

- **Apparent Authority:** A principals can be bound by the unauthorized acts of an agent if the agent appears to have authority to act
 - Principal sends signals to the third party that what the agent does binds the principal
 - There is *appearance of authority* that a third party could reasonably conclude
 - This arises when the principal creates an appearance of authority in an agent that leads a third party to conclude reasonably that the agent has authority to perform certain acts for the principal
 - Apparent authority cannot be created by an agent, but can exist only when the principal acts so as to lead a reasonably prudent third person to believe that the agent has certain authority
 - **Cove Management v. AFLAC (App. Ct., Ill., 2013):**
 - Galgano was an authorized agent for AFLAC insurance as an independent contractor
 - He rented office space from Cove and stated on the agreement that AFLAC would guaranty payment
 - When Galgano later defaulted on the lease, Cove demanded payment from AFLAC, which refused
 - Cove sued and lost; it appealed
 - **Decision:** Affirmed
 - Cove claims Galgano was an agent with apparent authority to enter into lease for AFLAC since his office was AFLAC branded
 - But there is no showing of such authority other than the claim made by Galgano to Cove, which was not verified with AFLAC
 - Anyone can claim to be authorized by anyone else, so Cove should have verified that AFLAC was in fact willing to guarantee the lease or that Galgano had authority to make such a lease that was binding on AFLAC
- **Acts for the Principal:** An agent's ability to transact business for a principal depends on the scope of authority given to the agent
- The scope of authority is determined from the oral or written expressions of the principal, the principal's conduct, or the customs of trade or business for which the agent is employed
- An agent can possess actual authority and apparent authority
- **Principal's Duties to Agent:**
 - **Cooperation:** with the agent to fulfill the agency purpose
 - **Compensation:** for services rendered
 - Unless agent agreed to work for free
 - **Reimbursement:** of "reasonable" expenses
 - No reimbursement for agents misconduct
 - **Working Conditions:** as required by law and to meet legal obligations
 - **Indemnify (pay back):** for legal liabilities incurred by the agent

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- Is the work generally done without supervision,
- Does the work involve significant skill,
- Does the employer provide tools,
- How long is the work relationship,
- How is the work compensated, and
- Is the person hired integrated into the employers labor force
- **France v. Southern Equipment (S. Ct., W.Va., 2010):**
 - France, age 16, was hired by Hensley, d/b/a Royalty Builders, during his spring break, to help with a roofing job
 - Southern hired Quality Metal Roof to put a new roof on its business building
 - Quality hired Hensley and supplied him the material
 - France fell off the roof and was severely injured
 - He sued Southern for exposing him to an inherently dangerous job
 - The trial court held for Southern
 - France appealed
 - **Decision:** Affirmed
 - Hensley (Royalty Builders) was clearly an independent contractor with respect to Southern
 - Southern did not control the work in any respect, it gave the contract for the job to Quality which subcontracted to Hensley
 - France was Hensley's employee who was not under the control of Southern
 - Even if Southern was aware that a teenager was on the job, the details were not under its control
 - Southern did not select the workers who did the installation for Quality and did not direct the work while in progress
- **Master-Servant or Employer-Employee:** This is an employment relationship where the servant (employee) is employed by a master (employer)
 - Master-Servant is old term still used, but employer-employee is used more
 - Employee's conduct is controlled by employer
 - The employee can also be an agent (distinction is sometimes blurred)
 - Employer is usually liable for contracts made by employee; may be responsible for some torts
 - The chief difference between an agent and a servant is that the servant generally does not have authority to act on behalf of the master in contractual matters involving third parties (this was more relevant when more workers were manual laborers with no duties with outsiders)
 - The master is liable for the torts of the servant if the tort is committed within the scope of the servant's employment
- **Employees as Servants and Agents:** Agents are allowed more discretion in deciding how to achieve a certain objective
 - A servant is subject to the close control of the master
 - Most jobs now are a blending of servant and agent status

Tort Liability for Employers and Principals:

- A principal is liable for the torts of an agent if the tort was authorized by the principal
- A principal is also liable for an agent's unauthorized torts as long as the tort occurred within the scope of the agent's employment
- **Principal Liability:** In imposing liability on a principal for the torts of an agent, the courts generally use one of two liability doctrines: vicarious liability and respondeat superior
 - *Restatement (Third) Agency* states that principals are liable to third parties for harm when an agent acts with actual authority or the principal ratifies the conduct and that conduct is tortious
 - if the principal directs the agents to do tortious acts, then the principal is liable (rare)
 - principal may give actual authority or instructs employee or agent to do a certain act. Thereby the principal may ratify agent's conduct
 - *Vicarious Liability imposed*
 - "Liability for unauthorized acts of the agent"
 - Was the agent acting, "within the scope of his/ her employment"?
 - Courts use the doctrine of *respondeat superior*
 - Employers may be liable for torts of employees due to negligent hiring or supervision
 - **Negligent Hiring:** liability may be imposed for intentional torts committed by an employment who is not acting in the scope of employment
 - Obligations to check background of an employee
 - May conflict with EEO rule
 - Restrict check to relevant issues
 - In some instances, can also be an obligation to check independent contractor for doubtful history, such as:
 - Child molester: should not be in routine contact with children
 - Bad driving record: should not be permitted to drive a company truck
- **Vicarious Liability:** Under this doctrine, a principal will have ordered an agent to undertake the tortious act
 - In this way, the agent is acting on behalf of the principal
 - Courts may consider several factors in determining whether an act was within the scope of employment
 - Some of the factors are:
 1. Whether the act was of the same general nature of those authorized by the principal.
 2. Whether the agent was authorized to be in the location at the time the act occurred.
 3. Whether the agent was serving the principal's interests at the time of the tort.
- **Respondeat superior** is a doctrine holding the principal liable if an agent's tortious act occurred within the scope of the agent's employment

- **Forms of Discrimination:**

- Among employment practices struck down are those that impose differential standards on the basis of race or sex, such as not give women the chance to be traveling sales representatives
- Compensation differentials, including fringe benefits and working conditions, may not be based on protected class status
- Segregation is obviously illegal, but can appear in the assignment of employees based on perceived racial preferences of customers
- Unequal treatment in hiring and promotion is illegal
- To make working conditions intolerable so someone quits is called constructive discharge (as in the *Harris Forklift* case), and is a form of illegal harassment
- While there are many bases for claims, they fall into two major categories:
 - Disparate treatment (intentional discrimination) or
 - Disparate impact (unintentional discrimination)

- **Elements of a Case:**

- For a court to take a case:
 1. Plaintiff must establish a *Prima Facie Case*
 2. Burden then *shifts* to defendant to present evidence that claim is untrue
 3. After employer offers non-discriminatory reason for employment decision, the burden *shifts back* to plaintiff to show that defendant had illegal motives

- **Disparate Treatment:** This is illegal discrimination that is shown to be intentional

- **Disparate Impact:** (unintentional discrimination)

- **Plaintiff Must Establish a Prima Facie Case:**

- This test applies for all aspects of employment, so persons denied promotion or fired must meet the same criteria
- Courts apply a four-part test, developed in *McDonnell-Douglas Corp. v. Green*, to decide if a prima facie case of intentional discrimination exists
- This test asks if:
 1. The person suing belongs to a protected class;
 2. If the person applied for a job and met the job qualifications;
 3. If the person was denied a job; and
 4. If the employer continued to seek job applicants with similar qualifications to the person suing

- **Burden Shifts to Defendant:** If plaintiff meets the test, burden shifts to the employer to provide a “legitimate, nondiscriminatory reason” for its actions; or plaintiff wins

- **Burden Shifts to Plaintiff to Attack Defense:** If the employer provides a reason, plaintiff has the burden of proving that employer’s explanation is only a pretext for disguising discrimination

- Employer’s intent does not matter as much as evidence of how discrimination worked in practice

- Example: one dock worker over 400 lbs. was dismissed—morbid obesity is not an impairment
 - He could not go up and down ladders as needed
 - Could not perform job
- **Considered Disabled:** Even if a person is not impaired, if other people think the person is disabled, then the person is protected by the ADA
 - One is “regarded as” disabled if she
 - 1) has an impairment that does not limit a major life activity, but is treated as if that is the case;
 - 2) has an impairment only as a result of the attitude of others; or
 - 3) has no impairment but is treated by the employer as if impaired
- **Pre-Employment Guidance:**
 - See ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations
 - ADA prohibits employers asking disability-related questions or requiring medical exams before the job is offered
 - What you may and may not ask of applicants must related to the job
 - If disability is obvious or applicant volunteers information, questions may be asked about *reasonable accommodations*
 - Once a job offer is made, an employer may ask:
 1. For documentation of a disability, and
 2. More questions about *reasonable accommodations*
 - If physical exams given to new employees, similar exams must be given to all employees in same job category
 - Results must be kept confidential
 - Exams must be related to ability to do the job—not to screen out employees with potential health problems
 - When applicant is qualified for employment, may need a professional assessment of limitations and accommodations
- **Illegal Questions During a Job Interview:**
 - Have you ever been treated for mental health problems?
 - Have you ever filed for workers’ compensation benefits?
 - Do you have a disability to interfere with ability to perform the job?
 - How many sick days were you out last year?
 - Have you ever been treated for drug addiction or drug abuse?
 - Past addiction is a disability; current use of illegal drugs are not
 - Alcoholism is protected disability—applicant may not be asked re: drinking habits (can ask if person has been arrested for DUI)
 - Other questions: can you ask?
 - Age? No
 - Married? Children? No
 - Sexual Preference? No
 - Been in therapy? No

Vizcaino v. Microsoft (120 F.3d 1006 1997):

- Plaintiffs: Class Action
 - Plaintiffs worked for Microsoft as independent contractors at various times
- Defendant: Microsoft
 - Eventually, Microsoft determined that Π's were actual employees of the company
 - Concede that the workers (Π's) qualify as common law employees
- Ruling: Ruling for Π's
- Takeaways:
 - The court is/ will construe it as Microsoft made an honest mistake in labelling the workers independent contractors/ not giving them the rights of regular employees when they were, in fact, regular employees
 - Because the Workers were actual employees, they are entitled to the benefits of both plans

Laws Against Discrimination:

- Civil Rights Act of 1964 (Title VII)
- Various federal and state laws protecting persons in employment and other situations against discriminatory treatment. Including:
 - Race and color
 - National-Origin
 - Religion
 - Sex (Gender)
 - Equal Pay or Equal Work
 - Age
 - Disability
- ***Bostock v. Clayton County:***
 - Georgia, a gay man, argued that he was fired because of his sexual orientation
 - The US Court of Appeals for the Eleventh Circuit dismissed Gerald Lynn Bostock's case over a 1979 precedent, even though several Supreme Court cases since then have undermined that ruling, including a case that recognized "sex stereotyping" as a form of sex discrimination as well as a case that recognized **same-sex sexual harassment as sex discrimination**
 - The Eleventh Circuit insisted that "sexual orientation" enjoys no recognition under Title VII's employment protections on the basis of sex
 - Meanwhile, this past February, the US Court of Appeals for the Second Circuit arrived at the exact opposite conclusion in ***Zarda v. Altitude Express***
 - In that case, the appellate court found that skydiving instructor, Donald Zarda, now deceased, was illegally fired for being gay under Title VII
 - The Trump administration had argued otherwise