

EMPLOYMENT LAW
INSTRUCTOR'S MANUAL



Adverse Impact and Disparate Treatment: Two Types of Discrimination

By Audra H. Nelson, M.S.

PROJECT TEAM

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Module Summary

This module discusses adverse impact and disparate treatment discrimination. To thoroughly understand adverse impact discrimination, the module explains its origin (*Griggs v. Duke Power Co.*) and relevant legislation and case law, along with the legally accepted method (the 4/5ths rule) used to determine if statistical evidence of adverse impact discrimination exists. In the event that statistical evidence is present, the employer must show that the selection practice is job-related. As such, this module defines job relatedness (i.e., validity) and describes three strategies (criterion, content and construct-related evidence) used to evaluate validity and methodology for gathering each type of evidence. The module also includes relevant examples and practice scenarios for students to practice the calculations used to determine statistical evidence of adverse impact. These examples may be used in class or as homework. Lastly, the module examines disparate treatment discrimination. Relevant examples, case law and methods used to determine if disparate treatment discrimination has occurred conclude this module.

LEARNING OBJECTIVES

By the end of this module, students will:

- Define adverse impact discrimination and practice the legally accepted calculation to discern if such discrimination exists in a given situation.
- Define disparate treatment discrimination and understand the process used to determine if there is reason to believe discrimination has occurred.
- Distinguish among three types of test validity evidence and understand the primary steps needed to collect such evidence.
- Identify related human resource (HR) policy and procedure implications.

SUGGESTED READINGS

U.S. Department of Labor. (1978). *Uniform Guidelines on Employee Selection Procedures*. [41CFR60-3]. Retrieved on April 20, 2009, from www.dol.gov/dol/allcfr/title_41/Part_60-3/toc.htm.

Course texts related to human resource management (e.g., Introduction to HR Management) may supplement the material found in this training module.

TARGET AUDIENCE

This module was designed for an audience in an undergraduate mid- to upper-level or graduate-level HR or industrial/organizational psychology course. Students may benefit from prior completion of an introduction to statistics course as well. This module pertains specifically to U.S. employment law.

MODULE DURATION

This module was designed to be delivered in 150 minutes. If instructors intend to present the material over three 50-minute classes, it is recommended that they break after slides 8 and 15. If instructors intend to present the material over two 75-minute classes, it is recommended that they break after slide 12. Several learning aids are included in this module and may be used in class or as homework. Allowable in-class time recommendations are included per PowerPoint slide and activity.

INSTRUCTOR'S NOTES FOR POWERPOINT PRESENTATION

Detailed instructor notes for the PowerPoint presentation are included in the "Notes" view of the presentation.

Learning Aids (Instructor's Version)

The following learning aids can be used in class or as homework. Learning aids 1-4 are scenarios that pertain to adverse impact discrimination based on race, sex and age in selection for hire, promotion, training and termination. A student version (without the calculations) is included in this manual. If allowing class time for these exercises, five minutes per scenario is appropriate.

LEARNING AID 1: SELECTION FOR HIRE (SEX)

ABC Corporation has 23 warehouse positions to fill. Results of the recruiting efforts yielded 75 applicants (30 women and 45 men). After face-to-face interviews to identify the top candidates, employment offers were made to seven women and 16 men. Compare the selection ratios for men and women and use the 4/5ths rule to determine if there is statistical evidence of adverse impact in this case.

Teaching Note

Selection ratio for women = $7/30$ or 23 percent.

Selection ratio for men = $16/45$ or 36 percent.

23 percent divided by 36 percent equals 64 percent, which is less than 80 percent (4/5ths), so evidence of adverse impact is present in this case.

LEARNING AID 2: SELECTION FOR PROMOTION (RACE)

XYZ Corporation promoted 15 people last year into management-level positions. With no formal, documented selection procedure in place, department directors and vice presidents identified two minorities and 13 non-minorities to fill the management positions. All individual contributors in the department were considered for these promotions (50 minorities and 200 non-minorities). Compare the selection ratios for minorities and non-minorities and use the 4/5ths rule to determine if there is statistical evidence of adverse impact in this case.

Teaching Note

Selection ratio for minorities = $2/50$ or 4 percent.

Selection ratio for non-minorities = $13/200$ or 6.5 percent.

4 percent divided by 6.5 percent equals 62 percent, which is less than 80 percent (4/5ths), so evidence of adverse impact is present in this case.

LEARNING AID 3: SELECTION FOR TERMINATION (AGE)

Due to poor company performance, management was asked to reduce headcount by 25 percent this year. With a total headcount of 500, that means 125 employees must be identified for termination. Management did not consider performance ratings when determining which employees would lose their jobs. Rather, career orientation interviews were conducted with each employee to assess his or her continued longevity potential. The interviews were completed, and 105 employees who were 40 years of age and older and 20 employees younger than 40 were selected for termination. Of all 500 employees, only 225 were 40 years of age and over. Compare the selection ratios for employees in 40+ age group and those less than 40 using the 4/5ths rule to determine if there is statistical evidence of adverse impact in this case.

Teaching Note

Selection ratio for employees 40 years of age and older = $105/225$ or 47 percent.

Selection ratio for employees less than 40 years of age = $20/275$ or 7 percent.

Seven percent divided by 47 percent equals 15 percent, which is less than 80 percent (4/5ths), so evidence of adverse impact is present in this case.

LEARNING AID 4: SELECTION FOR TRAINING (SEX)

Each year, 20 employees are selected for entrance into a management training program, and at the end of the program, many are placed into management positions in the organization. Performance ratings, attendance records, performance potential ratings and interviews are used to identify the 20 employees who receive offers to enter the training program. This year, 300 employees were considered for entrance into this program (200 women and 100 men). In the end, 13 women and seven men were presented with offers. Compare the selection ratios for the male and female candidates using the 4/5ths rule to determine if there is statistical evidence of adverse impact in this case.

Teaching Note

Selection ratio for women = $13/200$ or 6.5 percent.

Selection ratio for men = $7/100$ or 7 percent.

6.5 percent divided by seven percent equals 93 percent, which is greater than 80 percent (4/5ths), so there is no statistical evidence of adverse impact in this case.

In-Class Activity (Instructor's Version)

Below are three summaries based on real discrimination cases pursued by the Equal Employment Opportunity Commission (EEOC). The fourth one is a fictitious summary. Students can read these cases in class or outside of class (to conserve class time) and prepare a discussion on what the HR department at each organization could have done to mitigate risk in the case and/or what they can do to mitigate risks of this nature in the future. Students can work in small groups and discuss with the entire class, or they can discuss the cases just with their small groups, depending on class size. The instructor may also opt to make this a written assignment. Allow 30 minutes of class time for this activity.

Case #1

EEOC v. Morton Buildings, Inc.

No. 3:04-CV-02122 (N.D. Tex. June 5, 2006)

The Dallas District Office of the EEOC filed this Title VII case alleging that the defendant, a national construction company in Illinois, discharged the charging party (CP) from her sales consultant position at its Texas office because of her sex. The manager of the McKinney office hired the CP, who had 30 years of sales and marketing experience (20 in commercial real estate construction and sales), as a sales consultant in December 2002, despite initial resistance from the Western Region manager who pressed him to hire an inexperienced male instead. The regional manager made statements to the CP and other staff suggesting that he was uncomfortable with women working in construction sales. In June 2003, during a period of decreased sales, the defendant fired the CP, ostensibly for lack of production. Defendant retained male trainees who were hired at the same time as the CP and who had made fewer sales for the defendant than the CP had. The CP and was the only female sales consultant in the McKinney office and one of only four in its five-state Western Region.

Under the one-year consent decree resolving this case, the defendant will pay the CP \$275,000 in monetary relief and provide her with a letter of reference agreed to by the parties. The defendant will conduct two training sessions on the requirements of federal anti-discrimination laws at the defendant's construction center facilities in the Southern Plains Region and will report to the EEOC on all sex discrimination complaints made during the term of the consent decree, including the resolution of such complaints.

Teaching Note

What could the HR department have done to mitigate risk in this case and/or what can they do to mitigate risks of this nature in the future?

Morton Buildings should or could have:

- Provided anti-discrimination training to its management staff on a regular basis.
- Developed and communicated a companywide anti-discrimination policy and required employees to acknowledge receipt of the policy.
- Created and communicated a complaint procedure for employees to report instances of discrimination, especially one that allowed employees to bypass their manager to file such complaints.
- Provided gender (and race, age, etc.) sensitivity training to all employees, especially management staff.
- Required performance documentation for each employee before terminating one employee for performance issues when there were others with lower performance ratings. Documentation should have been reviewed by HR personnel and possibly higher up the management chain before termination.
- Recognized and questioned the gender demographics of the sales team prior to this instance to discern why it was so disproportionate.

Case #2

EEOC v. Jax Inns, Inc., d/b/a Spindrifter Hotel **No. 3:04-CV-978-J-16MMH (M.D. Fla. April 13, 2006)**

The Miami District Office of the EEOC filed this Title VII race discrimination case alleging that the defendant, owner of the Spindrifter Hotel and Conference Center in Florida, fired the charging party, who was white, from her director of sales position for associating with blacks. The defendant bought the Spindrifter Hotel in June 2002, and in October 2002 rehired the CP into the director of sales position she had held under the previous owners. The defendant's owners often complimented the CP on the great job she was doing. In December 2002, the CP stopped by the hotel after church to make sure everything was going well, although she was not scheduled to work. Her biracial children accompanied her. The defendant's majority owner asked if the children were hers and appeared shocked and disappointed when she said they were. The following week the majority owner made stereotypical, pejorative comments about black people to the CP. He then began interviewing candidates for the CP's position. After hiring a new assistant, general manager fired the CP without explanation on January 17, 2003. The new manager assumed the CP's duties. Under the three-year consent decree resolving this case, the CP will receive \$99,000 in monetary relief. The decree enjoins the defendant from engaging in race discrimination and retaliation in violation of Title VII.

Teaching Note

What could the HR department have done to mitigate risk in this case and/or what can they do to mitigate risks of this nature in the future?

Spindrift Hotel and Conference Center should or could have:

- Learned what equal employment opportunity law prohibits. Many employers know that it prohibits discrimination based on protected class status, but many don't know that it is unlawful to discriminate against those who associate, in one way or another, with members of protected classes.
- Not relied on the employment-at-will doctrine. Many employers rely too much on this doctrine because of lack of training.
- Refrained from making the remarks the owner made about black people.

Case #3

EEOC v. Lithia Motors, Inc., d/b/a Lithia Dodge of Cherry Creek, et al. **No. 1:05-cv-01901 (D. Colo. March 8, 2006)**

The Denver District Office of the EEOC filed this Title VII lawsuit alleging that Lithia Motors (the eighth largest automobile retailer in the United States) and Lithia Dodge of Cherry Creek (an Aurora, Colo., subsidiary of Lithia Motors) maintained a racially hostile work environment and subjected the charging party to unequal terms and conditions of employment based on his race (black), and constructively discharged the CP in retaliation for his complaints about discrimination. The CP had been employed at Cherry Creek Dodge since 1998 or 1999, before Lithia bought it. In January 2003, Lithia transferred a white employee to Cherry Creek Dodge as the new general manager (GM). The defendant had previously disciplined the new GM for “anger management issues.” Shortly after the GM’s arrival, he made racial remarks to the CP [pejorative comments about “BP time” (black people time) and remarking that he’d fired “a bunch of you people already”] and subjected the CP to less favorable treatment than whites (screamed obscenities at him more frequently and required him to undergo a drug test when no reasonable grounds existed for so doing while not testing a white employee known to be intoxicated at work). After the CP filed an internal complaint on April 29, 2003, the new GM berated the personnel coordinator for assisting with the CP’s complaint and intensified his harassment of the CP. The CP resigned on May 16, 2003, having heard nothing from headquarters about his internal complaint. The defendant subsequently counseled the GM regarding unacceptable behavior.

The Phoenix District Office resolved this case through a four-year consent decree providing the CP and two other former black employees with \$562,470 in monetary relief (\$320,000 to CP and \$142,500 and \$100,000 to the two other claimants). Defendants are prohibited from discrimination based on race, color or national origin.

Teaching Note

What could the HR department have done to mitigate risk in this case and/or what can they do to mitigate risks of this nature in the future?

Lithia should or could have:

- Provided anti-discrimination training to its management staff on a regular basis.
- Developed and communicated a companywide anti-discrimination policy and required all employees to acknowledge receipt of the policy.
- Created and communicated a complaint procedure for employees to report instances of discrimination, especially one that allows employees to bypass their manager to file such complaints.
- Provided race (and gender, age, etc.) sensitivity training to all employees, especially management staff.
- Developed a drug testing policy that included provisions for reasonable suspicion testing and trained managers on application of each provision of the policy.
- Disciplined the GM in some way for berating the personnel coordinator for his or her assistance with the complaint. If the personnel coordinator chose to do nothing with the complaint after the lecture from the GM, the personnel coordinator may deserve disciplinary action. To whom does the personnel coordinator report? Does that position report to the GM or to HR personnel? In some cases, it can't be helped, but it is usually best if a site HR manager reports to other HR personnel rather than a GM so that the HR manager can do his or her job without worrying about being punished for doing so. Did the personnel coordinator not see what was going on around him or her? Is this personnel coordinator a business partner or a paper-pusher? If HR is busy pushing papers all day, it misses these situations. Being a member of the team and a business partner can help to mitigate this type of risk.

Case #4

A hiring manager and his interview team narrowed a pool of applicants to two final candidates. One candidate, who is white, had a really great interview and the whole interview team agreed that he would be a great fit with the rest of the team. He had a bachelor's degree and five and half years of relevant experience. The other candidate, who is black, also had a good interview, a bachelor's degree and seven years of relevant experience and had received numerous recognition awards from previous employers for excellent performance. Both candidates met the minimum requirements for the job in question, which included a bachelor's degree and four years of related experience.

During a closed-door meeting about the candidates with an interview team member and the hiring manager, the hiring manager said that it would be tough to have a black person on the team and that he thought a black person would be hard to manage. He then said that he would ask the HR department to make an offer to the white candidate and proceeded to complete the necessary paperwork. HR policy stated that hiring managers must submit all documents pertaining to the hiring process to HR for review and retention.

Before extending the offer to the selected candidate, the HR representative noticed on the interview notes of the rejected candidate that the primary reason for not hiring the candidate was “not a good fit for the team.” However, the interview notes in response to each of the interview questions did not provide anything specific about why the candidate would not be a good fit for the team. The HR representative contacted the hiring manager and interview team to collect more detail about the reason for not hiring the candidate who had more experience than the selected candidate. The general consensus among the interview team was that both candidates were qualified to do the job and both would have been fine choices. However, many of them did agree that since the selected candidate enjoyed playing golf in his spare time, he would be a good addition to the team. The interviewer who heard the hiring manager’s racist remarks about the rejected candidate informed the HR representative about the comments. Without documenting the incident, the HR representative, who reported to the hiring manager, phoned the selected candidate to extend the offer of employment.

Teaching Note

Did the organization discriminate against the black candidate? Is this a potential discrimination case? If so, what could the HR department have done to mitigate risk in this case and/or what can they do to mitigate risks of this nature in the future?

- Provide anti-discrimination training to management staff on a regular basis.
- Develop and communicate a companywide anti-discrimination policy and require all employees to acknowledge receipt of the policy.
- Create and communicate a complaint procedure for employees to report instances of discrimination, especially one that allows employees to bypass their manager to file such complaints.
- Provide race (and gender, age, etc.) sensitivity training to all employees, especially management staff.
- Provide interview and candidate selection training to those who make hiring decisions or who are involved in the hiring process. The training should include the dangers associated with asking questions in the interview that are not related to the job, the tendency for personal bias to influence the ability to be objective and the proper way

to document selection decisions. "Not a good fit for the team" is a terrible reason to reject someone and to document.

- It is a great policy to have HR making offers to candidates and to require managers to submit hiring paperwork to HR for review. HR did a good job of reviewing the material and investigating the incident. If the HR representative had acted appropriately on the results of the investigation, it would have been a great procedure to have in place.
- It is likely that the reason the HR representative did not question the hiring manager about the comments is because he or she reports to the hiring manager and may be afraid of retaliation if he or she questioned the hiring manager. We don't know details of the organization's structure, but perhaps an adjustment in reporting relationships might mitigate this risk in the future.
- It was great that there were a number of people involved in the interview process as opposed to just one person doing the interviewing and hiring.



Learning Aids (Student Version)

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