Equal Employment Opportunity and Human Resources Management

After studying this chapter, you should be able to

1. Explain the reasons behind passage of EEO legislation.
2. Prepare an outline describing the major laws affecting equal employment opportunity. Describe bona fide occupational qualification and religious preference as EEO issues.
3. Discuss sexual harassment and immigration reform and control as EEO concerns.
4. Explain the use of the Uniform Guidelines on Employee Selection Procedures.
5. Provide examples illustrating the concept of adverse impact and apply the four-fifths rule.
6. Discuss significant court cases affecting equal employment opportunity.
7. Illustrate the various enforcement procedures affecting equal employment opportunity.
8. Describe affirmative action and the basic steps in developing an affirmative action program.
Within the field of HRM perhaps no topics continue to receive more attention than equal employment opportunity (EEO) and affirmative action (AA). **Equal employment opportunity**, or the employment of individuals in a fair and nonbiased manner, has consumed the attention of the media, the courts, practitioners, and legislators. Not surprisingly, a more diverse and multicultural workforce has mandated that managers know and comply with a myriad of legal requirements affecting all aspects of the employment relationship. These mandates create legal responsibilities for an organization and each of its managers to comply with various laws and administrative guidelines. Importantly, practitioners agree that when all functions of HRM comply with the law, the organization becomes a fairer and more effective place to work.

However, when managers ignore the legal aspects of HRM, they risk incurring costly and time-consuming litigation, negative public attitudes, and damage to their individual careers. Two highly publicized cases illustrate these points. In 2004, Wal-Mart Stores, Inc., the nation’s largest employer, was hit with a gender-discrimination lawsuit. The charge, originally filed by six women, was granted class-action status and will cover as many as 1.6 million current and former Wal-Mart employees—the largest civil rights case in U.S. history. The suit claims that the retail giant used a pay system that paid female workers 5–15 percent less than their male counterparts for comparable jobs and favored men for promotions despite women having higher performance ratings and seniority. In a black eye for Boeing Co., the Seattle airplane manufacturer was charged, in a 2004 lawsuit filed on behalf of 28,000 women, with systematic pay discrimination and a hostile sexual work environment. Depositions from multiple employees describe groping, fondling, and offensive language on the part of male colleagues. These prominent examples overshadow the hundreds of discrimination lawsuits filed by employees of smaller organizations. For example, a federal jury in Florida awarded $1.55 million in damages to five former waitresses and hostesses of the Rio Bravo Cantina in Clearwater, Florida. The women claimed they were sexually harassed on the job over a four-year period. Each of the five women was awarded $10,000 in compensation for emotional pain and suffering. Punitive damages of $500,000 each were awarded to three of the five women. Delner Franklin-Thomas, EEOC regional attorney in Miami, noted, “This is the largest jury verdict for the EEOC in Florida in a sexual harassment case.”

Equal employment opportunity is not only a legal topic, it is also an emotional issue. It concerns all individuals, regardless of their sex, race, religion, age, national origin, color, physical condition, or position in an organization. Supervisors should be aware of their personal biases and how these attitudes can influence their dealings with subordinates. It should be emphasized that covert, as well as blatantly intentional, discrimination in employment is illegal.

To comply with the mandates of EEO legislation, employers have been compelled to develop employment policies that incorporate different laws, executive orders (EOs), administrative regulations, and court decisions (case law) designed to end job discrimination. The role of these legal requirements in shaping employment policies will be emphasized in this chapter. We will also discuss the process of affirmative action, which attempts to correct past practices of discrimination by actively recruiting minority-group members, and the importance of supporting diversity as a proactive business goal.
Equal employment opportunity as a national priority has emerged slowly in the United States. Not until the mid-1950s and early 1960s did nondiscriminatory employment become a strong social concern. Three factors seem to have influenced the growth of EEO legislation: (1) changing attitudes toward employment discrimination; (2) published reports highlighting the economic problems of women, minorities, and older workers; and (3) a growing body of disparate laws and government regulations covering discrimination.

**Changing National Values**

The United States was founded on the principles of individual merit, hard work, and equality. The Constitution grants to all citizens the right to life, liberty, and the pursuit of happiness. A central aim of political action has been to establish justice for all people of the nation.

In spite of these constitutional guarantees, employment discrimination has a long history in the United States. Organizations that claim to offer fair treatment to employees have openly or covertly engaged in discriminatory practices. Well-known organizations such as Dow Chemical, Westinghouse Electric Corporation, Mitsubishi Motor Manufacturing of America, the U.S. Army, the City of Los Angeles, Lockheed Martin, Amtrak, Home Depot, and American Airlines have violated equal employment laws.
Public attitudes changed dramatically with the beginning of the civil rights movement. During the late 1950s and early 1960s, minorities—especially blacks—publicized their low economic and occupational position through marches, sit-ins, rallies, and clashes with public authorities. The low employment status of women also gained recognition during this period. Supported by concerned individuals and church and civic leaders, the civil rights movement and the women’s movement received wide attention through television and print media. These movements had a pronounced influence on changing the attitudes of society at large, of the business community, of civic leaders, and of government officials, resulting in improvements in the civil rights of all individuals. No longer was blatant discrimination to be accepted.

Economic Disparity

The change in government and societal attitudes toward discrimination was further prompted by increasing public awareness of the economic imbalance between nonwhites and whites. Even today, civil rights activists cite government statistics to emphasize this disparity. For example, the March 2004 unemployment rate for black males over age 20 was 9.2 percent, compared with 4.7 percent for white males of the same age. When employed, nonwhites tend to hold unskilled or semiskilled jobs characterized by unstable employment, low status, and low pay. In the fourth quarter of 2003, the median weekly earnings of white males were $702; of black males, $524; and, of Hispanic males, $451. Remarkling on the disparity in wages between whites and minorities, Steve Hipple, a Bureau of Labor Statistics economist, notes, “There's still a huge gap and it hasn’t improved over the last 20 years.”

Early Legal Developments

Since as early as the nineteenth century, the public has been aware of discriminatory employment practices in the United States. In 1866 Congress passed the Civil Rights Act, which extended to all people the right to enjoy full and equal benefits of all laws, regardless of race. Beginning in the 1930s and 1940s, more-specific federal policies covering nondiscrimination began to emerge. In 1933 Congress enacted the Unemployment Relief Act, which prohibited employment discrimination on account of race, color, or creed. In 1941 President Franklin D. Roosevelt issued Executive Order 8802, which was to ensure that every American citizen, “regardless of race, creed, color, or national origin,” would be guaranteed equal employment opportunities in World War II defense contracts. Over the next twenty years a variety of other legislative efforts were promoted to resolve inequities in employment practices.

Unfortunately, these early efforts did little to correct employment discrimination. First, at both the state and federal levels, nondiscrimination laws often failed to give any enforcement power to the agency charged with upholding the law. Second, the laws that were passed frequently neglected to list specific discriminatory practices or methods for their correction. Third, employers covered by the acts were required only to comply voluntarily with the equal employment opportunity legislation. Without a compulsory requirement, employers often violated legislation with impunity. Despite these faults, however, early executive orders and laws laid the groundwork for passage of the Civil Rights Act of 1964.
**Government Regulation of Equal Employment Opportunity**

Significant laws have been passed barring employment discrimination. These laws influence all of the HRM functions, including recruitment, selection, performance appraisal, training opportunities, promotion, and compensation. Because today's managers and supervisors are involved in employment activities, knowledge and application of these statutes are critical. It should be understood that managers and supervisors perform their jobs as agents of the employer. Under the business concept of agency, managers and supervisors authorized to deal with employees on the employers' behalf subject themselves, and their employers, to responsibility for illegal acts taken against employees. Both the manager and the organization can be sued by an employee alleging discrimination.

Organizations cannot afford to have managers make HRM decisions without considering the possible legal implications of their actions for the organization and themselves. Highlights in HRM 1 will test your current understanding of EEO laws.

**Major Federal Laws**

Major federal equal employment opportunity laws have attempted to correct social problems of interest to particular groups of workers, called **protected classes**. Defined broadly, these include individuals of a minority race, women, older people, and those with physical or mental disabilities. Separate federal laws cover each of these classes. Figure 3.1 lists the major federal laws and their provisions governing equal employment opportunity.

**Equal Pay Act of 1963**

The Equal Pay Act outlaws discrimination in pay, employee benefits, and pensions based on the worker's gender. Employers are prohibited from paying employees of one gender at a rate lower than that paid to members of the other gender for doing equal work. Jobs are considered "equal" when they require substantially the same skill, effort, and responsibility under similar working conditions and in the same establishment. For example, male and female plastic molders working for Medical Plastics Laboratory, a company of 125 employees manufacturing medical education products, must not be paid differently because of their gender. However, other employers in this specialized industry may pay their plastic molders wage rates that differ on the basis of different job content or economic conditions from those of Medical Plastics.

Employers do not violate the Equal Pay Act when differences in wages paid to men and women for equal work are based on seniority systems, merit considerations, or quantity or quality of production. However, these exceptions must not be based on the employee's gender or serve to discriminate against one particular gender. Employers may not lower the wages of one gender to comply with the law; rather, they must raise the wages of the gender being underpaid.

The Equal Pay Act was passed as an amendment to the Fair Labor Standards Act (FLSA) and is administered by the Equal Employment Opportunity Commission (EEOC). It covers employers engaged in interstate commerce and most government employees.
Test Your Knowledge of Equal Employment Opportunity Law

The following questions have been used as “icebreakers” by employers and consultants when training supervisors and managers in EEO legislation. What is your knowledge of EEO laws? Answers are found at the end of this chapter.

1. Two male employees tell a sexually dirty joke. The joke is overheard by a female employee who complains to her supervisor that this is sexual harassment. Is her complaint legitimate?
   ___Yes ___No

2. To be covered by Title VII of the Civil Rights Act, an employer must be engaged in interstate commerce and employ twenty-five or more employees.
   ___True ___False

3. People addicted to illegal drugs are classified as disabled under the Americans with Disabilities Act of 1990.
   ___Yes ___No

4. The Equal Pay Act of 1963 allows employers to pay different wages to men and women who are performing substantially similar work. What are the three defenses for paying a different wage?
   1. ______________________________
   2. ______________________________
   3. ______________________________

5. A person applies with you for a job as a janitor. During the interview the person mentions that since birth he has sometimes experienced short periods of memory loss. Must you consider this individual a disabled person under the Americans with Disabilities Act of 1990?
   ___Yes ___No

6. On Friday afternoon you tell Nancy Penley, a computer analyst, that she must work overtime the next day. She refuses, saying that Saturday is her regular religious holiday and she can’t work. Do you have the legal right to order her to work on Saturday?
   ___Yes ___No

7. You have just told an applicant that she will not receive the job she applied for. She claims that you denied her employment because of her age (she’s 52). You claim she is not protected under the age discrimination law. Is your reasoning correct?
   ___Yes ___No

8. As an employer, you can select those applicants who are the most qualified in terms of education and experience.
   ___Yes ___No

9. As a manager, you have the legal right to mandate dates for pregnancy leaves.
   ___True ___False

10. State fair employment practice laws cover smaller employers not covered by federal legislation.
    ___True ___False
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Civil Rights Act of 1964
Title VII of the Civil Rights Act of 1964 is the broadest and most significant of the antidiscrimination statutes. The act bars discrimination in all HR activities, including hiring, training, promotion, pay, employee benefits, and other conditions of employment. Discrimination is prohibited on the basis of race, color, religion, sex (also referred to as gender), or national origin. Importantly, in response to the growing number of immigrant workers and workplace cultural and ethnic awareness, the EEOC has issued new guidelines on national origin discrimination. A “national origin group” is defined as a group of people sharing a common language, culture,
ancestry, and/or similar social characteristics. This definition includes people born in the United States who are not racial or ethnic minorities. Also prohibited under the act is discrimination based on pregnancy. The law protects hourly employees, supervisors, professional employees, managers, and executives from discriminatory practices. Section 703(a) of Title VII of the Civil Rights Act specifically provides that

It shall be 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 [or her] compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.

While the purpose and the coverage of Title VII are extensive, the law does permit various exemptions. For example, as with the Equal Pay Act, managers are permitted to apply employment conditions differently if those differences are based on such objective factors as merit, seniority, or incentive payments. For example, the law would permit the promotion of a male office worker over a female office worker if the promotion was based on the superior skills and abilities of the male. Nowhere does the law require employers to hire, promote, or retain workers who are not qualified to perform their job duties. And managers may still reward employees differently, provided these differences are not predicated on the employees’ race, color, sex, religion, or national origin.

The Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 and the Civil Rights Act of 1991, covers a broad range of organizations. The law includes under its jurisdiction the following:
1. All private employers in interstate commerce who employ fifteen or more employees for twenty or more weeks per year
2. State and local governments
3. Private and public employment agencies, including the U.S. Employment Service
4. Joint labor-management committees that govern apprenticeship or training programs
5. Labor unions having fifteen or more members or employees
6. Public and private educational institutions
7. Foreign subsidiaries of U.S. organizations employing U.S. citizens

Certain employers are excluded from coverage of the Civil Rights Act. Broadly defined, these are (1) U.S. government–owned corporations, (2) bona fide, tax-exempt private clubs, (3) religious organizations employing people of a specific religion, and (4) organizations hiring Native Americans on or near a reservation.

The Civil Rights Act of 1964 established the Equal Employment Opportunity Commission to administer the law and promote equal employment opportunity. The commission’s structure and operations will be reviewed later in this chapter.

**Bona Fide Occupational Qualification.** Under Title VII of the Civil Rights Act, employers are permitted limited exemptions from antidiscrimination regulations if employment preferences are based on a bona fide occupational qualification. A *bona fide occupational qualification (BFOQ)* permits discrimination when employer hiring preferences are a reasonable necessity for the normal operation of the business. However, a BFOQ is a suitable defense against a discrimination charge only when age, religion, sex, or national origin is an actual qualification for performing the job. For example, an older person could legitimately be excluded from consideration for employment as a model for teen age designer jeans. It is reasonable to expect the San Francisco 49ers of the National Football League to hire male locker-room attendants or for Macy’s department store to employ females as models for women’s fashions. Likewise, religion is a BFOQ in organizations that require employees to share a particular religious doctrine.

The EEOC does not favor BFOQs, and both the EEOC and the courts have construed the concept narrowly. The exception does not apply to discrimination based on race or color. When an organization claims a BFOQ, it must be able to prove that hiring on the basis of sex, religion, age, or national origin is a business necessity. **Business necessity** has been interpreted by the courts as a practice that is necessary to the safe and efficient operation of the organization. A commercial driver’s license required for over-the-road truck drivers would ensure proper handling of the vehicle and safety to the driver and other motorists. Students often ask, “Why do Asian restaurants hire only Asian American food servers?” While restaurants generally cannot prefer one nationality over another (because the job of serving food can be performed equally well by all nationalities), to ensure the “authenticity” of the dining experience, an Asian restaurant may legitimately use the business-necessity defense to support the preference for hiring Asian American servers.

**Religious Preference.** Freedom to exercise religious choice is guaranteed under the U.S. Constitution. Title VII of the Civil Rights Act also prohibits discrimination based on religion in employment decisions, though it permits employer exemptions.
The act defines religion to “include all aspects of religious observance and practice, as well as belief.”

Title VII does not require employers to grant complete religious freedom in employment situations. Employers need only make a reasonable accommodation for a current employee’s or job applicant’s religious observance or practice without incurring undue hardship in the conduct of the business. Managers or supervisors may have to accommodate an employee’s religion in the specific areas of (1) holidays and observances (scheduling), (2) personal appearance (wearing beards, veils, or turbans), and (3) religious conduct on the job (missionary work among other employees).

What constitutes “reasonable accommodation” has been difficult to define. In 1977, in the leading case of TWA v Hardison, the Supreme Court attempted to settle this dispute by ruling that employers had only to bear a minimum cost to show accommodation. The Court said that to require otherwise would be discrimination against other employees for whom the expense of permitting time off for religious observance was not incurred. The Hardison case is important because it supported union management seniority systems in which the employer had made a reasonable attempt to adjust employee work schedules without undue hardship. While Hardison permits reasonable accommodation and undue hardship as a defense against religious discrimination charges, the EEOC investigates complaints on a case-by-case basis; employers are still responsible for supporting their decisions to deny an employee’s religious requests.

Age Discrimination in Employment Act of 1967
With the aging of the baby boomers—76 million people—the chances of age discrimination by employers increase dramatically. Recent figures from the EEOC show that age discrimination complaints compose about 23.5 percent of all discrimination charges. Managers or supervisors may discriminate against older employees by

- Excluding older workers from important work activities
- Making negative changes in the performance evaluations of older employees
- Denying older employees job-related education, career development, or promotional opportunities
- Selecting younger job applicants over older, better-qualified candidates
- Pressuring older employees into taking early retirement
- Reducing the job duties and responsibilities of older employees
- Terminating older employees through downsizing

Additionally, since older workers are less likely to agree to relocate or adapt to new job demands, they are prone to employer discrimination.

To make employment decisions based on age illegal, the Age Discrimination in Employment Act (ADEA), as amended, was passed in 1967. The act prohibits specific employers from discriminating against people age 40 or older in any area of employment, including selection, because of age. Employers affected are those with twenty or more employees; unions with twenty-five or more members; employment agencies; and federal, state, and local governments.

Exceptions to the law are permitted when age is a bona fide occupational qualification. A BFOQ may exist when an employer can show that advanced age may
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affect public safety or organizational efficiency. For example, such conditions might exist for bus or truck drivers or for locomotive engineers. The greater the safety factor, measured by the likelihood of harm through accidents, the more stringent may be the job qualification designed to ensure safety. A BFOQ does not exist when an employer argues that younger employees foster a youthful or more energetic organizational image. Employers must also be careful to avoid making offhand remarks (such as “the old man” or our “aging graying sales force”) or expressing negative opinions (such as “People over 50 years old have more accidents”) about older individuals. These remarks and attitudes can be used as proof of discrimination in age-bias suits.  

Equal Employment Opportunity Act of 1972
In 1972 the Civil Rights Act of 1964 was amended by the Equal Employment Opportunity Act. Two important changes were made. First, the coverage of the act was broadened to include state and local governments and public and private educational institutions. Colleges and universities such as Central Texas College in Killeen; San Diego State University; and Bloomfield College in Bloomfield, New Jersey, are now covered by this statute. Second, the law strengthened the enforcement powers of the EEOC by allowing the agency itself to sue employers in court to enforce the provisions of the act. Regional litigation centers now exist to provide faster and more effective court action.

Pregnancy Discrimination Act of 1978
Before the passage of the Pregnancy Discrimination Act, pregnant women could be forced to resign or take a leave of absence because of their condition. In addition, employers did not have to provide disability or medical coverage for pregnancy. The Pregnancy Discrimination Act amended the Civil Rights Act of 1964 by stating that pregnancy is a disability and that pregnant employees in covered organizations must be treated on an equal basis with employees having other medical conditions. Under the law, it is illegal for employers to deny sick leave for morning sickness or related pregnancy illness if sick leave is permitted for other medical conditions such as flu or surgical operations. Specifically, the Pregnancy Discrimination Act affects employee benefit programs including (1) hospitalization and major medical insurance, (2) temporary disability and salary continuation plans, and (3) sick leave policies.

Furthermore, the law prohibits discrimination in the hiring, promotion, or termination of women because of pregnancy. Women must be evaluated on their ability to perform the job, and employers may not set arbitrary dates for mandatory pregnancy leaves. Leave dates are to be based on the individual pregnant employee’s ability to work.

Americans with Disabilities Act of 1990
Discrimination against the disabled was first prohibited in federally funded activities by the Vocational Rehabilitation Act of 1973 (to be discussed later). However, the disabled were not among the protected classes covered by the Civil Rights Act of 1964. To remedy this shortcoming, Congress in 1990 passed the Americans with Disabilities Act (ADA), prohibiting employers from discriminating against individuals with physical and mental handicaps and the chronically ill. The law defines a disability as “(a) a physical or mental impairment that substantially limits one or more
of the major life activities; (b) a record of such impairment; or (c) being regarded as having such an impairment.” Note that the law also protects people “regarded” as having a disability—for example, individuals with disfiguring burns.

Managers and supervisors remark that the ADA is difficult to administer because of the ambiguous definition of a disability, particularly mental impairment. The issue is, what is a disability? It sounds like a simple question, yet it is not. Not every mental or physical impairment is considered a disability under the law. For example, significant personality disorders are covered under the EEOC’s “Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities.” Covered personality disorders include schizophrenia, bipolar disorders, major affective disorders, personality disorders, and anxiety disorders. These impairments are characterized by aberrant behavior, self-defeating behavior, manipulation of others, and troublesome manners of behavior. However, mental impairments described as “adjustment disorders” or attributed to stress have generally not been subject to ADA coverage. Therefore, employees who claim to be “stressed” over marital problems, financial hardships, demands of the work environment, job duties, or harsh, unreasonable treatment from a supervisor would not be classified as disabled under the ADA.

Does the ADA protect individuals who use medication or corrective devices to control the effects of their physical or mental impairments—for example, individuals wearing eyeglasses or those taking medication to ameliorate illnesses such as asthma, diabetes, or epilepsy? In a significant Supreme Court case, *Toyota v Williams* (2002), the Court ruled that if physical or mental impairments are correctable, then they are not a disability. Specifically, the Court held that (1) to be substantially limited in performing work tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives and (2) it is insufficient for individuals attempting to prove disability status to merely submit evidence of a medical diagnosis of an impairment. Therefore, coverage of the act is restricted to only those whose impairments are not mitigated by corrective measures. To decide whether a person’s conditions substantially limit a major life activity, managers must consider how the person functions with medication or assistive devices, not in the individual’s uncorrected state.

The act does not cover

1. Homosexuality or bisexuality
2. Gender-identity disorders not resulting from physical impairment or other sexual-behavior disorders
3. Compulsive gambling, kleptomania, or pyromania
4. Psychoactive substance-use disorders resulting from current illegal use of drugs
5. Current illegal use of drugs
6. Infectious or communicable diseases of public health significance (applied to food-handling jobs only and excluding AIDS)

In the cases it does cover, the act requires employers to make a reasonable accommodation for disabled people who are otherwise qualified to work, unless doing so would cause undue hardship to the employer. “Undue hardship” refers to unusual work modifications or excessive expenses that might be incurred by an employer in providing an accommodation. *Reasonable accommodation* includes making facilities accessible and usable to disabled persons, restructuring jobs, permitting part-time
or modified work schedules, reassigning to a vacant position, changing equipment, and/or expense." 24 “Reasonable” is to be determined according to (1) the nature and cost of the accommodation and (2) the financial resources, size, and profitability of the facility and parent organization. Furthermore, employers cannot use selection procedures that screen out or tend to screen out disabled people, unless the selection procedure “is shown to be job-related for the position in question and is consistent with business necessity” and acceptable job performance cannot be achieved through reasonable accommodation. (“Essential functions,” a pivotal issue for ensuring reasonable accommodation, will be discussed in Chapter 4.)

The act prohibits covered employers from discriminating against a qualified individual regarding application for employment, hiring, advancement, discharge, compensation, training, or other employment conditions. The law incorporates the procedures and remedies found in Title VII of the Civil Rights Act, allowing job applicants or employees initial employment, reinstatement, back pay, and other injunctive relief against employers who violate the statute. The act covers employers with fifteen or more employees. The EEOC enforces the law in the same manner that Title VII of the Civil Rights Act is enforced.

Employers subject to the ADA, and those who value the varied abilities of the disabled, approach the law in a proactive manner. Because of the success experienced in the employment of disabled people, the slogan “Hire the disabled—it’s good business” is a standard policy for organizations such as Little Tykes Co. of Hudson, Ohio; Fry’s Food Stores of Phoenix, Arizona; and Magnum Assembly Inc. of Austin, Texas. 25 Jennifer Sheehy of the federal Office of Special Education and Rehabilitative Services advocates hiring disabled students as a way to enhance diversity recruitment and offset labor shortages. 26 Hiring the disabled emphasizes what these individuals can do rather than what they cannot do. It is not suggested that disabled people can be placed in any job without giving careful consideration to their disabilities, nor that employers can always make the workplace “user-friendly,” but rather that it is good business to hire qualified disabled people who can work safely and productively. Fortunately, there exist today manual and electronic devices to aid hearing-impaired, visually impaired, and mobility-impaired employees. In many cases, the simple restructuring of jobs permits disabled persons to qualify for employment. Figure 3.2 identifies specific ways to make the workplace more accessible to the disabled.

**Civil Rights Act of 1991**

After extensive U.S. House and Senate debate, the Civil Rights Act of 1991 was signed into law. The act amends Title VII of the Civil Rights Act of 1964. One of the major elements of the law is the awarding of damages in cases of intentional discrimination or unlawful harassment. For the first time under federal law, damages are provided to victims of intentional discrimination or unlawful harassment on the basis of sex, religion, national origin, and disability. An employee who claims intentional discrimination can seek compensatory or punitive damages. Compensatory damages include payment for future money losses, emotional pain, suffering, mental anguish, and other nonmonetary losses. Punitive damages are awarded if it can be shown that the employer engaged in discrimination with malice or reckless indifference to the law. Most significantly, the act allows juries rather than federal judges to decide discrimination claims. Compensatory or punitive damages cannot be awarded in cases when

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**Using the Internet**

Retailer Sears has long had a commitment to hiring people with disabilities. Go to the Student Resources at: [http://bohlander.swlearning.com](http://bohlander.swlearning.com)
an employment practice not intended to be discriminatory is shown to have an unlawful adverse impact on members of a protected class. The total damages any one person can receive cannot be more than

- $50,000 for employers having between 15 and 100 employees
- $100,000 for employers having between 101 and 200 employees
- $200,000 for employers having between 201 and 500 employees
- $300,000 for employers having more than 500 employees

In each case the aggrieved individual must have been employed with the organization for twenty or more calendar weeks.

Under its other provisions, the law

- Prohibits employers from adjusting employment test scores or using different cutoff test scores on the basis of race, color, religion, sex, or national origin
- Prohibits litigation involving charges of reverse discrimination when employers are under a consent order (court order) to implement an affirmative action program
- Requires that employers defending against a charge of discrimination demonstrate that employment practices are job-related and consistent with business necessity.

The Civil Rights Act of 1991 states that employees who are sent abroad to work for American-based companies are protected by U.S. antidiscrimination legislation governing age and disability and Title VII of the Civil Rights Act of 1964. Thus employees can sue their American employers for claims of discriminatory treatment while employed in a foreign country. This could occur, for example, in Middle Eastern countries where women are prohibited from holding certain jobs or when a foreign country’s mandatory retirement law conflicts with the Age Discrimination in Employment Act.

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**Figure 3.2** ADA Suggestions for an Accessible Workplace

| **Install easy-to-reach switches.** | **Remove turnstiles and revolving doors or provide alternative accessible paths.** |
| **Provide sloping sidewalks and entrances.** | **Install holding bars in toilet areas.** |
| **Install wheelchair ramps.** | **Redesign toilet partitions to increase access space.** |
| **Reposition shelves for the easy reach of materials.** | **Add paper cup dispensers at water fountains.** |
| **Rearrange tables, chairs, vending machines, dispensers, and other furniture and fixtures.** | **Replace high-pile, low-density carpeting.** |
| **Widen doors and hallways.** | **Reposition telephones, water fountains, and other needed equipment.** |
| **Add raised markings on control buttons.** | **Add raised toilet seats.** |
| **Provide designated accessible parking spaces.** | **Provide a full-length bathroom mirror.** |
| **Install wheelchair ramps.** | **Provide flashing alarm lights.** |
| **Reposition shelves for the easy reach of materials.** | **Provide designated accessible parking spaces.** |
| **Install hand controls or manipulation devices.** | **Add raised toilet seats.** |
| **Provide flashing alarm lights.** | **Provide a full-length bathroom mirror.** |
Passed jointly with the Civil Rights Act of 1991 was the Glass Ceiling Act of 1991. The “glass ceiling” represents an invisible barrier that prohibits protected-class members from reaching top organizational positions. The act created the Glass Ceiling Commission to study and report on the status of and obstacles faced by minorities as they strive for top-level management jobs. Additional discussion of the glass ceiling can be found in Chapter 5.

Uniformed Services Employment and Reemployment Rights Act of 1994

Under this act, individuals who enter the military for a short period of service can return to their private-sector jobs without risk of loss of seniority or benefits. For example, military reservists called up to active duty during the Iraq conflict would qualify for reemployment rights under this law. The act protects against discrimination on the basis of military obligation in the areas of hiring, job retention, and advancement. Other provisions under the act require employers to make reasonable efforts to retrain or upgrade skills to qualify employees for reemployment, expand health care and employee pension plan coverage, and extend the length of time an individual may be absent for military duty from four to five years. For their part, service members must provide their employers advance notice of their military obligations in order to be protected by the reemployment rights statute. The Labor Department’s Veterans Employment and Training Service is responsible for enforcing the law.

Other Federal Laws and Executive Orders

Because the major laws affecting equal employment opportunity do not cover agencies of the federal government and because state laws do not apply to federal employees, it has at times been necessary for the president to issue executive orders to protect federal employees. Executive orders are also used to provide equal employment opportunity to individuals employed by government contractors. Since many large employers—such as General Dynamics, AT&T, Honeywell, and Motorola—and numerous small companies have contracts with the federal government, managers are expected to know and comply with the provisions of executive orders and other laws. The federal laws and executive orders that apply to government agencies and government contractors are summarized in Figure 3.3.

Vocational Rehabilitation Act of 1973

People with disabilities experience discrimination both because of negative attitudes regarding their ability to perform work and because of physical barriers imposed by organizational facilities. The Vocational Rehabilitation Act was passed in 1973 to correct these problems by requiring private employers with federal contracts over $2,500 to take affirmative action to hire individuals with a mental or physical disability. Recipients of federal financial assistance, such as public and private colleges and universities, are also covered. Employers must make a reasonable accommodation to hire disabled individuals but are not required to employ unqualified people. In applying the safeguards of this law, the term disabled individual means “any person who (1) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment.” This definition closely parallels the definition of disabled individual provided in the Americans with Disabilities Act, just discussed.
In a significant 1987 decision, the Supreme Court ruled in *Nassau County, Florida v Arline* that employees afflicted with contagious diseases, such as tuberculosis, are disabled individuals and subject to the act’s coverage. In cases when people with contagious diseases are “otherwise qualified” to do their jobs, the law requires employers to make a reasonable accommodation to allow the disabled to perform their jobs. Individuals with AIDS are also disabled within the meaning of the Rehabilitation Act. Therefore, discrimination on the basis of AIDS violates the law, and employers must accommodate the employment needs of people with AIDS. Public interest in AIDS has presented management with a challenge to address work-related concerns about AIDS. Many organizations have developed specific policies to deal with the issue of AIDS in the workplace.

The Rehabilitation Act does not require employers to hire or retain a disabled person if he or she has a contagious disease that poses a direct threat to the health or safety of others and the individual cannot be accommodated. Also, employment is not required when some aspect of the employee’s disability prevents that person from carrying out essential parts of the job; nor is it required if the disabled person is not otherwise qualified.

**Executive Order 11246**

Federal agencies and government contractors with contracts of $10,000 or more must comply with the antidiscrimination provisions of Executive Order 11246. The order prohibits discrimination based on race, color, religion, sex, or national origin in all employment activities. Furthermore, it requires that government contractors or subcontractors having fifty or more employees with contracts in excess of $50,000 develop affirmative action plans; such plans will be discussed later in the chapter.

Executive Order 11246 created the Office of Federal Contract Compliance Programs (OFCCP) to ensure equal employment opportunity in the federal procurement area. The agency issues nondiscriminatory guidelines and regulations similar to those issued by the EEOC. Noncompliance with OFCCP policies can result in the
cancellation or suspension of contracts. The OFCCP is further charged with requiring that contractors provide job opportunities to the disabled, disabled veterans, and veterans of the Vietnam War.

**Fair Employment Practice Laws**

Federal laws and executive orders provide the major regulations governing equal employment opportunity. But, in addition, almost all states and many local governments have passed laws barring employment discrimination. Referred to as fair employment practices (FEPs), these statutes are often more comprehensive than the federal laws. While state and local laws are too numerous to review here, managers should be aware of them and how they affect HRM in their organizations.

State and local FEPs also promote the employment of individuals in a fair and unbiased way. They are patterned after federal legislation, although they frequently extend jurisdiction to employers exempt from federal coverage and therefore pertain mainly to smaller employers. While Title VII of the Civil Rights Act exempts employers with fewer than fifteen employees, many states extend antidiscrimination laws to employers with one or more workers. Thus managers and entrepreneurs operating a small business must pay close attention to these laws. Local or state legislation may bar discrimination based on physical appearance, marital status, arrest records, color blindness, or political affiliation. Maryland recently joined states such as California, Vermont, Hawaii, Nevada, New Mexico, and Wisconsin in protecting employees from discrimination based on sexual orientation.

More than 100 fair employment practices agencies (FEPAs) administer and enforce equal employment opportunity statutes. The Ohio Civil Rights Commission, the Massachusetts Commission against Discrimination, the Colorado Civil Rights Division, and the Pittsburgh Commission on Human Relations are examples. State agencies play an important role in the investigation and resolution of employment discrimination charges. FEPAs and the Equal Employment Opportunity Commission often work together to resolve discrimination complaints.  

**Other Equal Employment Opportunity Issues**

Federal laws, executive orders, court cases, and state and local statutes provide the broad legal framework for equal employment opportunity. Within these major laws, specific issues are of particular interest to supervisors and managers. The situations discussed here occur in the day-to-day supervision of employees.

**Sexual Harassment**

Sexual situations in the work environment are not new to organizational life. Sexual feelings are a part of group dynamics, and people who work together may come to develop these kinds of feelings for one another. Unfortunately, however, often these encounters are unpleasant and unwelcome, as witnessed by the many reported instances of sexual harassment. Nationwide, 13,136 sexual harassment complaints were filed in 2004 with the EEOC and state fair employment practice agencies by
employees of both small and large employers. About 15 percent of these charges were filed by males. Problems often arise from lack of knowledge of the specific on-the-job behaviors that constitute sexual harassment under the law. Through a questionnaire it is possible to test employee understanding of what is and what is not sexual harassment. Highlights in HRM 2 is a sampling of questions that could be used during a sexual harassment audit. Such an instrument, which is essentially a test, is a valuable tool for determining what employees know and do not know about sexual harassment.

The EEOC guidelines on sexual harassment are specific, stating that “unwelcome advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” constitute sexual harassment when submission to the conduct is tied to continuing employment or advancement. The EEOC recognizes two forms of sexual harassment as being illegal under Title VII. The first, quid pro quo harassment, occurs when “submission to or rejection of sexual conduct is used as a basis for employment decisions.” This type of harassment involves a tangible or economic consequence, such as a demotion or loss of pay. If a supervisor promotes a female employee only after she agrees to an after-work date, the conduct is clearly illegal.

The second type of harassment, hostile environment, can occur when unwelcome sexual conduct “has the purpose or effect of unreasonably interfering with job performance or creating an intimidating, hostile, or offensive working environment.” Thus dirty jokes, vulgar slang, nude pictures, swearing, and personal ridicule and insult constitute sexual harassment when an employee finds them offensive.

For example, the Paradise Valley Unified School District of Phoenix, Arizona, defines sexual harassment as including, but not limited to, suggestive or obscene letters, notes, or invitations; derogatory comments, slurs, jokes, and epithets; assault; blocking movements; leering gestures; and displays of sexually suggestive objects, pictures, or cartoons where such conduct may create a hostile environment for the employee. Interestingly, with the intrusion of pornographic spam at work, Eugene Volokh, professor of law at UCLA, cautions employers to operate as if porn spam does create a hostile work environment.

The EEOC considers an employer guilty of sexual harassment when the employer knew or should have known about the unlawful conduct and failed to remedy it or to take corrective action. Employers are also guilty of sexual harassment when they allow nonemployees (customers or salespeople) to sexually harass employees.

It is noteworthy that both the Supreme Court and the EEOC hold employers strictly accountable to prevent sexual harassment of both female and male employees. In 1998, the Supreme Court held in Oncale v Sundowner Offshore Services that same-sex sexual harassment (male-to-male, female-to-female) is covered under Title VII. In the opinion of Justice Antonin Scalia, “What matters is the conduct at issue, not the sex of the people involved and not the presence or absence of sexual desire, whether heterosexual or homosexual.” When charges of sexual harassment have
### Questions Used in Auditing Sexual Harassment

<table>
<thead>
<tr>
<th>ACTIVITY</th>
<th>IS THIS SEXUAL HARASSMENT?</th>
<th>ARE YOU AWARE OF THIS BEHAVIOR IN THE ORGANIZATION?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employees post cartoons on bulletin boards containing sexually related material.</td>
<td>Yes No Uncertain</td>
<td>Yes No</td>
</tr>
<tr>
<td>A male employee says to a female employee that she has beautiful eyes and hair.</td>
<td>Yes No Uncertain</td>
<td>Yes No</td>
</tr>
<tr>
<td>A male manager habitually calls all female employees “sweetie” or “darling.”</td>
<td>Yes No Uncertain</td>
<td>Yes No</td>
</tr>
<tr>
<td>A manager fails to promote a female (male) employee for not granting sexual favors.</td>
<td>Yes No Uncertain</td>
<td>Yes No</td>
</tr>
<tr>
<td>Male employees use vulgar language and tell sexual jokes that are overheard by, but not directed at, female employees.</td>
<td>Yes No Uncertain</td>
<td>Yes No</td>
</tr>
<tr>
<td>A male employee leans and peers over the back of a female employee when she wears a low-cut dress.</td>
<td>Yes No Uncertain</td>
<td>Yes No</td>
</tr>
<tr>
<td>A supervisor gives a female (male) subordinate a nice gift on her (his) birthday.</td>
<td>Yes No Uncertain</td>
<td>Yes No</td>
</tr>
<tr>
<td>Two male employees share a sexually explicit magazine while observed by a female employee.</td>
<td>Yes No Uncertain</td>
<td>Yes No</td>
</tr>
<tr>
<td>Female office workers are “rated” by male employees as they pass the men’s desks.</td>
<td>Yes No Uncertain</td>
<td>Yes No</td>
</tr>
<tr>
<td>Revealing female clothing is given as a gift at an office birthday party.</td>
<td>Yes No Uncertain</td>
<td>Yes No</td>
</tr>
<tr>
<td>A sales representative from a supplier makes “suggestive” sexual remarks to a receptionist.</td>
<td>Yes No Uncertain</td>
<td>Yes No</td>
</tr>
</tbody>
</table>
been proved, the EEOC has imposed remedies including back pay; reinstatement; and payment of lost benefits, interest charges, and attorney’s fees. Sexual harassment involving physical conduct can invite criminal charges, and damages may be assessed against both the employer and the individual offender.

Sexual harassment investigations are one of the most sensitive responsibilities faced by managers. When to investigate, who should handle the investigation, how to interview the complainant and the accused, and the availability of witnesses are a few of the critical elements affecting harassment cases. One HR professional described the investigating manager as playing the multiple roles of prosecutor, defender, judge, and jury. Additionally, to determine whether the misconduct is hostile or offensive, the manager must look at all the circumstances surrounding the charge of harassment. Important factors include the frequency of the misconduct; the severity of the misconduct; whether it is physically threatening or humiliating, as opposed to merely offensive; and whether it unreasonably interferes with the employee’s work performance.

Despite legislation against it, however, sexual harassment is still common in the workplace. Managers and supervisors must take special precautions to try to prevent it. Highlights in HRM 3 presents the Court’s suggestions and the EEOC guidelines for an effective policy to minimize sexual harassment in the work environment.

**Basic Components of an Effective Sexual Harassment Policy**

1. Develop a comprehensive organization-wide policy on sexual harassment and present it to all current and new employees. Stress that sexual harassment will not be tolerated under any circumstances. Emphasis is best achieved when the policy is publicized and supported by top management.

2. Hold training sessions with supervisors to explain Title VII requirements, their role in providing an environment free of sexual harassment, and proper investigative procedures when charges occur.

3. Establish a formal complaint procedure in which employees can discuss problems without fear of retaliation. The complaint procedure should spell out how charges will be investigated and resolved.

4. Act immediately when employees complain of sexual harassment. Communicate widely that investigations will be conducted objectively and with appreciation for the sensitivity of the issue.

5. When an investigation supports employee charges, discipline the offender at once. For extremely serious offenses, discipline should include penalties up to and including discharge. Discipline should be applied consistently across similar cases and among managers and hourly employees alike.

6. Follow up on all cases to ensure a satisfactory resolution of the problem.
Sexual Orientation

A culture of “changing lifestyles,” a growing diversified workforce, and continual employee demands for equal workplace rights has sparked an emotional debate over employment guarantees for homosexuals. The debate intensifies as growing numbers of gays and lesbians openly announce their sexual orientation and legislatures, courts, and company leaders discuss the merits of “gay rights.” Presently, what laws protect employees from discrimination based on their sexual orientation?

While Title VII of the Civil Rights Act of 1964 lists “sex” as a protected class, court cases have consistently held that sexual orientation is not a valid defense against discrimination. Currently, no federal law bars discrimination based on one’s sexual orientation. For homosexual employees protection from discrimination largely comes from fair employment practice laws passed at the state or local level. Furthermore, state and local same-sex statutes vary regarding the protection afforded homosexuals and who is covered under the laws. For example, in some states, public—but not private—sector employees are protected from discrimination based on their sexual orientation. Therefore, it becomes important for managers and supervisors to know and follow the legal rights of homosexuals in their geographic area.

Regardless of their legal obligations toward homosexuals, companies—in support of their diversity initiatives—increasingly are fostering “gay-friendly” workplaces. Organizations such as S. C. Johnson and Sons, Eastman Kodak, Lucent Technologies, Microsoft, and Southern California Edison hold training sessions aimed at overcoming the stereotypes affecting gay and lesbian workers. Defense contractors Raytheon and Lockheed Martin sponsor homosexual support groups, and Wal-Mart has adopted a nondiscrimination policy toward homosexuals. Of the nation’s top 500 companies, 70 percent now offer health benefits to same-sex couples (see Chapter 10). A safe prediction is that employment rights for gays and lesbians will intensify, becoming a dynamic area for future legislation.

Immigration Reform and Control

Good employment is the magnet that attracts many people to the United States. Unfortunately, illegal immigration has adversely affected welfare services and educational and Social Security benefits. To preserve our tradition of legal immigration while closing the door to illegal entry, in 1986 Congress passed the Immigration Reform and Control Act. The act was passed to control unauthorized immigration by making it unlawful for a person or organization to hire, recruit, or refer for a fee people not legally eligible for employment in the United States.

Employers must comply with the law by verifying and maintaining records on the legal rights of applicants to work in the United States. The *Handbook for Employers*, published by the U.S. Department of Justice, lists five actions that employers must take to comply with the law:

1. Have employees fill out their part of Form I-9.
2. Check documents establishing an employee’s identity and eligibility to work.
3. Complete the employer’s section of Form I-9.
4. Retain Form I-9 for at least three years.
5. Present Form I-9 for inspection to an Immigration and Naturalization Service officer or to a Department of Labor officer upon request.
Section 102 of the law also prohibits discrimination. Employers with four or more employees may not discriminate against any individual (other than an unauthorized alien) in hiring, discharge, recruiting, or referring for a fee because of that individual’s national origin or, in the case of a citizen or intending citizen, because of citizenship status. Employers found to have violated the act will be ordered to cease the discriminatory practice. They may also be directed to hire, with or without back pay, individuals harmed by the discrimination and pay a fine of up to $1,000 for each person discriminated against. Charges of discrimination based on national origin or citizenship are filed with the Office of Special Counsel in the Department of Justice.

**Uniform Guidelines on Employee Selection Procedures**

Employers are often uncertain about the appropriateness of specific selection procedures, especially those related to testing and selection. To remedy this concern, in 1978 the Equal Employment Opportunity Commission, along with three other government agencies, adopted the current **Uniform Guidelines on Employee Selection Procedures**. Since it was first published in 1970, the Uniform Guidelines has become a very important procedural document for managers because it applies to employee selection procedures in the areas of hiring, retention, promotion, transfer, demotion, dismissal, and referral. It is designed to help employers, labor organizations, employment agencies, and licensing and certification boards comply with the requirements of federal laws prohibiting discrimination in employment.

Essentially the Uniform Guidelines recommends that an employer be able to demonstrate that selection procedures are valid in predicting or measuring performance in a particular job. It defines “discrimination” as follows:

> The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines (or, certain other provisions are satisfied).

**Validity**

When using a test or other selection instrument to choose individuals for employment, employers must be able to prove that the selection instrument bears a direct relationship to job success. This proof is established through validation studies that show the job relatedness or lack thereof for the selection instrument under study. The Uniform Guidelines, along with several of the court cases we discuss later, provides strict standards for employers to follow as they validate selection procedures. The different methods of testing validity are reviewed in detail in Chapter 6.

**Adverse Impact and Disparate Treatment**

For an applicant or employee to pursue a discrimination case successfully, the individual must establish that the employer’s selection procedures resulted in an adverse impact on a protected class. **Adverse impact** refers to the rejection for employment, placement, or promotion of a significantly higher percentage of a protected class when compared with a nonprotected class. Additionally, when pursuing an adverse impact claim, an individual is alleging that the employer’s selection practice has unintentionally discriminated against a protected group.
While the *Uniform Guidelines* does not require an employer to conduct validity studies of selection procedures where no adverse impact exists, it does encourage employers to use selection procedures that are valid. Organizations that validate their selection procedures on a regular basis and use interviews, tests, and other procedures in such a manner as to avoid adverse impact will generally be in compliance with the principles of equal employment legislation. Affirmative action programs also reflect employer intent. The motivation for using valid selection procedures, however, should be the desire to achieve effective management of human resources rather than the fear of legal pressure.

There are two basic ways to show that adverse impact exists:

**Adverse Rejection Rate, or Four-Fifths Rule.** According to the *Uniform Guidelines*, a selection program has an adverse impact when the selection rate for any racial, ethnic, or sex class is less than four-fifths (or 80 percent) of the rate of the class with the highest selection rate. The Equal Employment Opportunity Commission has adopted the **four-fifths rule** as a rule of thumb to determine adverse impact in enforcement proceedings. The four-fifths rule is not a legal definition of discrimination; rather, it is a method by which the EEOC or any other enforcement agency monitors serious discrepancies in hiring, promotion, or other employment decisions. The appendix at the end of this chapter explains how adverse impact is determined and gives a realistic example of how the four-fifths rule is computed.

An alternative to the four-fifths rule, and one increasingly used in discrimination lawsuits, is to apply **standard deviation analysis** to the observed applicant flow data. In 1977, the Supreme Court, in *Hazelwood School District v United States*, set forth a standard deviation analysis that has been followed by numerous lower courts. This statistical procedure determines whether the difference between the expected selection rates for protected groups and the actual selection rates could be attributed to chance. If chance is eliminated for the lower selection rates of the protected class, it is assumed that the employer’s selection technique has an adverse impact on the employment opportunities of that group.

**Restricted Policy.** Any evidence that an employer has a selection procedure that excludes members of a protected class, whether intentional or not, constitutes adverse impact. For example, hiring individuals who must meet a minimum height or appearance standard (at the expense of protected-class members) is evidence of a restricted policy. In one case known to the authors, an organization when downsizing discharged employees primarily age 40 or older. These employees filed a class-action suit claiming adverse impact under the Age Discrimination in Employment Act.

In EEO cases it is important to distinguish between adverse impact and disparate treatment discrimination. Adverse impact cases deal with unintentional discrimination; **disparate treatment** cases involve instances of purposeful discrimination. For example, disparate treatment would arise when an employer hires men, but no women, with school-age children. Allowing men to apply for craft jobs, such as carpentry or electrical work, but denying this opportunity to women would also show disparate treatment. To win a disparate treatment case, the plaintiff must prove that the employer’s actions intended to discriminate, a situation often difficult to substantiate.

**McDonnell Douglas Test.** Individuals who believe they have been unjustly rejected for employment may demonstrate disparate treatment through the McDonnell Douglas
test. This test, named for the Supreme Court case *McDonnell Douglas Corp. v Green* (1973), provides four guidelines for individuals to follow in establishing a case:

1. The person is a member of a protected class.
2. The person applied for a job for which he or she was qualified.
3. The person was rejected, despite being qualified.
4. After rejection, the employer continued to seek other applicants with similar qualifications.

Provided these four guidelines are met, then a prima facie (before further examination) case of discrimination is shown. The burden now shifts to the employer to prove that the action taken against the individual was not discriminatory. For example, in a selection case in which female applicants were denied employment, the supervisor may claim that the male hired was the only applicant qualified to perform the job.

**Workforce Utilization Analysis**

While employers must be aware of the impact of their selection procedures on protected-class members, they must also be concerned with the composition of their internal workforce when compared with their external labor market. The EEOC refers to this comparison as *workforce utilization analysis*. This concept simply compares an employer’s workforce by race and sex for specific job categories against the surrounding labor market. The employer’s relevant labor market is that area from which employees are drawn who have the skills needed to successfully perform the job. For example, if the Vision Track Golf Corporation is hiring computer technicians from a labor market composed of 10 percent black workers, 8 percent Hispanic workers, and 2 percent Native American workers, all of whom possess the qualifications for the job, the employer’s internal workforce should reflect this racial composition. When this occurs, the employer’s workforce is said to be *at parity* with the relevant labor market. If the employer’s racial workforce composition is below external figures, then the protected class is said to be *underutilized* and the employer should take affirmative steps to correct the imbalance.

**Significant Court Cases**

The *Uniform Guidelines* has been given added importance through two leading Supreme Court cases. Each case is noteworthy because it elaborates on the concepts of adverse impact, validity testing, and job-relatedness. Managers of both large and small organizations must constantly be alert to new court decisions and be prepared to implement those rulings. The Bureau of National Affairs, Commerce Clearing House, and Prentice Hall provide legal information on a subscription basis to interested managers. Local and regional seminars offered by professional organizations such as the American Management Association also provide information.

The benchmark case in employment selection procedures is *Griggs v Duke Power Company* (1971). Willie Griggs had applied for the position of coal handler with the Duke Power Company. His request for the position was denied because he was not a high school graduate, a requirement for the position. Griggs claimed the job standard was discriminatory because it did not relate to job success and because the standard had an adverse impact on a protected class.
In the Griggs decision, the Supreme Court established two important principles affecting equal employment opportunity. First, the Court ruled that employer discrimination need not be overt or intentional to be present. Rather, employment practices can be illegal even when applied equally to all employees. For example, under this ruling, a new venture pharmaceuticals company requiring all salespeople to be six feet tall would impose an adverse impact on Asians and women, limiting their employment opportunities.

Second, under Griggs, employment practices must be job-related. When discrimination charges arise, employers have the burden of proving that employment requirements are job-related or constitute a business necessity. When employers use education, physical, or intelligence standards as a basis for hiring or promotion, these requirements must be absolutely necessary for job success. Under Title VII, good intent, or absence of intent to discriminate, is not a sufficient defense.

In 1975 the Supreme Court decided Albemarle Paper Company v Moody. The Albemarle Paper Company required job applicants to pass a variety of employment tests, some of which were believed to be poor predictors of job success. The Albemarle case is important because in it the Supreme Court strengthened the principles established in Griggs. Specifically, more-stringent requirements were placed on employers to demonstrate the job-relatedness of tests. When tests are used for hiring or promotion decisions (tests are defined to include performance appraisals), they must be valid predictors of job success.

Enforcing Equal Employment Opportunity Legislation

Along with prohibiting employment discrimination, Title VII of the Civil Rights Act created the Equal Employment Opportunity Commission. As the federal government’s leading civil rights agency, the EEOC is responsible for ensuring that covered employers comply with the intent of this act. The commission accomplishes this goal primarily by (1) issuing various employment guidelines and monitoring the employment practices of organizations and (2) protecting employee rights through the investigation and prosecution of discrimination charges. Figure 3.4 illustrates the caseload of the EEOC for recent years.

It is important to remember that the EEOC’s guidelines are not federal law but administrative rules and regulations published in the Federal Register. However, the different guidelines have been given weight by the courts as they interpret the law and therefore should not be taken lightly. In addition to enforcing Title VII, the EEOC has the authority to enforce the Age Discrimination in Employment Act and the Equal Pay Act. Executive Order 12067, which requires the coordination of all federal equal employment opportunity regulations, practices, and policies, is also administered by the EEOC.

The Equal Employment Opportunity Commission

The EEOC consists of five commissioners and a general counsel, all appointed by the president of the United States and confirmed by the Senate. The president appoints
Commissioners for staggered five-year terms, and no more than three members of
the commission can be of the same political party. One commissioner is appointed
to be the EEOC chairperson, who is responsible for the overall administration of the
agency. The commission’s work consists of formulating EEO policy and approving all
litigation involved in maintaining equal employment opportunity.

Appointed for a four-year term, the general counsel is responsible for investigating
discrimination charges, conducting agency litigation, and providing legal opinions,
in addition to reviewing EEOC regulations, guidelines, and contracts.

The day-to-day operation of the commission is performed through administrative
headquarters, districts, and area offices. District offices handle discrimination
charges and all compliance and litigation enforcement functions. Area offices are less
than full-service organizations and generally serve as charge-processing and initial
investigation units. Much of the EEOC’s work is delegated to the district offices and
other designated representatives. District directors have authority to receive or consent
to the withdrawal of Title VII charges, issue subpoenas, send notices of the filing
of charges, dismiss charges, enter into and sign conciliation agreements (voluntary
employer settlements), and send out notices of the employee’s right to sue. Employ-
ees who wish to file discrimination charges and employers responding to complaints
work with district or area office personnel.

**Record-Keeping and Posting Requirements**

Organizations subject to Title VII are required by law to maintain specific employ-
ment records and reports. In addition, employers are required to post selected equal
employment opportunity notices and to summarize the composition of their workforce
in order to determine the distribution of protected individuals. These records are
for establishing minority-group statistical reports. Equal employment opportu-
nity legislation covering federal contractors and subcontractors has special reporting
requirements for these employers. Those failing to comply with record-keeping and

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</tr>
</thead>
<tbody>
<tr>
<td>Race</td>
<td>28,820</td>
<td>28,819</td>
<td>28,945</td>
<td>28,912</td>
<td>29,910</td>
<td>28,526</td>
<td>27,696</td>
</tr>
<tr>
<td>Sex</td>
<td>24,454</td>
<td>23,907</td>
<td>24,194</td>
<td>25,140</td>
<td>25,536</td>
<td>24,362</td>
<td>24,249</td>
</tr>
<tr>
<td>Disability</td>
<td>17,806</td>
<td>17,007</td>
<td>15,864</td>
<td>16,470</td>
<td>15,964</td>
<td>15,377</td>
<td>15,346</td>
</tr>
<tr>
<td>Age</td>
<td>15,191</td>
<td>14,141</td>
<td>16,008</td>
<td>17,405</td>
<td>19,921</td>
<td>19,124</td>
<td>17,837</td>
</tr>
<tr>
<td>Retaliation</td>
<td>19,114</td>
<td>19,694</td>
<td>21,613</td>
<td>22,257</td>
<td>22,768</td>
<td>22,690</td>
<td>22,740</td>
</tr>
<tr>
<td>National origin</td>
<td>6,778</td>
<td>7,108</td>
<td>7,792</td>
<td>8,025</td>
<td>9,046</td>
<td>8,450</td>
<td>8,361</td>
</tr>
<tr>
<td>Religion</td>
<td>1,786</td>
<td>1,811</td>
<td>1,939</td>
<td>2,217</td>
<td>2,572</td>
<td>2,532</td>
<td>2,466</td>
</tr>
<tr>
<td>Equal pay</td>
<td>1,071</td>
<td>1,044</td>
<td>1,270</td>
<td>1,251</td>
<td>1,256</td>
<td>1,167</td>
<td>1,011</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>79,591</strong></td>
<td><strong>77,444</strong></td>
<td><strong>79,896</strong></td>
<td><strong>80,840</strong></td>
<td><strong>84,442</strong></td>
<td><strong>81,293</strong></td>
<td><strong>79,432</strong></td>
</tr>
</tbody>
</table>

*The number for total charges reflects the number of individual charge filings. Because individuals often file charges under multiple bases, the number of total charges for any given fiscal year will be less than the total of the eight bases listed.*

Source: Data compiled by the Office of Research, Information and Planning from EEOC’s Charge Data System’s national database.
posting requirements or willfully falsifying records can incur penalties, including fines and imprisonment.

It is important to note that record-keeping requirements are both detailed and comprehensive. For example, managers must generate and retain for specific time periods different employment data under each of the following laws: Title VII, the Age Discrimination in Employment Act, and the Equal Pay Act. When federal contractors are required to have written affirmative action programs, these must be retained along with supporting documents (such as names of job applicants, rejection ratios, and seniority lists).

Employers of 100 or more employees (except state and local government employees) and government contractors and subcontractors subject to Executive Order 11286 must file annually an **EEO-1 report** (Employer Information Report) that requires the reporting of minority employees. This comprehensive report is the EEOC’s basic document for determining an employer’s workforce composition, investigating charges of discrimination, and providing information about the employment status of minorities and women. Employers can now submit the EEO-1 report through the agency’s Web-based filing system. Highlights in HRM 4 discusses the new Web-based reporting system. In preparing the EEO-1 report, the organization may collect records...
concerning racial or ethnic identity either by visual survey or through postemployment questionnaires, if not prohibited by state fair employment practice law.

To show evidence of its equal employment opportunity and affirmative action efforts, an organization should retain copies of recruitment letters sent to minority agencies, announcements of job openings, and other significant information concerning employee recruitment. Other employment records to keep include data on promotions, demotions, transfers, layoffs or terminations, rates of pay or other terms of compensation, and selections for training or apprenticeship programs. Title VII requires retention of all personnel or employment records, including application forms, for at least six months or until resolution of any HR action, whichever occurs later.

During the employment process, employers are permitted to collect racial data on job applicants for compiling statistical reports; however, these data must be collected on a separate information sheet, not on the formal job application form. When a charge of discrimination has been filed, the respondent organization must retain all HR records relevant to the case until final disposition of the charge.

Posters explaining to individuals what their employment rights are and how to file complaints of discrimination have been developed by the EEOC and other administrative agencies. (See Highlights in HRM 5.) The law requires that employers display these posters and other federally required posters related to HRM in prominent places easily accessible to employees. HR employment offices, cafeterias, centrally located bulletin boards, and time clocks are popular locations. Posting requirements should not be taken lightly. For example, EEO posters show the time limits for filing a charge of discrimination. Failure to post these notices may be used as a basis for excusing the late filing of a discrimination charge.

**Processing Discrimination Charges**

Employees or job applicants who believe they have been discriminated against may file a discrimination complaint, or **charge form**, with the EEOC. Filing a charge form initiates an administrative procedure that can be lengthy, time-consuming, and costly for the employer. Both parties, the plaintiff (employee) and the defendant (organization), must be prepared to support their beliefs or actions. If litigation follows, employers will normally take an aggressive approach to defend their position.

Figure 3.5 summarizes the process of filing a discrimination charge with the EEOC. Under the law, charges must be filed within 180 days (300 days in deferral states) of the alleged unlawful practice. The processing of a charge includes notifying the employer that a charge of employment discrimination has been filed. Employers will receive a copy of the charge within ten days of filing.

In states that have FEP laws with appropriate enforcement machinery, the discrimination charge is deferred to the state agency for resolution before action is taken by the EEOC. The EEOC will accept the recommendation of the state agency because deferral states must comply with federal standards. If the state agency fails to resolve the complaint or if the sixty-day deferral period lapses, the case is given back to the EEOC for final investigation.

EEOC investigations are conducted by fully trained equal opportunity specialists (EOSs) who have extensive experience in investigative procedures, theories of discrimination, and relief and remedy techniques. The EOS will gather facts from both sides through telephone calls, letters and questionnaires, field visits, or jointly arranged meetings. While it is generally advisable for them to cooperate in EEOC...
Equal Employment Opportunity is THE LAW

Employers Holding Federal Contracts or Subcontracts

Applicants to and employees of companies with a federal government contract or subcontract are protected under the following federal authorities:

RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN
Executive Order 11246, as amended, prohibits job discrimination on the basis of race, color, religion, sex or national origin, and requires affirmative action to ensure equality of opportunity in all aspects of employment.

INDIVIDUALS WITH HANDICAPS
Section 503 of the Rehabilitation Act of 1973, as amended, prohibits job discrimination because of handicap and requires affirmative action to employ and advance in employment qualified individuals with handicaps who, with reasonable accommodation, can perform the essential functions of a job.

VIETNAM ERA AND SPECIAL DISABLED VETERANS

Any person who believes a contractor has violated its nondiscrimination or affirmative action obligations under the authorities above should contact immediately:

The Office of Federal Contract Compliance Programs (OFCCP), Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210 or call (202) 332-3458, or an OFCCP regional or district office, listed in most telephone directories under U.S. Government, Department of Labor.

Private Employment, State and Local Governments, Educational Institutions

Applicants to and employees of most private employers, state and local governments, educational institutions, employment agencies and labor organizations are protected under the following federal laws:

RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN
Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination in hiring, promotion, discharge, pay, job training, fringe benefits, job training, classification, referral, and other aspects of employment, on the basis of race, color, religion, sex or national origin.

DISABILITY
The Americans with Disabilities Act of 1990, as amended, protects qualified applicants and employees with disabilities from discrimination in hiring, promotion, discharge, pay, job training, fringe benefits, job training, classification, referral, and other aspects of employment on the basis of disability. The law also requires that covered entities provide qualified applicants and employees with disabilities with reasonable accommodations that do not impose undue hardship.

AGE
The Age Discrimination in Employment Act of 1967, as amended, prohibits discrimination on the basis of age in compensation, promotion, discharge, compensation, terms, conditions or privileges of employment.

SEX (WAGES)
In addition to sex discrimination prohibited by Title VII of the Civil Rights Act (see above), the Equal Pay Act of 1963, as amended, prohibits sex discrimination in payment of wages to woman and men performing substantially equal work in the same establishments. Retaliation against a person who files a charge of discrimination, participates in an investigation, or opposes an unlawful employment practice is prohibited by all of these federal laws.

If you believe that you have been discriminated against in a program or activity which receives Federal financial assistance, you may contact the office of the federal agency which administers such program or activity.

Vocational Rehabilitation Services
Department of Education, Washington, D.C. 20202

Equal Employment Opportunity Commission (EEOC), 1810 L Street, N.W., Washington, D.C. 20006

 Individuals with hearing impairments, EEOC's toll free TDD number is (800) 669-3322.

Programs or Activities Receiving Federal Financial Assistance

RACE, COLOR, NATIONAL ORIGIN, SEX
In addition to the protection of Title VIII of the Civil Rights Act of 1964, Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color or national origin in programs or activities receiving Federal financial assistance. Employment discrimination is covered by Title VII if the primary objective of the financial assistance is the provision of employment, or where employment discrimination causes or may cause discrimination in providing services under such programs. Title IX of the Education Amendments of 1972 prohibits employment discrimination on the basis of sex in educational programs or activities which receive Federal assistance.

INDIVIDUALS WITH HANDICAPS
Section 504 of the Rehabilitation Act of 1973, as amended, prohibits employment discrimination on the basis of handicap in any program or activity which receives Federal financial assistance. Discrimination is prohibited in all aspects of employment of handicapped persons who with reasonable accommodation, can perform the essential functions of a job.

If you believe you have been discriminated against in a program or activity which receives Federal financial assistance, you should contact immediately the federal agency providing such assistance.
investigations, employers may legally resist the commission’s efforts by refusing to submit documents or give relevant testimony. However, the EEOC may obtain this information through a court subpoena. Employers who then refuse to supply the information will face contempt-of-court charges.

Once the investigation is under way or completed, several decision points occur. First, the employer may offer a settlement to resolve the case without further investi-
gation. If the offer is accepted, the case is closed. Second, the EEOC may find no violation of law and dismiss the charge. In this case, the charging party is sent a right-to-sue notice, which permits the individual to start private litigation, if he or she so desires, in federal court within ninety days. Third, if the EEOC finds “reasonable cause” of discrimination, the commission will attempt to conciliate (settle) the matter between the charging party and the employer. The conciliation process is a voluntary procedure and will not always lead to a settlement.

Employers should keep in mind that when the EEOC negotiates a settlement, it will attempt to obtain full remedial, corrective, and preventive relief. Back pay, reinstatement, transfers, promotions, seniority rights, bonuses, and other “make whole” perquisites of employment are considered appropriate remedies. These settlements can frequently be costly.

If the employer and the EEOC cannot reach a negotiated settlement, the commission has the power to prosecute the organization in court. However, this decision is made on a case-by-case basis and may depend on the importance of the issue. Failure of the EEOC to take court action or to resolve the charge in 180 days from filing permits employees to pursue litigation within 90 days after receiving a right-to-sue letter issued by the commission.61

**Retaliation**

Importantly, managers and supervisors must not retaliate against individuals who invoke their legal rights to file charges or to support other employees during EEOC proceedings.62 Title VII of the Civil Rights Act states that an employer may not discriminate against any of his employees because the employee has opposed any unlawful employment practice, or because the employee has made a charge, testified, assisted, or participated in any manner in an investigation, proceedings, or hearing under this Act.

In one case, a pilot working for Ryan International Airlines was awarded $400,000 in damages when she was fired in violation of Title VII of the Civil Rights Act of 1964 for complaining about sex discrimination and harassment to her employer.63 Retaliation can include any punitive action taken against employees who elect to exercise their legal rights before any EEO agency. These actions include discharge, demotion, salary reduction, reduced work responsibilities, and transfer to a less desirable job.64

**Preventing Discrimination Charges**

Both large and small employers understand that the foundation to preventing any form of discrimination is a comprehensive EEO policy. The Supreme Court’s emphasis on the prevention and correction of discrimination means that employers that do not have an EEO policy are legally vulnerable. Antidiscrimination policy statements must be inclusive; they must cover all applicable laws and EEOC guidelines and contain practical illustrations of specific inappropriate behavior. For the policy to have value it must be widely disseminated to managers, supervisors, and all nonmanagerial employees. A complete policy will include specific sanctions for those found guilty of discriminatory behavior.

Since managers and supervisors are key to preventing and correcting discrimination, they, in particular, must be trained to understand employee rights and managerial
A comprehensive training program will include (1) the prohibitions covered in the various EEO statutes, (2) guidance on how to respond to complaints of discrimination, (3) procedures for investigating complaints (see Chapter 13), and (4) suggestions for remedying inappropriate behavior. Perhaps the ultimate key to preventing employment discrimination is for managers and supervisors to create an organizational climate in which the principles of dignity, respect, and the acceptance of a diverse workforce are expected.

**Diversity Management: Affirmative Action**

Equal employment opportunity legislation requires managers to provide the same opportunities to all job applicants and employees regardless of race, color, religion, sex, national origin, or age. While EEO law is largely a policy of nondiscrimination, **affirmative action** requires employers to analyze their workforce and develop a plan of action to correct areas of past discrimination. Affirmative action is achieved by having organizations follow specific guidelines and goals to ensure that they have a balanced and representative workforce. To achieve these goals, employers must make a concerted effort to recruit, select, train, and promote members of protected classes. Employers must locate not only minority candidates who are qualified, but also those who, with a reasonable amount of training or physical accommodation, can be made to qualify for job openings.

**Establishing Affirmative Action Programs**

Employers establish affirmative action programs for several reasons. As noted in Figure 3.3, affirmative action programs are required by the OFCCP for employers with federal contracts greater than $50,000. The OFCCP provides regulations and suggestions for establishing affirmative action plans. Specifically, employers must (1) provide an organizational profile that graphically illustrates their workforce demographics, (2) establish goals and timetables for employment of underutilized protected classes, (3) develop actions and plans to reduce underutilization, including initiating proactive recruitment and selection methods, and (4) monitor progress of the entire affirmative action program.

Affirmative action programs may also be required by court order when an employer has been found guilty of past discrimination. Court-ordered programs will require the setting of hiring and promotion quotas along with stated timetables for compliance. Finally, many employers voluntarily develop their own affirmative action programs to ensure that protected-class members receive fair treatment in all aspects of employment. General Electric, the City of Portland, and Hilton Hotels use these programs as a useful way of monitoring the progress of employees while demonstrating good-faith employment effort. The EEOC recommends that organizations developing affirmative action programs follow specific steps, as shown in Highlights in HRM 6.

In pursuing affirmative action, employers may be accused of **reverse discrimination**, or giving preference to members of protected classes to the extent that unprotected individuals believe they are suffering discrimination. When these charges occur, organizations are caught between attempt-
ing to correct past discriminatory practices and handling present complaints from unprotected members alleging that HR policies are unfair. It is exactly this “catch-22” that has made affirmative action one of the most controversial issues of the past fifty years. Two highly publicized cases illustrate the controversy.

In *University of California Regents v Bakke* (1978), the Supreme Court settled one of the most famous reverse discrimination cases. Allen Bakke, a white male, charged that the University of California at Davis was guilty of reverse discrimination by admitting minority-group members he believed were less qualified than he. The central issue before the Court was equal treatment under the law as guaranteed in the equal protection clause of the Fourteenth Amendment. The Court ruled that applicants must be evaluated on an individual basis, and race can be one factor used in the evaluation process as long as other competitive factors are considered. The Court stated that affirmative action programs were not illegal per se as long as rigid quota systems were not specified for different protected classes.

One year later the Supreme Court decided *United Steelworkers of America v Weber.* In 1974 Kaiser Aluminum and its union, the United Steelworkers, had joined in a voluntary affirmative action program designed to increase the number of black workers in craft jobs at Kaiser’s Louisiana plant. Brian Weber, a white production employee who was passed over for craft training in favor of a less-senior black worker, filed a suit charging violation of Title VII. The Supreme Court ruled against Weber, holding that under Title VII voluntary affirmative action programs are permissible where they attempt to eliminate racial imbalances in “traditionally segregated job categories.” In *Weber,* the Supreme Court did not endorse all voluntary affirmative action programs, but it did give an important push to programs voluntarily implemented and designed to correct past racial imbalances.

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**Highlights in HRM 6**

**Basic Steps in Developing an Effective Affirmative Action Program**

1. Issue a written equal employment opportunity policy and affirmative action commitment.
2. Appoint a top official with responsibility and authority to direct and implement the program.
3. Publicize the policy and affirmative action commitment.
4. Survey present minority and female employment by department and job classification.
5. Develop goals and timetables to improve utilization of minorities and women in each area where underutilization has been identified.
6. Develop and implement specific programs to achieve goals.
7. Establish an internal audit and reporting system to monitor and evaluate progress in each aspect of the program.
8. Develop supportive in-house and community programs.

Managing Diversity: Affirmative Action

Affirmative action is a highly emotional and controversial subject because affirmative action programs affect all employees regardless of gender, race, or ethnicity. At the core of the debate is the concern that affirmative action leads to preferential treatment and quotas for selected individuals and thus results in reverse discrimination against others. Additionally, affirmative action as a national priority has been challenged for the following reasons:

- Affirmative action has not consistently resulted in improvement of the employment status of protected groups.
- Individuals hired under affirmative action programs sometimes feel prejudged and assumed capable only of inferior performance, and, in fact, these individuals are sometimes viewed by others as “tokens.”
- Affirmative action programs of either voluntary or forced compliance have failed to effectively assimilate protected classes into an organization’s workforce.
- Preferences shown toward one protected class may create conflicts between other minority groups.

Judicial support for affirmative action as a worthy national goal has changed remarkably over the years. For example, early support for affirmative action was demonstrated through the Bakke and Weber decisions. However, during the mid-1990s, federal courts increasingly restricted the use of race and ethnicity in awarding scholarships, determining college admissions, making layoff decisions, selecting employees, promoting employees, and awarding government contracts. Several important court cases illustrate this point.

In Adarand Constructors v Peña (1995), the court ruled that federal programs that use race or ethnicity as a basis for decision making must be strictly scrutinized to ensure that they promote “compelling” governmental interests. In the majority opinion the Court declared that “strict scrutiny of all governmental racial classifications is essential” to distinguish between legitimate programs that redress past discrimination and programs that “are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”

In a 1996 decision affecting admission standards at the University of Texas law school, the Court ruled in Hopwood v State of Texas that diversity could not constitute a competing state interest justifying racial preference in selection decisions. The Court noted that the school could not discriminate “because there was no compelling justification under the Fourteenth Amendment or Supreme Court precedent for such conduct even if it was designed to correct perceived racial imbalance in the student body.”

Then, in a landmark and highly significant 2003 affirmative action ruling, the Supreme Court held in Grutter v Bollinger that colleges and universities can consider an applicant’s race as a factor in admission decisions. The decision upheld an admission policy at the University of Michigan Law School in which officials considered an applicant’s race along with other factors when making admission decisions. Writing for the Court, Justice Sandra Day O’Connor noted that colleges and universities have compelling educational reasons for seeking a diverse student body in light of a growing diverse society and a global business environment. Justice O’Connor stated, “Effective participation by members of all racial and ethnic groups in the civil life of our nation is essential if the dream of one nation, indivisible, is to be realized.”
The Supreme Court decision was supported by legal briefs filed by more than thirty companies such as GM, Microsoft, KPMG International, and Bank One. The future of affirmative action may rest not in voluntary programs or judicial decisions but in managerial attitudes that value diversity in the workforce. Managers who embrace a diverse workforce acknowledge individual employee differences and the contributions made by people of varied abilities. Organizations that approach diversity from a practical, business-oriented perspective (rather than a court-ordered affirmative action mandate) will employ and promote protected-class members as a means for developing competitive advantage. Viewed in this manner, greater workforce diversity will significantly enhance organizational performance through knowledge of diverse marketplaces and creative problem solving. For example, Michael Goldstein, chairman of the Toys “R” Us Children’s Fund, supports both affirmative action and diversity because “our customers are not one group; they comprise all of America. It’s important to be able to serve them.” Eastman Kodak maintains that it is committed to diversity because the composition of its customer base and of the workforce is changing. For both of these organizations, commitment to the advantages of diversity automatically achieves the goals of affirmative action.

**SUMMARY**

Employment discrimination against blacks, Hispanics, women, and other groups has long been practiced by U.S. employers. Prejudice against minority groups is a major cause in their lack of employment gains. Government reports show that the wages and job opportunities of minorities typically lag behind those for whites.


Sexual harassment is an area of particular importance to managers and supervisors. Extensive efforts should be made to ensure that both male and female employees are free from all forms of sexually harassing conduct. The Immigration Reform and Control Act was passed to control unauthorized immigration into the United States. The law requires managers to maintain various employment records, and they must not discriminate against job applicants or present employees because of national origin or citizenship status.

The Uniform Guidelines on Employee Selection Procedures is designed to help employers comply with federal prohibitions against employment practices that discriminate on the basis of race, color, religion, gender, or national origin. The Uniform Guidelines provides employers a framework for making legally enforceable employment decisions. Employers must be able to show that selection procedures are valid in predicting job performance.
Adverse impact plays an important role in proving employment discrimination. Adverse impact means that an employer’s employment practices result in the rejection of a significantly higher percentage of members of minority and other protected groups for some employment activity. When charges of discrimination are filed, plaintiffs bear the initial responsibility to show proof of employer discrimination. Once this requirement has been met, managers must defend their actions by showing the action taken was not discriminatory to any protected class.

The United States court system continually interprets employment law, and managers must formulate organizational policy in response to court decisions. Violations of the law will invite discrimination charges from protected groups or self-initiated investigation from government agencies. *Griggs v Duke Power* and *Albemarle Paper Company v Moody* provided added importance to the *Uniform Guidelines on Employee Selection Procedures*. *Oncale v Sundowner Offshore Services* and *TWA v Hardison* are instructive in the areas of sexual harassment and religious preference. Important cases in affirmative action include *University of California Regents v Bakke*, *United Steelworkers of America v Weber*, *Adarand Constructors v Peña*, *Hopwood v State of Texas*, and *Grutter v Bollinger*.

To ensure that organizations comply with antidiscrimination legislation, the EEOC was established to monitor employers’ actions. Employers subject to federal laws must maintain required records and report requested employment statistics where mandated. The EEOC maintains a complaint procedure for individuals who believe they have been discriminated against. Figure 3.5 illustrates the steps in filing a charge of employment discrimination.

Affirmative action goes beyond providing equal employment opportunity to employees. Affirmative action requires employers to become proactive and correct areas of past discrimination. This is accomplished by employing protected classes for jobs in which they are underrepresented. The employer’s goal is to have a balanced internal workforce representative of the employer’s relevant labor market.

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**KEY TERMS**

- adverse impact
- affirmative action
- bona fide occupational qualification (BFOQ)
- business necessity
- charge form
- disabled individual
- disparate treatment
- EEO-1 report
- equal employment opportunity
- fair employment practices (FEPs)
- four-fifths rule
- protected classes
- reasonable accommodation
- reverse discrimination
- sexual harassment
- *Uniform Guidelines on Employee Selection Procedures*
- workforce utilization analysis
DISCUSSION QUESTIONS

1. EEO legislation was prompted by significant social events. List those events and describe how they influenced the passage of various EEO laws.

2. Cite and describe the major federal laws and court decisions that affect the employment process of both large and small organizations.

3. After receiving several complaints of sexual harassment, the HR department of a city library decided to establish a sexual harassment policy. What should be included in the policy? How should it be implemented?

4. What is the Uniform Guidelines on Employee Selection Procedures? To whom do the guidelines apply? What do they cover?

5. Explain the difference between adverse impact and disparate treatment. Provide examples illustrating how adverse impact and disparate treatment discrimination can exist.

6. Throughout the chapter, specific court cases have been highlighted to signify their impact on shaping federal antidiscrimination policy. Identify these cases and explain their significance in defining employee or employer rights and duties.

7. As a marketing manager you have recently turned down Nancy Conrad for a position as sales supervisor. Nancy believes the denial was due to her gender and she has filed a sex discrimination charge with the EEOC. Explain the steps the EEOC will use to process the charge; include Nancy’s options during the process.

8. Affirmative action is both a legal and emotional issue affecting employees and employers. Develop as many arguments as you can both supporting and opposing affirmative action as an employer policy. If you were asked to implement such a program, what steps would you follow?

BIZFLIX EXERCISES

*Legally Blonde: Sexual Harassment*

Review the earlier section “Sexual Harassment” before watching this scene from *Legally Blonde*. Several aspects of that discussion appear in the scene.

Elle Woods’ (Reese Witherspoon) boyfriend, Warner Huntington III (Matthew Davis), wants to go to Harvard Law School instead of keeping their relationship alive. Elle pursues him vigorously by applying to and getting accepted to Harvard Law School. This is a charming comedy, dedicated to blonde women everywhere in the world. It is filled with stereotyping, giving many delightful twists to its surprise conclusion.

This scene comes from the “Poor Judgment” segment near the end of the film. It follows the successful use of Elle’s hunch about key witness Enrique Salva-tore (Greg Serano) in Brooke Windam’s (Ali Larter) trial. The film continues after she leaves Professor Callahan’s (Victor Garber) office. Elle sees Emmett (Luke Wilson) in the building lobby and tells him she is quitting the internship.

**What to Watch for and Ask Yourself**

- Does Professor Callahan sexually harass Elle? If yes, what is the evidence in these scenes?
- If these scenes show sexual harassment, what type of harassment is it? Quid pro quo harassment or hostile environment harassment?
- Did Elle behave appropriately or inappropriately in Professor Callahan’s office?
Sexual Harassment: A Frank Discussion

Over the past decade the problem of sexual harassment has captured the attention of all managers and employees. While it is widely known that sexual harassment is both unethical and illegal, the incidents of sexual harassment continue to plague business. Unfortunately, when these cases arise, they cause morale problems among employees, embarrassment to the organization, and costly legal damages. Consequently, all managers and supervisors play a central role in preventing sexual harassment complaints. It is important that managers understand the definition of sexual harassment, who is covered by sexual harassment guidelines, and how to prevent its occurrence. This skill-building exercise will provide you knowledge in each of these areas.

Assignment

1. Working in teams of female and male members, develop a list of behaviors that could be classified as quid pro quo harassment or hostile environment. Explore the possibility that some sexual harassing behaviors might be viewed differently by female and male employees. Give examples.

2. Many sexual harassment incidents go unreported. Fully discuss why this can occur and what might be done to reduce this problem.

3. The cornerstone to addressing sexual harassment is achieving organizational awareness through training. Develop a sexual harassment training program for a company of 250 employees that covers, at a minimum, the following: (1) who should attend the training sessions, (2) the content outline for the training program (the list of materials your team wants to teach), (3) specific examples to illustrate the training materials, and (4) how to investigate sexual harassment complaints.

4. This chapter will assist you with this assignment. You can obtain additional materials from EEOC offices and from various HR magazines.

5. Be prepared to present your training outline to other class members.

Work-related charges often seen as justified by employers can lead to EEO court cases. Take, for example, the following case on disability discrimination.

Robert Johnson began working for CompTech in Glendale, Colorado, in 1999. His position, at the time of his discharge, was senior electrical technician. In 2003, Johnson was diagnosed with attention deficit disorder (ADD), a medical condition that caused him severe work stress and anxiety.
After a work reorganization plan implemented by CompTech in 2004, Johnson was placed under a new manager, after which he experienced increased levels of workplace stress and tension. According to Johnson, his new manager’s supervisory style was “harsh, autocratic, and very demanding.” Johnson requested a transfer to accommodate his disability. The request was supported by a letter from his personal physician noting that Johnson should be assigned to “a more relaxing work setting.” The transfer and accommodation were not granted.

On June 14, 2004, Johnson was required to attend a meeting to discuss important design changes to the company’s core products. Johnson missed the meeting due to “personal reasons,” which he refused to discuss with his manager. On June 15, 2004, after his manager discussed the missed meeting with members of human resources, Johnson was terminated for insubordination. On June 26, 2004, Johnson filed a court case claiming both disability discrimination and retaliatory discharge.

**QUESTIONS**

1. In your opinion, does Johnson have a viable claim of disability discrimination? Explain. Does he have a claim of retaliatory discharge? Explain.
2. Does the fact that Johnson refused to discuss his personal reasons for missing the meeting affect this case?
3. Do you believe Johnson was insubordinate in this case? Explain.
4. How do you believe the court decided this case? What might be the basis for the court’s decision?

Source: This case is adapted from a 2003 circuit court decision. All names are fictitious.

Peter Lewiston was terminated on July 15, 2004, by the governing board of the Pine Circle Unified School District (PCUSD) for violation of the district’s sexual harassment policy. Prior to Lewiston’s termination he was a senior maintenance employee with an above-average work record who had worked for the PCUSD for eleven years. He had been a widower since 1998 and was described by his co-workers as a friendly, outgoing, but lonely individual. Beverly Gilbury was a fifth-grade teacher working in the district’s Advanced Learning Program. She was 28 years old and married, and had worked for PCUSD for six years. At the time of the incidents, Lewiston and Gilbury both worked at the Simpson Elementary School, where their relationship was described as “cooperative.” The following sequence of events was reported separately by Lewiston and Gilbury during the district’s investigation of this sexual harassment case.

Gilbury reported that her relationship with Lewiston began to change during the last month of the 2003-2004 school year. She believed that Lewiston was paying her more attention and that his behavior was “out of the ordinary” and “sometimes weird.” He began spending more time in her classroom talking with the children and with her. At the time she didn’t say anything to Lewiston because “I didn’t want to hurt his feelings since he is a nice, lonely, older man.” However, on May 25, when
Lewiston told Gilbury that he was “very fond” of her and that she had “very beautiful eyes,” she replied, “Remember, Peter, we’re just friends.” For the remainder of the school year there was little contact between them; however, when they did see each other, Lewiston seemed “overly friendly” to her.

June 7, 2004. On the first day of summer school, Gilbury returned to school to find a dozen roses and a card from Lewiston. The card read, “Please forgive me for thinking you could like me. I played the big fool. Yours always, P.L.” Later in the day Lewiston asked Gilbury to lunch. She replied, “It’s been a long time since anyone sent me roses, but I can’t go to lunch. We need to remain just friends.” Gilbury told another teacher that she was uncomfortable about receiving the roses and card and that Lewiston wouldn’t leave her alone. She expressed concern that Lewiston might get “more romantic” with her.

June 8, 2004. Gilbury arrived at school to find another card from Lewiston. Inside was a handwritten note that read, “I hope you can someday return my affections for you. I need you so much.” Later in the day Lewiston again asked her to lunch and she declined saying, “I’m a happily married woman.” At the close of the school day, when Gilbury went to her car, Lewiston suddenly appeared. He asked to explain himself but Gilbury became agitated and shouted, “I have to leave right now.” Lewiston reached inside the car, supposedly to pat her shoulder, but touched her head instead. She believed he meant to stroke her hair. He stated that he was only trying to calm her down. She drove away, very upset.

June 9, 2004. Gilbury received another card and a lengthy letter from Lewiston, stating that he was wrong in trying to develop a relationship with her and he hoped they could still remain friends. He wished her all happiness with her family and job.

June 11, 2004. Gilbury obtained from the Western Justice Court an injunction prohibiting sexual harassment by Lewiston. Shortly thereafter Lewiston appealed the injunction. A notice was mailed to Gilbury giving the dates of the appeal hearing. The notice stated in part, “If you fail to appear, the injunction may be vacated and the petition dismissed.” Gilbury failed to appear at the hearing and the injunction was set aside. Additionally, on June 11 she had filed with the district’s EEOC officer a sexual harassment complaint against Lewiston. After the investigation the district concluded that Lewiston’s actions created an “extremely sexually hostile” environment for Gilbury. The investigative report recommended dismissal based upon the grievous conduct of Lewiston and the initial injunction granted by the Justice Court.

QUESTIONS

1. Evaluate the conduct of Peter Lewiston against the EEOC’s definition of sexual harassment.
2. Should the intent or motive behind Lewiston’s conduct be considered when deciding sexual harassment activities? Explain.
3. If you were the district’s EEOC officer, what would you conclude? What disciplinary action, if any, would you take?

Source: This case is adapted from an actual experience. The background information is factual. All names are fictitious.
NOTES AND REFERENCES


9. "‘Supervisor’ May Be Broadly Defined in Employer Liability," HRFocus 80, no. 6 (June 2003): 2.


11. For a practical overview of EEO law, see David J. Walsh, Employment Law for Human Resource Practice (Mason, OH: South-Western, 2004).


20. The Americans with Disabilities Act: A Primer for Small Business contains examples, tips, and do’s and don’ts. Published by the EEOC, the handbook explains who is protected, how to avoid mistakes during interviews, when employers may ask questions about a medical condition, how to address safety issues, reasonable accommodation obligations, and tax incentives for businesses that hire and retain individuals with disabilities. It’s available on the Web or in printed format. Call 202-663-4900 or go to http://www.eeoc.gov.

21. According to the ADA, an employer is not required to retain an employee who presents a “direct threat,” implying a significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. Also, some court cases have held that an employee with a psychiatric disability is not a qualified individual because he or she cannot perform the essential functions of the job.


29. As currently defined, an "otherwise qualified" employee is one who can perform the "essential functions" of the job under consideration.

30. To learn more about fair employment practice agencies, go to http://www.eeoc.gov. Under the title "Employers & EEOC," click on "Small Businesses," then click on "State and Local Agencies."


32. EEOC charge statistics can be found at http://www.eeoc.gov. EEOC figures do not include the thousands of sexual harassment incidents not reported to governmental agencies or complaints reported to employers and settled internally through in-house complaint procedures.

33. Guidelines on Discrimination Because of Sex, 29 C.F.R. Sec. 1604.11(a) (1955).


50. Uniform Guidelines, Sec. 3A.

51. Uniform Guidelines, Sec. 40. Adverse impact need not be considered for groups that constitute less than 2 percent of the relevant labor force.


56. The primary web site for the EEOC is http://www.eeoc.gov. This web site contains a wealth of information about the EEOC including the agency's history and administration, how discrimination charges are filed and processed, training and outreach programs, litigation statistics, and various pamphlets and posters offered free of charge to interested parties.


60. A deferral state is one in which the state EEOC office complies with minimum operating guidelines established by the federal agency. In a deferral state, discrimination charges filed with the federal EEOC office will be deferred to the state agency for investigation and determination. If the state agency is unwilling or unable to resolve the complaint in a specified time period,
the complaint is referred back to the federal EEOC office for final disposition.


70. Hopwood v State of Texas, 78 F. 3d 932 (5th Cir. 1996).


Employers can determine adverse impact by using the method outlined in the interpretive manual for the *Uniform Guidelines on Employee Selection Procedures*.

A. Calculate the rate of selection for each group (divide the number of people selected from a group by the number of total applicants from that group).

B. Observe which group has the highest selection.

C. Calculate the impact ratios by comparing the selection rate for each group with that of the highest group (divide the selection rate for a group by the selection rate for the highest group).

D. Observe whether the selection rate for any group is substantially less (usually less than four-fifths, or 80 percent) than the selection rate for the highest group. If it is, adverse impact is indicated in most circumstances.

Example

<table>
<thead>
<tr>
<th>Step</th>
<th>JOB APPLICANTS</th>
<th>NUMBER HIRED</th>
<th>SELECTION RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Whites 100</td>
<td>52</td>
<td>52/100 = 52%</td>
</tr>
<tr>
<td></td>
<td>Blacks 50</td>
<td>14</td>
<td>14/50 = 28%</td>
</tr>
<tr>
<td>B</td>
<td>The group with the highest selection rate is whites, 52 percent.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td>Divide the black selection rate (28 percent) by the white selection rate (52 percent). The black rate is 53.8 percent of the white rate.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>D</td>
<td>Since 53.8 percent is less than four-fifths, or 80 percent, adverse impact is indicated.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the *Uniform Guidelines on Employee Selection Procedures*, Federal Register 44, no. 43 (March 2, 1979): 11998.
ANSWERS TO HIGHLIGHTS IN HRM 1

1. Yes
2. False
3. No
4. Merit, seniority, incentive pay plans
5. Yes
6. Yes, if no reasonable accommodation can be made
7. No
8. Yes, except if under a court order
9. False
10. True