions (ILO111/58 & 117/62) which Brazil had signed.” *Id.*

4. Since the end of slavery in Brazil, the country has embraced the idea that it is a colourblind nation. “Brazilian colourblindness . . . projects the melding of persons into a unified nation with no salient differences, which generates claims about harmonious private relations.” Racusen, *supra* at 777. This notion was formed in part by the idea of “racial democracy.” During the 1930s Brazil was going through an important state-building process, and at this time a work by Gilberto Freyre, which articulated the theory of “racial democracy,” became increasingly accepted in the country. “Put simply, racial democracy posits that Brazilian society is relatively free of racial discrimination because extensive interracial parentage has created a large, mixed race population incapable of prejudice against each other.” Hensler, *supra,* at 282. His theory was so popular that it was found in “state policy,” “official pronouncements,” and the curriculum of school children. Racusen, *supra,* at 786. His work on “racial democracy” had three “basic tenets”:

“First, he inverted the racist pessimism about ‘degenerate Mulatos’ into the counter claim that the rise of the Moreno represented ‘racial progress’ that would ‘resolve racial problems.’ He claimed that ‘racial
mixing’ would inherently produce social harmony. Second, he compared this Brazilian model with the US, which generated two other claims. Freyre defined racism as a US phenomenon such as segregation, lynching, and the resultant tension between groups. That notion of racial discrimination enabled the denial of Brazilian racial discrimination. Freyre argued that the absence of North American phenomena, visible tensions and explicit state organized discrimination indicated the lack of a Brazilian problem.

Id. [citations omitted].

5. The 1951 anti-discrimination law, Lei No. 1.390, was created under the belief of a racial democracy. “Unlike in the U.S. where civil rights laws were enacted in recognition of the need to counteract domestic systems of racial subordination, in Brazil the influence of the racial democracy thesis meant that the purpose articulated for the anti-discrimination laws was to protect Brazilian society from the importation of racism from abroad.” Hensler, supra, at 287. The push for the law happened after “prominent African–American dancer Katherine Dunham was denied admittance to a Sao Paulo hotel.” Id. at 288. The advocate of the bill, Senator Afonso Arionos, blamed the racial discrimination on “gringos who . . . insensitive to our old customs of racial fraternity.” Id. Those social practices were perceived as more characteristic of North America than Brazil:

The Lei Afonso Arinos established “acts resulting from race or color prejudice” as a criminal misdemeanor, including denial of employment, service, lodging or admittance. Thus, until the late 1980s Brazil’s main anti-discrimination law was one “which prohibited social practices of the North American segregationist past,” but failed to address the covert forms of discrimination far more common in Brazilian society. Within the rubric of racial democracy, however, these less explicit forms of exclusion were not covered because they did not fit a conception of discrimination based on the U.S. model of Jim Crow laws. This “narrow construction of racial discrimination,” has severely limited its usefulness to the persons it purports to protect.

The logic behind making discrimination merely a misdemeanor offense was that the law’s purpose was not to uproot an already entrenched social problem, but to prevent the emergence of one that did not currently exist. As one Brazilian author notes, “the legislator of the penal code considered the practice of racism . . . like the illegal carrying of arms, or vandalism, etc. These acts are punished because they can cause future prejudice or danger to the security of society.” This focus on deterring the introduction of racist practices, typically of foreign origin, into society, is a persistent preoccupation in Brazilian anti-discrimination law. In a text on employment discrimination law, Francisco Gerson Marques de Lima cites, as his chief example of racial discrimination in Brazil, incidents of prejudice towards mixed race Brazilians by ‘groups of “Aryans”’ among the country’s large German immigrant population. “This is the result,” charges de Lima, “of discrimination against Brazilians in our own land by foreigners!”

Id. at 288–289. The ideology of racial democracy thus helps explain why Brazil seems to have employment discrimination laws that are hard to use.
If racism and discrimination is not acknowledged as a real problem in Brazil, it is hard to work up a claim that it exists in a particular situation.

The racial ideology of Brazil, and other Latin American countries, might also account for “the refusal of many Latin American nations to collect census data according to racial identity, or otherwise collect systematic information on the status of its racial and ethnic populations.” Tanya Kateri Hernández, Multiracial Matrix: The Role Of Race Ideology In The Enforcement Of Antidiscrimination Laws, A United States–Latin America Comparison, 87 CORNELL L. REV. 1093, 1130 (2002). Hernandez reports that “Only 4 out of 26 countries in Latin America have census data on populations of African descent” and concludes that the lack of census racial data “obstructs the attempt to address widespread patterns of inequality that could, inter alia, more effectively address societal inequality through litigating individual acts of discrimination.” Id. at 1130–31.

6. There is some evidence that Brazil is shifting away from the “racial democracy” theory. In 2005, Brazilian prosecutors brought civil complaints and charged five of the country’s leading banks with violating the Brazilian constitution by discriminating against Afro-Brazilian employees and job applicants in hiring, promotion and compensation:

In almost every significant aspect, these lawsuits represented a dramatic break with the traditional treatment of racial discrimination claims in Brazilian courts. Up until the mid-1990s public prosecutors considered protection of minority rights at the bottom of their list of law enforcement priorities. Brazil’s statutory anti-discrimination law was comprised of a single provision of the penal code prohibiting acts “motivated by racial prejudice.” Brazilian courts held that liability for racial discrimination could only be established through direct evidence of a defendant’s prejudicial motive. Instances of Afro-Brazilian workers successfully challenging racial discrimination through the court system were so rare that a 1997 documentary film chronicling a case where a plaintiff actually prevailed was entitled ‘The Exception and the Rule.’

* * * The recent employment discrimination suits brought against the banks on behalf of Afro-Brazilian workers also reflect a broader shift in the country’s treatment of racial inequality. For most of the last century the Brazilian state claimed that it was a “racial democracy” whose colorblind society stood in contrast to the segregationist practices of other nations, a claim that was accepted by numerous scholars, Brazilian and foreign. By the century’s end, however, both scholars and state officials increasingly recognized that despite long-standing traditions of formal legal equality and widespread interracial mixing, Brazilian racial relations were characterized by deep and persistent inequalities between the white and non-white populations. In place of the claim that Brazil was a racial democracy came a realization that in areas such as formal employment and higher education, the exclusion of persons of African descent—a group that is generally understood to include more than 40 percent of the country’s population—rivaled that of countries such as South Africa and the
United States, that have only recently emerged from decades of legally-enforced apartheid.
Hensler, supra, at 267–269.

F. INDIA

India’s Constitution is quite progressive and it is often heralded as a landmark document. There are a number of places in the document that focus on equality and discrimination; the most important for employment discrimination is Article 15, which prohibits discrimination on the grounds of religion, race, caste, sex, or place of birth. Article 15 reads:

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

The Constitution also mentions equality of opportunity for employment, but is limited to “public employment.” Article 16 provides that:

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

Although India’s Constitution offers protection against discrimination, the main anti-discrimination laws in India are the Persons with Disabilities Act, 1995, the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, the Equal Remuneration Act, 1976, and the Protection of Civil Rights Act, 1955. The Protection of Civil Rights Act, 1955 only covers one class of individuals, the “untouchables.” The Act states that a person cannot bar an “untouchable” from “the practice of any profession or the carrying on of any occupation, trade or business [or employment in any job].” 4(iii).

The Equal Remuneration Act of 1976 focuses solely on gender discrimination. The Equal Remuneration Act, No. 25 of 1976, India Code (1976). This Act defines employer with no distinction between a government and private employer. This Act “advocates nondiscrimination on the basis of gender in matters related to fixing wages and determining transfers, training and promotion.” Anuradha Saibaba Rajesh, Women in India:

The Disabilities Act protects persons with disabilities in India, but the scope of the enforceable prohibitions of the Act is fairly limited. First, the Act defines employer to mean only organizations run by the government, or sectors of the government, and as such it does not apply to any private employers. Ch. I, 2(j). Second, there is no mention of discrimination during the hiring process under the Act; the discrimination that is prohibited refers only to situations where the person with a disability is already an employee of the government. Ch. I, 2(j). Thus, if a government employee is disabled they can be protected by the act if only when they meet the definition of “disability” and are discriminated against while on the job. The term “disability” includes: blindness; low vision; leprosy-cured; hearing impairment; locomotor disability; mental retardation; mental illness. Ch. I, 2(i). Act Ch. I–Definitions. The relevant part of the statute is:

(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that it is not possible to adjust the employee against and post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

Ch.VIII ¶ 46.

Finally, the Act requires government authorities to provide incentives to public and private employers to “ensure that at least five percent of their work force is composed of persons with disabilities.” Id.

NOTES

1. The Supreme Court of India has interpreted certain Constitutional equality prohibitions somewhat narrowly, particularly in the case of sex discrimination. The Supreme Court of India has held that: “what Articles 15(1) and 16(2) prohibit is that discrimination should not be made only and only on the ground of sex. These Articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations.” AIR India v. Meerza and Ors, (1981) 1 S.C.C. 335 (India) ¶ 70. The Court reviewed Air India regulations forcing airhos-
tesses, who were women, to retire because of marriage or first pregnancy. The Court upheld the basic scheme of classification by sex, holding that air hostesses were a category of workers distinct from other airline employees. Moreover, the Court concluded that the marital restriction was neither unreasonable nor arbitrary because requiring air hostesses to delay marriage until they were “fully mature” would improve their health and their chances of a successful marriage, promote India’s family planning program, and prevent the airlines from having to incur the cost of recruiting new air hostesses if the air hostesses who married became pregnant and quit their jobs. On the other hand, the Court struck down as unconstitutionally unreasonable and arbitrary the requirement that air hostesses terminate employment at the time of pregnancy. The Court reasoned that the difference between male and female with regard to pregnancy does not license a regulation that “amounts to compelling the poor air hostess not to have any children and thus interfere with and divert the ordinary course of human nature.” See ¶¶ 70–84.

2. There is no specific legislation on sexual harassment in India but the Supreme Court has construed the Constitution to prohibit it under various constitutional provisions and international conventions. Vishakha & Others v. State of Rajasthan, A.I.R. 1997 S.C. 3011. As a result of the Supreme Court’s opinion in Vishaka, there has been additional momentum to pass a statutory prohibition of sexual harassment in the workplace:

The Supreme Court defines sexual harassment to include any unwelcome physical contact or advances, demands or requests for sexual favours, sexually coloured remarks, displaying of pornography and other unwelcome physical, verbal or nonverbal conduct of a sexual nature. The Supreme Court requires all workplaces, educational institutions and organised service sectors, private or public, with more than 50 employees to introduce sexual harassment prevention policy and set up a complaints committee to investigate into sexual harassment complaints. The complaints committee is required to submit an inquiry report which is treated as the last word on the incident. Prior to Vishakha, the only remedy for sexual harassment was to initiate a criminal proceeding. The then law did not specifically provide for awarding monetary compensation. In Vishakha, the Supreme Court did not deal with the question of compensation to the victim. However in subsequent cases the courts have granted tort damages to sexual harassment victims.

The National Commission for Women (NCW) can intervene where the Vishakha guidelines are not followed by an employer. The NCW drafted the Sexual Harassment of Women at their Workplace (Prevention) Bill which is still pending before Parliament. The Bill does not apply to agriculture, construction and home based unorganised work sectors, among others and excludes men and same sex harassment from its purview. However it relaxes the burden of proof on a woman complaining of sexual harassment, and there is a proposal to amend the Bill to specifically cover students, research scholars and those working in unorganised sector.
There is an all-out attempt to protect women. The Sexual Harassment Bill is but one example. There are national laws on eve teasing (street sexual harassment) and a Bill to reserve 33% of seats in the national Parliament and provisional assemblies to women in the pipeline. In big cities like Delhi and Mumbai, seats are reserved for women in local trains, ladies special buses are running, and there are women-only taxis driven by women drivers...


3. The most rigorously enforced system of social hierarchy in India is the caste system. Although “untouchability” was officially abolished under Article 17 of the Constitution of India, the practice remains “determinative of the social and economic outcomes of those at the bottom of the caste hierarchy.” Smita Narula, *Equal by Law, Unequal by Caste: The “Untouchable” Condition in Critical Race Perspective* 26, Wis. Int’l L.J. 255, 280–81 (2010). The “caste divisions ... dominate in housing, marriage, employment, and general social interaction—divisions that are reinforced through the practice and threat of social ostracism, economic boycotts, and physical violence.” *Id.* at 273. The specific labor conditions these outcasts face can be downright offensive; they are subject to “exploitative labor arrangements such as bonded labor, migratory labor, and forced prostitution.” *Id.* at 274. Even if they are not forced to work these jobs the outcasts are discriminated against in hiring and in the payment of wages by private employers. *Id.* at 274. This system is a great hurdle in combating employment discrimination and in crafting effective laws in the country to combat it. The laws, specifically the Protection of Civil Rights Act, challenge a system that has been ingrained in the country over many years. When these two systems do conflict, it seems that the caste system often takes precedence. Narula writes:

The Rule of Law in India lives in the shadow of the Rule of Caste. If law is understood as a set of rules backed by sanction, then both the legal system and the caste system can lay claim to the mantle of law with one significant difference: the caste system operates more efficiently, more swiftly, and more punitively than any rights-protecting law on the books.

*Id.* at 295.

4. According to the above author, even among the untouchables, or “Dalits,” it is the women who endure the brunt of discrimination in Indian society. She describes the “multiple forms of discrimination” that Dalit women suffer:

Dalit women have unequal access to services, employment opportunities, and justice mechanisms as compared to Dalit men. In relation to employment opportunities, Dalit women are allotted some of the most menial and arduous tasks and experience greater discrimination in the payment of wages than Dalit men. In relation to services, Dalit women have less access to education and health facilities, ensuring that their literacy, nutrition, and health standards fall far below that of Dalit
women and non-Dalit men and women. The number of Dalit women in decision-making positions is also very low, and in some central services Dalit women are not represented at all. * * *

Dalit women make up the majority of manual scavengers—a caste-based occupation wherein Dalits remove excrement from public and private dry pit latrines and carry it to dumping grounds and disposal sites. Indeed, the “occupation” of manual scavenging is the only economic opportunity available to many Dalit women hailing from scavenger sub-castes, with the result that more Dalit women and girls work as manual scavengers than Dalit men. Manual scavengers are situated at the very bottom of the graded inequality structure of the caste system and as a result face discrimination from other non-scavenger caste Dalits who treat them as “untouchables,” creating an unquestioned “‘untouchability’ within the ‘untouchables’.” The entrenched discrimination against manual scavengers makes it difficult to find alternative employment and even more difficult to convince scavengers that they are able to take on, or are “worthy of performing,” different occupations.

Narula, *Id.*, at 278–280.

5. There are laws that prevent compulsory labor on people who are “untouchable.” The Civil Rights Act of 1995, discussed above and in Chapter II, provides that: “(w)hoever compels any person, on the ground of “untouchability”, to do any scavenging or sweeping or to remove any carcass or to flay any animal or to remove the umbilical cord or to do any other job of a similar nature, shall be deemed to have enforced a disability arising out of “untouchability.” Chapter 7A. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is focused on the commitment of “atrocities against the members of the Scheduled Castes and the Scheduled Tribes.” It makes a punishable crime, among other things, to “compel[] or entice[] a member of a Scheduled Caste or a Scheduled Tribe to do ‘begar’ or other similar forms of forced or bonded labour other than any compulsory service for public purposes imposed by Government.” Chapter 2(3)(vi). Although the Atrocities Act is a powerful weapon to enforce the rights of Dalits through the criminal justice system, advocates argue that it has suffered from a lack of enforcement:

Ironically, the primary obstacles to implementation are intended to be the primary enforcers of the Act—the lowest rungs of the police and bureaucracy that form the primary mode of interaction between state and society in the rural areas. Policemen have displayed a consistent unwillingness to register offenses under the act. This reluctance stems partially from ignorance. According to a 1999 study, nearly a quarter of those government officials charged with enforcing the Act are unaware of its existence.

In most cases, unwillingness to file a First Information Report (FIR) under the Act comes from caste-bias. Upper caste policemen are reluctant to file cases against fellow caste-members because of the severity of the penalties imposed by the Act; most offenses are non-bailable and carry minimum punishments of five years imprisonment...
A bigger obstacle faces victims who actually manage to lodge a complaint. Failure to follow through with cases is alarmingly apparent at the lowest echelons of the judicial system. The statistics speak for themselves: out of 147,000 POA cases pending in the courts in 1998, only 31,011 were brought to trial. Such delay is endemic to the Indian judicial system. Although the POA mandated the creation of Special Courts precisely to circumvent this problem, only two states have created separate Special Courts in accordance with the law. In other states, existing sessions courts have been designated Special Courts, while still being asked to process their usual caseloads. Since many different Acts require the creation of Special Courts, such sessions courts are often overloaded with a number of different kinds of “priority” cases, virtually guaranteeing that none of these cases receive the attention they are mandated to receive.

Even if cases make it to trial, the POA also suffers from abysmal rates of conviction. Out of the 31,011 cases tried under the POA in 1998, only a paltry 1,677 instances or 5.4% resulted in a conviction and 29,334 ended in acquittal. Compare this to the conviction rate in cases tried under the Indian Penal Code: in 1999, 39.4% of cases ended in a conviction and in 2000, 41.8%. Judicial delay is just one cause of this low conviction rate; the lapse between the case being registered and the trial means that witnesses who are often poor and face intimidation in the interim, turn hostile and the case becomes too weak for a conviction. The long wait also results in many plaintiffs losing interest. Judicial bias against Dalits is rampant and unchecked, and court decisions frequently bear the mark of such bias.