This is a very important concept that you need to understand.  You will see the terms "disparate impact" and "disparate treatment" throughout the notes.  But I am posting it right here and upfront so no one misses it.

**Two Theories of Discrimination**

If an  EE is claiming discrimination based on one the Title 7 protected categories the EE must prove the discrimination.

**Proving Discrimination:** There are twoways (or theories) to provediscrimination (must use one)

**Disparate Treatment** (when the ER says, for example, I will not hire men” Note: Its is clear from the company policy statement who is being discriminated against -- men)

**SHIFTING BURDEN OF PROOF**: When pursuing this theory of discrimination the burden of proof shifts back and forth between EE and ER

EE has first burden and must show that discr is possible, even likely (called “prima facie”).

1. EE has identified a category of discrimination (race, gender, age etc – this is called the “protected category”)

                2. EE is qualified for the job

                3. EE had a “adverse decision”  (did not get the job, raise or was fired)

                 4. ER hired someone who was not of the protected category

IF the EE show these four things (1 thru 4 above) the burden shifts to the ER.

**ER must show that he has a legal reason for firing EE.  Those options can be:**

                1. Not true – examples: EE not qualified,

                2. Business necessity:  example: I would lose money if I hired a man

Note: Not legal to say my customers don’t want a man i.e. insist I discriminate

                 3. Bona Fide Occupational Qualification (BFOQ) --  Eg.  I need to hire a woman to model women’s clothes or I can only hire a man to work in the men’s locker room.

**If the ER offers legal reason then the burden of proof shifts back to the EE to show**

EE must show that Ers reason for firing is a “pretext” or a lie.

The second form or theory is **disparate impact –** is neutral **–** meaning it is not obvious from the policy used to screen EEs who is being discriminated against.

Example: No people under 5’ 9” and 175 lbs will be hired as security guard.  It is not clear from this policy (or screening device) who is being discriminated against.  But the impact of this policy is that significantly fewer women are being hired because few women are 5’9” 175 lbs.

Once again there are **shifting burdens of  proof** between the EE and the ER.  EE goes first.

1. EE must

a.     identify the policy that is keeping them from getting hired/fired./ or from getting a raise. etc.  Called “prima facie

b.     Apply 4/5ths rule to show that   the policy REALLY discriminated against the protected category (see below)

2.     Er must now show a legal reason for the policy

a.     Business necessity – example: I need big people to be a security guard.

b.     BFOQ

Note: In arguing business necessity the ER must show that policy criteria is consistent with the **fundamental essence of the job.**  For example the ER may say the essence of being a security guard is force or intimidate the jailed inmates.  I need big people to do that.  The court would likely respond that no the essence of the job is not to intimidate or force the inmates.  It is to control the inmates. Control can be done with a gun, stun gun a taser, by observing the inmates etc.  You do not have to be big to do that.  In this case the business necessity argument fails and the EE wins.  More likely the court will say “well, maybe” then the burden of proof shifts back to the EE.

3.     EE must then show that there is a less discriminatory way to meet the Er objectives than his current discriminatory policy.

**4/5ths rule:** Ers hiring policies do not have to result in the exact number of men and women/blacks, whites and Latinos hired.   But it cannot be an extreme difference. To determine if it is significant you use the 4/5ths rule. EXAMPLE

a.     100 men and 100 women apply for the security job above.

b.     90 men meet the height and weight (or pass the test) criteria but only 50 women.

c.      4/5ths (or 80%) of 90 is 72.

d.     Since less than 72 women met the policy requirement the Crt will require the ER offer a legal reason (such as business necessity) for that hiring policy.

If 75 women (or 80% or more) had met the height and weight criteria then they ER would not have to justify the height and weight policy.