

# Equal Employment Opportunity

IAFF Human Resources Conference  
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## Agenda

- Overview of EEO Basics
- Recent cases:
  - Gross v. FBL Financial Services, Inc.
  - Ricci v. City of New Haven
  - 14 Penn Plaza v. Pyett
  - Serwatka v. Rockwell Automation
- Recent statutory advances
  - ADAAA
  - GINA
- Special considerations for union leaders
- Anticipated developments

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## Overview of EEO Basics

1. Coverage
2. Race, national origin: Disparate treatment & disparate impact
3. Sex or Gender Discrimination
4. Disability
5. Religion
6. Age
7. Uniformed Services & Veterans
8. GINA

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## Why Should Union Leaders Care?

- Arbitrators follow Title VII and related statutes
- Most employers are covered
- As are unions
  - As a union, duh
  - As an employer, too
- And there's a new landscape: *14 Penn Plaza v. Pyett*
  - Be aware of limitations period!

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## EEO: Bases for Discrimination

- Title VII
  - 42 U.S.C. § 2000e *et seq.*
- ADA
  - 42 U.S.C. § 12101 *et seq.*
- ADEA
  - 29 U.S.C. §§ 629-634
- GINA
  - multiple citations: 29 U.S.C. §§ 216(e), 1132, 1182, & 1191b(d), 42 U.S.C. Subpart 300gg & Subpart 1395ss
- USERRA
  - 38 U.S.C. § 4301 *et seq.*
- Your contract!
- Race, Color, Religion, Sex, National Origin
- Disability
- Age
- Use of genetic information in health insurance and employment
- Past or present military service (or applied for it)
- Whatever you got!

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## Bases of Discrimination

- Disparate treatment
  - Individual or “systemic”
  - Unlawful motive *and usually* intent to discriminate
  - Typical cases:
    - Harassment, discharge or discipline, unequal benefits (individual)
    - Specific rules or policies (systemic)
- Disparate Impact
  - Always systemic
  - No need to prove motive, or intent
  - Typical cases:
    - Hiring or promotions

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## Disparate Treatment

- Requires proving motivation:
  - By direct evidence, e.g.:
    - “Smoking gun” memoranda
    - Ignorant statements
  - By circumstantial evidence, e.g.:
    - The disparate (unequal) treatment itself
    - Disproving pretext

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## Systemic Disparate Treatment

1. Pattern and practice
  - Statistics, anecdotes, etc.
  - E.g., *U.S. v. City of New York* (2010)
2. Formal policy
  - E.g., only considering women applicants for flight attendants
  - Employer’s defense is usually “bona fide occupational qualification” (except for race):  
“BFOQ”

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## BFOQs

- Forced Retirements
  - permitted by specific statutory amendment (1996) for police and fire fighters
  - permitted for employees if validated, or supported by medical evidence, e.g.,
    - air traffic controllers, pilots, flight engineers
    - in some cases, police or fire fighters not covered by statutory amendment
- Fluency in English, *Garcia v. Rush-Presbyterian*, 660 F.2d 1217 (7<sup>th</sup> Cir. 1981)
- Rejected BFOQs:
  - Excluding child-rearing-age women: *Johnson Controls*

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## Disparate Impact

- Plaintiff must show that the employer “uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin”
  - permitted in ADEA (age) jury trial cases (*Smith v. City of Jackson*, 544 U.S. 228 (2005))
  - generally not permitted in ADA (disability) cases (*Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003))

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## Disparate Impact

- Four-fifths rule
- “Particular employment practice” examples:
  - written test score
  - method of weighting in testing
  - physical agility test score
  - word-of-mouth recruiting practices
- But not:
  - drug testing
- Defendant/employer may rebut

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## Rebutting an Allegation of Disparate Impact

### *Employer Defenses:*

- “Particular” practice does not cause the statistical disparity
- “Business necessity” or “job-relatedness”
- Professionally developed practice (“validation” defense)
- Seniority is the reason

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## Business Necessity

- Facial Hair:
  - Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11<sup>th</sup> Cir. 1993)
- English-only rules:
  - *Garcia v. Gloor*, 618 F.2d 264 (5<sup>th</sup> Cir 1980) (allowing discharge of employee for deliberately speaking Spanish at work, with English-only rule)
  - but EEOC guidance now prohibits absolute English-only rules, and there may be First Amendment protections
  - Employers may implement tailored policies

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## Validation

- Defense to disparate impact claims only
- Two methods of validation:
  - Criterion:
    1. Test a bunch of people, and save their scores
    2. Hire them
    3. Evaluate them
    4. Correlate performance to score
    5. Use correlated score for new tests
  - Content:
    1. Analyze the job
    2. Construct test that emulates the job
    3. Establish testing criteria that correlate test performance to job performance
- Plaintiff can sur-rebut by showing better test (“alternative employment practice”)

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## “Alternative Employment Practice”

- Generally need to show that the employer refuses to adopt the better practice
- Must serve the same, valid interest that employer asserts must be tested
- *Ricci v. New Haven*
  - City arguably failed to establish that an alternative test existed that could have accomplished the promotions testing goal
  - This would have been the plaintiffs’ burden if African-American fire fighters had sued

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## Sex Discrimination

- Harassment
  - “quid pro quo” or hostile environment: both constitute discrimination “because of” sex
  - male-female harassment
  - male-male/female-female harassment
    - may require “credible evidence” that harasser is homosexual
- Coming soon: Employment Non-Disc. Act

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## Harassment

- Employer should have good sex harassment policy, and union officers should have a copy
- Employer may have obligation to pursue regular training, etc., of both rank-and-file and supervisory employees
- DFR considerations – a “firewall”

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## Pregnancy Discrimination Act

- Prohibits discrimination “because of” pregnancy
- Requires that women affected by pregnancy, childbirth, or related medical complications shall be treated “the same” for all employment-related purposes
  - BUT
- Pregnancy policies that treat women better than men are permitted

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## Treating Her “the Same” as Him

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*if the employer does it for men ... then it must do so for women*

### MEN

- Paid time off for knee surgery, triple bypass,
- Paternity leave
- Granting 40-hour light duty to injured male
- Firing man who was excessively absent because of repeated illnesses

### WOMEN

- Paid time off for pregnancy
- Maternity leave
- Granting 40-hour light duty to pregnant female
- Firing woman who was excessively absent due to morning sickness, pregnancy complications

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## Disability

- Prohibits discrimination against a “qualified individual with a disability”
- “With a disability” can mean a record of disability, or “regarded as” having a disability
  - severely narrowed by courts
  - Congress reversed that course
- “Qualified individual” means he/she can perform “essential functions” with or without “reasonable accommodation”

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## Reasonable Accommodation

- Examples:
  - Modifications to physical work environment
  - Adjustments to work schedules
  - Modified duties
- Defenses:
  - “undue hardship” to the employer
  - “direct threat to others”

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## Reasonable Accommodations

- Leave of absence for determined period, for rehabilitation, treatment, therapy
- Sporadic attendance not “reasonable”
- Closer parking space
- Light duty?
  - Usually not, because it would require re-assigning essential functions of job
  - But blanket policy against it is not a defense, and some courts have held that, if a light duty position is available, then the employer may have an obligation to put a temporarily disabled employee in a light duty position

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## ADA Amendments Act

- Passed 2008, signed by President Bush (!)
- Effective January 1, 2009
- Heavily expands the definition of “disability”

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## Other ADA Issues

- Limited medical privacy protections
  - No “fishing expeditions”
- Accessibility requirements for public buildings
- Disability protection applies to past drug and alcohol addiction, but not current drug or alcohol use
- Can’t use “disparate impact” theory

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## Religion

- “Sincere” belief
- Reasonable accomodation
- A BFOQ for public employers?
- Union dues

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## Age

- Disparate Impact theory is permissible
- Only protects employees over 40
- Mandatory retirement ages & max hiring ages permitted for public employers of police and fire fighters
- RIFs: split among the courts
  - Show intent (age consciousness), or
  - Merely show favoritism to younger employees

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## Retirement Plans

- “Voluntary” early retirement plans
- Minimum retirement ages permitted
- Early retirement benefit subsidies permitted if they reflect actuarial cost to employee for early retirement
- “Bridge” benefits usually permitted

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## USERRA

- Employer must rehire or reemploy military personnel on return from military leave or military duty.
- A request for reemployment should be done as early as possible. Depending on the situation, an individual on military leave could have anywhere from 14 days to two years to reapply for the job.
- In order to qualify for rehire under USERRA, the employee must give advance notice to the employer *before* military leave or duty unless it is impossible or unreasonable to do so or he is prevented by military necessity from doing so.

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## USERRA

- A person returning to work after military leave under USERRA is entitled to the same seniority and position as though he never left employment.
- Provides for “for-cause” termination protections for certain periods after return from service (useful in non-collective bargaining environments)

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## Genetic Information Non-discrimination Act

- Also signed by Bush
- Prohibits employer from requesting or disclosing genetic information, except in special circumstances
- Prohibits insurers (incl. self-insurers) from using genetic information to adjust premium or contribution amounts

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