

Legal Updates:

Understanding & Applying Equal Opportunity & Non-Discrimination Laws

February 16, 2007

Overview of Program

- We will review and discuss the following:
 - Various equal opportunity & non-discrimination laws that apply to the University
 - University policies ensuring equal opportunity & non-discrimination & resources supporting those policies
 - the University's Diversity Initiative
 - Case studies

Objectives of Program

- Learn about key laws that ensure equal opportunity & non-discrimination
- Understand how these laws apply to the University and learn about the University policies that implement them
- Align employment practices with the University's Diversity Initiative
- Understand how equal opportunity & non-discrimination principles apply to situations on campus

Lehigh's Commitment



- **Policy on Equal Opportunity / Affirmative Action/ Non-Discrimination**
- Lehigh University strives to be an educational institution that welcomes faculty, staff, and students from diverse backgrounds and situations. Lehigh University is committed to provide all members of our community with equal access to relevant academic programs, social and recreational programs, services, and opportunities for participation, growth and promotion, and to promote and enhance the diversity of the university community. The purpose of this policy is to define a philosophy for the institution and to articulate mechanisms for the oversight of the policy.

Lehigh's Commitment

- EQUAL OPPORTUNITY:

Lehigh University does not discriminate against any person based on age, color, disability, gender, gender identity, marital status, national or ethnic origin, race, religion, sexual orientation, or veteran status. For students, this applies to educational programs, residential environments, athletics and other co-curricular programs, social and recreational programs, and student services. For faculty, staff, and student employees, this applies to all employment decisions, including selection, benefits, compensation, tenure, training and educational programs, transfer, promotion/demotion, layoff, return from layoff, and termination.

The Law: Non-Discrimination in Employment

Federal Constitution – 14th Amendment
Equal Protection Clause

Federal }
State } Non-Discrimination Laws
Local }

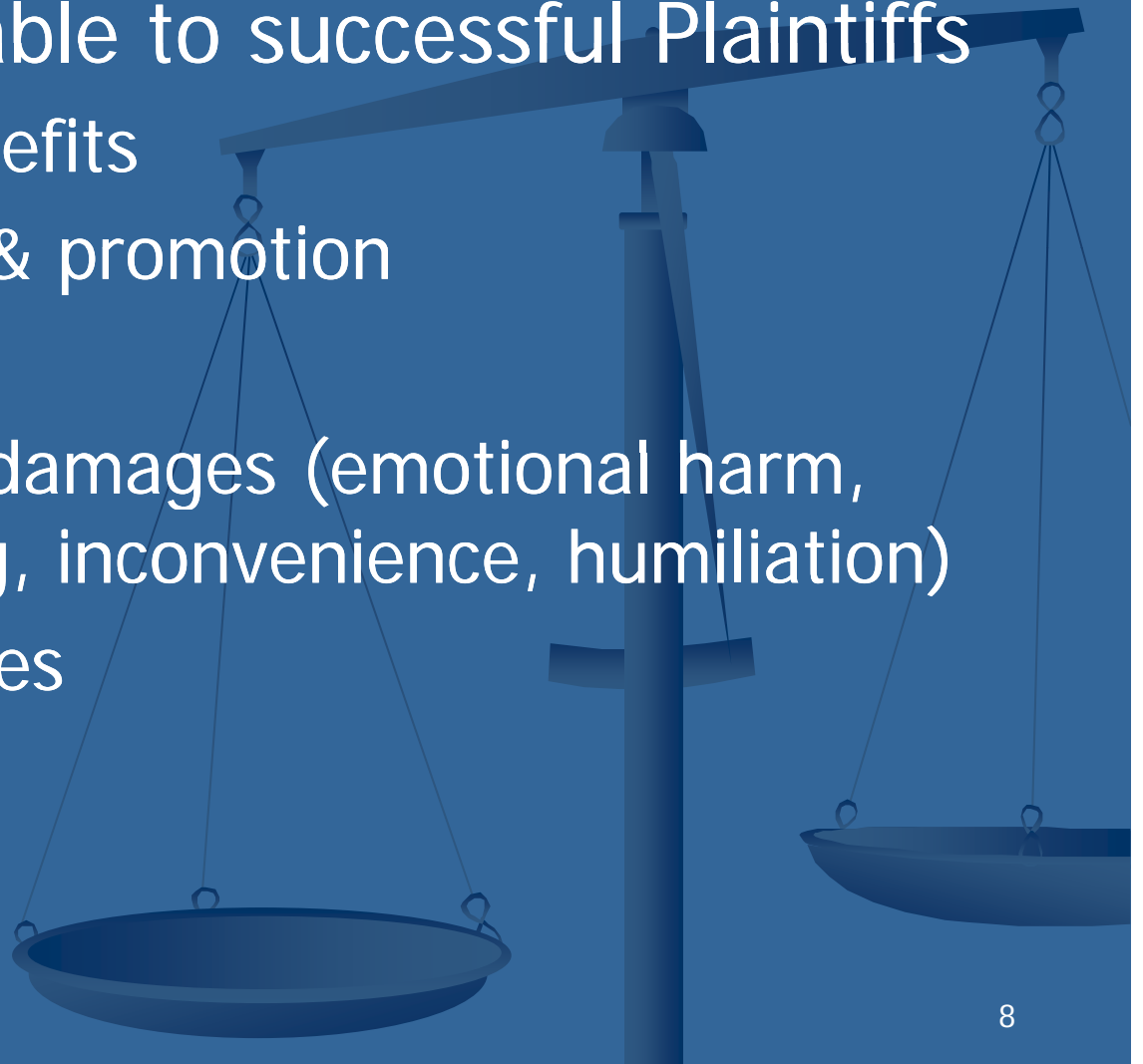
Govt. Agencies at each level enforce these laws
(EEOC, PHRC, OCR, etc.)

Practical Realities

- Employment-related claims are:
 - Increasing (especially allegations of retaliation)
 - Expensive to defend
 - Subject to hidden costs (time, administrative costs, damage to institutional reputation, etc.)

Potential Costs, Risks and Exposure for Lehigh

- Remedies available to successful Plaintiffs
 - Back pay & benefits
 - Reinstatement & promotion
 - Front pay
 - Compensatory damages (emotional harm, pain & suffering, inconvenience, humiliation)
 - Punitive damages
 - Attorneys' fees



Potential Costs, Risks and Exposure for Lehigh

- Examples of verdicts against other institutions
 - University ordered to pay \$1.275M (\$225K actual damages; \$750K punitive; \$200K Vice Chancellor; and \$100K athletics director) in age discrimination/retaliation lawsuit brought by baseball coach
 - Jury awarded \$850,000 to College employee who claimed that her bosses failed to protect her from sexual advances by a campus police officer and then retaliated against her after she complained

Potential Costs, Risks and Exposure for Lehigh

■ Examples of settlements

- University agreed to pay \$12M to settle a class action lawsuit based upon gender discrimination
- University agreed to pay \$182,500 to settle an EEOC sex discrimination/ retaliation claim brought by the former Dean of Admissions

Preventing, Responding, Resolving



- As a result of these realities, it is essential to have:
 - Policies and programs that prevent discrimination
 - Accessible offices and campus resources that respond to instances of discrimination
 - Effective internal complaint resolution procedures

Non-Discrimination : Federal Statutes & the Federal Constitution

All Employers

Title VII – race, color, religion, sex,
national origin
ADEA – age (over 40)
ADA - disability

Recipients of Federal Financial Assistance

Title VI – race, color, national origin
Title IX - sex
Sec. 504, Rehab. Act of 1973 - disability

Federal Contractors

Executive Orders 11246 + 11375
- race, color, religion, sex, nat'l origin
Sec. 503, Rehab. Act of 1973 – disability

Govt. / State Actors

Federal Constitution
14th Amendment, Equal Protection clause
– classifications in laws must bear
a sufficient relationship to a sufficient govt.
interest

Federal Non-Discrimination Statutes Applicable to All Employers : An Overview

- All employers = usually, employers with 15 or more employees
- First –
Section 1981 (Sec. 1 of Civil Rights Act of 1866)
- Most comprehensive –
Title VII of Civil Rights Act of 1964

Title VII, Civil Rights Act of 1964

- Broadest coverage of federal non-discrimination laws :

Applies to all employers with more than 15 employees

i.e., all colleges / universities

public and private colleges / universities

Title VII, Civil Rights Act of 1964

- Prohibits discrimination based on:
 - race
 - color
 - religion
 - sex
 - national origin
- ... in employment
(hiring, discharge, compensation, terms, conditions, or privileges of employment)

Title VII, Civil Rights Act of 1964

- Does not prohibit employer from hiring or distinguishing among employees based on job-related qualifications

e.g., merit, skills, performance,
seniority (yrs. with employer), etc.

Title VII, Civil Rights Act of 1964

- Exception to Title VII (“BFOQ”):
 - Employment decisions can be based upon religion, sex, or national origin when such a characteristic is a bona fide occupational qualification (“BFOQ”) that is “necessary to the normal operation of that particular business or enterprise”
 - [race + color cannot be a BFOQ]

Title VII, Civil Rights Act of 1964

2 types of Title VII discrimination claims :

1. **Disparate treatment** – unlawful different treatment based upon protected personal characteristic
2. **Disparate impact** – ostensibly neutral action has unlawful discriminatory impact on person(s) of protected personal characteristic

Title VII – Enforcement & Litigation

Plaintiff :
prima facie case

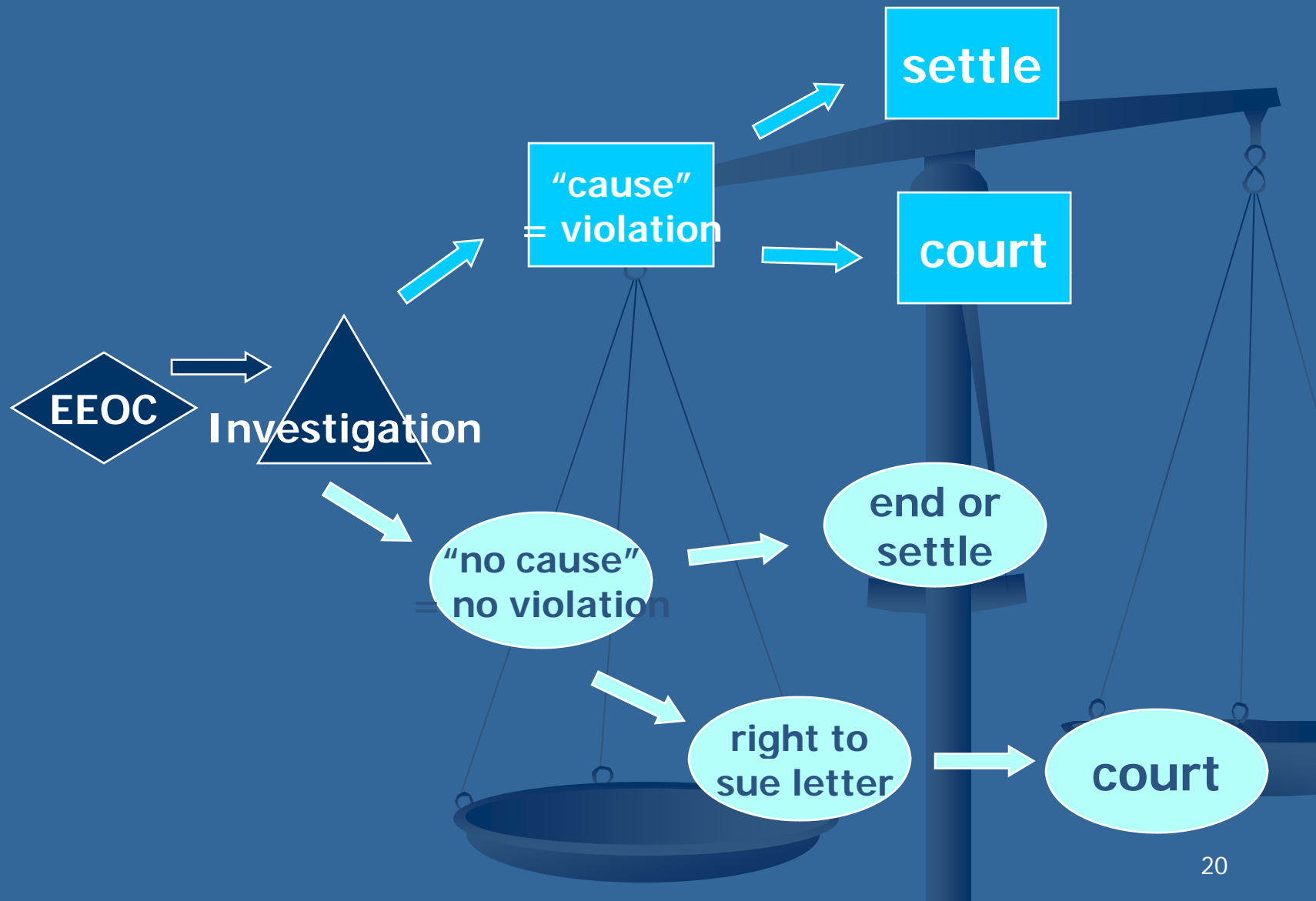


Defendant :
evidence of legit.,
non-discriminatory
reason



Plaintiff :
proof of discrim.
(Deft.'s reason
was pretext)

Title VII – Enforcement & Litigation



Title VII, Civil Rights Act of 1964

Remedies for Title VII violations :

Courts have the power to grant remedies to “make a person whole for injuries suffered on account of ... employment discrimination”

Age Discrimination in Employment Act (ADEA)

- Enacted 1967
- Applies to all employers with more than 20 employees
(i.e., all public + private colleges / univs.)
- Prohibits discrimination on basis of age
(over 40 years of age)
- ... in employment
(i.e., hiring, discharge, compensation, terms, conditions, or privileges of employment)

Federal Non-Discrimination Statutes Applicable to Recipients of Federal Financial Assistance

- Title VI, Civil Rights Act of 1964
 - race, color, national origin
- Title IX, Education Amendments. of 1972
 - sex
- Section 504, Rehabilitation Act of 1973
 - disability

Federal Non-Discrimination Statutes Applicable to Recipients of Federal Financial Assistance

- “Federal financial assistance” =
defined by federal agency reguls.
“aid” (... as compared to “procurement”)
very broad definitions – examples:
 - grant or loan of funds for bldgs.,
scholarships, loans, wages, etc.
 - grant of real estate or personal property
 - sale, lease, use of federal property
 - provision of services of federal personnel

Federal Non-Discrimination Statutes Applicable to Recipients of Federal Financial Assistance

- “Program or Activity”
 - originally not defined by laws or agency regulations
 - Grove City College vs. Bell (U.S. Sup.Ct. , 1984) –
 - BEOG’s given narrow interpretation
 - non-discrimination statutes only applied to part of institution that received the federal financial assistance

Federal Non-Discrimination Statutes Applicable to Recipients of Federal Financial Assistance

- “Program or Activity” (continued)

Civil Rights Restoration Act of 1987

--- “program or activity” means:

ALL of the operations of :

- a dept., agency of a state / local govt.
- a school system
- a corporation
- a college, univ., or other postsecondary institution

Federal Non-Discrimination Executive Orders Applicable to Federal Contractors

- Executive Order 11246 – race, color, religion,
+ national origin
- Executive Order 11375 – sex
- Not statutes, but Presidential orders
- Attach conditions, or “strings,” to the awarding
of federal contracts or subcontracts for the sale
of goods or services to the Federal Government

Disability Non-Discrimination Statutes

Sections 503 & 504

of Rehabilitation Act of 1973

- Recipients of Federal Financial Assistance

■ Americans with Disabilities Act of 1990

- All employers with > 15 employees
- Places of "public accommodation"

Disability Non-Discrimination Statutes

- “disability” =
a physical or mental impairment that limits one or more major life activities
(walking, seeing, hearing, speaking, breathing, learning, working, performing manual tasks, caring for oneself, etc.)
- or, having a record of such an impairment
- or, being regarded as having such an impairment

Disability Non-Discrimination Statutes

- “qualified individual with a disability” =
an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of a position

Disability Non-Discrimination Statutes

- “reasonable accommodation” =
 - reached by interactive process between employer + employee
 - not required if would impose “undue hardship” on employer (determined by considering all employer assets)

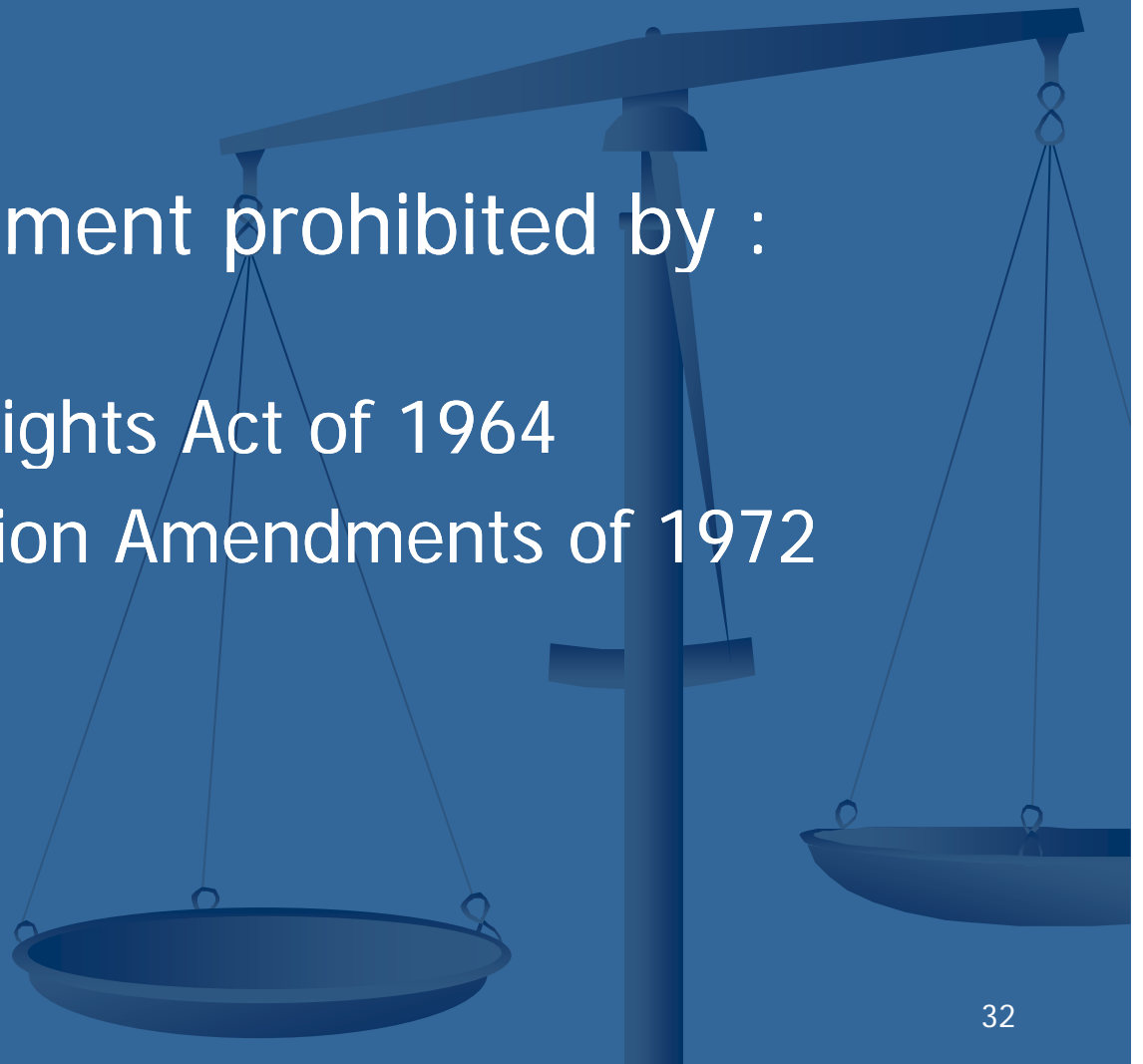
Harassment

- Origin :

- Sexual harassment prohibited by :

Title VII, Civil Rights Act of 1964

Title IX, Education Amendments of 1972



Harassment

- 2 types of harassment :
 1. Quid pro quo
 2. Offensive Environment (or Hostile Environment)



Harassment



- Quid pro quo :
(translation : “what for what”)
A form of sexual harassment:
 - When submission to unwelcome sexual advances or attention is made a term or condition of employment, or is used as a basis for employment decisions

Harassment



- Offensive Environment or Hostile Environment :

When verbal or physical conduct unreasonably interferes with an employee's performance or creates an intimidating, hostile, or offensive working environment

Harassment



- Offensive Environment or Hostile Environment :
 - applied to other personal characteristics protected by non-discrimination laws
 - e.g., harassment based upon race, religion, national origin, disability, etc. are also unlawful
- (no longer limited to sexual harassment)

Federal Constitutional Protection Against Discrimination

- Applicable to state actors / government
(e.g., colleges + universities found to be
state actors)

- 14th Amendment

Equal Protection clause:

"No state shall ... deny to any person within its
jurisdiction the equal protection of the laws."

14th Amendment Equal Protection



- In some ways narrower than federal non-discrimination statutes
 - applies only to state actors / govt.
 - not private actors, institutions
- In some ways broader than federal non-discrimination statutes
 - protects personal characteristics not covered by federal statutes
 - e.g., alienage, sexual orientation, age under 40, etc.

14th Amendment Equal Protection

- Classifications in laws must bear a sufficient relationship to a sufficient government interest
- Not a prohibition against all classifications in law (i.e., does not require that all laws be applied identically to different people)
- Concept : to treat different people as though they were the same could create injustices

14th Amendment Equal Protection

| Classification | Scrutiny | Relationship of Classification to Purpose of Govt Regulation | Govt. Interest in Accomplishing Regulation's Purpose |
|-------------------------------------------------------------------------------------------------------------------------|-----------------------|--------------------------------------------------------------|------------------------------------------------------|
| Economic Factors | Rational Basis Test | Rationally Related | Legitimate |
| Sex / Gender | Intermediate Scrutiny | Substantially Related | Important |
| "Suspect Classifications" - Race - National origin - Affecting fundamental rights secured by Fed. Constitution | Strict Scrutiny | Necessary / Least Restrictive | Compelling / Substantial |

University Policies / Procedures

- Equal Opportunity/Affirmative Action/
Non-Discrimination Policy
- Policy on Harassment
- ADA Policy (staff/faculty)
- Problem Solving Process



University Resources

- EEO Officers (Policy on Equal Opportunity / Affirmative Action / Non-Discrimination)
 - Provost (Faculty & Students)
 - Vice President for Finance & Administration (Staff)
- Human Resources
- Dean of Students Office
- Faculty Personnel Committee
- Harassment Policy Officer & “Informal Network” (Policy on Harassment)
- Ombudsperson
- Office of the General Counsel
- Bias Response Team (see *Confronting Intolerance at Lehigh* website)

Questions?

