

Disparate Treatment – “Express Classification”

Prima Facie Case (Plaintiff)	Defense (Why Express Classification Valid)	Plaintiff’s Rebuttal (examples)
Member of group under protected category	Bona Fide Occupational Qualification (BFOQ):	Defendant’s business objective does not necessitate this express classification
Qualified/Competent	Necessary for the normal operation of the business	Marketing strategy/business niche does not make for a BFOQ
Adverse Employment Decision	“All” Members’ of Plaintiff’s group do not have this necessary characteristic	Individual assessment is available
Employer (kept) looking/filled position	Measuring individual members’ characteristic is not possible/practicable	

Disparate Treatment: Circumstantial Evidence

Prima Facie Case (Plaintiff)	Defense	“Pretext” (Plaintiff’s Rebuttal)
Member of group under protected category	“Valid Business Reason”	Defendant’s alleged “Valid Business Reason” is pretextual.
Qualified/Competent	Plaintiff’s membership was not basis for adverse employment decision	Similarly situated employees/applicants who are not members of plaintiff’s group treated more favorably
Adverse Employment Decision		e.g. policies, standards not applied uniformly/ express references to membership in group/ policies and procedures not followed, etc.
Employer (kept) looking/filled position		

Disparate Impact

Prima Facie Case (Plaintiff)	Defense	Plaintiff's Rebuttal
Facially neutral policy or practice	Legitimate business requirement	Less discriminatory means available to fulfill business requirement
Adverse impact on a group under a "protected category"	That is a "business necessity" – necessary for the safe and efficient operation of business	
	And the challenged practice effectively fulfills this business necessity.	

Retaliation as “Discrimination” under Title VII:

Employer cannot discriminate on the basis of.....

- “Opposition”
- Good faith opposition to allegedly discriminatory employment practice
- Does not have to be accurate or upheld
- e.g. Inquiring about legality of hiring practices, performance evaluation policies
- “Participation”
- Making a claim, serving as witness in a claim, assisting another file/making a claim, “participating” in investigation.
- No “good faith” requirement