




of the law was developed under it, and for that reason we often refer to Title VII. However, as the age discrimination, pregnancy discrimination, and disability discrimination law were later passed, the legal considerations were applied to those categories as appropriate. So, in this part of the chapter discussing these concepts, know that the basis of the claim may vary depending on the category, but the underlying legal concepts remain applicable.

In alleging discrimination, an employee plaintiff must use one of two theories to bring suit under Title VII and other protective legislation: disparate treatment or disparate impact. The suit must fit into one theory or the other to be recognized at law. A thorough understanding of each will help employers make sounder policies that avoid litigation in the first place, help managerial and supervisory employees do a better overall job of avoiding liability, and enhance the workplace in the process. Those will be our next two topics. We will also discuss accommodation, retaliation, exhaustion of administrative remedies, and remedies available under the protective legislation, which, collectively, we tend to speak of as Title VII.

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Disparate Treatment

Disparate treatment  is the theory of discrimination used in cases of individual and overt discrimination and is the one you probably think of when you think of discrimination. The plaintiff employee (or applicant) bringing suit alleges that the employer treated the employee differently from other similarly situated employees based on a prohibited category or categories. Disparate treatment is considered intentional discrimination. However, the employee need not prove that the employer actually said that race, gender, and so on was the reason for the decision. In disparate treatment cases, the employer's policy is discriminatory on its face, such as a policy of only hiring men to work in a warehouse facility as happened in a Cleveland warehouse in 2016.²² Keep in mind that it is not the employer's subjective intent that is important. There need not be evil intent to discriminate. Claimant must simply be able to show that the difference in treatment occurred and had no sustainable justification, leaving a prohibited category as the only remaining conclusion.