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How affirmative is affirmative?

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How Affirmative is Affirmative?

by

Shu-Fen HSU

Thesis submitted to the faculty of the Graduate School
of New Jersey Institute of Technology in partial
fulfillment of the requirements for the degree of
Master of Science in Organizational and Social Sciences

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ABSTRACT

Title of Thesis: How Affirmative is Affirmative

Shu-Fen HSU, Master of Science in Organizational and Social Sciences, 1990

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Since January 1989, the US Supreme Court has launched a major offensive on affirmative action and civil rights law. The biggest target of the attack is Title VII of the 1964 Civil Rights Act, which bars employment discrimination. As a result, access to private and public contracts for all but the largest black businesses will virtually be nonexistent. For black ,,it means decreasing employment and mobility opportunities in the workplace. In addition, complainants will have a more difficult time bringing forth and winning discrimination suits. Racial tension now has a stronger - although subtler - presence in the US. The ascent to upper management, in many instances, has been blocked for minority executives.

This study concerns with the US Supreme Courts' significant decisions and antidiscrimination issues in the employment context. Within these decisions, however, lurk unexamined pitfalls for employers, and the decisions fail to support employer activities that provide the best defense against any type of discrimination claim. At the same time, the decisions will encourage additional litigation, to which employers will respond by retaining outside counsel.

ACKNOWLEDGEMENTS

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Introduction

Affirmative action programs usually involve giving preference in hiring or promotion to qualified female or minority employees. Employees who are not members of the group being accorded the preference (usually white male) may be at a disadvantage for hiring or promotion. Recall that McDonald v. Santa Fe Trail held that Title VII protected every individual employee from discrimination because of race, sex color, religion, or national origin. Is the denial of preferential treatment to employees not within the preferred group (defined by race or sex) a violation of Title VII?

Title VII does not require employers to enact affirmative action plans; however, the courts have often ordered affirmative action when the employer has been found in violation of Title VII. The courts have consistently held that remedial affirmative action plans-plans set up to remedy prior illegal discrimination-are permissible under Title VII, because such plans may be necessary to overcome the effects of the employer's prior illegal discrimination. But if the plan is a voluntary one, and the employer has not been found guilty of prior discrimination, does it violate Title VII by discriminating on the basis of race or sex?[1]

Employers increasingly are adopting affirmative action plans to correct real or perceived racial or sexual imbalances in the workplace. However, many are not aware of the legal risks associated with informal affirmative action

programs. In 1985, a federal district court ruled that the District of Columbia violated Title VII of the Civil Rights Act of 1964 when its city administrator selected 2 black fire batallion chiefs as deputy fire chiefs, thus bypassing 8 eligible Caucasian batallion chiefs. The court found that the promotions were made pursuant to the city administrator's personal vision of affirmative action. Race-conscious or gender-conscious employment decisions cannot be carried out on an informal, ad hoc basis. Employers that voluntarily wish to increase their representation of women and minorities should present a well-thought-out, written plan that meets the requirements of the court rulings as well as Equal Employment Opportunity Commission guidelines.

The boundaries of permissible affirmative action remain uncertain after the Reagan administration years. Reagan's efforts to limit Title VII remedies and constitutional relief exclusively to victims of discrimination have suffered a stinging rebuke. The case of Johnson versus Transportation Agency (1987) reaffirmed the case of United Steelworkers versus Weber (1979). Local 28 of the Sheet Metal Workers' International Association versus Equal Employment Opportunity Commission (1986) refused to extend the case of Firefighters Local Union Number 1784 versus Stotts (1984). Both the cases of City of Richmond J. A. Croson Co. (1989) and Wygant versus Jackson Board of Education (1986) recognize that affirmative action can be predicated on minority underrepresentation. In several of

the 1986 and 1987 cases, the Supreme Court ridiculed the Reagan administration for departing from past governmental efforts in support of affirmative action.[2]

Three 1989 Supreme Court cases have provided a strong indication of the Court's attitude toward affirmative action as a variable remedial concept. In City of Richmond versus J. A. Croson Co., the Court addressed the constitutionality of a Richmond, Virginia, ordinance that required primary contractors that were awarded city construction contracts to give at least 30% of the contract to minority subcontractors. In Wards Cove Packing Co. versus Antonio, Alaskan salmon cannery workers charged that the employment practices of 2 Alaskan canneries resulted in a lack of minority group members in skilled positions.[3] In Martin versus Wilks, a group of white firefighters from Birmingham, Alabama, challenged an affirmative action settlement that was intended to increase the number of minorities hired and promoted in the Birmingham Fire Department. Although the decisions reached in the three cases do not necessarily indicate that affirmative action programs will be eliminated, they reflect an increasing dissatisfaction with current affirmative action programs.

Footnote

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Chapter 1

THE LEGAL BASES FOR AFFIRMATIVE ACTION

I. TITLE VII[1]

Title VII of the Civil Rights Act of 1964 is the federal law that protects employees against discrimination based on race, color, religion, sex or national origin. It is the most widely-used employment discrimination statue, generating 40,000 claims per year, primarily because of the scope of the employment classes which are protected.

As every employer should know by now, powerful federal legislation proscribing discrimination in employment has been in effect since 1964. While antidiscrimination legislation has existed since the Civil Rights Act of 1964. Very simple, Title VII of that act prohibits discrimination in all aspects of employment on the basis of race, color, religion, sex, or national origin.

Title VII of the Civil Rights Act is enforced by the Equal Employment Opportunity Commission (EEOC). EEOC's mission is to investigate charges of discriminatory practice and to prosecute, if necessary, violations of Title VII. The Commission also has the authority to initiate investigations and, if necessary, charges of discriminatory practice, and many dramatic and expensive settlements have resulted from the exercise of this power.

1. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

To the surprise of many, **Title VII** says nothing about numbers, goals, and timetables. To put it in some what oversimplified terms, Title VII merely says that discrimination in employment on the bases of race, color, religion, sex, or national origin is illegal and that violations can be prosecuted and corrected under law.

What is not well understood is that "employment" means more than recruitment, application, and hiring. Under Title VII, employment includes compensation, promotion, termination, benefits, work assignment, career compensation, shift assignment, and virtually any company activity which affects the status, income, advancement, or work environment of any individual employee or class of employees. Discriminatory practice, intentional or inadvertent, must be eliminated from each of these aspects of the employment process. Under Title VII, it is the employer's implicit obligation to discover discriminatory practice and eliminate it. The employer is also implicitly obliged to "make whole" all persons who have been denied equal employment opportunity. This may require promotion (when openings permit), back pay, special training programs, or other corrective actions.

2. THE EXECUTIVE ORDERS AND THE REVISED ORDERS

What is implicit in Title VII is explicit in Revised Order No. 4. The employer who is a federal contractor or licensee is explicitly instructed to conduct a utilization analysis and write an "Affirmative Action Plan" explaining how he will (a) correct any deficiencies discovered in the process of utilization analysis, and (b) attain a compliant posture. This, of course, will include the specification of actions intended to make aggrieved parties, or "affected classes," whole.

Utilization analysis require the employer to:

- item determine by race, sex, and sex-within-race the current work force distribution (vertically and horizontally, for all units and subunits of the organization) of minorities and women in the organization.
- item compare his employment of minorities and women with their availability in the external labor market(or markets).
- item determine, through the above comparisons, where his employment (again, across all units and subunits of organization) is not statistically consonant with the incidence of minorities and women (who possess the requisite skills for various types and levels of jobs) in the labor market.

- item establish Affirmative Action Plan (AAP) goals and timetables to attract and employ minorities and women with the requisite skills at a rate compatible with the rate at which job openings or opportunities will occur within the organization (through expansion or turnover).
- item conduct an analysis of the applicant flow process, recruitment effort, placement process, promotion process (job to job, pay grade to pay grade, etc.), compensation process, and termination process (voluntary and involuntary) to determine whether the protected classes participate equitably in these processes. These analyses depend upon historical data. Revised Order No. 4 requires federal contractors to retain at least six months' history on each of these aspects of the employment process.)
- item where statistical disparities are found investigate to determine whether they are discriminatory; if so, include in the AAP the steps intended to eliminate the practice and to relieve ("make whole") the affected persons or classes.

In summary, Revised Order No. 4 tells the employer to: determine where he is in his current utilization of the protected classes; determine where he should be, through comparison with the appropriate external labor market and analysis of his employment process, and determine how he

intends to go from where he is to where he should be by creating an AAP.

II. THE AGE DISCRIMINATION IN EMPLOYMENT ACT[2]

Enacted in 1967, the Age Discrimination in Employment Act (ADEA) seeks to promote the employment of older persons based upon their ability instead of their age. It originally prohibited discrimination in employment against persons between the ages of 40 and 65. In 1978, the law was amended to prohibit discrimination against those between the ages of 40 and 70.

The reason the Age Discrimination in Employment Act (ADEA) was passed in 1967 is best described by the law itself. The purpose, as identified in Section 2(b), is to "it promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in the employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

As with Title VII, the ADEA prohibits an employer from discrimination against any individual with respect to compensation , terms, conditions, or privileges of employment if that individual is 40 years of age or order. This protection encompasses nearly every type of employment criteria in existence. In addition to the protections provided to Title VII litigants, however, Congress supplied

additional ammunition to its aged constituents. First, it provided individuals filing under the Act with the opportunity to secure a jury trial. Second, it allowed not only back wages as part of a damage award, but also the possibility of double damages if the violation is determined to be willful.

1. CONGRESSIONAL FINDINGS AND THE PURPOSE OF THE ACT

Congress set forth four major findings as a preamble to the body of the Act:

- In the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to retain employment when displaced from job;
- The setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
- The incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability, is high among older worker; their numbers are great and growing; and their employment problems grave;
- The existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in

commerce;

The stated purposes of the Act are (a) to promote employment of older persons based on ability rather than age, (b) to prohibit arbitrary age discrimination in employment, and (c) to help employers and workers find ways of meeting problems arising form the impact of age on employment. Thus the entire emphasis is not on enforcement activities since Section 3 of the Act requires the establishment of an education and research program to assist both employees and employers.

2. FORBIDDEN DISCRIMINATE[3]

The prohibition of ADEA parallel those under Title VII.

Employers of 20 or more persons are forbidden to do any of the following:

* Fail or refuse to hire, discharge, or otherwise discriminate against any individual because of his age with respect to compensation, terms, conditions, or privileges of employment
* Limit, segregate, or classify an employee in any way that would deprive him of job opportunities or adversely affect his employment status because of age
* Reduce the wage rate of an employee to comply with the Act
* Indicate any "preference, limitation, specification, or discrimination" based on age in any notices or

advertisements for employment

The prohibitions also apply to employment agencies serving covered employees and labor unions with 25 or more members.

Employment agencies are forbidden to fail or refuse to refer individuals for employment because of age. Unions are forbidden to expel or exclude persons from membership on the basis of age.

3. EXCEPTIONS

As under Title VII, ADEA provides for a number of exceptions. The prohibitions do not apply if based on one or more of the following:

* A "bona fide occupational qualification" (BFOQ) that is reasonably necessary to the normal operation of the business.
* A differentiation based on reasonable factors other than age.
* A bona fide seniority system or employee benefit plan, provided that no such benefit plan shall excuse the failure to hire any individual because age.
* Discharge or other disciplinary action against an individual for good cause.

III. THE EQUAL PAY ACT[4]

No employer having employees subject to any provisions of this section shall discriminate within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working and which are performed under similar working conditions, except where such payment is made pursuant to (a) a seniority system (b) a merit system; (c) a system which measures earnings by quantity or quality of production: or (d) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Put into the context that motivated this legislation, these words mean that employers cannot pay women less than they pay men when both are performing equal work on the employer's premises, except when the greater pay to men(or women) is justified by a widely accepted standard such as seniority, merit, or output.

1. THE ACT'S COVERAGE

The Act's coverage is coextensive with the coverage of the minimum wage provisions of the FLSA (Fail Labor Standards Act). In addition to individual employee coverage, all employees of a covered enterprise are covered by the Act. An "enterprise" is an employer who has two or more employees engaged in commerce or in the production of goods for commerce or in the production of goods for commerce. The 1974 amendments to the FLSA, for the first time, made the Act applicable to employees of the federal, state and local governments and their agencies. The Act also applies to labor organizations which cause or attempt to cause such an employer to discriminate against an employee in violation of the Act.

In analyzing any FLSA case, once it is determined that coverage exists, the numerous exceptions to the FLSA must be examined to determine whether the respondent would be exempt. While the exemption cannot be considered in detail here, one major exemption, for employees employed in a "bona fide executive, administrative, or professional capacity," was made inapplicable in equal pay cases under in 1972 amendment. Another major exemption applies to retail or service establishments, but as of January 1, 1977, this exemption will apply only to establishments which are not part of covered enterprises, thereby becoming far less significant.

2. WHAT IS "ESTABLISHMENT"?

The Equal Pay Act requires that comparisons be made only between wages paid employees of the opposite sex in the same establishment. There is no need to compare rates paid in different establishments.

So the definition of an "establishment" is critical to the application of the equal-pay standard. Although "establishment" is not expressly defined in the Equal Pay Act, it has the same meaning as it has under other sections of the Fair Labor Standard Act.

As defined in the interpretative bulletin, "establishment" refers to a "distinct physical place of business." rather than to "an entire enterprise or business," which may include several places of business.

On this basis, the Wage-Hour Division found that two divisions that were semi-autonomous were separate establishments where:

* Each was physically separated from the other's activities;
* They were functionally operated as separate units with separate records and separate bookkeeping;
* There was no interchange of employees between the units-except on a minimal or emergency basis. (Wage-Hour Opinion Letter, June 7, 1966)

3. WHAT IS EQUAL RESPONSIBILITY

The degree of accountability required, with the emphasis on the importance of the job obligations, is the test for application of the "equal responsibility" standard. This test would be met, according to the Wage-Hour Division's interpretative bulletin (FEP 401:483), in such situations as the following:

* If one in a group of employees is required to assume supervisory responsibilities in the absence of a regular supervisor. But minor differences would not justify a pay differential.
* If one sales clerk is designated to determine whether to accept customer's personal checks, there would be a responsibility justifying a differential.

But minor differences, such as the responsibility for turning out the lights or locking up at the end of the day would not justify a differential.

4. STATE LAWS

There are equal - pay laws in 37 of the states. The U.S. Act provides that where both the federal and state laws apply the federal equal-paystandard is controlling. But it adds that this will not excuse noncompliance with any other state or other law establishing standards higher than those provided by federal law.

Some state overtime laws require that women be paid overtime rates for work in excess of a specific number of hours in a workweek or workday. To comply with the Act, the employer must pay men who perform equal work in the same establishment the same overtime premium when they work such excess hours.

Although the use of different methods to compute overtime pay for men and women would not, in itself, be a violation of the equal-pay standard, the Division has stated that the results of such computation must in the end provide equal pay for equal work. (Wage-Hour Opinion Letter, December 14, 1964)

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Chapter 2

Equal Employment Issues

Age, Sex, Race, National Origin and Religion discrimination

I. EQUAL EMPLOYMENT OPPORTUNITY IN AMERICA

The past two decades have witnessed an explosion of governmental laws and regulations which circumscribe organizational activities. Despite the increase in a body of literature dealing with organizational and their environments, the importance of regulation as a distinct sector of that environment has not been emphasized until relatively recently.

The personnel function in particular has been affected by much of this new regulation. For example, wage and salary administration has been constrained by the Equal Pay Act of 1963, benefits by the Employee Retirement Income Security Act of 1974 (ERISA), and so forth. The most important legislation affecting the personnel function is the Civil Rights Act of 1964 and the creation under the Act of the Equal Employment Opportunity Commission (EEOC).

1. EEO PRIOR TO 1964

Prior to 1964, four other major categories of law existed that sought to provide some protections against discrimination in employment: (1) constitutional amendments,

(2) nineteenth-century civil rights acts, (3) executive orders, and (4) state and/or local fair employment practice laws (FEP).

The Civil Rights Acts of 1866 and 1871 also provide some limited protections against discrimination in both the public and private sectors of employment. Interestingly, however, the applicability of these earlier Acts by the courts to employment decisions has occurred only since the passage of the Civil Rights Act of 1964.

These earlier Acts also contain three important limitations regarding their applicability. First, although Section 1981 covers the acts of states and local governments, the courts have limited its applicability to federal agencies to instances where Title VII does not apply. Second, although this section covers both private and public employers, it forbids discrimination based on race and not on sex. Finally, the applicability of both laws to cases involving national origin discrimination has not yet been fully resolved by the courts.

Executive orders prohibiting discrimination by federal contractors date back to President Franklin D. Roosevelt and E.C. 8802 on June 25, 1941. This order established the Fair Employment Practice Committee and established a tradition followed by every President since: issuing orders prohibiting discrimination by federal contractors. It was not until Lyndon Johnson issued Executive Orders 11246 and 11375, however, that discrimination based on sex was added

to the list of prohibited practices and that affirmative action programs were required of federal contractors. Today the Office of Federal Contract Compliance Programs (OFCCP) has responsibility for assuring compliance by federal contractors, their subcontractors, and labor unions. However, OFCCP's powers are restricted to the activities of those organizations involved in federal contracts.

The above discussion has highlighted major shortfalls of protective legislation prior to 1964. First, prior to World War II, there was little concern for fair employment practices in private industry: FEP laws were non-existent, EEO was not required of government contractors, and constitutional challenges were limited to the public sector.

Second, the changes, which began during the 1940's, were far from uniform in their applicability. FEP laws have been slow to develop, executive orders were limited in applicability, and the earlier Civil Rights Acts had not yet been interpreted as applying to employment decisions. At the time of the passage of Title VII of the Civil Rights Act of 1964, a large percentage of workers did not possess protection against acts of discrimination.

Third, the issue of sex discrimination has been a relatively recent development. During debate on the Civil Rights Act of 1964, inclusion of sex as a "protected class" was added initially in an attempt to block passage of the Act. As a result of E.O. 11375 and other increased protections against acts of discrimination in employment.

Finally, prior to 1964, enforcement of existing EEO legislation had been weak. Lack of enforcement was exacerbated by the assumption that the complainant would bear the burden of proof under Title VII and that only firms with overt discriminatory employment practices would be challenged under the "pattern and practice" provision of the Act. Such perceptions, however, were soon to be dispelled by both EEOC and court interpretations of the Civil Rights Act of 1964.

2. THE CIVIL RIGHTS ACT OF 1964

The Civil Rights Act of 1964, as amended, was passed in 1964, with an effective date of July 2, 1965. Title VII of the Act prohibits all discrimination in employment decisions based on race, religion, sex, color, and national origin. As originally passed, the Act contained an almost "fatal flaw": in establishing the EEOC as the "watchdog" of the Act, Congress failed to provide the agency with powers to bring suit against private employers. Instead, the agency functioned as an investigatory or conciliation service, seeking voluntary complicance.

These restrictions on access to the courts reinforced the beliefs of many employers that little would change under the law. In response to this issue, Congress amended Title VII in 1972 by enacting the Equal Employment Opportunity Act. This amendment included a number of important changes,

including the rights of EEOC to initiate lawsuits against organizations. In addition, the Act applies to employers and labor unions with 15 or more full-time employees/members and extends coverage to state and local governments. Finally, religious organizations were granted preferences in the hiring of members of particular religions for all positions but could not discriminate against applicants based on other protected categories.

Interpretations of the law by federal agencies and the courts were inconsistent. The four agencies primarily concerned with issues of EEO were: the Department of Justice, the Office of Federal Contract Compliance Programs (Department of Labor), the Civil Service Commission, and the EEOC. These four agencies have issued numerous different interpretations of the Act in the form of departmental guidelines on employee selection procedures: (EEOC in 1966 and 1970; OFCCP in 1968; and Federal Agency Guidelines in 1976). It was not until 1978, however, that these four agencies cooperated in issuing uniform guidelines, which will be discussed later.

Secondly, all agency interpretations are not law until decided in the courts; and, from 1964 to 1971, the lower courts required proof of "evil intent." Since such intent is difficult to prove, there were relatively few convictions in the first few years following the passage of Title VII. This question was not addressed by the United States Supreme Court until Griggs v. Duke Power Company, possibly in an

attempt to give the lower courts maximum discretion in developing case law in a highly controversial area. In Griggs, the Court rendered a decision on whether intent to discriminate had to be proven in order to show a violation of Title VII. This decision continues to be the basis of current civil rights law.

Duke Power had openly discriminated on the basis of race prior to 1964 in the selection and assignment of personnel. Blacks were hired to fill lower paying labor jobs, and whites were assigned to other higher paying positions. The firm instituted a requirement for a high school diploma for all positions except labor in 1955, the firm instituted still another requirement: satisfactory scores on two tests in addition to the high school diploma for all department except labor.

Duke Power could not show any business necessity for the job requirements, and the Court ruled that the firm was in violation of Title VII. The importance of this decision for current EEO interpretation is: if a plaintiff shows that an employment procedure has had adverse impact on a protected class, a prima facie case is established, and the defendant must then show the practice is job related, and, if the practice is not job related, the plaintiffs win.

3. UNIFORM GUIDELINES

At President Carter's insistence, a uniform procedure for evaluating compliance with the Civil Rights Act was finally established. In addition to the Guidelines, these same agencies issued "Questions and Answers," in order to assist firms in the proper interpretation and implementation of these requirements.

Adverse impact is defined as " a substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group." In order to measure adverse impact, the Guidelines provide a simple statistical tool which may be applied to analysis of applicant pools: the 4/5th or 80 percent of the highest selection rate in the pool, or else the firm is said to have adverse impact upon the affected protected class.

Two exceptions to the 80 percent rule exist. First, applicant pools may be so small as to make the numbers involved statistically insignificant. In this case, other measures of discrimination may be applied, such as the overall posture of the firm in employing minorities and females. Second, the firm may have discouraged or "chilled" minority or female applicants in the past. thus, the applicant pool in such situations may not reflect the true makeup of qualified applicants in the community.

At the present time, both agency and court interpretations of discrimination continue to follow the principles set forth in Griggs and later developed in the

Uniform Guidelines. Discrimination is understood in terms of adverse impact, without the need to prove invidious intent or motive on the part of the employer. Specific ways of measuring such impact have been provided in the 4/5th or 80 percent rule, and the courts continue to apply this statistical tool in the analysis of applicant pools.

The past decade of agency interpretations and court decisions also point toward the future and to apparent emerging trends of equal employment opportunity in America. Although federal agencies and the courts may be subject to political changes and resultant alterations in directions, the past is still the best predictor of the future. Having discussed where EEO has been, we now turn our attention to three areas of emerging trends for the decades of the 1980s and 1990s.

II. ISSUES OF DISCRIMINATION

> **Discrimination is a phenomenon which is so pervasive in all human societies that there is no doubt at all that it exists. It is not, however, a unitary phenomenon but a complex of a number of related forms of human behavior, and this makes it not only hard to define but frequently difficult to comprehend fully.**
> --K.E. Boulding.

As the above quotation implies, there are a large number of reasons for the existence of wage differentials among different groups in the labor force, such as men and women or blacks and whites.

Employment discrimination is illegal in America. Included in that general prohibition is virtually every type of employment practice. Although it is impossible to list every possible employment situation that may prove to be unlawful-there have been 15,000 pages of court decisions since Title VII was enacted-we can draw some familiar outlines of legal liabilities.

Section 703(a) of Title VII combined with Section 4(a) of the Age Discrimination in Employment Act reads as follows:

It shall be unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or other-wise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, or age (40 to 65); or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race,

color, religion, sex, national origin, or age (40 to 65).

III. BASIC OF DISCRIMINATION

Some people tend to believe that "fair employment" laws prohibit unfairness in employment. they do not. Discrimination laws were not enacted for such a broad general purpose, but rather to rectify a long history of discrimination against certain groups in our society. Knowing the particular nature and significance of the basis of discrimination will therefore greatly assist the reader in dealing with the subject matter as a whole. As the Supreme Court stated in **Griggs v. Duke Power Company:**

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.

After all, it was not the persecution of white men that motivated Congress to enact Title VII. Those employers who do not fully acknowledge this past and present purpose of the law will have difficulty in seeing how many common personnel practices may be viewed as unlawful.

AGE Discrimination

The Age Discrimination in Employment Act was enacted in 1967, and amended in 1978 and 1986, to promote employment of older persons based on ability rather than age. Age discrimination does not take individual characteristics into account, but rather only the qualities derived from group membership.

As individuals age, hearing and vision tend to decline. the speed of reaction time also decreases, although this can be compensated for to some degree. For example, a middle-aged driver may start slowing the car before a young driver would. Problem-solving, recent memory, and abstract reasoning tend to be less acute with age. However, individual differences do exist.

Age-related differences at work include positive differences in job attitudes. Older employees tend to have higher job satisfaction, and age and job involvement appear to be positively correlated. Lower turnover suggests the older worker is more committed to the organization.

The older worker tends to have a lower rate of avoidable absence than does the younger worker. the two groups also differ in the seriousness of the work accidents in which they are involved. the younger workers' accidents are less severe and are related to lack of caution and inexperience, whereas the older group is likely to have accidents due to sensorymotor skill decline.

With all of these differences, it is not surprising that some need for protection of the older employee is needed. Legislation attempts to see that employees are not discriminated against on the basis of age, but rather considered on an individual basis. A large group of employees is affected; currently, about 21 percent of the U.S. labor force is between the ages of 40 and 70.

1. The Legislation

Composite cases. The typical employee who files an age discrimination suit (generally under ADEA) is a managerial or professional employee (nearly 75% of the time) and equally as likely to be employed in manufacturing, service or government organizations. The age of the litigants is generally over 50.

The major personnel decision areas in dispute are terminations (nearly half the cases), mandatory retirement and internal movements (usually demotions). Of those cases that do reach litigation, organizations have prevailed in half of the cases, with another 18% split between employee and employer.

Interestingly, business necessity is used sparingly in defense of ADEA suits. (Roughly one-fourth of the time.) However, indications are that companies are more likely to raise this issue in the future.

The use of business necessity as a defense slightly increases an organization's chances of winning a suit. In cases where it has been used, the organization has prevailed 60% of the time versus 50% overall.

EEOC involvement. EEOC involvement, as might be expected, has significantly affected the outcome of court decisions. Our study shows that the EEOC was involved in less than one-fourth of all ADEA-related suits. However, the employer won only 21.6% of the time (versus 50% overall). It appears that the EEOC chooses cases it feels it has a strong likelihood of winning in order to build up an impressive track record.

Personnel decision areas. Of the 301 cases analyzed, approximately two-thirds were involved with substantive decisions. The 106 cases involved with procedural issues were primarily concerned with such issues as timeliness of filing and whether the employee showed the possibility of a prima facie.

When performance was raised as an issue (usually in conjunction with termination or demotion cases), the use of performance data significantly improved the employer's prospects of winning.

Mondatory retirement and pension-related cases had a greater likelihood of being decided for the employee than did other issues.

2. LABOR FORCE PARTICIPATION PATTERNS OF OLDER WORKERS

Since the creation of the social security program in the 1930's, age 65 has come to be viewed as the time when most persons could be expected to retire. Although many people to leave the labor force on or around their 65th birthday, the reality is not nearly as clear-cut as the traditional view might lead one to expect. Substantial numbers of men and women work well beyond their 65th year, while the members of another large (and growing) group relinquish employment between ages 55 and 65, or even earlier.

For example, about 30 percent of the men aged 65 to 69 years in August 1978 were still in the labor force, as were nearly 15 percent of women of similar age (table 3-1). While it is true that the proportion of male labor force participants in this age group dropped from almost 60 percent to about 30 percent between 1950 and 1978, the degree of labor market activity among these presumably retirable persons is still substantial.

For all male workers aged 50 and over, however, the long-term trend has been toward earlier retirement, in contrast to the generally rising rate of labor force participation among older women. These sex-differentiated patterns can be explained to some extent by the greater concentration of men in physically-demanding occupations, especially in manufacturing, which may inspire a reluctance

to continue working past middle-age. Then too, men aged 50 or more typically have been working continuously since their late teens or early twenties, in contrast to the more intermittent employment patterns of some married women of similar age, with the result that many men approach the end of their willingness to remain in demanding or unsatisfactory jobs at about the same age that many women resume working outside the home.

TABLE 3.1 LABOR FORCE PARTICIPATION RATES FOR OLDER AGE GROUPS, BY SEX, SELECTED YEARS, 1950-78

Age group and year	Men	Women
50 to 54 years		
1950	90.5	30.8
1960	92.0	45.9
1970	91.5	52.4
1978	89.1	53.8
55 to 59 years		
1950	86.7	25.9
1960	87.7	39.7
1970	86.8	47.6
1978	83.1	47.7
60 to 64 years		
1950	79.4	20.6
1960	77.8	29.4
1970	73.2	36.4
1978	61.1	31.7
65 to 69 years		
1950	59.7	12.0
1960	44.0	16.5
1970	39.3	17.2
1978	30.0	14.2

Source: Bureau of the Census 1970 Census of Population, Employment Status and Work Experience, table 2 for 1950, 1960, and 1970 data. 3. An Update on Involuntary Retirement

Prior to the 1978 Amendments to ADEA, involuntary retirement because of age was exempted from the Act if it was based upon a bona fide benefit plan. Department of Labor (DOL) took the position that such as exemption authorized involuntary retirement irrespective of age if the requirements of Section 4(f)(2) of ADEA were met:

The Department took the position that in order to meet the requirements of Section 4(f)(2), the mandatory retirement provision has to be (1) contained in a bona fide pension or retirement plan: (2) required by the terms of the plan and not optional; and (3) essential to the plan's economic survival or to some other legitimate purpose.[1]

However, the courts sometimes construed 4(f)(2) to permit involuntary retirement based on age alone, even if the case did not meet all three tests of DOL. However, in McMann vs. United Air Lines, the Court found that involuntary retirement within the protected age group was allowed only if legitimate considerations other than preferance for youth could be found.[2] On appeal, however, the Supreme Court concluded that Congress had not intended to invalidate retirement plans and held that Section 4(f)(2) permitted the involuntary retirement of an employee because of age, if it were done pursuant to the terms of a bona fide pension plan adopted before the enactment of ADEA.[3]

During this time Congress reviewed the intent of ADEA, and following the Supreme Court's decision amended the law with a final clause:

...and no such... employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individuals...[4]

Hence, Section 1625.9 was added to the new guidelines, specifying that any new or existing plan authorizing involuntary retirement is illegal. This new and important addition completely prohibits any discrimination against members of the protected class via involuntary retirement provisions.

The new EEOC guidelines on age discrimination are important additions to EEOC's arsenal against discrimination of protected classes. These new guidelines extend many of DOL's earlier interpretations of discrimination between members of the protected group, hiring and selection policies, and BFOQ's. Important differences also exist: omissions of the wage-rate reduction prohibition and the omission of examples specifying BFOQ's. Finally, an important addition is presented: prohibitions against involuntary retirement programs, whether or not such plans are part of a bona fide pension plan.

Sex Discrimination

Employment discrimination based on sets is prohibited by the fifth and fourteenth amendments to the Constitution, federal and state statutes,[5] administrative regulations, and Executive orders. Title VII of the Civil Rights Act of 1964, as amended, has been the most important antidiscrimination legislation passed by Congress. The Act proscribes employment discrimination on the basis of race, color, religion, national origin, and sex. The mandate of Title VII provides the legal foundation for the principle of nondiscrimination in employment and prohibits unlawful sex discrimination in recruitment, hiring, and promotion practices of employers. The Act makes it an unlawful employment practice for an employer: "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's sex, or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's sex."

The congressional intent is to guarantee equal job opportunities for males and females and to prevent the disparate treatment of women in employment. Title VII, as

amended, rejects the notion of "romantic paternalism" toward women and seeks to place women on an equal footing with men. Any employer policy or device which serves to deny an individual equal access to a job, or promotion in such job, based on the immutable characteristic of sex is violative of Title VII.

The antidiscrimination policy of Title VII is far-reaching; however, it is not absolute, and some gender-based distinctions do not amount to illegal discrimination. Where "sex" is a bona fide occupational qualification reasonably necessary to the normal operation of a particular enterprise or business, such gender-based decisions are not lawful and do not violate Title VII restrictions.

1. EQUAL PAY

The Higher Education Act of 1982[6] provided women with greater statutory protection by prohibiting discrimination on the basis of sex in any education program receiving federal funds. Further, the Equal Pay Act of 1963 was extended to include executive, administrative, and professional employees.[7]

The Act, as amended, prohibits sex discrimination in employee remuneration. Under the Act, "women and men performing work in the same establishment, under similar conditions, must receive the same pay if their jobs require equal skill, effort, and responsibility."

The rule of "equal pay for equal work" represents a broad charter of women's rights in the economic field. Traditional misconceptions about women's inferiority in the work force were challenged. Equalizing pay scales was not motivated solely by the injustice of such discrimination. [8] Disparate wage scales for women depressed the wage scale of the nation's labor force on the whole. The passage of three major pieces of antidiscrimination legislation evinces a clear intent by Congress to strike at the entire spectrum of unequal treatment of men and women resulting from sex stereotypes.

2. PROVING THE CLAIM

The ultimate issue in any sex discrimination claim is whether the employment decision was based on merit or whether it was based on the illegal criterion of sex. While this may appear to be simple, the problems of proving sex discrimination claims are enormous, especially in the academic context.

Congress has provided a federal forum for the redress of sex discrimination claims brought by individual litigants. Before a plaintiff reaches the federal court arena, the EEOC procedural requirements and time limitations must be met. Once the hurdle of procedural requirements has been complied with, the order and allocation of proof at trial must be satisfied.

There are many obstacles facing a complainant alleging sex discrimination by a university. The subjectivity involving academic personnel decisions provides tremendous leeway for universities to disguise sex discrimination[9] Evaluating a scholar requires subjective judgments. The intangible quality of creativity and teaching ability prevents the creation of objective standards by which professors may be judged. The necessary subjective criteria that is used in evaluating academicians prevents close scrutiny of university decisionmaking.

A second obstacle facing a Title VII complainant in the academic context is secrecy involved in academic employment decisions. Academicians have resisted allowing plaintiffs access to their personnel files in preparation of their cases.[10] University officials claim that such files are confidential. Educators believe that disclosing the contents of such files would prevent free and open criticism in such evaluations.

Finally, the plaintiff's case may be hindered by the federal court's concern for academic freedom. Freedom to teach without fear of state monitoring is basic to a free society, and the courts have vehemently protected this form of speech. Academic freedom is protected by the first amendment, due process clause, and the free association clause of the Constitution. Educators have successfully resisted state review of their employment practices by arguing that free thought requires autonomy in teaching,

researching, and publishing. Where the goals of government regulations in assuring equal job opportunity conflict with academic freedom, the courts have been quick to uphold the constitutional rights of educators' academic freedom.

Although the status of women in academic institutions has improved since the 1972 amendments, a great disparity continues to exist between males and females in academia.[11] The Title VII right to a federal forum appears, on its face, to lend great assistance to women in academia. The Title VII plaintiff has rights to a federal forum but the difficulty in proving a sex discrimination claim makes this right illusory. Title VII, as amended, any be of assistance in correcting the most blatant forms of sex discrimination, but it does not strike at the heart of the problem of sex discrimination in academia.

3. CONCLUSION

The 1972 amendment including academic institutions as potential Title VII defendants was intended by Congress to remedy discrimination in academic employment.[12] That academic employment decisions are often infected with sex bias has been recognized both by Congress and by the courts.[13] Bias on the part of institutional decision-makers may be conscious or unconscious. Frequently it is unconscious and, where it is, the faculty plaintiff may have difficulty presenting evidence of it to the court, which she must do if

she is to succeed in her disparate treatment claim. Because academic evaluations of faculty members are most often based on subjective criteria, "bias is further disguised by the expression of judgment in terms that appear both neutral and relevant."[14] Consequently, the discriminatory treatment may be relatively easy to mask. Uncovering it is the difficult task of the plaintiff. She may do it by statistical evidence and the testimony of witnesses, if she can find other faculty members will to testify.

It has been suggested that Title VII can help academic employers recognize the unconscious bias of their decision makers through the role of the courts in identifying discrimination and imposing liability for it. This view may be overly optimistic but it is doubtless true that the prospect of liability for biased employment practices may serve to check the more blatant examples of discrimination in academia.

In order for Title VII to be effective in redressing the grievances of female faculty, however, it is essential that courts moderate, if not eliminate, their traditional policy of deferring to academic decision-makers. A more informed judicial deference can enforce the acknowledged right of women not to be judged by a stricter standard without undermining the academic freedom of institutions of higher learning whose employment decisions are free from bias.

Sexual Harassment

Title VII requires the employer to maintain working conditions that are free of sexist intimidation and harassment. This duty extends to management's taking positive action where necessary to redress or eliminate employee or supervisory misconduct along these lines. For example, where a female employee is promoted or transferred to a formerly all male department, a sexually tense situation might arise in that department. Extra support may be necessary on the part of supervisory personnel to insure that the change of employment conditions does not prejudice the employee in her new position or force her to resign.

If a female employee becomes the object of sexually derogatory, oral and written remarks, jokes or gestures, and the situation is brought to the attention of the employee's supervisor, failure to act on the matter would be judged as management's condoning of the conduct. The EEOC is sensitive to the complaints of women alleging such instances of harassment, and stands ready to take harassment and intimidation issues to court to secure relief for the alleged victim.

Perhaps the extreme application of the sexual harassment concept is the predicating of an employee's career success on a willingness to submit to the sexual demands of that employee's supervisor. Case history dictates that women who have been victimized by such conduct

have been successful in suits against their employers. Firms taken to court over such matters often try to show that the incident in question was an isolated one, one that was not sanctioned by management or one that took place unbeknownst to management. Regardless of the propriety of management's argument, the courts often equate an individual supervisor's actions with company policy or at least conduct condoned by management. The best defense a company can use in preventing such across the board equations is to have a written policy that spells out the fact that management will not tolerate a supervisor's use of his position to secure the sexual cooperation of his subordinates. Records showing disciplinary action taken against such conduct are also helpful in showing that management stands ready to uphold the rights and dignity of its employees. Where management can be shown to be unsympathetic or indifferent to acting on an employee's allegations that sexual harassment has occurred, the victim's success in court becomes an almost sure thing. Arguments to the effect that sexual harassment is not in itself, sex discrimination, have not been successful. The courts have ruled that making sexual submission a prerequisite to career success is placing an employment barrier before an employee that would not exist were the employee a member of the opposite sex. Based upon this logic, sexual harassment is often construed as sex discrimination within the meaning of Title VII.

Race discrimination

Several recent court decisions have provoked the question of whether the purpose of court-ordered equal employment remedies is to provide equal employment opportunity for minorities and females or to attain equal employment results in the workplace. This part examines recent cases and reflects on this question from a legislative and philosophical perspective.

The framers of equal employment law in the 1960s were very much concerned over whether minorities and, later, females would receive preferential treatment over majority group males. On the heels of considerable objections and debate about the purpose of the legislation, the sponsors of Title VII of the Civil Rights Act of 1964 made it quite clear that it was never the intent of the legislation that employers would be compelled to achieve a racially balanced work force. An often quoted statement from the Congressional debates is from Senator Hubert Humphrey: "No court can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not hired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Sec. 707(e)....Contrary to the allegations of some opponents of this title, there is nothing in it that will give any other court to require...or achieve a certain racial balance...

That bugaboo has been brought up a dozen times, but it is nos-existent."[15]

Statements from various debates surrounding the enactment of Title VII of the Civil Rights Act show that assurances were made to opponents of the legislation that Title VII would "not permit the ordering of racial quotas in businesses or unions" and that, "under Title VII, not even a court, much less the Commission, could order racial Quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this Title."[16]

Thus, from a mere cursory reading of the legislative history of Title VII, statements from sponsors of the bill make it clear that, absent evidence of discrimination in the workplace, there exists a clear proscription against hiring quotas and goals in the legislation.

1. 1987 COURT DECISIONS

Of a more recent vintage, the Supreme Court issued a decision in 1987 in United States v. Paradise, [17] upholding the use of affirmative action in the Alabama State Trooper classification wherein blacks were to be promoted, one black for each white, due to past discriminatory employment practices. More interesting, the Supreme Court rendered another 1987 decision in the Johnson v.

Transportation Agency, Santa Clara Country[18] case upholding an affirmative action plan where there was no evidence of discrimination but mere statistical imbalance. Here, an employer sought to correct a sexually imbalanced workforce and promoted a female who was ranked lower than qualified males on the employer's list of qualified eligibles. A lawsuit was filed by a male who was bypassed, and the Supreme Court upheld the decision of the employer.

The cases reflect the High Court's opinions in the area of affirmative action. The reasoning has seemingly been varied: from a strict interpretation of the legislation (Stoots and Wygant); to an utterance that the court did not make a decision on the legality of the matter (Firefighters); to one that was quite creative in the instance of the Johnson v. Transportation Agency decision. To be sure, the implications of the cases here are still being debated; in many circles, it is thought that these decisions have merely raised more questions that will be resolved only in future litigation.

2. PHILOSOPHICAL PERSPECTIVE

Many would argue that the reagan Administration, though the Justice Department, has sought to gut affirmative action of employers. The Administration has found support in the controversial Chairman of the U.S. Commission on Civil Rights, Clarence M. Pendleton, Jr., who claims that

affirmative action with its preferential treatment of minorities, merely makes blacks permanent victims. According to Pendleton, affirmative action "assumes you can't stand on your own."[19] To a lesser degree, Clarence Thomas, Chairman of the U.S. Equal Employment Opportunity Commission, has also attempted to thwart affirmative action considerations through his outspokenness against the use of goals and quotas.

Many whites also complain that affirmative action, with its court-ordered preferential treatment, violates their rights. While admitting that blacks and females have suffered in the past due to discrimination, they do not accept it as their responsibility to bear the burden of their foreparents' transgressions.

A number of blacks too find the use of affirmative action not palatable in its implications that they can gain acceptance or advancement in the work force through no other means. This is rather an ironic situation in that "many companies and local governmental entities have grown comfortable with voluntary or court-supervised programs that guarantee members of some minority groups a slice of the available jobs."[20] The national Association of Manufacturers, representing some of the nation's large industrial corporations, has filed amicus briefs supportive of affirmative action programs. Moreover, state and local governments have rejected offers by the Justice Department to help them dissolve existing consent decrees because they

reason that affirmative action results (minority presence in their workplace), most companies and governments can successfully avoid lawsuits alleging discrimination. Given the preceding court cases, one might ask, what is affirmative action? This will be discussed in Chapter 4.

Seemingly, the courts have done just what Sylvester has suggested in their affirmative action decisions. In the Stotts and Wygant cases, a strict interpretation was used when majority group members were harmed. In firefighters and Paradise, the Court avoided an interpretation of the legislation. And, in the case of Johnson v. Transpiration Agency, the Court applied what could be called an imaginative approach to its approval of an affirmative action plan where there was no discrimination.

Critics of such an approach, like the EEOC's Thomas, called the Court's ruling in the Johnson v. Transportation Agency case, "Social Engineering." [21] What Thomas suggests is that, despite his personal preferences, sexual or racial restructuring of the workplace is legally permissible give that the Court has proclaimed it legally acceptable to consider sex and perhaps race in the workplace. A permissible restructuring of the work force could work to the benefit of minorities and females, but it is certainly philosophically contrary to the prevailing view of the Reagan Administration. Thomas, of course, is a part of that Administration.

To be sure, the High Court is well aware that we live in an imperfect society. Decisions have been made that seem to fly in the face of a sanitized reading of Title VII legislation. The framers of this legislation never intended to have a system where there exists sex-and race-based favoritism in the workplace. Senator Humphrey would perhaps be surprised at the direction Title VII legislation has taken in the past two decades.

Morris Abrams, formerly of the Commission of Civil Rights, states that what we have seen recently in court decisions is a switch in focus from one of "equality of opportunity (a notion of the law as completely color-blind) to equality of results - a highly color conscious notion that weighs the relative achievement of various racial and sex groups."[22] This change, he suggests, is the nature of our approach to affirmative action in this country.

Moreover, some claim that Supreme Court's decisions seem to reflect public opinion in its approach to affirmative action cases. As indicated by the divided view of the Supreme Court Justices in Johnson v. Transportation Agency, the general population is also divided over whether the position taken by the Court is appropriate. Appropriate or not, however, equal employment results, from this author's perspective, appear to be the order of the day. Employers would do well to take note of this trend.

National Origin Discrimination

The Equal Employment Opportunity Commission (EEOC) adopted its **Guidelines on Discrimination Because of National Origin** on January 13, 1970.[23] These guidelines were issued due to discrimination allegations based on last names, which suggested an associating with certain national origin groups, or with certain persons, schools, churches and other lawful organizations representing certain national origin groups.

These guidelines were amended in 1974 to conform to the Supreme Court decision in Espinoza v. Farah Manufacturing Co., Inc. They were further updated on December 29, 1980 by the EEOC and represent the latest EEOC interpretation of discrimination based on race, religion, sex, color or national origin. This article will discuss the impact of each section of the new guidelines on personnel management.

1. AN EXPANDED DEFINITION OF NATIONAL ORIGIN

The 1980 guidelines define national origin very broadly as a place of origin rather than any country of origin, thus extending coverage beyond that of sovereign nations. Hence, Americans with identifiable national characteristics such as accents, dress, foreign sounding names and so forth are covered by the new regulations. A Bostonian in Southern California or a "Pennsylvania Dutchman" in Georgia would be

protected under the law. So, too, would be the spouse of someone with a foreign sounding name. Further, the complaintants do not even need to show that discrimination was against them because of their specific nationality-only that discrimination took place because of dress, accent or name. In other words, someone might discriminate against another person based on the latter's "Russian accent," when in reality, the accent was Iranian. All that is required is that the complainant show discrimination took place based on some (any) place and national origin.

The broad definition of the new guidelines includes coverage of individuals who are white as well as those who are nonwhite: "The Commission's definition of national origin discrimination is necessarily broad because **Title VII protects all individuals from national origin discrimination regardless of their race or color.[24]** Such broadness would appear to open the door to the issue of "reverse discrimination," even though the courts have yet to resolve this issue. However, no one can be certain at this time 1) how the EEOC would rule if such charges were to be filed by, for example, an Anglo who was allegedly refused employment in a Japanese restaurant because of nationality; or 2) whether the EEOC might interpret national origin issues on a lower priority than discrimination based upon other protected categories, such as race.

However, the guidelines do note that the Bona Fide Occupational Qualification (BFOQ) exception will "be strictly construed," and therefore narrowly interpreted, as it was in its earlier guidelines and has been generally construed by the courts.

2. SCOPE OF TITLE VII PROVISIONS

The final guidelines were phrased to include not only employers, but labor organizations, joint labor-management committees controlling apprenticeships, other training or retraining programs, and public or private employment agencies. This is completely consistent with the coverage of Title VII and Office of Federal Contract Compliance Programs (OFCCP) provisions which extend affirmative action plans beyond those of actual employers to sources of labor supply.

Exceptions to Title VII provisions are narrowly defined, as we have already indicated. However, the guidelines do recognize, as does Title VII, that national origin discrimination is preempted by the national security provision of the Civil Rights Act. Thus, an individual may be denied employment regardless of race, color, religion, sex or national origin, if he or she does not have appropriate security clearance for national-security related jobs calling for such clearances. Such requirements are common among firms having contracts with the government.

3. BUSINESS NECESSITY

The new national origin guidelines maintain the posture taken by EEOC in the Uniform Guidelines on Selection Procedures of August 1978. If an employer's selection procedures have adverse impact upon a national origin group, such procedures must be validated or shown to be motivated by "business necessity." The burden of proof lies with the employer should charges of discrimination be filed.

On new concept introduced into these new guidelines involves the issue of proficiency in speaking English as it relates to business necessity. We believe that the "proficiency" question may well pose problems for many employers. The EEOC states the problem clearly:

For example, knowing how to speak English could be job related for the job of selling shoes to English-speaking customers. However, if the employer required it sales people to speak without an accent, or to have a certain degree of fluency in English, and if these requirements had an adverse impact based on national origin, the employer would have to show the job relatedness of the no-foreign-accent requirement, or of the degree of fluency in English which it required.[25]

The logic of the EEOC on the English proficiency issue is continued in its discussion of employers with "speak-English-only" rules. The EEOC's position is that any

general prohibition against speaking a foreign language on the job is to burdensome, particularly for someone whose primary language is not English. What an employer may do is to require the speaking of English in Specific job situations where the English language is a matter of business necessity.

4. NATIONAL ORIGIN HARASSMENT

The November 1980 guidelines on sexual harassment have been widely discussed in the literature, and the new national origin guidelines parallel the principles expressed. First, harassment may be both physical and verbal. The verbal imperative is especially troublesome, and includes, but it si not limited to, "ethnic jokes," "verbal slurs," and other statements which may be construed as harassment. Second, the liability of the employer extends not only to actions of supervisors, but also to co-workers and non-employees such as vendors or customers. Drawing on a figure that we developed elsewhere, the procedures shown in Figure 1 are recommended to the employer in dealing with national origin harassment.

Figure 1[26]

National Origin Harassment: How To Deal With It

Harasser	Victim	Recommendation	Outcome
Supervisor	Employee	1. Victim notifies employer as soon as possible. 2. Supervisor is disciplined	By advising supervisors that harassment may result in severe disciplinary action, employer attempts to eliminate supervisory harassment completely.
Co-worker	Employee	1. Victim notifies supervisor as soon possible. 2. Harasser is disciplined.	Hope for complete elimination of harassment, but when harassment occurs, taking immediate corrective action may satisfy the EEOC guidelines
Non-employee	Employee	1. Victim notifies supervisor as soon as possible 2. Supervisor steps in to correct immediately; if the harasser is a customer, supervisor should also try to maintain good customer relations	Difficult for supervisors to eliminate harassment from outsiders entirely. Taking immediate corrective action may satisfy the EEOC guidelines If handled delicately, the employer may be able to keep customers while minimizing his or her liability.

The EEOC has provided us with two new sets of discrimination guidelines. With the exception of the state illegal alien-equal employment conflict, and the possibility of "reverse discrimination," we consider the new national origin guidelines not only to be consistent with both the uniform federal selection and sexual harassment guidelines, but also to be relatively simple to understand on the part of the employer. Our hope is that his summary of the major provisions in the newest guidelines will be helpful to the manager in making selection and other employment decisions that are rational and are within the scope of the law.

Religion Discrimination

In September 1979, The Equal Employment Opportunity Commission proposed a revision of its Guidelines on Discrimination because of Religion. If adopted, the proposed guide lines could require businesses to change their employment practices dramatically. This part analyzes the proposed guidelines and explores their potential impact on business practices. It should be noted that the proposed guidelines could be revised before they are finally adopted.

The Commission proposed the guideline revisions in response to the Supreme Court's 1977 ruling in Trans World Airlines V. Hardison.[27] In the Hardison decision, the Supreme Court narrowly interpreted Section 701(j) of Title VII of the Civil Rights Act of 1964.

In Section 701(j) was added to Title VII:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

This Section prohibits religious discrimination in employment unless an employer can show that it cannot reasonably accommodate an employee's religious requirements without undue hardship to the employer's business.

The dispute in Hardison focused on the effort an employer must make to accommodate an employee's religious beliefs and practices. Due to Hardison's low seniority status, conflicts between his work schedule and his observance of a Saturday Sabbath ensued. His employer, Trans World Airlines, attempted to accommodate Hardison's religious needs but failed to achieve a satisfactory accommodation. Hardison refused to report to work Saturdays and was fired for insubordination. He subsequently sued under Title VII, charging TWA with religious discriminating.

A divided Supreme Court held that requiring an employer to disregard a seniority system was an undue hardship, even if that system had some discriminatory consequences. Absent a discriminatory intent, Title VII specifically excepts seniority systems from its application. The Court thus established that employers should attempt to accommodate an individual's religious requirements within the bounds of a neutral collective bargaining agreement.

The Court further reasoned that violating the established seniority system would require the employer to discriminate against the majority of employees to accommodate the religious preferences of some. The Court maintained that discrimination in the form of allocating privileges on the basis of religion is proscribed when directed against majorities as well as minorities. The Court thus distinguished between required religious accommodation and unlawful unequal treatment.

1. THE EEOC'S RESPONSE

Because the Supreme Court's de minimis reling represented a narrower interpretation of Title VII than previous lower court decisions, the EEOC has proposed a revision of its religious discrimination guidelines. The proposed guidelines attempt to define undue hardship in light of the Hardison ruling and try to clarify the employer's duty to reasonably accommodate employees' religious requirements.

The proposed guidelines discuss at length preselection inquiries and selection practices. The proposals would specifically limit the employer's preselection inquiries and would significantly increase the employer's responsibility to justify rejecting any qualified applicant requiring religious accommodation.

To clarify the employer's obligations, the EEOC has attempted to define reasonable accommodation in terms of specific alternatives employers might use. For the first time, the guidelines would specifically mention voluntary substitutes, flexible scheduling, lateral transfers, and change of job assignments as some of the alternatives that employers will have to consider. Employers would be required to explore these alternatives and show that each alternative would in fact result in an undue hardship of more than a minimal cost. This would represent a significant change from the present guidelines, which state

only that the employer has an obligation to make reasonable accommodations.

2. OBLIGATION TO ACCOMMODATE

After selection, an employer would be obligated to explore all possible alternatives in accommodating an employee's religious needs. Problems to date have generally involved conflicts between work schedules and religious practices. The proposed guidelines list several alternatives that employers will need to explore in accommodating an employee's religious practices, noting that the list is not intended to be all inclusive.

When refusing to accommodate an employee's religious practices, the employer will have to demonstrate that each alternative would in fact result in undue hardship. The proposed guidelines specify that a mere assumption that many other employees may also need accommodation would not constitute an undue hardship.

Some of the suggested accommodations could reduce the employee's wages, career opportunities, or desirability of position. The proposed guidelines therefore would require that the employer adopt the alternative that disadvantages the employee the least.

3. COMPATIBILITY OF PROPOSED GUIDELINES

The proposed guidelines reflect the EEOC's changing interpretation of Title VII, but do they reflect the Supreme Court's interpretation of the law? In attempting to clarify the Supreme Court's de minimis ruling of undue hardship, the Commission may well have gone beyond the Court's interpretation of reasonable accommodation.

The EEOC focuses its interpretation on what constitutes more than a minimal cost. In contrast, the Supreme Court's holding in Hardison appears more concerned that nay cost is being incurred rather than the actual amount incurred.

The Commission's proposed guidelines explicitly state that the employer will have to bear the additional costs of occasional premium wages or administrative scheduling costs. In requiring the employer to bear these additional costs, the guidelines appear to conflict with the Hardison holding. The EEOC has apparently disregarded the holding in Hardison that nay unequal treatment on the basis of religion is proscribed by Title VII. It thus seems probable that the courts would not defer to the Commission's proposed guidelines as valid interpretations of Title VII.

To be more consistent with Hardison, the proposed guidelines could still require employers to explore alternatives such as voluntary substitutes or lateral transfers, which do not involve treating employees unequally. However, requiring accommodations such as

flexible scheduling or changing job assignments within an entire job involves allocating privileges on the basis of religion. Unless the employer would offer these privileges to all employees, the employer would be discriminating against the majority. The EEOC has apparently equated reasonable accommodation with affirmative action while the Supreme Court has equated reasonable accommodation with lack of discrimination.

IV. Key Issues in Major Court Cases

1. Griggs v. Duke Power (1971)

The first landmark case decided by the Supreme Court under Title VII was Griggs V. Duke Power. The case began in 1967 when 13 black employees filed a class action suit against Duke Power, charging discriminatory employment practices. The suit centered on recently developed selection requirements for the company's operations units. The plaintiffs charged that the requirements were arbitrary and screened out a much higher proportion of blacks than whites. The requirements, which were implemented in 1965, included a high school diploma, passage of a mechanical aptitude test, and a general intelligence test. When the requirements were initiated, they were not retrospective and so did not apply to current employees in the company's operations units. There was no attempt made by the company to determine the job-relatedness of these requirements.

A lower district court found in favor of the company on the grounds that any former discriminatory practices had ended and there was no evidence of discriminatory intent in the new requirements. An appellate court agreed with the finding of no discriminatory intent and in the absence of such intent the requirements were permissible.

The Supreme Court, in a unanimous decision, reversed the previous decisions. The court ruled that lack of discriminatory intent was not a sufficient defense against

the use of employment devices which exclude on the basis of race. In North Carolina at that time 34 percent of the white males had high school degrees whereas only 12 percent of the black males did. The court acknowledged that tests and other measuring devices could be used, but held that they must be related to job performance. Duke Power had contended that their two test requirements were permissible because Title VII allowed the use of "professionally developed tests" as selection devices.

Because there were employees already working in the operational units of the company who did not have a high school diploma or had not taken the tests and were performing their duties in a satisfactory manner, Duke Power had no evidence relating these requirements to job performance. The court stated that if "an employment practice that operated to exclude Negroes cannot be shown to be related to job performance, it is prohibited."

Two important precedents were set by the Griggs case, both of which are related to burdens of proof. The applicant carries the burden of proving the adverse impact of a particular selection device. Once adverse impact has been determined, the burden shifts to the employer to prove the validity or job-relatedness of the device. The Court said that the EEOC Guidelines were entitled to deference for proving validity.

2. Spurlock v. United Airlines (1972)

The case of Supurlock v. United Airlines involved a demonstration of the job-relatedness of selection instruments other than tests. In this case, Spurlock field suit against United Airlines after his application for the job of flight officer had been rejected. Spurlock charged the airline with discrimination against blacks and offered as evidence the fact that only 9 flight officers out of 5,900 were black. In the suit, Spurlock challenged tow of the requirement of the job: a college degree and a minimum of 500 hours of flight time.

United contended that both these selection requirements were job related. Using statistics, united showed that applicants with a greater number of flight officers must complete after being hired. Statistics also showed that 500 hours was a reasonable minimum requirement. In addition, United contended that, because of the high cost of the training program, it was important that those who begin the training program eventually become flight officers.

United officials also testified that the possession of a college degree indicated that the applicant had the ability to function in a classroom atmosphere. This ability is important because of the initial training program and because flight officers are required to attend intensive refresher courses every six months.

The court accepted the evidence presented by United as proof of the job-relatedness of the requirements and, in a

significant ruling, stated that when a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should closely examine selection instruments which are discriminatory. On the other hand, when the job requires a high degree of skill and the economic and human risks involved are great, the employer bears a lighter burden to show that selection instruments are job-related.

3. Boundy v. Jackson (1981)

This case was one of sex discrimination, particularly sexual harassment relative to promotion. Sandra Bundy began as a GS-4 personnel clerk in 1970 with the District of Columbia Department of Corrections. Her experiences began in 1972 when she received and rejected sexual propositions from Delbert Jackson, then a fellow employee but later the director of the agency and the individual named as the defendant. Two years after this, in 1974, the sexual intimidation Bundy suffered began to interfere with her employment when she received propositions from two of her supervisors, Arthur Burton and James Gainey. Burton began repeatedly to call Bundy into his office to request that she spend the workday afternoon with him at his apartment and to question her about her sexual activities. Shortly thereafter, Gainey also began making sexual advances, asking her to join him at a motel and on a trip to the Bahamas. bundy complained about these advances to Lawrence Swain who

supervised both Burton and Gainey. Swain casually dismissed Bundy's complaints telling her that "any man in his right mind would want to rape you." He then proceeded to request that she begin a sexual relationship with him in his apartment.

When Bundy became eligible for promotion to GS-9 in January 1976, she contacted Gainey who told her that because of a promotion freeze he could not recommend her. Bundy later found out that others had been recommended by the personnel office in spite of the freeze. Bundy then informed Aquila Gilmore, the Chief EEO Officer in the agency, about the sexual harassment. Gilmore simply advised that her charges might be difficult to prove and cautioned her against bringing unwarranted complaints. In April 1975, Gainey and Burton completed a memorandum offering Bundy's inadequate work performance as the reason for denying her a promotion. Bundy protested that her supervisors had never presented her with any written criticism of her work until she raised the harassment issue. She then pursued her complaint and subsequent formal complaints. Jackson, now the director, took no steps to investigate the complaints beyond asking Burton, Gainey, and Swain whether they had made improper advances. Bundy was finally promoted in July 1976, having received satisfactory ratings for her work performance.

In finding for Bundy, the U.S. Court of Appeals, District of Columbia Circuit, made the primary ruling that

Title VII sex discrimination exists whenever sex is for no legitimate reason a substantial factor in the discrimination. This extended the concept of sex discrimination. Next, it concluded that harassment included not only physical contact or abuse, which environment. The court concluded that unless this extension was made an employer could sexually harass with impunity by carefully stopping short of firing or taking other tangible actions.

In further comments about this issue, the court advised that an employer is responsible for the discriminatory acts of its supervisors and should take immediate corrective actions in such cases. "The employer should inform all employees that such harassment violates Title VII and also develop an effective procedure for hearing, adjudicating, and remedying complaints.

4. Connecticut v. Teal (1982)

The central issue in the case of Connecticut v. Teal was whether discrimination occurred in a multi-step selection program even though the total program did not demonstrate adverse impact. Four black employees of the Department of Income Maintenance of the state of Connecticut were provisionally promoted to Welfare Eligibility Supervisor and served in that capacity for almost two years. According to departmental policy, to permanently gain the position an individual had to participate successfully in a multi-step selection process. The first step was a passing

score on a written examination. This exam was administered to 48 black and 259 white applicants. Of these, 26 blacks (54%) and 206 white (80%) passed. the four black individuals serving as previsional supervisors did not pass.

Even though the rate of passing for blacks was below the recommended four-fifths ratio, the remaining parts of the selection program were conducted in such a way as to insure nondiscrimination in the final selection. Forty-six persons in total were promoted. 11 of whom were black and 35 of whom were white. This meant that 23 percent of the black applicants were promoted and 14 percent of the whites. The department argued that, as a consequence, no discrimination against blacks in selection was demonstrated.

The court disagreed with this position, pointing out the adverse impact of the written test. The decision stated that Title VII prohibits employment practices that deprive "any individual of employment opportunities." Therefore, the focus of the statute is on the individual, not the minority group as a whole. Title VII does not permit the victims of discriminatory policy to be told they have not been wronged because other persons of their race or sex were hired. The Department, therefore, had to insure that each part of the selection program was nondiscriminatory.

5. Western Air Lines v. Criswell (1985)

The focus of this decision was the Age Discrimination in Employment Act and the specific question of a BFOQ

defense by Western Air Lines. A regulation of the Federal Aviation Administration prohibits any person from serving as a pilot or first officer on a commercial flight once that person is 60. In 1978 Criswell was a pilot operating DC-10s for Western; he had also turned 60. Under the collective-bargaining agreement in effect at that time, cockpit crew members could obtain open positions by bidding in order of seniority. In order to avoid mandatory retirement caused by the FAA policy, Criswell applied for reassignment as a flight engineer. This was the third position in the cockpit and because its normal duties are less critical to the safety of the flight than that of pilot or first officer, it is not bound by the FAA retirement policy. His bid was denied because Western had its own mandatory retirement policy which was applied to all crew members at age 60. Western's position in this case was that the flight engineer did, in fact, have critical duties in times of emergencies and also could cause serious disruption to the flight if he himself suffered a medical emergency. Therefore, the mandatory retirement policy of all crew could be defended on a BFOQ basis.

The Supreme Court found for Criswell. In so doing, it observed that several other large commercial airlines currently had flight engineers over age 60 without any reduction in their safety records. It also pointed out that throughout the legislative history of ADEA one empirical fact was repeatedly emphasized," the process of

psychological and physiological degeneration caused by aging varies with each individual....As a result, many older American workers performs at levels equal or superior to their younger colleagues." Moreover, the preamble of the ADEA declares its purpose to be "to promote employment of older persons based on their ability rather than age to prohibit arbitrary age discrimination in employment."

In further comments the Court took issue with mandatory retirement in general. In so doing, its point was that retirement based solely upon age is arbitrary because age is a poor indicator of ability to perform a job. Rather retirement should be based on an assessment of abilities and capacities. Finally, the Court also concluded that the BFOQ exemption to the ADEA was meant to be narrow in scope. A company had to prove that age qualifications were more than convenient or reasonable. They must be reasonably necessary to the particular business. To do this the company must establish that it has a factual basis for believing that all or substantially all persons over the specific age would be unable to perform the job safely and efficiently. Alternatively, the employer could establish that it was impossible or highly impractical to deal with the older employees on an individualized basis.

6. OFCCP v. Ozark Air lines (1986)

This case concerns the Rehabilitation Act of 1973 and the refusal of the airline to employ a handicapped person as

an airline technician. Gary Frey, because of a childhood accident, had a nonfunctioning left ear. His right ear was unimpaired. Ozark agreed that Fery had the necessary qualifications for the position but refused to hire him because of his hearing handicap and his failure to prove that he could carry out the job duties without endangering himself and others. Because Ozark Airlines was regarded as a federal contractor, the case was decided by the OFCCP.

Frey won the decision and was also awarded back pay. In so doing, the OFCCP argued that it was Ozark's burden to prove that Frey's employment would have endangered him and others, not the burden of Frey and OFCCP to prove that he could successfully do the work. Secondly, it stated that a handicapped person is "qualified for employment if he is capable of performing a particular job with reasonable accommodation to his or her handicap. The only evidence that Ozark submitted was the testimony of its personnel director who, responding to questioning as to whether he had given any thought to accommodating Frey or putting restrictions on his duties, stated that this was not possible because of limitations in the union contract. A related Ozark argument that the noise levels of the facility would endanger Frey's remaining hearing was also dismissed. Citing specific decibel levels, the OFCCP commented that Ozark failed to show that Frey's hearing could not be protected by wearing ear plugs or ear muffs.

Table 3.3 Key Issues in Major Court Cases

Case	Policy Addressed
Griggs v. Duke Power (1971)	1. Lack of discriminatory intent not sufficient defense 2. Employer bears burden of proof in face of apparent adverse impact
Spurlock v. United Airlines (1972)	1. College degree and experience requirements can be shown to be job related 2. Company's burden of proof diminishes as human risks increase
Boundy v. Jackson (1981)	1. Sexual harassment includes psychological work conditions as well as physical abuse 2. Employer is responsible for acts of managers and supervisors 3. Specific procedures preventative of sexual harassment are recommended
Connecticut v. Teal (1982)	1. Company must insure that all parts of a multiple-step selection program have no adverse impact
Western Air Lines v. Criswell (1985)	1. Rejection of applicants based solely on age is not usually permissable 2. Employability should be based on individual's abilities 3. Mandatory retirement policies, based on specific age, not permissible
OFCCP v. Ozark Air Lines (1986)	1. In handicap cases, organization must prove that individual can not perform job 2. Reasonable accommodation must be given to handicapped individual

FOOTNOTE

1. Ibid.

2. 542 F. 2d 217 (4th Cir. 1976)

3. 434 U.S. 192 (1977)

4. 44 Federal Register 68859

5. The Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (42 USCS 2000e et seq.); the Equal Pay Act of 1963 (29 USCS 206(d)); and State Fair Employment Practice Acts

6. Education Amendments of 1972, Pub. L. No 92-318, Section 901-907, 86 stat, 235

7. Pub. L. No. 88-38, 77 Stat, 56 [condified at 29 USC 206(d) (1976)]

8. For broad remedial purposes of the Equal Pay Act of 1963

9. Ibid.

10. EEOC. v. University of New Mexico 9DC NM, 19730, 7 EPD

11. Greenberger, "The Effectiveness of Federal Laws Prohibiting Sex Discrimination in Employment in the United States," Equal Employment Policy for Women, ed, R. Ratner (1980)

12. Legislative history, cited at note 6

13. Especially Kunda II (Women relegated to positions of lesser standing in institutions of higher learning)

14. Taub. P.355

15. 110 Cong. Rec. 6549 (1964) (remarks of Senator Hubert Humphrey)

16. Ibid..pp.6588 & 14465 (1964) (Senate & House Analysis of Title VII)

17. United States V. Phillip Paradise. Jr. et al. 42 EPD

18. Clara County, California. et al. 42 EPD

19. Charlotte low, "Affirmative Action Proves Tenacious." Insight, August 4, 1986

20 Id.

21. "Listening to Reaction on Affirmative Action," Atlanta Journal Constitution, 4 April 1987

22. Insight, p. 60

23. 35 Federal Register 421.

24. 45 Federal Register 85633

25. 45 federal Register 86534

26. John P. Kohl and Paul S. Greenlaw "Sexual Harassment in the Hospital Industry," Cornell H.R.A. Quarterly (21 February, 1981)

27. 432 US 63 (US SCt, 1977)

Chapter 3

AFFIRMATIVE ACTION

I. WHAT IS AFFIRMATIVE ACTION?

Affirmative action is, as the term implies, the use of positive, results oriented practices to ensure that women, minorities, handicapped persons, and other protected classes of people will be equitably represented in the organization. Put another way, affirmative action is any action that is taken specifically to overcome the results of past discriminatory employment practices.

In 1977, nothing is more central to the success of the long struggle to eliminate racial discrimination from American life than the effort to establish equal access to job and career opportunities. For the better part of two centuries the Federal Government was indifferent to employment discrimination or actively fostered its imposition on black people and on other minorities and women as well. Twenty six years ago, with passage of the Civil Rights Act of 1964, did the emerging consensus that employment discrimination was wrong be come a national policy favoring equal employment opportunity.

Title VII of the 1964 law was a clear statement of the national will to end unfair treatment of minorities and women in the job market. What was not fully apparent in 1964 was the magnitude of the effort that would be required

to create genuine equality of opportunity and the specific measures needed to accomplish the task.

While progress has been made during the past decade, the current employment situation provides disturbing evidence that members of groups historically victimized by discriminatory practices still carry the burden of that wrongdoing. Unemployment statistics-a critical indicator of economic status-reveal a worsening situation for black people and members of other minority groups. In 1967 the national unemployment rate was 3.4 percent for whites and 7.4 percent for racial minorities. During the economic expansion of the late 1960s, the ratio of black to white unemployment declined. But when the economy entered a recession in the 1970s, minority workers suffered disproportionately. In 1976 the rate of unemployment was 7 percent for whites and 13.1 percent for black and other minorities. In August 1977 white joblessness declined to 6.1 percent, while minority unemployment increased to 14.8 percent.

The persistence of problems of providing equal opportunity is also evidenced by the crisis in unemployment for minority youth. In 1971, when 15.1 percent of white teenagers were jobless, the unemployment rate for minority teenagers was 31.7 percent. In 1976 white teenage unemployment stood at 18 percent, while 39.8 percent of minority teenagers were unemployed; and by August 1977

unemployment for minority teenagers had reached a staggering 40 percent.

As the status and rewards of particular types of employment increase, minority participation tends to decline. This is particularly true in the professions where blacks, who are 11 percent of the population, constitute only 2,2 percent of all physicians, 3.4 percent of the lawyers and judges in the country, and hold only 1 percent of the engineering jobs. At the gateway to these occupations stand the graduate and professional schools. Although progress has been made in recent years, in 1976 the minority enrollment of American law schools was only 8 percent, including 4.8 percent black and 2 percent Hispanic American students. Medical schools had a similar enrollment pattern, with an 8 percent minority enrollment, including 6 percent black students and 1.2 percent Mexican Americans.

While these racial disparities in job and economic status may stem from a web of causes, they provide strong evidence of the persistence of discriminatory practices. As the Supreme Court has observed, statistics showing racial or ethnic imbalance are important in legal proceedings:

> Because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

As the difficulty of fulfilling this expectation has become apparent, debate has also intensified about the necessity and propriety of specific measures designed to eliminate discriminatory practices and their effects on both hiring and admissions decisions. In 1977 the controversy is centered around the concept of "affirmative action," a term that in a broad sense encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future. Particular applications of the concept of affirmative action have given rise to charges of "reverse discrimination," "preferential treatment," and "quota systems" - all, in essence, claims that the action sought or imposed goes beyond what is needed to create conditions of equal opportunity for minorities or women and that it imposes unfair treatment on others.

The Commission believes that a sensible and fair resolution of the controversy is best served by an examination of the specific decisions made by agencies charged with implementing and interpreting the law, of the reasons for the decisions, and of what the decisions have meant in practical terms to the people affected by them. To this end and to offer our own views, the Commission had prepared this position statement for public discussion and consideration.

1. LAWS AND ORDERS THAT PROVIDE LEGAL BASIS FOR AFFIRMATIVE ACTION

Affirmative action is not a requirement of one equal employment opportunity law or order, but several. Each equal employment opportunity law protects one or more minority class or sex. Not all minority classifications have to do with race or ethnic background, some are based on physical handicap or the fact that an individual is a veteran of the Vietnam Era. Compliance in the area of equal employment opportunity is a changing scene. As new laws and orders are passed, extending protection against discrimination to still more groups, employers will need to include those groups in their affirmative action programs. The following equal employment opportunity laws and orders require affirmative action from all businesses subject to them:

- Title VII of the Civil Rights Act of 1964, as amended in 1972 by the Equal Opportunity Act (prohibits discrimination because of sex, race, color, religion, or notion origin, in any term, condition or privilege of employment);

- Executive Order 11246, as amended by Executive Order 11375 (requires written affirmative action programs from all businesses with federal government contracts of $50,000 or more who employ 50 or more employees);

- The Equal Pay Act of 1963 and the Fair Labor Standards Act of 1972 (requires employers to provide equal pay for men and women performing similar work);

- The Age Discrimination in Employment Act (Prohibits employment discrimination against persons between the ages of 40 and 65 years);

- Title VII of the Civil Rights Act of 1964 (prohibits discrimination based on race, color and national origin in all programs or activities which receive federal financial aid);

- State and local law (many state and local governments prohibit employment discrimination and require affirmative action on behalf of businesses located in their respective jurisdictions)

- The National Labor Relations Act (prohibits discrimination on the basis of race, religion or national origin and establishes the requirement to refrain from entering into agreements with unions that practice discrimination);

- The Rehabilitation Act of 1973 (prohibits discrimination against handicapped persons who are employment by or seek employment with businesses holding government contracts);

- The Vietnam Era Veterans Readjustment assistance Act of 1974 (prohibits discrimination against disabled veterans and veterans of the Vietnam Era and applies to businesses covered by Executive Order 11246);

- Other equal employment opportunity laws (employment discrimination is prohibited by the Civil Rights Acts of 1866 and 1870 and Equal Protection Clause of 14th Amendments to the Constitution).

2. HOW DOES AFFIRMATIVE ACTION DIFFER FROM EQUAL EMPLOYMENT OPPORTUNITY?

Equal employment opportunity requires that personnel practices guarantee the some opportunities to all individuals regardless of their race, color, religion, sex, national origin, handicaps, or other factors that cannot, by law, be used to exclude them from participating fully in an employment system. In effect, then EEO is a policy of nondiscrimination. By law, a firm cannot administer its personnel and employment function in a manner that excludes or discriminates against people for reasons that have not been proven to be related to bona fide job qualifications.

Affirmative action puts teeth into EEO laws by requiring an employer to follow certain guidelines to ensure that a balanced and representative work force will be achieved. Non discrimination alone is not affirmative action. To be truly affirmative, a company must take specific steps to remedy the present effect of past practices. What this may mean in practice is that a company has to go out of its way to recruit, select, train, and promote women, minorities, veterans, and handicapped persons

until they are equitably represented in the work force. Under EEO, a company may adopt a policy of neutrality and hope or assume this will happen. Under the affirmative action, then, is an extension of equal employment opportunity; it is the means by which a company achieves EEO.

An affirmative action program requires:

- positive and continued support by management at all levels
- demonstrated aggressive action both in word and deed
- pursuit of constructive activities
- overcoming of obstacles that impede equality

TABLE 4.1 SOME OF THE DIFFERENCES BETWEEN EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION

	EEO	Affirmative action
Who is affected:	Everyone virtually is covered by law	Legally, applies only to certain organizations
What is required:	Employment neutrality nondiscrimination	systemic plan
What are the sanctions?	Legal charges can be filed Possible court action	Withdrawal of contracts or funds if noncompliant
What are some examples?	Not barring female minorities, or handicapped persons from employment	Actively recruiting and hiring female, veteran, minority, or handicapped persons
	Selecting, promoting, and paying people solely on the basis of bona fide job-related qualifications	Validating tests; rigorously examining company practices in selection, promoting, and benefits to eliminate non-job-related qualifications that discriminate against protected persons

II. AFFIRMATIVE ACTION OR REVERSE DISCRIMINATION

Affirmative action and reverse discrimination: at what point does one end and the other begin?

First, one thing must be made clear; reverse discrimination is not "affirmative action." It is but one facet of affirmative action.

Under Title VII of the Civil Rights Act of 1964, five classes of individuals are protected from discrimination in employment-discrimination on the basis of race, color, religion, sex and national origin.

Courts are empowered to take any affirmative action to correct discriminatory employment decisions including: selection, promotion, demotion, layoffs, performance appraisal, training, pay and employee benefits.

However, highly controversial affirmative action "goals," "quotas," and "timetalbes" have also been invoked under the Act to increase the proportion of protected groups in the work force. Such controversial actions have often been referred to as "reverse discrimination."

Reverse discrimination means discriminating in favor of any protected class member at the expense of individuals not falling in a protected class-most often white males.

Therefore, hiring 50% blacks until the work force consists of 30% black members would most likely qualify as reverse discrimination. The reinstatement of a black or woman worker discriminatorily discharged, on the other hand,

would constitute affirmative action but not reverse discrimination because it does not discriminate at the expense of a non-protected class.

Although reverse discrimination is generally conceived of in terms of selection goals and quotas, the term is really much broader. It includes preferential treatment in internal organizational decisions, such as training that affects current employees, and exit (layoff) decisions as well.

TITLE VII EXPRESSLY PROHIBITS REVERSE DISCRIMINATION

Ironically, and a fact not widely known, Title VII of the Civil Rights Act overtly prohibits reverse discrimination. Title VII states that nothing contained in the title should be interpreted to require any employer:

"...to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer...in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin employed by any employer...in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin, in any community, State,

section, or other area in the available work force in any community, State, section, or other area."(1)

Further, this meaning was strongly reinforced in the landmark Griggs decision:

"Congress did not intend by Title VII...to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."(2)

In spite of these prohibitions, reverse discrimination has flourished at lower court levels and in consent decrees; in Supreme Court decisions reverse discrimination has not fared as well.

Perhaps the most notable reverse discrimination selection case was the 1978 Bakke case. Allan Bakke was denied admission to the medical school at the University of California at Davis.

Davis, with no record of previous discrimination, had set aside 16 of its 100 admission seats with lower standards for minority and economically disadvantaged students. Bakke was passed over for selection even though his credentials were better than some of the minority and disadvantaged students.

The Supreme Court, upon hearing the case, ruled against such blatant numerical quotas and ordered Bakke admitted to Davis.

Two important notes concern the Bakke case. First, because the medical school at Davis is a state institution, the Fourteenth Amendment and Title VI of the Civil Rights Act applied - not Title VII. Thus the key question of whether reverse discrimination and quotas in industry were permissible was not answered. Second, the Court very importantly did go on to say that more flexible affirmative action programs were admissible and that race could be considered as one factor in affirmative action programs.

The supreme Court has entered the layoff-bumping reverse discrimination area after at least 30 lower court decisions rendered seniority systems illegal "if they locked racial minorities and women into a lower paying job specialization while white males moved up a better-paying separate seniority ladder.(3)

The initial Supreme Court Decision, Teamsters vs. US, in 1977 was a complex bumping-layoff reverse discrimination case.(4) The Court ruled that bona fide seniority systems were legal and that whites with greater seniority could not be bumped by blacks with less seniority - a defeat for reverse discrimination.

More recently (1984) and germane, the Supreme Court again ruled against reverse discrimination in layoffs in Firefighters Local Union No. 1784 vs. Carl W. Stotts.(5)

Under a consent decree with the government, the Menphis Fire Department had eliminated discrimination in its hiring and promotion policies. In 1981, however, budget cuts required the city to lay off some of the fire fighters.

The case was appealed by the white fire fighters who had apparently lost their seniority rights, and again the Supreme Court killed reverse discrimination. The Court emphasized that: "Title VII protects bona fide seniority systems, and it is inappropriate to deny any innocent employee the benefits of his seniority in order to provide a remedy in a pattern-or-practice suit such as this."

The 1985 outlook for reverse discrimination appears bleak. The Reagan Administration has publicly opposed both affirmative action and reverse discrimination. As President Reagan said on one occasion: "My goal is an America where something or anything that is done to or for anyone is done neither because nor in spite of any difference between them, racially, religiously or ethnic-origin wise."(6)

Further, with Justice Lewis Powell ill - having missed several Supreme Court decisions - and with the current Supreme Court being the first ever to have a majority of its members 76 or older, the possibility of resignations and newly appointed Reagan conservative members to the high court are strong. One can never predict how new justices will vote, but a more conservative court would appear to spell doom for reverse discrimination.

III. CASE STUDY : WEBER

The Weber case grew out of a voluntary agreement between the Kaiser Aluminum and Chemical Corporation and the United Steelworkers of America. This 1974 agreement was an attempt by a major employer and a very large labor organization to "clean house" in such a way as to avoid either a class action lawsuit under Title VII of the 1964 Civil Rights Act or the establishment of an affirmative action plan under the authority of Executive Order 11246.

The centerpiece of the agreement was a remedy for the paucity of minority (particularly black) workers in the craft occupations in the Kaiser plants. Before the agreement was reached, the employer had generally followed a policy of hiring craft workers from outside the ranks of those employees who were in lower job classifications at the respective plants. The intent of the plan was to shift the recruitment in-house and to make the selection process color-conscious. The agreement did not, however, require the company to fire any white workers to make room for minorities. There were regional variations in the terms of these plans, but the particular one involving Weber covered an alumina refinery in Grammercy, Louisiana.

There was a considerable disparity between the black content of the local labor force and the black content of the craft workers' unit in the Kaiser plant in Grammercy. The labor force was about 40 percent black and less than 2

percent of the craft jobs were held by blacks. The new selection plan for craft jobs required employees to pass a test, ranked employees by seniority for bidding, and divided job opportunities between black and white workers on a fifty-fifty basis.

The basis for a lawsuit soon developed when it was discovered that the senior black trainee had less seniority than several white applicants who were rejected. Relying on this disparate impact and on what Weber thought was a clearly written prohibition covering this kind of personnel selection result, Weber and his class filed suit in federal district court. Their case was based strictly on Title VII language, Sections 703(a) and (d), which made it a violation to use race as a selection criterion for a training or apprentice program.

Weber did not attack the agreement on the ground that it violated the union's Duty of Fair Representation. Weber prevailed at the district court level and the decision was upheld by the Fifth Circuit, before moving to the Supreme Court. The Court overturned the lower court decision, holding that the voluntary affirmative action plan did not violate Title VII, as argued by Weber.

2. Court Opinion

The Supreme Court found that this affirmative action training program did not violate Title Vii. The Court

reviewed the legislative history of the Act and concluded that, because its primary intent was to increase employment opportunity for minorities in occupations from which they had traditionally been excluded, Congress did not intend to completely prohibit private, voluntary efforts consistent with the legislative intent.

The Court relied upon what it perceived to be the intent of Congress rather than a literal construction of Sections 703(a) and (d) of the Act, which make it unlawful to "'discriminate...because of...race ' in hiring and in the selection of apprentices for training programs."

Section 703(a). 42 USC Section 2000e-2(a), provides: "(a) It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Section 703(d), 42 USC Section 2000e-2(d), provides: "It shall be unlawful employment practice for any employer, labor organization, or joint labor- management committee

controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of his race, color, religion, sex, or national origin admission to, or employment in, any program established to provide apprenticeship or other training."

The Court urged: "It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers'." The dissent, led by Mr. Justice Rehnquist, said that any and all racially based employment quotas or preferences are prohibited by the plain language of the statute.

While the Court expressly declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans," it concluded that the Kaiser plan was permissible because it was remedial in purpose and reasonable under the circumstances. It found that the express purpose of the plan was to remedy and identified, conspicuous racial imbalance. The purposes of the plan, to break down racial barriers and to increase minority employment opportunity, thus mirrored those of Title VII.

The Court further ruled that the plan did "not unnecessarily trammel the interests of the white employees." This conclusion was premised upon the factual findings that the plan did not absolutely bar advancement of white workers

(half the trainees were white) and did not require the discharge of whites and their subsequent replacement with blacks. The Court also noted the temporary nature of the plan. Racial preferences were to be discontinued upon elimination of the racial imbalance.

3. An Evaluation of the Weber Decision

Justice Brennan, writing for the majority, cautioned his readers to notice the "narrowness of our inquiry," by which he meant that the sole issue before the Court was whether or not Congress, either in the statute or in the Legislative history, intended to restrict voluntary actions that were designed to move the labor market away from a discriminatory past.

The opinion seized on the statutory language stating that nothing in the Act could be relied on to "require" an employer (or a labor organization) to use race as a criterion in a personnel selection procedure. Because the Congress could have written "allow," but did not, Justice Brennan saw no barrier to the use of voluntary plans, as long as the intent of the voluntary plan was consistent with the Congressional intent.

The issues in Weber that concern us here are the voluntary nature of the agreement (a collective bargaining contract) and the forward-looking nature of the remedy (the distribution of the training slots on racial grounds). In

this case, the Court justified racial preferences by arguing that the joint plan did not "unnecessarily trammel the interests of white workers" That is, the agreement did trammel the interests of white workers, but the Court allowed such conduct because the results of the remedy were deemed to be more important.

But within the union, the senior members did not suffer the burden of the adjustment (or trammelling); rather, the burden was carried by those in the lower occupational grades who might otherwise have entered into craft job training programs. Within the union, senior colleagues appear to have given away the rights of their junior colleagues. Thus, the issue of the Duty of Fair Representation is involved.

4. EEOC Guidelines

The Equal Employment Opportunity Commission has published affirmative action guidelines. They designate the circumstances under which the EEOC will not find employers who take voluntary affirmative action liable in reverse discrimination cases.

The Guidelines, which were effective prior to the Weber decision, permit an employer to engage in race- or sex-conscious employment practices after it determines through written self-analysis that its employment practices do or tend to exclude, restrict, or result in adverse impact or

disparate treatment of, protected persons. Such determinations need not amount to an admission of a Title VII violation.

After analysis, the employer is authorized to take, if appropriate, remedial race- or sex-conscious corrective action, such as the implementation of goals and timetables, pursuant to a written plan. Such plans must avoid "unnecessary restrictions on opportunities for the workforce as a whole" and may be "maintained only so long as is necessary to achieve" the remedial objectives. These standards are analogous to those set forth by the Supreme Court in Weber.

The Guidelines constitute a "written interpretation or opinion of EEOC within the meaning of Section 713(b)-(1) of Title VII. Therefore, good faith reliance upon the guidelines will be a defense to reverse discrimination claims."

5. Conclusion

What seeds did the Court sow in the Weber decision? Employers should recognize that the Court is still in the midst of deciding the difficult legal and moral question of affirmative action and reverse discrimination. We still have a long way to go before we have a consistent doctrine on equal employment opportunity. However, the Court has made several decisions in the last few years that may have

long-lasting implications. The Weber decision held that a private employer's voluntary affirmative action plan designed to remedy past racial imbalances in traditionally segregated jobs does not violate the will of Congress as expressed in Title VII of the Civil Rights Act of 1964.

IV. THE SUPREME COURT'S 1987 DECISION ON AFFIRMATIVE ACTION

On March 25, 1987, in Johnson v. Transportation Agency, the Supreme Court issued its fifth affirmative action ruling within the last eleven months. In Johnson, the Court upheld a voluntary affirmative action plan for hiring and promoting women and minorities adopted by the Transportation Agency of Santa Clara County, California. Johnson firmly supports the conclusion that, as we wrote last year, public employers may use affirmative action under some circumstances.(7) However, Johnson leaves several important questions unresolved about what types of affirmative action are permissible under what conditions, particularly for public employers. Cities and municipal agencies should consider carefully the implications of the Johnson decision for their own employment practices.

1. The Supreme Court's Decision in Johnson

The decision in Johnson concerned an affirmative action promotion and hiring plan voluntarily adopted in 1978 by the

Santa Clara County Transportation Agency. The plan was intended to achieve a "statistically measurable" yearly improvement in the hiring and promotion of minorities and women in job categories in which they were underrepresented; the long-term goal of the program was to ensure that the composition of the work force generally reflected the proportion of women and minorities in the area labor force. Although the plan directed the agency to establish and adjust specific short-term goals for particular job categories each year, it did not call for quotas or for particular numbers of positions for minorities or women to be set aside. In making promotions to positions within job categories where women or minorities were traditionally and significantly underrepresented, the plan authorized the agency to consider as one factor the sex or minority status of qualified applicants.

In 1979, the agency announced a vacancy for the position of road dispatcher, which was included in the "skilled craft worker" job category. None of the 238 positions in that category had ever been held by a woman. The agency promoted a female applicant, Diane Joyce, although she was rated slightly less well qualified for the job than a male applicant, Paul Johnson. In 1981, Johnson sued the agency in federal court under Title VII of the Civil Rights Act of 1964, the federal law that bans job discrimination. The trail court found in Johnson's favor and ruled that the agency's affirmative action plan was

invalid. The federal court of appeals reversed the lower court decision, however, holding that the plan was proper under Title VII.

In a 6-to-3 decision, the Supreme Court upheld the agency's affirmative action plan. The majority opinion pointed out that Johnson had sued only under Title VII and had not claimed that the plan was unconstitutional. The Court explained that the plan in Johnson should be evaluated according to the same criteria used in Steel-workers V. Weber, a 1979 decision that upheld a private employer's affirmative action hiring plan under Title VII. The Court held that the Santa Clara plan met the Weber standard because it was designed to eliminate a "manifest imbalance" of women in a "traditionally segregated job category" and because it did not "unnecessarily trammel" the rights of male employees.

2. The IMPLICATIONS OF JOHNSON FOR PUBLIC EMPLOYERS

Although the decision in Johnson strongly supports affirmative action in principle, the types of affirmative action that the courts will allow will continue to vary significantly depending upon the circumstances. The following questions and answers may provide guidance for public employers:

a. Must a public employer admit that it has discriminated in the past in order to adopt an

affirmative action program?

No. The Court suggested last year in Wygant that no such admission is necessary and has now made the point clear in Johnson.

b. Does the rule announced in Johnson govern all affirmative action by municipal employers?

No. Since Johnson decided to sue Santa Clara County only under Title VII, the Johnson Case concerns the validity of affirmative action only under Title VII. Unlike private employers, public employers are subject to constitutional antidiscrimination requirements as well as to Title VII and should design their affirmative action plans to meet both constitutional and Title VII standards.

While the majority in Johnson stated that the Constitution's requirements are stricter than those of Title VII, it is not clear what these constitutional requirements are or how they will be applied. It appears that a majority of the Court would require the public employer to have a "firm basis" for the belief that remedial action is required to address that employer's past discrimination.

c. What types of affirmative action are acceptable?

The answer to this question will depend on individual circumstances, such as the impact of an affirmative action plan on nonminorities, the

availability of alternatives, and the strength of the original justification for affirmative action. The courts are least likely to accept plans that damage the rights or "firmly rooted expectations" of nonminority employees, such as a layoff plan or a promotion plan that makes it very difficult for white male s to advance. The courts are most likely to accept flexible plans that simply include minority or female status as a positive factor in job decisions, as in Johnson.

d. Can numerical goals be used in affirmative action plans?

Yes, if they are designed and implemented properly. It is important that the right labor market comparison be used in selecting goals. For example, in designing an affirmative action plan to hire workers for unskilled positions, a municipality could choose a percentage goal comparable to the percentage of minorities in the general labor market. On the other hand, the appropriate basis for a human services department affirmative action plan for minority social workers would probably be the percentage of qualified minority social workers in the labor market.

Goals are also more likely to be acceptable if they are flexible and temporary and consider factors such

as likely turnover and new job openings. Rigid quotas will probably be disapproved of, although it may be permissible under some circumstances temporarily to set aside a carefully specified number of job positions for women or minorities as part of an affirmative action plan.

e. What is the effect of Johnson on the affirmative action provisions of Executive Order 11246, which concerns government contractors?

Johnson did not deal explicitly with Executive Order 11246. The Executive Order requires contractors with the federal government to avoid discrimination, to attempt to recruit minority workers, and to adopt affirmative action hiring goals if the racial composition of a contractor's work force differs substantially from the racial composition of the work force in the contractor's geographic area. Although the Executive Order is not mentioned in Johnson, the decision indicates that such affirmative action goals would probably be considered valid under most circumstances.

Although the decision in Johnson has provided additional guidance for public employers concerning affirmative action, the question of precisely what types of plans can be adopted remains unanswered and will depend upon the particular circumstances in each case. Johnson reemphasizes the importance of careful design and

implementation of any affirmative action plan, including both the reasons for the plan and the techniques to be used.

Footnote

1. U.S.C. Section 2002-2j

2. Griggs vs. Duke Power Corp. 401 U.S. 424 (1971)

3. "The EEOC Retreats After A Seniority Ruling," Business week, June 20, 1977

4. Tea msters vs. US, 431 U.S. 324 (1977); dissussed in Swanson, Stephen C., "The Effect of the Supreme Court's Seniority Decisions," Personnel Journal, December 1977

5. 104 S. Ct. 2576 (1984)

6. Parade Magazine, April 21, 1985

7. D. Tatel and E. mincberg, "The Supreme Court's Affirmative Action Decisions," Public Management, October 1986

Chapter 4

Statistics, Discrimination, and The Courts: The Fairfax County Example

The Civil Rights movement of the 1950s and 1960s did more than identify social evil in American society, or point out ways in which individual rights were denied by state and local government action. It generated a new area of public policy for the administrative state, in which instruments for change--new administrative technologies--were necessary to go beyond symbolism and empty legalism. Of the administrative technologies designed to address racial discrimination, one stands out in importance: the affirmative action plan. As Combs and Gruhl point out in a recent book, "affirmative action is not an end, but rather a means of insuring the ultimate goal of equality of employment opportunity... affirmative action is a remedial measure."[1]

The notion of remedy for past injustice is the common thread of judicial doctrine. But developing an approach to affirmative action that is fair, effective and statistically valid is no easy matter. Increasingly the focus is on statistical analysis of the workforce. A plan must establish a frame of reference for minority representation; this may rely on applicant flow experience, or the composition of the local labor market. Litigation subjects

any remedies--and the statistical proofs used to justify them--to rigid criteria of validity.

The test of affirmative action is clear: Past discrimination, not the achievement of racial balance in the workforce as an end in itself, is the only justification for affirmative action plans.

This chapter analyzes efforts to develop an affirmative action plan in Fairfax County, Virginia. The Fairfax case exposes a number of important issues tied to affirmative action: the role of the courts, the proper management of public personnel system, the impact of hiring quotas on public agencies. But our major focus is on the enduring problem of proof and proper corrective action. What constitutes the basis for a county government's hiring goals, what shows past discrimination, what points to a solution other than the inadmissable objective of a racially balanced workforce, what provides compelling statistical analysis for judicial decisions--these the issues this chapter addresses.

The Fairfax case was played out largely in the courts. On April 20, 1979, Fairfax County, Virginia, a wealthy and mostly white suburban jurisdiction in the Washington Metropolitan Area, was praised by U.S. District Court Judge Albert V. Bryan, Jr., for its "convincing and satisfactory progress" in affirmative action.{2} An affirmative action program instituted by the County in 1978 had set goals for the hiring of minority and female employees that were

largely met and , in some cases, exceeded. At the time of the judge's ruling, which effectively threw out most points in a lawsuit brought by the Department of Justice (DOJ) alleging discriminating in county hiring practices, Fairfax employed 6.6% minority employees in its workforce; the black population of the county in 1970 was 3.5% and by 1980 5.9%. Most observers of the decision concurred that no pattern of discrimination existed in county hiring policies.

Yet, scarcely 18 months later, Judge Bryan reversed his ruling, after the case had been vacated and remanded by the Fourth Circuit Court of Appeals. Finding that DOJ's statistical analysis had shown a prima facie proof of discriminating, Bryan ordered the County to be "enjoined from engaging in any act or practice which has the purpose or effect of discriminating against any employee of, or any applicant or potential applicant for employment."

I. LITIGATION: TRIAL, APPEAL, RETRIAL

The case of United States vs. County of Fairfax, Va., et al., Civil Action No. 78-862-A, was tried before United States District Judge Albert V. Bryan, Jr., April 9-11, 1979, DOJ as plaintiff sought a general injunction against discrimination in employment by race or sex; a requirement that the County deep and report records on affirmative action; and the establishment of numerical hiring goals for blacks and women. In addition, relief for identifiable

individuals affected by County employment practices was sought.

As in all EEO cases, the intent of the plaintiff was to establish a Prima facie case of discriminating using statistical proof. The burden of proof is transferred to the defense to rebut and no intent or malicious motive need be shown. Thus the case seemingly becomes one of statistician versus statistician.

DOJ's effort to show prima facie discriminating rested on two statistical bases. First, it argued that the black and female share of the County workforce fell significantly short of their representation in the Washington, D.C., SMSA. Second, it asserted that the black and female share of 1974 through 1978 County hires in many job classes fell significantly short of their representation in the 1978 applicant pool. Central to the Plaintiff's second point was their Exhibit 119-B (Table 1). A quick glance at this exhibit shows some questionable assumptions. The most obvious is the use of only one year's data on applications, 1978, in a binomial model for comparison with 1974 to 1978 hiring. 1978 was the first year of an aggressive affirmative action program, and it can be assumed to have yielded a much larger number of black and female applicants. Using this as the only year in which female and minority percentages of applicants are computed penalized the County for having started an affirmative action program. Further, the DOJ statistician aggregated 1974 through 1978 hires for

a single lumped comparison to 1978 applicants, a statistically unsound distortion of the hiring data.

A further weakness was the grossness of the data used to show the government's case. None of the subtleties of Fairfax's hiring process was shown. The differences between independent bodies and regular County departments, inside versus outside searches and hires, reapplications by the same individual, recording of actual hires by year of initial application, were hidden by the aggregate data. To challenge DOJ's argument for SMSA availability, Fairfax County developed a weighted availability model. The weighted SMSA model required two numeric quantities by job category for each geographic location providing potential County applicants: a race/sex breakdown of the pool of available workers and the percentage of total County applicants from that location. The model then multiplied the raw black/female availability figure for a location by the fraction of County applicants from that location to get the "weighted" availability for the location. Total availability for a work category was considered the sum of weighted availability in the separate locations. The model yielded availability that contrasted strongly with the unweighted SMSA availability of DOJ, as illustrated in Table 2 for one job category.

The model building exercise depended upon the integrity and ability of separate County administrators to provide required input information in an accurate form to survive

the challenges of litigation. The model did not require rigid consistency of definitions for input variables. Separate County administrators selected the variables representing model input information from what was available and expedient. Labor-intense data collection under rigidly controlled conditions was inappropriate and not seriously considered in building the model.

The only readily-available source of applicant information with race and sex identified was 1978 applications. Applicant data were collected in the following steps. In late February, 1979, applications from rejected applicants in personnel archives were analyzed manually, and SSN, zip code, class code and EEO category were recorded for entry into the computer . ORS (Office of Research and Statistics) provided computerized payroll files on active County employees which were used to list employees who were appointed in 1978, whose appointment was to a full-time position, and who were still active in the last period of 1978.

The rebuttal of gross SMSA availability by the weighted SMSA model was not a "diamond cutting" model. It did not require finely tuned precision and validity. It was meant to shift the contest away from the Washington SMSA argument rather than to provide a detailed blueprint for applicant availability.

The initial charge of the statistician was narrow and specific. He was to determine whether the appointment dat

on plaintiff's Exhibit 18 was within reasonable chance deviation from the applicant data presented in Exhibit 16. (An example of the data is in Table 3.) Further, he was to make a similar yearly determination of the statistical significance of the relationship between the County's hiring data for 1974 through 1978 and the availability percentages from the weighted SMSA model. (An example of the data is in Table 4.) The classical statistical comparison tests used in similar cases assume that the input data in the tables are accurate. Based on this assumption, they then determine if chance alone is sufficient to explain the data. If chance alone does not explain the data, then the alternative explanation may provide a prima facie case.

With the exception of a minor point involving the employment of women in EEO job category 8, the County won a clear victory n the first round. Judge Bryan rejected DOJ's aggregation of appointments for the period 1974 through 1978 in comparison with only the atypical applicant data for 1978. The court rejected the argument that the Washington SMSA be considered the County's recruitment source, accepting instead the weighted SMSA model of the County. The strongest language in the Judge's opinion concerned the good faith efforts of the County to institute an affirmative action program:

Despite its record in 1976 and 1977, the County has made convincing and satisfactory progress toward the goal of equal employment opportunity for blacks in both job categories and, as importantly, evinces a commitment to continue to do so. Under these circumstances, no "compelling need" has been shown for the ordering of the percentage employment goals for blacks as requested by the plaintiff.

The Second round was a clear victory for the plaintiff. The case was appealed to the Fourth Circuit Court in Richmond by DOJ. Arguments were made on May 5, 1980, and on July 23, 1980, Judges Winter, Murnaghan, and Sprouse vacated the judgment of the District Court and remanded the case for further proceedings.

The Circuit Court was unswayed by the County's good faith efforts at affirmative action and found the case to show evidence of disparate treatment and disparate impact. Disparate treatment occurs when percentages of applicants fall short of percentages in the relevant labor market. Disparate impact considers whether employment practices have discriminatory effects without the necessity to show motive or conscious discrimination. Test validation controversies are perhaps the most common source of disparate impact cases. This was a minor part of the plaintiff's case in the District Court suit. Nonetheless, the Circuit Court instructed the District Court to consider the problem of job test validation in its follow-up proceedings.

Why did the County lose round two? Three factors apparently dominated the judgment of the Court. Unlike Judge Bryan, the Circuit Court did not find that the 1978 program had had significant effects and saw it rather as a continuation of earlier efforts. Second, the Circuit Court rejected the County's zip code analysis as inadequate and in so doing focused less on the obvious shortcomings of the government's statistical reasoning. Third, the Court viewed the case as another in a series of prima facie cases of discrimination and judged it against the body of cases showing disparate impact, a factor of little consequence in the District proceedings.

Round three was the rubber match, again heard by Judge Bryan in the District Court. The immediate effect of the Circuit Court decision was to hold that a prima facie case of discrimination had been shown. The County had to rebut this finding. The County's strategy for round three was to develop a more sophisticated rebuttal of the applicant flow data. The most telling argument of the plaintiff was not surprisingly in the disparate impact area--the opening offered by the Circuit Court was used by the government to its advantage. Using the applicant flow data for 1978 and the hirings form 1974 to 1978, the government was able to show a prima facie case of discriminating against blacks in six of eight EEO categories and five of eight for females. In addition, the government pointed out the absence of job validation in most testing done by the County.

The exposure to the Fairfax personnel system required in the qualification analysis made the County statistician realize that the disparate impact comparisons used by both sides in the first trial were based on data that were incorrectly collected and inappropriate for that use. Hence, also within three months of trial, the County statistician initiated collection of a consistent and statistically proper data base of applicants and hires for 1978. This was the first year in which records allowed this and markedly new numbers of this year promised to discredit prior data and comparisons. This work was labor intensive and was completed only hours before the trial.

Presentations of the County case began with more detailed and expanded criticisms of the DOJ applicant flow model introduced in the first trial. Several problems were shown: Inflating sample size with five aggregated years of hires forced statistical significance; final results varied using successive generations of first trial data runs; and there remained an obvious need for a reasonable assessment of practical significance in each instance of statistical significance.

DOJ's case established additional momentum by listing fundamental errors in job category assignments made by Ors in producing yearly hire totals from computerized payroll records. Ironically, these runs used by the County in the first trial had no connection with the County's prepared defense in the second trial. In fact, the opening segment

of the County's presentation illustrated and emphasized how the successive data produced by that part of ORS varied and clouded the validity of any model based on them, in particular, DOJ's disparate impact model. However, the effect of DOJ's presentation was to cast general doubt on any and all data put forth by the County.

The County's new 1978 comprehensive applicant and hire data base, which was intended to give a clear and reliable view of County hiring, was considered in the above atmosphere. Hindsight indicates it should have been a primary thrust taken by the County. The new data base was not a complete justification for the County but it did turn around the DOJ picture in some job categories and moderated the picture in others. Acceptance of the new 1978 data would have required the court to deal in detail with complexity. Judge Bryan felt that, if the County could use their original 1978 applicant data for the weighted SMSA model in the first trial, then they would have to live with it used against them in the DOJ disparate impact model of applicant flow. The court was not swayed by the argument that data appropriate for one use are not immediately appropriate for any use.

The County's disposal of applicant records for the years 1974 to 1977 also proved to be a major weakness in its efforts to rebut. It permitted the government to utilize the 1978 applicant flow data which, the County believed, reflected its aggressive affirmative action efforts of that

year. And it made the County's argument for precise statistical proofs seem a bit hypocritical, against the background of sloppy records management.

II. IMPLICATIONS

The Fairfax County affirmative action suit has a number of important implications for public managers. In the area of records maintenance and data collection, the County had deficiencies. Many of these stemmed from the traditional approach of the Office of Personnel to its staff role in the County. Major decisions on hiring were made by line agency managers, and the Office of Personnel was concerned with routine activities at the front end of the hiring process. It had only partial control over hiring. The deficiency was accentuated by the role of the Office of Statistics and Research, which did not have data on personnel available and certainly not in a manner structured to take into account the needs of the County Attorney's Office. The working relationship of the County Attorney's Office and the staff agencies of the County was problematic. Neither staff unit was able to provide in a coordinated and useful manner the information needed by the County Attorney. In-house statistical capability was insufficient to build the County case, and outside experts had to be hired to gather and analyze data to show the County's position. Statistics of

the County agencies were designed for managerial functions, not those required in litigation.

The extreme arguments for regionally based hiring goals were rejected. The government's use of the Washington SMSA, and the resulting high percentages of blacks and women in the relevant labor market, was consistently rejected by both the District and Circuit Courts. Thus the most radical possible outcome of the litigation, the imposition of hiring goals for blacks that would have produced an unrepresentative public service in Fairfax County, was rejected.

One is left with these questions. Why did the case take place at all? was this a productive use of public resources? Despite the County's inability to show the immediate effects of its 1978 affirmative action program, Fairfax was not a notorious discriminator. It was a typical suburban jurisdiction, with an enviable reputation for professional competence in the public service. The lack of an observable public problem was underscored by the Justice Department's decision to litigate before it had a statistical proof of any sort of discrimination. Fairfax was a likely target for the Justice Department suit because of the regional issue. Fairfax was an affluent, mostly white jurisdiction adjacent to a heavily black city, Washington. Fairfax had used the SMSA for certain of its recruiting and hiring strategies prior to the suit, making the DOJ argument potentially more effective. If this is

true, should the federal government be charged with remaking the public services of individual local jurisdictions against a statistical background of labor market percentages for broad metropolitan regions? Is the resulting imbalance a step forward for advocates of either regionalism or equal protection? Who benefits?

The litigation has had its effect upon the County's personnel process. Early in 1982 the County began using a new management information system that automates much of the personnel process including applications and certifications for employment as well as affirmative action functions. In general, the hiring process underwent significant centralization. After five years of satisfactory reporting to the Court under the consent decree, the County motioned successfully to have the reporting requirement lifted. While the discrimination litigation has become history, there continue to be periodic allegations concerning employment and promotional opportunities for blacks and females. Some critics claim that the County has put too many promotional opportunities into open competition with the result that the external labor market is utilized at the expense of incumbents. This phenomenon, which may be affecting both majority and minority incumbent employees equally, is perhaps a subtle consequence of excessive fairness imposed on the personnel system after the litigation. It could also be that the constrained post-trial hiring has resulted in a less qualified, and

consequently less promotable, incumbent workforce. Most likely such patterns in the post-trial years' statistics are due to a variety of complex causes some of which are consequences of the litigation.

Table 1

Alternative 1974-78 Black Appointments

Category	Total Appointments (1974-1978)	Proportion of Blacks in App. Pool (1978)	Observed No. of Blacks	Expected No. of Blacks	Standard Deviation Of No. of Blacks	Disparity in Standard Deviations
1. Official and Admin.	27	.1258	1	3.40	-	-
2. Professionals	647	.1126	54	72.85	8.04	2.34
3. Technicals	322	.1299	23	41.83	6.03	3.12
4. Prot.Serv.	745	.2296	78	171.05	11.48	8.11
5. Paraprof.	299	.0978	15	29.24	5.14	2.77
6. Ofc./Cler.	1,218	.1260	78	153.47	11.58	6.52
7. Sk. Craft	377	.1352	30	50.97	6.64	3.16
8. Serv./ Maint.	1,252	.1957	162	245.02	14.04	5.91
Total	4,887	.1362	441	665.61	23.98	9.37

Table 2

Weighted Availability for EEOC-4 workers

Area	Distribution of Applicants	Black Percentages Unweighted Availability	Weighted Availability
No. Va.	57.58%	2.8%	1.61%
D.C.	12.26%	81.7%	10.02%
Sub. Md	9.58%	10.7%	1.03%
Other Mid. Atlantic	5.76%	9.9%	.57%
N.Y./Pa./Del.	11.80%	10.5%	1.24%
Rest of U.S.	3.02%	5.6%	.17%
Aggregate Availability			14.63%

Table 3

1978 DOJ Applicant/Appointment data
Skilled Craft EEO Category

Total Appl.	Total Hires	Black No. of Hires	Black % of Hires	Black No. of Appl.	Black % of Appl.	Female NO. of Hires	Female % of Hires	Female No. of Appl.	female % of Appl.
1,258	61	2	3.3	146	11.7	1	1.6	61	4.8

Table 4

1978 Fairfax Availability/Hiring Data
Skilled Craft EEO Category

Total Hires	Black No. of Hires	Black % of Hires	Black % of Avail.	Expect. Black No. of Hires	Female No. of Hires	Female % of Hires	Female % of Avail.	Expects. Female No. of Hires
61	7	11.5	8.3	5.7	6	9.8	6.4	3.9

Footnote

1. Michael v. Combs and John Gruhl, "Affirmative Action: Theory, Analysis and Prospects

2. Hammon, et. al., Appelant v. Barry, No 85-5669 U.S. Court of Appeals for the District of Columbia, 1987

3. United States v. County of Fairfax, Virginia, et.al., No. 78-862-A U.S. District Court for the Eastern District of Virginia, 1979

Chapter 5

Conclusion

Numerous controversies have arisen around the issue of whether groups protected under the antidiscrimination laws have benefited at the expense of other participants in the labor market. In 1979, the Supreme Court in the Weber case articulated the doctrine of not harming innocent victims in order to compensate those who had been adversely affected by past employment discrimination. In 1989, in Wards Cove versus Atonio, the Court dramatically shifted its interpretation of affirmative action away from the disparate impact doctrine in Griggs versus Duke Power Co. Nevertheless, corporate employers have indicated that they remain firmly committed to company programs on affirmative action. Despite some improvements, large disparities in income and employment between blacks and whites persist, and there has been uneven progress in reducing the occupational income gap between men and women.[1] Given that the supply of young entrants into the labor force will decline in the 1990s, affirmative action will encompass a broader scope of programs of specialized training, education, and outreach to disadvantaged persons.

On the other hand, case of Wards Cove Packing Co. versus Atonio (1989) has implications for the public and private sectors, federal contractors, and plaintiffs. Employers that have at least 100 employees should pay particular attention to the clear record-keeping and

analysis statements in the decision. The case was taken under the disparate impact theory of Title VII, in which a facially neutral employment practice may violate the statute without evidence of the company's subjective intent to discriminate. Before Atonio, nonwhites have not been interpreted consistently as an allowable group for analysis. As a result, this decision will allow plaintiffs to use either separate race-ethnic group or bring actions as a combined group of minorities. By combining these groups, plaintiffs are able to obtain a larger sample size, thereby making statistical significance easier to obtain.[2]

With its 1989 employment discrimination rulings the Supreme Court has made some significant refinements in procedural and evidentiary rules, but the charges that the Court's conservative majority has overruled major, long-standing precedents are unwarranted. It is still possible to settle Civil Rights class actions with consent decrees or other agreements containing affirmative action provisions. Plaintiffs will continue to have remedies for all kinds of unlawful conduct as before, but, for the most part, the nature of their remedies will no longer differ greatly depending on whether their claims involve race or sex or whether they are based on disparate treatment or impact.[3]

Affirmative action programs in the public sector are necessarily affected by political and economic trends. The current conservative political environment, coupled with the advent of serious fiscal constraints facing many cities,

raises questions about whether it is reasonable to expect progress in the employment of women in nontraditional roles in municipal governments. This question was investigated by analyzing data gathered from reported surveys of over 280 municipal police departments in large US Cities between 1978 and 1987. Findings indicate that women can expect great difficulty and long delays in improving their representation in municipal policing. Municipal budget reductions, increasing numbers of court cases that challenge the legality of affirmative hiring, promotion, and firing policies, and a conservative political environment emphasizing individual rights over social equity are causes for this delay.

Footnote

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3. Williams, Robert E. "The Supreme Court's 1989 Employment Decisions- Civil Rights and Illusions of Armageddon" ILR Report Spring, 1990

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