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THE LEGAL ASPECTS OF EQUAL EMPLOYMENT OPPORTUNITIES IN THE PUBLIC SCHOOLS

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# THE LEGAL ASPECTS OF EQUAL EMPLOYMENT OPPORTUNITIES IN THE PUBLIC SCHOOLS

by

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APPROVAL PAGE

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This study reviews federal laws, state laws, and case laws, decisions of regulatory agencies, Executive Orders, and Equal Employment Opportunity Guidelines where equal employment opportunity has been the major issue. The study focused on applicability of these legislative and judicial decisions on employment in public schools.

The following questions were proposed and answered:

1. What are the Equal Employment Opportunity laws that cover public school employees and who is covered?

2. How are the Equal Employment Opportunity laws enforced?

3. What is the legal status of the Equal Employment Opportunity Commission and how does it function?

4. What legal principles of equal employment opportunity have been established through case law?

5. What are the current trends in Equal Employment Opportunity laws and rulings?

6. Based on this study, what are the legally acceptable standards which are most likely to prevent charges of discrimination in public school employment?

Based on analysis of this study, the following conclusions were reached:

1. School board policies are legally binding on employers and the employees.

2. School board policies that result in charges of unlawful employment practices may have to be proven by the employers to be bona fide occupational qualifications to stand muster in the courts.

3. Practices and patterns of equal employment opportunities must not disadvantage protected classes of individuals.

4. Administrators and boards of education who make employment decisions need to act with well reasoned procedures and anticipate the potentially adverse impact of their decisions.

5. Personnel officers in the public schools, aided by legal counsel, must be familiar with the Equal Employment Opportunity laws and regulations applicable to public school employees.

6. Personnel officers must understand and be prepared to respond appropriately to the Equal Employment Opportunity Commission (EEOC) by having a working knowledge of Title VII and the EEOC Guidelines, questions and answers, and Commission opinions.

7. School attorneys need to regularly advise personnel officers regarding the legal remification of employment practices.

8. Personnel officers need to avail themselves of special training to understand equal employment opportunity procedures.

9. Politics and litigation are constantly in a change mode and the impermissable and the permissable rise and fall on political and judicial decisions. They usually have predictable trends, but have been somewhat irregular in the rulings based on Title VII.

10. Sexual harassment has not been faced realistically by most school systems. Few policies exist to handle the issue of sexual harassment.

11. Maternity benefits are still in litigious limbo.

12. Comparable worth is the newest area of major litigation and is likely to be the subject of many law suits in the 1980's.

13. Salary and benefit conflicts arise when policies are not clear and specific.

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# CHAPTER I

## INTRODUCTION

### Overview

Employment discrimination, an issue in both the public and the private sectors, has provided the basis for a myriad of court decisions, Presidential Orders, federal and state guidelines, rules, policies, and regulations. Beginning with the Civil Rights Act of 1866, employment discrimination has been a continuing concern of the American people for over one hundred years. Both state and federal legislative bodies and the courts at all levels have sought to make it illegal to engage in employment discrimination.

Immediately following the Civil War, the United States Congress enacted the Civil Rights Act of 1866. In addition to providing a guarantee to the newly freed slaves that they would have the same legal rights as whites, the act also included the right to enter into contracts of employment without discrimination.

The Civil Rights Acts of 1866 and 1870, which are certified in the United States Code,[1] were weakened by a series of court decisions in 1883. These decisions mandated that the Acts were intended to cover only acts of discrimination by a state and were never intended to cover the private sector. These judicial decisions, commonly called "the Civil Rights Cases", struck down the federal protection that gave

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[1] 42 U.S.C. Sections 1981 and 1983.

blacks and other minorities the right to enter into contractual agreements with private parties. The passage of the Civil Rights Act of 1964 provided for the reinstatement of the coverage of employment in the private sector.[2]

From 1866 and up to the New Deal administration of President Franklin D. Roosevelt, governmental action provided protection primarily for governmental employees. The Civil Service Act of 1883 sought to establish the principle of "merit employment", and contained one of the first regulations issued under legislated law making religious discrimination in federal employment illegal.[3]

President Roosevelt's Executive Order 8587 issued in 1940 contained a Civil Service rule making racial as well as religious discrimination illegal. In 1940, the United States Congress established through the passage of the Ramspeck Act, which served to amend the Classification Act of 1932, a philosophy of "equal rights for all" in classified federal employment.[4]

Equal opportunity in the availability of training, in addition to equal employment opportunity, evolved from the political environment of the New Deal through Presidential Order and Congressional action. The equal opportunity for training is prescribed in those areas where federal

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[2]Kenneth P. Norwick, Your Legal Rights: Making the Law Work for You (New York: The John Day Company, 1975), p. 191.

[3]The Pendleton Act (Civil Service Act), 22 Stat. 403, (1883). 5 U.S.C. Ch. 12, (1958); U.S. Civil Service Commission, Rule VIII, 1883.

[4]Bureau of National Affairs, The Equal Employment Opportunity Act of 1972, (Washington, D.C.: The Bureau of National Affairs, Inc., 1973), p. 14.

funds are expended for employment and training. The requirement applies not only to the direct federal employment but also to employment by governmental and training contractors as well as training opportunities provided by grant-in-aid programs.[5]

In the closing years of the New Deal, World War II became the top priority of the nation. However, the legislative and executive branches of government continued to focus on the problems of discrimination. Through their own initiative they responded to pressure groups that were advocating fair employment practices, not only in the public sector, but in the private sector as well.

This initiative in Congress, supported by the President, Lyndon B. Johnson, reached a zenith in the passage of the Civil Rights Act of 1964. Title VII of this act prohibits employers, employment agencies, and labor unions from committing certain discriminatory acts. It protects individuals from discrimination on the basis of color, race, religion, sex, or national origin.

Title VII provided for the establishment of the Equal Employment Opportunity Commission (EEOC). This federal agency is given the responsibility to secure compliance with Title VII. A network of offices exist throughout the nation to make the services provided by EEOC available to any person who needs its help because of perceived acts of discrimination on the basis of color, race, religion, sex, or national origin. The EEOC staff investigates such charges and seeks to bring resolutions.

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[5]Ibid., p. 15.

In recent years both the EEOC and the Supreme Court have recognized that the mandate of the Civil Rights Act of 1964 could not be met by prohibiting practices intentionally designed to deny opportunities to minorities. Practices that are not racially motivated may, nonetheless, operate to disadvantage minority workers unfairly. In the landmark case of Griggs v. Duke Power Company [6], the Supreme Court's application of Title VII invalidated the use of general intelligence tests and other selection criteria for employment that causes disparate treatment for minorities. The only exclusions are those criteria that are shown to be bona fide occupational qualifications (BFOQ).[7] Thus, the courts become the ultimate watchers of discriminatory behavior in the work place.

As government agencies, public school systems in America come under the same laws and regulatory requirements as do other private and public employers. Therefore, school personnel officers are increasingly involved in monitoring employment procedures as the administrators responsible for affirmative action in the public school systems. In this capacity, the personnel officer is responsible to provide leadership to prevent charges of discrimination through effective employment discipline and dismissal procedures.

The personnel officer's role in cases where charges are filed with EEOC or in a suit taken to the courts requires an understanding of the requirements of federal and state laws, case laws, federal and state

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[6]Griggs v. Duke Power Company, 401 U.S. 424 (1971).

[7]United States Commission on Civil Rights, Toward an Understanding of Bakke, (Washington: U.S. Government Printing Office, 1979), p. 179.

requirements of federal and state laws, case laws, federal and state regulations and the Uniform Guidelines in Employment Selection Procedures (1978).[8]

Status of Equal Employment Opportunity in Public Education

Title VII of the Civil Rights Act of 1964, (42 U.S.C.) was enacted by Congress as a comprehensive prohibition on private acts of employment discrimination. With an amendment known as The Equal Employment Opportunity Act of 1972, Title VII now covered practically all state and local governmental employees to include the previously exempt employees of educational institutions and agencies. The law charged the Equal Employment Opportunity Commission (EEOC) to process, investigate, and conciliate employment discrimination complaints, and if necessary, to bring suits against respondents in the federal courts. This was a change in the role of EEOC which, as a part of the compromise that led to the adoption of the 1964 act, had virtually no enforcement powers.

The basic responsibilities of employees under the 1972 Act are predominantly those that are imposed under Title VII of the 1964 Act. Under Section 703(a) of the act, it is an unlawful practice for an employer to do the following:

A. Fail or refuse to hire, or to discharge, any individual or otherwise discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment because of his race, color, religion, sex, or national origin. This applies to applicants for employment, as well as employees.

B. Limit, segregate, or classify employees in any way that would deprive or tend to deprive any individual of employment oppor-

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[8]Federal Register, 43 no. 166, 25 August 1978, 38290-38311.

> tunities or otherwise adversely affect his status as an employee because of his race, color, religion, sex, or national origin.

Section 706(c) of Title VII requires that an allegedly unlawful employment act occurring in a state or political subdivision that has a 706 agency be filed with the 706 agency before it can be filed with the EEOC.

The North Carolina State Personnel Commission has been designated by EEOC as the 706 agency for those charges filed by state employees, employees of local service departments, public health departments and mental health clinics, employees of local civil defense agencies that receive federal grant-in-aid funds, and other county employees that the county commissioners may from time to time determine. The designation does not include charges filed by public school superintendents, principals, teachers, other public school employees, or employees of the Office of the Governor and Lieutenant Governor.[9] Therefore, the EEOC is the notice agency for public school employees and such charges must be filed within 180 days of the occurrence of an allegedly unlawful employment practice.

Even though the Civil Rights Act of 1964 requires that charges of discrimination be filed within one hundred eighty days of the incident that is alleged to be discriminatory, the Supreme Court in Zipes v. TransWorld Airlines, Inc.[10] ruled that an employee can sue later even if the employee did not go to the EEOC. The court indicated in this

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[9]North Carolina, General Statutes, Chapter 95, Sec. 95-28.1.

[10]Zipes v. TransWorld Airlines, Inc., (U.S. Sup. Ct. 1982), 28 EPD, 32,432.

case that there are some instances where the timely filing requirement might be waived. Timing, in addition to other documentations, is an important factor in filing charges and an employer must insure that all records maintained are appropriately and correctly dated in the event a charge should occur.

A study of the developments in constitutional law in the last two decades shows a major reversal on the question of constitutional rights for public school employees under the protection of the First Amendment. Splitt stated, "A more careful historical analysis, however, shows that the actual change in legal interpretation took place . . . when the First Amendment rights of public workers began to receive serious attention."[11]

Prior to the early 1950's, an employee in a public school position had little or no right to object to employment conditions, and job applicants were held without regard to having rights. School executives and boards of education hired and fired school personnel in the 1930s and 1940s at will and without regard to constitutional limitations. Persons were fired for any reason that displeased the employer.

The first breach in the absolute perceived right of school executives and members of school boards to hire and fire at will came to light in the litigious environment resulting from a requirement of teachers to sign loyalty oaths. In the landmark case of Wieman v.Undegroff[12](1952),

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[11]David A. Splitt, "School Law," The Executive Educator, 12 (July 1983):8.

[12]Wieman v. Undegroff, 344 U.S. 183 (1952).

the Supreme held that a state could not require its employees to swear oaths of loyalty and deny under oath that they had past affiliation with Communists. This ruling extended into a series of law cases dealing with loyalty oaths and culminated in the 1961 decision in Cafeteria Workers v. McElroy.[13] The court held that employment could not be based on whether a person previously had membership in a specific political party. This case was followed by several other First Amendment cases that eventially led to Connick v. Myers[14] in April, 1983. Myers appears to significantly limit the rights of public employees under certain working conditions.

The full meaning of the Myers decision will not be realized in the near future, but to conclude that the case makes a new and strong basis for terminating employees who prove disruptive is wrong. It appears more reasonable to conclude that when a well-documented, procedurally correct dismissal is pursued, it is less likely to be overturned by a federal judge in cases where lawyers argue that the action was unconstitutional and based on statements made by the employee. It is an employer's responsibility to document and be procedurally correct in the employment of public school personnel for the benefit of the applicants, employees, and the school system.

However carefully policies, regulations, guidelines, contracts and letters of appointment are worded, no general rule can possibly anticipate every individual case that is likely to arise. When a clear

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[13]Cafeteria and Restaurant Workers Union 473 AFL-CIO v. McElroy, 36 U.S. 886 (1961).

[14]Connick v. Myers, 103 SCT, 1684 (1983).

course is not apparent, the decision makers in a public school system, like those in both private and public organizations, must draw on society's other laws and traditions for guidance.

Clarence Thomas, Chairman of EEOC, in an address before the District of Columbia Chapter of the Industrial Relations Research Association on June 3, 1982, stated that he intended to use his office to question old assumptions and to gather data, analyze it, and use it to check the validity of current employment practices.[15] Thomas' comments add emphasis to developing a planned procedure to reduce the liability of charges of discrimination in the employment of public school personnel.

This study provides public school administrators with an evaluation of the legal aspects of equal employment opportunities for public school employees. The study offers a philosophical and an operational basis for public school administrators to avoid litigation resulting from charges of discrimination in the employment of public school personnel. Should an EEOC charge or lawsuit be filed against a school system, understanding of proceedings and role of defendent are outlined in the study.

This study is important in that it provides information to the educational decision-makers to understand the complexity of the requirements of a personnel procedure that will provide equal employment opportunities for all persons. As legal questions arise in

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[15]"EEOC's New Chairman Says Commission Will Examine Use of Statistic, Other 'Old Assumptions'," Ideas and Trends in Personnel, 23 July 1982, pp. 141-2.

increasing numbers, personnel administrators must be able to justify personnel decisions or they may become increasingly involved in charges taken to EEOC or suits filed in the courts.

This study will provide significant data and guidelines to public school decision-makers, especially personnel officers, to help them assess the employment process that exists in their school systems and to provide suggestions for making equal employment opportunity available to all applicants and employees of the public schools.

## Questions to be Answered

The purpose of this study is to examine equal employment opportunities in the employment of personnel in public schools and to develop practical, legal guidelines for decision-makers in the public schools to use in making employment decisions.

Several key questions to be answered in this study are as follows:

1. What are the Equal Employment Opportunity laws that cover public school employees and who is covered?
2. How are the Equal Employment Opportunity laws enforced?
3. What is the legal status of the Equal Employment Opportunity Commission and how does it function?
4. What legal principles of equal employment opportunity have been established through case law?
5. What are the current trends in Equal Employment Opportunity laws and rulings?

6. Based on this study, what are the legally acceptable standards which are most likely to prevent charges of discrimination in public school employment?

## Coverage and Organization of the Issues Involved

The remaining four chapters of this study explore and analyze the issues raised in Chapter I.

Chapter II is a review of the literature of equal employment opportunity and traces the establishment of the Equal Employment Opportunity Commission. This background data will provide information on which to analyze more appropriately the legal cases to be discussed in Chapter III.

Chapter III is a historical narrative of some of the legal issues relating to equal employment opportunity and their influence on the employment procedures of the public schools.

Chapter IV is an analysis of several major judicial cases with emphasis on the major legally protected categories of employees and how action in the employment process causes adverse impact on these protected classes.

Chapter V contains a summary of the findings of this study that have been obtained from a review of the literature and the analysis of the selected court cases. Recommendations for the foundation of legally acceptable policies and regulations concerning equal employment opportunities in the public schools are made.

## Definition of Terms

To facilitate an understanding of this study, the following terms are identified:

Adverse Impact - occurs when employment decisions such as hiring, promotion, and termination work to the disadvantage of members of protected groups; focuses on the consequences of employment practices, and as such, the charging party need only establish that an employment practice has the effect of excluding a significant proportion of women or members of minority groups.

Affected Class - any group of employees or former employees who are members of a protected group that has suffered or continues to suffer the effects of unlawful discrimination.

Affirmative Action - specific actions taken by the institution or agency to eliminate the effects of past discrimination in regard to recruitment, hiring, or promoting of employees.

Bias - any constant error; any systematic influence on measures or on statistical results irrelevant to the purpose of measurement.

Bona Fide Occupational Qualification (BFOQ) - a job requirement which permits an employer to discriminate legally on the basis of sex, age, or religion; for example, the requirement that a performer playing the part

of a woman be a woman or that a minister of a particular religion be a member of that religion; is interpreted very narrowly by the courts; for example, age may be a BFOQ, but race is never a BFOQ.

Business Necessity - an institution's plea that if institutional practices adversely affect members of a protected group, the practices challenged are essential to the institution and that no alternative nondiscriminatory practice exists.

Class Action Suit - a civil action brought on behalf of an affected class by one or more individuals or by the EEOC to secure a judicial remedy to an unlawful pattern of discrimination by the institution.

Compliance - the degree to which the institution has carried out its mandatory affirmative action obligation.

Conciliation the process by which the EEOC attempts to settle a complaint of discrimination through agreement with the respondent after a finding of reasonable cause and before bringing a civil action.

Disparate Treatment - discrimination by which an employer treats certain people differently because they are women or members of a minority group;may be proven by comparative evidence, statistical evidence, and direct evidence of motive.

Prima-Facie Evidence - evidence that doesn't have to be proven because it is sufficient on its face or first appearance. For example, if all of a company's

stockroom employees were black, all of its clerical workers female, and all of its supervisors white male, the EEOC would consider this prima-facie evidence of discrimination.

Probable (or Reasonable) Cause - finding required to conclude that discrimination exists in contrast to the "proof beyond a reasonable doubt" needed in criminal cases.

Protected Class - any group (or member of that group) specified in, and therefore protected by, the anti-discrimination laws which bar discrimination because of race, color, religion, sex or national origin.

Reasonable Accommodation - usually used in connection with discrimination because of religion; for example, if an employee needs to be absent for religious reasons, an employer must make reasonable accommodation to grant the employee that absence--even though it may conflict with, or differ from, the employer's schedules, standards or other business conditions; exception: If absence causes employer undue hardship.

Sexual Harassment - an incident in which a person uses his or her position to control, influence, or affect the grade, career, salary, or job of another employee or prospective employee in exchange for sexual favors; includes sexual innuendos made at inappropriate times, perhaps in the guise of humor; verbal harassment or abuse; subtle pressure for sexual activity; sexist remarks about a woman's clothing, body, or sexual

activities; unnecessary touching, patting, or pinching; leering at a woman's body; constant brushing against a woman's body; demanding sexual favors accompanied by implied or overt threats concerning one's jobs, grades, letters of recommendation; and physical assault.

# CHAPTER II

## REVIEW OF THE LITERATURE

Equal employment opportunity is a principle that Congress made into law with the passage of Title VII of the Civil Rights Act of 1964. Equal employment opportunity as identified in the legislation was not a new concept. Like much of social legislation, Title VII had roots extending deep into the past.

The Civil Rights Acts of 1864 and 1870 guaranteed that all persons within the jurisdiction of the United States have the same rights enjoyed by white citizens in every state and territory to make and enforce contracts, to sue, be parties and give evidence, and to enjoy the full and equal benefits of all laws and proceedings for the security of pensions and property. This protection of the rights of all persons had long been in place, but the Civil Rights Act's intent was to define these rights better and provide enforcement.

The coverage of the Civil Rights Acts seemed broad enough to prohibit acts of racial discrimination in both private sector and public sector, in a number of situations. However, a series of court decisions in 1883 rendered the law virtually meaningless by determining that the acts were never intended to cover acts of discrimination in the private sector. Further, the courts restricted coverage to acts of discrimination initiated by the individual states. Because of these rulings, minorities were without federal legislation to protect their right to contract for employment with private employers until the Civil Rights Act of 1964 passed.

After the passage of the Civil Rights Act of 1964, the United States Supreme Court reversed its 1883 decision and decided in a 1968 Case, Jones v. Mayer,[1] that the Civil Rights Act of 1866 covered acts of discrimination in the private sector. Mr. Jones, the plaintiff, claimed a private housing developer refused to sell him a house because he was black. The plaintiff argued this action was illegal under the Civil Rights Act of 1866 and the Supreme Court agreed with him. With this ruling, the Court expanded the principle of equal employment opportunity to cover private persons as well as persons employed by a state.

Like other minorities, women were without rights prior to the passage of the Civil Rights Act of 1964. They were not considered legally responsible persons and therefore were not allowed to enter into contracts or to control their own property.

The Civil Service Act of 1883[2] which sought to establish the principle of "merit employment" was one of the first laws making religious discrimination in employment illegal.

A Civil Service rule in 1940 made racial, as well as religious, discrimination illegal[3]. This was followed by the Congressional adoption of the Ramspeck Act, which extended the coverage of the Civil Service Act and amended the Classification Act of 1923. The principle of "equal rights for all" in the Ramspect Act read:

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[1]Jones v. Alfred H. Mayer, 392 U.S. 409 (1968).

[2]The Pendleton Act (Civil Service Act), 22 STAT. 404 (1883).

[3]Executive Order 8587, 5 Fed. Reg. 445 (1940).

> In carrying out the provisions of this title, and the provisions of the Classification Act of 1923, as amended, there shall be no discrimination against any person, or with respect to the position held by any person, on account of race, creed or color.[4]

The first recognition by the United States Congress of the principle of equal job opportunity was found in the Unemployment Relief Act of 1933. The Act provided:

> That in employing citizens for the purpose of the Act no discrimination shall be made on account of race, color, or creed.[5]

Many of the laws passed during the New Deal administration of President Franklin Roosevelt contained similar provisions to bar discrimination. If the laws did not directly bar discrimination, the executive branch executed a policy of non discrimination to fill the void. Regulations of the National Industrial Recovery Act and the laws covering public housing and defense housing forbade discrimination based on race, color, or religion.[6]

The Bureau of National Affairs summed up this early effort to provide antidiscrimination procedures as follows:

> Although these amounted to unequivocal declarations by the legislative and executive branches, they were of limited effect in most instances. They amount to little more than expressions of policy. There were no standards by which discrimination could be determined, and machinery and sanctions for enforcement were rare.[7]

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[4]Ramspeck Act, 545 Stat. 1211, (1940), Title I, 5 U.S.C. Sec. 631a (1958).

[5]Unemployment Relief Act of 1933, 48 Stat. 22 (1933).

[6]National Industrial Recovery Act of 1933, Title II, 48 Stat. 200 (1933).

[7]Bureau of National Affairs, The Equal Employment Opportunity Act of 1972, (Washington, D.C.: The Bureau of National Affairs, Inc., 1973), p. 15.

More effective approaches to the problems of discrimination were initiated during World War II. On June 25, 1941, President Roosevelt issued Executive Order 8802 which provided for the establishment of a five-member Fair Employment Practice Committee (FEPC). The committee was an independent agency reporting solely to the President. The demand of the National Association for the Advancement of Colored People (NAACP) and the Brotherhood of Sleeping Car porters for the elimination of employment discrimination in war industries and in federal government agencies led to this action by President Roosevelt. The executive order states the policy of the government:

> To encourage full participation in the national defense program by all citizens of the United States, regardless of race, creed, color, or national origin, in the firm belief that the democratic way of life within the nation can be defended successfully only with the help and support of all groups within its borders.[8]

Executive Order 8802 was broad in its coverage and applied to all defense contracts, persons employed by the federal government, and vocational and training programs administered by federal agencies. FEPC had the authorization to receive and investigate complaints of discrimination and to take appropriate steps to address concerns and make the necessary recommendations to federal agencies and to the President to fulfill requirements of the Executive Order and protect the interest of citizens.

This committee was short-lived due to many reasons, but primarily due to having a staff of only eight members and no direct power to enforce its recommendations to abolish discrimination in employment.[9]

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[8] Federal Register 6 (1941):3109.

[9] Kenneth P. Norwick, Your Legal Rights (New York: The John Day Company, 1975), p. 194.

With only eight staff members, FEPC concentrated on drafting policies and holding public hearings throughout the country, but lost its autonomy when it was transferred to the War Manpower Commission. A dispute with the chairman of the War Manpower Commission resulted in several resignations from FEPC and and the Committee ceased operation in early 1943.

Executive Order 8802 was followed by Excutive Order 9346,[10] which re-established the Fair Employment Practice Committee (FEPC), and announced that policy of the federal government was to promote to the fullest utilization the available work force, and to eliminate employment discrimination.

The new FEPC was broader in its jurisdiction than its predecessor. The FEPC now covered all persons employed by governmental contractors, not just those in defense work, the recruitment and training for war production, and persons employed by the Federal Government. For the first time labor unions were covered to include, not only discrimination in employment, but in member-ship as well.

When the authority for the FEPC expired in 1946, the staff of approximately one hundred twenty serving fifteen field offices had processed approximately 8,000 complaints and held thirty public hearings. However, the FEPC had to depend on negotiations, moral persuasion, and the pressure of public opinion to gain compliance and eliminate employment discrimination. FEPC was not a viable force to do so.

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[10] Federal Register 8 (1943):7183.

Several states and some cities using the FEPC as a model developed similar agencies through state and local legislation to handle individual employment discrimination complaints. These state and city initiatives occurred between 1945 and the passage of the Civil Rights Act of 1964.[11] Although several states had Fair Employment Practice Laws, sometimes called State Civil Rights Laws, and the Federal Government continued to insert nondiscrimination clauses in some contracts, the ending of the FEPC terminated the nationwide efforts to effect a policy of equal employment opportunity.

President Harry S. Truman tried to revise the policy of nondiscrimination in employment by companies and agencies holding government contracts.[12] President Truman issued a series of Executive Orders that directed specific government agencies to insert clauses in contracts that required nondiscrimination in employment. On December 3, 1951, President Truman issued Executive Order 10308,[13] which created the Committee on Government Contract Compliance. The committee consisted of eleven members made up of persons who represented industry, the public, and the five principal government contracting agencies. The committee was charged to study and evaluate existing programs and issue a report to appraise their effectiveness.

The following conclusions among others, resulted from this evaluation:

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[11]Norwick, Your Legal Rights, p. 194.

[12]Bureau of National Affairs, The Equal Employment Opportunity Act of 1972, p. 16.

[13]Federal Register 16 (1951):12303.

(1) The nondiscrimination clause is almost "forgotten, dead, and buried" under thousands of standard legal and technical words in contracts.

(2) Government contracting is so far-reaching that nondiscriminatory employment would be practically assured if every contractor were made to live up to the letter of the nondiscrimination clauses in his contract.

(3) There is no effective enforcement of the nondiscrimination clause.[14]

Based on these conclusions, the committee developed twenty specific recommendations, many of which were targeted to provide adequate enforcement procedures to deal with the issue of discrimination in employment.

As a result of this study, President Dwight Eisenhower issued Executive Order 10479[15] creating the President's Committee on Government Contracts. This fifteen-member committee replaced the Truman Committee. Membership on the committee included representatives of industry, labor, government, and the public. The new committee had these duties:

(1) To make recommendations to contracting agencies for improving nondiscrimination provisions in government contracts.

(2) To serve as a clearing house for complaints alleging violation of the nondiscrimination clauses.

(3) To encourage and assist with educational progress by nongovernmenal groups.

As was true of its predecessors, the President's Committee on Government Contracts had no enforcement power and had to rely on the

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[13]Ibid.

[14]31 Labor Relations Reference Manual 186.

[15]Federal Register 18 (1953):4899.

(2) To take affirmative action to ensure that applicants are employed and employees are treated during their employment without regard to race, creed, color or national origin.

(3) To state in all solicitations or advertisements for employment that all qualified applicants will receive consideration without regard to race, creed, color or national origin.

(4) To advise each labor union with which the employer deals of their committment under the order.

(5) To include the obligations under the order in every sub-contract or purchase order, unless specifically exempt.

(6) To comply with all provisions of the order and the rules and regulations issued to the committee.

(7) To furnish all information and reports required to the committee and to permit access to books, records, and accounts for the purpose of investigation to assure compliance.

(7) To file regular compliance reports to describe hiring and employment practices.

Executive Order 10925 established very specific enforcement powers. Compliance reports were required, but to assure compliance, the Committee was empowered to (1) publish the names of noncomplying contractors and unions, (2) recommend suits to the Justice Department, (3) recommend criminal actions by the Justice Department for furnishing incorrect data, (4) terminate contracts for non-compliance, and (5) forbid contracting agencies to enter into new contracts with a contractor who discriminates unless the contractor can show his employment policy had changed.

In addition to the five requirements above, the "plan for progress" set up by the committee required the contractor to establish an effective recruiting program that gave protected classes of individuals equal employment opportunities.

procurement agencies to adjust complaints, although a copy of the deposition tion was made to the committee.

President John F. Kennedy, on March 6, 1961, issued Executive Order 10925[16] which created a new President's Committee on Equal Employment Opportunity (EEO) that was charged to effect equal employment opportunity in the federal government and in employment on government contracts. This new committee had more enforcement power than previous committees.

This Executive Order revamped the EEO program and reaffirmed the policies established by the Eisenhower order. It reunited governmental and private programs and abolished the President's Committee on Equal Employment Opportunity (PCEEO). The new committee was chaired by the Vice President, while the Chairman of the Atomic Energy Commission, the Secretary of Commerce, the Attorney General, the Secretary of Defense, the Secretaries of the Army, Navy, and Air Force; the Administrator of General Services, the Chairman of the Civil Service Commission, and the head of the National Aeronautics Space Administration were committee members. The PCEEO was to provide procedures and policies to implement the executive order, make reports to the President, and act in an advisory capacity. There was an additional requirement that all executive departments would initiate studies of employment practices.

Executive Order 10925 required the following:

(1) Not to discriminate against any employee or job applicant because of race, creed, color or national origin.

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[16] Federal Register 26 (1961):1977.

Executive Order 10925 was extended by Executive Order 11114[17] on June 22, 1963, which placed the nondiscrimination requirement for federally assisted construction contracts. On February 13, 1964, President Lyndon Johnson issued Execuive Order 11141,[18] extending the nondiscrimination coverage to forbid employment discrimination on the basis of age, except upon the basis of a bona fide occupational qualification (BFOQ), retirement plan, or statutory requirement.

The 1940's, the 1950's and 1960's were eventful years in the history of the United States. During World War II with the nation's industry operating at a peak to help the war effort, minorities were employed through the influence of President Roosevelt's Committee on Fair Employment Practices. By 1950, labor demand decreased. Automation and other technological innovations contributed to the shortage of jobs. A sizable number of employers and labor unions continued to avoid equal employment opportunities even though discrimination was against the law.[19]

In 1954, the United States Supreme Court decided the landmark Brown v. Board of Education,[20] holding that segregation of school children was unconstitutional. Blacks began to picket, demonstrate, and conduct sit-ins to consolidate the gain that came with Brown through the Civil Rights movement. Norwick commented:

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[17]Federal Register 20 (1963):6485.

[18]Federal Register 29 (1966):2477.

[19]Norwick, Your Legal Rights, p. 198.

[20]Brown v. Board of Education, 347 U.S. 485 (1954).

> The Civil Rights Movement continued to press for full equality throughout the 1950's and the early 1960's, and in 1963-64 a substantial victory was finally achieved. The high point for the movement was the famous March on Washington in 1963 . . . led by Dr. Martin Luther King, Jr. . . . (to) demand equal opportunity for black people and to demand passage by Congress of a comprehensive Civil Rights Act.[21]

## The Civil Rights Act of 1964

Between 1866 and 1964 many forces arose to establish equal employment opportunities without regard to race, color, religion, sex, or national origin.

Rosenbloom related:

> The history of federal efforts to prevent discrimination and promote EEO in the federal services is complex yet instructive. It is impossible to view the present federal EEO Program in its proper political and administrative contexts or to understand its policy development without entering into a consideration of past developments.[22]

Rosenbloom noted that in a sense, the gradual development of the current equal employment opportunity program may be traced to the enactment of the first Civil Service Act, or perhaps to Article VI of the United States Constitution. However, it was well into the 1930's and 1940's when a continuing, systematic effort to assure equal employment in the public services became a major feature of federal personnel administration. The Hatch Act of 1939[23] is the first significant link in the chain of laws and excutive orders leading to current programs.

Section 4 of the Hatch Act provides:

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[21]Norwick, Your Legal Rights, p. 198.

[22]David H. Rosenbloom, Federal Equal Employment Opportunity: Politics and Public Personnel Administration (New York: Praeger Publishers, 1977), p. 59.

[23]"Interpretation of Hatch Political Activities Act," Cong. Rec. 85, Part 2, Appendix, p. 712.

> It shall be unlawful for any person to deprive, attempt to deprive, or threaten to deprive, by any means, any person of any employment, position, work, compensation, or other benefit provided for or made possible by any act of Congress appropriating funds for work relief purposes, on account of race, creed, (or) color. . .

This provision applies only to a peripheral kind of employee, but does establish the principle that public employment or public funds should not be denied to protected individuals in the employment process.

The Ramspeck Act of 1940[24] was an important act to combat discrimination. Section 3 (e) prohibits "discrimination against any person, or with respect to the position held by any person, on account of race, creed or color." These prohibitions relate to establishing salaries, allocations of personnel to positions or grades, transferring of personnel, promotions and other personnel actions. This law is important because it represents the first major piece of legislation to outlaw discrimination in the federal services. It became a catalyst to encourage similar actions by the executive branch.

Rosenbloom added:

> The history of the development of these early regulations demonstrates the fact that the government only reluctantly formulated a policy of nondiscrimination in the federal service and basically lacked a strong committment to equality.[25]

Rosenbloom held that the pressures for equal employment opportunities began to mount in 1941 from the philosophical impact of the New Deal and the impending likelihood that the United States would become involved in World War II. It was deemed desirable to promote racial

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[24]Ramspeck Act, 545 Stat. 1211 (1940), Title I, 5 U.S.C. Sec. 631a (1958).

[25]Rosenbloom, Federal Equal Employment Opportunity, p. 60.

harmony and unity as a way to expand war production through the utilization of manpower without regard to factors unrelated to output and efficiency. One of the most dramatic and visible gestures in support of government action in the area of racial equality was A. Philip Randolph's threat to lead a mass march on Washington to protest discrimination against blacks. The march was scheduled for June 1941. President Roosevelt tried to get Randolph to cancel the march, but he failed. In July the various forces came to a head and positive action was taken to create a fair employment practice in the federal services and the defense industries. Although Vito Marcantonio, an American Labor Party representative from New York, introduced the nation's first bill to this end, it was the executive branch that led the way with the issuance of President Roosevelt's Executive Order 8802.[26]

The equal employment opportunity bill was introduced by Congressman Marcantonio in February, 1943. Between 1943 and 1963, other bills were introduced in both the Senate and the House of Representatives to regulate or attempt to conciliate situations involving alleged discrimination for reasons of race, creed, color, religion, sex, age, or national origin. The breadth, authority, and power of enforcement were varied. During this time only one bill was passed by either house, and two others were killed by Senate filibuster. Others died in committees.[27]

A bill introduced on February 22, 1950, by Congressman Samuel K. McConnell, Jr., a Republican representing Pennsylvania, dealt with

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[26]Federal Register 6 (1941):3109.

[27]Bureau of National Affairs, The Equal Employment Opportunity Act of 1972, p. 23.

"fair employment practices". Representative McConnell introduced this bill in an all-night session running over into Washington's Birthday, at 3:00 a.m.

The next morning, February 23, the House voted to substitute McConnell's bill for a previously introduced bill by Congressman Adam C. Powell, a Democrat of New York. The vote was 221 to 178 to substitute and it passed 240 to 177. Powell proposed enforcement of orders based on findings of illegal discrimination. The McConnell proposal set up a Fair Employment Practices Commission with power to study the matter of discrimination on the basis of race, creed, or color and to recommend procedures for its elimination. The bill provided employment opportunities for minority groups without the use of force. Discrimination on account of sex, physical disability, and political affliation were added on the House floor before the substitute was adopted. The only real power was that of subpoena to compel the attendance of any witnesses.[28]

In 1960, a Presidential election year, the Eisenhower administration proposed legislation with respect to Fair Employment Practices for the consideration of Congress in 1960. The proposal was to write the principle of equal employment opportunity into the Civil Rights Act of 1960[29]. This act dealt primarily with voting rights. Congress did not act on the proposal, but did enact a Civil Rights Bill.

When President John F. Kennedy was elected in 1960, action began to change the composition of the Rules Committee of the House and Rule

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[28]Ibid., p. 23-34.

[29]PL 86-449, 6 May 1960, 62 Stat. 86.

XXI of the Senate. The House Rules Committee, controlling legislation coming to the House, had been unfriendly to the Fair Employment Practices Commission for two decades and on several occasions had blocked its consideration on the floor of the House with the addition of new members appointed by a speaker friendly to the administration. The power balance with respect to legislation now shifted from the iron rule of Chairman Howard W. Smith, Democrat from Virginia.

In the Senate where extended debates were annual happenings over the requirements for ending a debate, a new rule was established that a two-thirds vote of those present and voting was necessary to end debate after one hour of debate per Senator. This replaced the two-thirds rule of all Senators.

President Kennedy did not propose any equal employment opportunity legislation during the 87th Congress for which he received criticism. However, others introduced bills. Congressman Powell, then Chairman of the House Labor Committee, introduced a bill and declared that Fair Employment Practice legislation was a target for 1962.

Two events happened during the House Committee's consideration of H.R. 10144. The principal argument was whether the courts or the administrative body should be the enforcing agency; notwithstanding, the name of the legislation was changed to the "Equal Opportunity Act of 1962". However, the bill did not survive.[30]

President Kennedy announced in a television conference on June 11, 1963, that he would seek Civil Rights legislation from the 88th

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[30]Bureau of National Affairs, The Equal Employment Opportunity Act of 1972, p. 25.

Congress. His proposed legislation went to Congress on June 19, 1963.[31] Exactly one year to the day the Senate passed a compromise bill acceptable to the House without further changes. The House passed the legislation on July 2, 1964, and President Johnson signed it into law about 6:55 p.m., EST, the same day. The dispute with respect to the method of enforcing the Equal Employment Section was resolved. An Equal Employment Opportunity Commission was created that was to be partisan in nature without enforcement power. Enforcement would be handled by judicial review in a federal district court.[32]

President Kennedy's assassination advanced his unfulfilled legislative program. His successor, President Lyndon Johnson, put civil rights legislation in a priority position comparable to the 1964 tax cut. Chairman Smith of the House Rules Committee cleared H.R. 7152[33] immediately after New Year's Day in 1964, with his own amendment adding sex to the list of reasons which might cause discrimination.

After 543 hours, 1 minute, and 37 seconds of Senate debate, the bill's supporters, mainly Senator Everett Dirksen, Republican from Illinois, and Senator Hubert Humphrey, Democrat from Minnesota, drafted a compromise in consultation with Attorney General Robert Kennedy. The Senate passed the bill 76 to 18. This vote was followed on July 2, 1964, by a House vote of 289 to 126. "After more than 20 years, a

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[31]"Civil Rights Legislation - Message from the President", 109 Cong. Rec., 11097 (1963).

[32]Bureau of National Affairs, The Equal Employment Opportunity Act of 1972, p. 26.

[33]78 Stat. 253; 42 U.S.C.A. (1964).

Federal Employment Practice bill, under another name, became law with President Johnson's signature."[34].

The Civil Rights Act of 1964 preface reads:

> An Act to enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.[35]

The Civil Rights Act of 1964 was amended by the Equal Employment Opportunity Act of 1972[36]. Like the Civil Rights Act, the 1972 Amendment was a compromise worked out in the conference committee in late 1972. The Senate approved it by a vote of 62 to 10 and the House approved it by a vote of 303 to 110. President Richard N. Nixon signed the measure on March 24, 1972. The amendment greatly extended the coverage and authority of Title VII of the Civil Rights Act of 1964.

## Title VII of the Civil Rights Act of 1964

Title VII became operative in July, 1965. Prior to 1965, the only major constraints on employee selection had been state and local practices. Some cities, counties, and states had fair employment statutes dating back to 1945. These were found in about half the states by the mid-1960's. The effectiveness of the Fair Employment Practice Laws varied considerably from one jurisdiction to another with regard to enforcement. A small number of cases were activated, but the overall

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[34]PL 92-261, 24 March 1972, 86 Stat. 103.

[35]78 Stat. 253, 42 U.S.C.A. (1964).

[36]PL 92-261, March 24, 1972, 86 Stat. 103 (1972).

impact on personnel practices was almost nil except for the elimination of certain questions on forms used for employment applications.[37]

When the federal government becomes involved in regulating an employment procedure, or any other procedure, it is not always entirely clear what role state and local government play. In some cases Congress takes full control, leaving the states powerless to enact and enforce any laws that differ from the federal law. Yet in other cases the state and local governments are permitted more stringent laws than the federal law, so that the federal law becomes a minimal requirement.[38]

Title VII of the Civil Rights Act of 1964 is a comprehensive prohibition on private acts of employment discrimination. As amended by the Equal Employment Act of 1972, Title VII now covers virtually all state and local government employees and the previously exempt employees of educational institutions and agencies. The law authorizes the Equal Employment Opportunity Commission (EEOC) to process, investigate, and conciliate employment discrimination complaints and, if necessary, to bring suits against employers in the federal courts. Until 1974, the Attorney General was authorized to bring "pattern and practice" employment suits concurrently with EEOC. This was changed in 1974, and EEOC assumed the primary governmental authority for enforcement of the law. However, the Attorney General remained the only government party authorized to sue states or municipalities. Title

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[37]Mary Green Miner and John B. Miner, Employee Selection Within the Law, (Washington, D.C.: The Bureau of National Affairs, Inc., 1978), p. 4.

[38]Editorial Staff, Equal Employment Opportunity, Human Resource Management, p. 309.

VII created a cause of action enforceable in federal courts by aggrieved persons or classes on protected persons. The law provided for injunctive and affirmative relief that included back pay and the granting of attorney's fees to prevailing party.

Title VII covers employers who employ more than fifteen employees, labor unions, and employment agencies. Persons covered by the substantive provisions of Title VII are numerous. It prohibits discrimination based upon race, color, religion, sex, or national origin in the acts of hiring, segregating and classifying protected persons. Also actions resulting in compensation, terms, conditions, or privileges of employment are covered. However, some exceptions exist. Title VII permits classification or employment referral on the basis of religion, sex, or national origin, but not to include race or color, in certain limited instances where there are bona fide occupational qualifications. Section 703 of Title VII states that an employer may act upon the results of "any professionally developed ability test" provided the test is not designed or used to discriminate. Further, an employer may apply different conditions of employment or rates of pay pursuant to a bona fide seniority or merit system.[39] However, the importance of these exceptions is very limited, if not nonexistent, after the Court's decision in Griggs v. Duke Power Company, and related cases. The Griggs v. Duke Power Company established the adverse-impact theory as stated in the decision by the United States Supreme Court in its landmark decision in 1971:

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[39]42 U.S.C.A. 2000e (a-j).

> 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. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.[40]

The Court insisted in Griggs that Duke Power had no evil motives in its employment practices and that qualification requirements in question have been administered fairly to blacks and whites. However, the consequences of employment practices resulted in an adverse impact on blacks. The Court pointed out that if an employment practice can be shown to be a "business necessity", it will not be prohibited even if the results create an adverse impact on a protected group. However, Duke Power failed to demonstrate a relationship between the tests and successful job performance.

Section 703 (j) states that:

> Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin or 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 referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, 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, or in the available work force in any community, State, section, or other area.[41]

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[40] Griggs v. Duke Power Company, 401 U.S. 424 (1971).

[41] 42 U.S.C.A. 200e (j).

However, this has not been interpreted to prohibit an order of preferential treatment or quotas against a defendent who has been found in violation of Title VII. When a court orders an employer to change an employment practice as it affects a protected group, the court's order is often characterized as requiring affirmative action because the persons who will benefit from the order are not only those who are actual victims of previous discriminatory actions, but also all those people who might otherwise become victims of biased action or policies.[42]

The adverse-impact theory of discrimination has been the basis for much Title VII litigation since 1971. When a clear case of adverse impact results from employment practices, the employer needs to establish that such practices are job-related and are a business necessity. The business necessity requirement has been narrowly construed. Miner and Miner asked, "if a practice results in cutting off opportunities for a certain group, does the practice in fact fulfill a legitimate business need?"[43]

One other exception exists. Section 703 (g) makes an exception for security classifications, and Section 703 (f) provides that discrimination is permitted on the grounds that an individual is a member of the Communist Party.[44]

Title VII provides a complainant with several procedural advantages. The EEOC will initially investigate and seek relief on the plain-

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[42]Editorial Staff, Equal Employment Opportunity of 1972, p. 963-64.

[43]Miner and Miner, Employee Selection Within the Law, p. 8.

[44]42 U.S.C.A. 200 (f & g).

tiff's behalf in federal courts except in the case of governmental employees which EEOC must refer to the Attorney General for investigation. If the EEOC or the Attorney General does not promptly seek judicial relief, the statute provides for a private right of action, with a court-appointed counsel, a waiver of costs and fees, and the payment of a reasonable counsel fee as part of the relief if the complainant ultimately prevails.[45]

Title VII has several extremely important technical requirements that must be met prior to filing a complaint in federal court. Generally, the procedural prerequisites require the filing of a discriminatory charge, first, with a state 706 agency and, then, with EEOC. Additionally, there are specific and strick time limitations.

In the provisions of Title VII, Congress chooses to encourage states to become the enforcers. The provisions of Title VII provide a federal enforcement mechanism, the Equal Employment Opportunity Commission, to take over for a state whose enforcement procedures do not satisfy the need. Section 708 of the Equal Employment Opportunity Act of 1972 states:

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.[46]

The only state laws preempted by Title VII of the Civil Rights Act of 1964 are those that are inconsistent with the purposes of Title

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[45]Title VII, Section 706.

[46]Title VII of Civil Rights Act of 1964 Showing Changes Made by Public Law 92-261, Approved March 24, 1972.

VII.[47] State laws barring discrimination in employee benefits plans are preempted by the Employee Retirement Income Security Act (ERISA) to the extent that the state law may prohibit practices relating to ERISA that cover employee benefits that are lawful under Title VII.[48]

Under Title VII, the Equal Employment Opportunity Commission (EEOC) defers to the authority of state government whenever the state has a law prohibiting the allegedly discriminatory practices and has an agency to enforce relief for the practice. Time limits are placed on the deferral requirement so that EEOC may act when the state fails to do so. Section (d) provides, "a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such state or local law)".[49]

The term "706 Agency" has been adopted by the EEOC to refer to a state or local agency that is deemed by the Commission to satisfy the criteria stated in Title VII's Section 706 (c) for the period of exclusive processing. Jurisdictions that have 706 agencies are often called "deferral jurisdictions". As cited earlier in this study, the North Carolina State Personnel Commission is designated by EEOC as a 706 agency, but is not the designated agency to handle charges filed by public school employes. For these charges, the EEOC is the designated notice agency.

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[47]Title VII, Section 1104.

[48]Employee Retirement Income Security Act of 1964, September 2, 1974, PL. 94-406, 88 Stat. 829.

[49]Title VII, Sec. 706 (c) and (d).

Although the provisions of Title VII preclude the filing of a charge with the EEOC prior to filing with a state or local 706 agency, the Commission does not reject a charge for that reason. Instead it defers its action until the state has handled or has declined to handle the charges. When the state or local agency's time has expired without relief, the charge filed with EEOC becomes active.

The EEOC considers the charges received by the state and local 706 agencies and those received directly by the Commission as a common workload and strives for an integration of the processing.[50]

Title VII is only one among many statutes available to redress employment discrimination. These remedies vary considerably in coverage, scope, procedure and in their relationship. In certain circumstances, they are used as alternative or supplemental remedies and causes of action. One outstanding course of action arises under 42 U.S.C.A. Section 1981 which is a derivative of paragraph #1 of the Civil Rights Act of 1866, as amended in 1870. The Supreme Court ruled in Jones v. Alfred H. Mayer Co.[51] that 42 U.S.C.A. Section 1981 bars racial discrimination by private individuals in the sale or rental of housing. Following the Jones principle, the federal courts have determined that Section 1981 requires that all persons be given the same rights to contracts as white citizens and prohibits private racial discrimination in employment by companies and unions.[52] Therefore,

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[50]EEOC Procedural Regulations, 29 CFR Part 1601.70.

[51]Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[52]Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970), cert. denied 400 U.S. 911 (1970) as an example.

employees who have suffered racial discrimination theoretically have a choice of using Title VII or 42 U.S.C.A. Section 1981. Section 1981 has also been read to prohibit discrimination in employment against aliens in Guerra v. Manchester Terminal Corporation[53] and has been read to prohibit discrimination against Puerto Ricans and other other Hispanics in Miranda v. Clothing Workers Local 208.[54]

Having Title VII and Section 1981 available presents several issues regarding the interrelationship of the causes of action. The federal courts have found authority to use Section 1981 whether or not Title VII procedures have been used and to grant injunctive and monetary relief in Section 1981 action similar to that available under Title VII. The same substantive rules of law have been applied to the extent of treating EEOC regulations and guidelines as persuasive in evaluating the merits of a Section 1981 claim. The remedy afforded by Title VII is supplemental to contractual remedies and any other legal remedies, and a charging party may seek requested relief without involving other remedies.[55]

Section 1981 is available where a Title VII claim would be precluded. The great advantage of Section 1981 is its longer statute of limitations. Unlike Title VII, there is no expressed time period in Section 1981. The courts have generally held that the period for bringing

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[53]Guerra v. Manchester Terminal Corp., 498 F.2d. 641 (5th Cir. 1974).

[54]Miranda v. Clothing Workers, Local 208, 8 EPD Sec. 9601 (D.C., N.J., 1974).

[55]Rios v. Reynolds Metal Co., (CA-5, 1972), 467 F.2d 54, and Caldwell v. National Brewing Co., (CA-5 1971), 443 F.2d 1044, cert. denied (U.S. Sup. Ct. 1972), 405 U.S. 916 (1972).

action, usually several years, is the appropriate referral by analogy.[56] Additionally, Section 1981 covers all private and public employers, while Title VII exempts employers of fewer than 15 persons not engaged in interstate commerce, private clubs, Indian Tribes, and to some extent, the U.S. Government, the District of Columbia, and companies wholly owned by the U.S. Government.[57] Section 1981 may preserve a racial discrimination charge that would be dismissed under procedural reasons under Title VII due to the charging parties' failure to follow the technical prerequisites.

Section 1981 does not provide for the intervention of the Attorney General or the EEOC in the suit, waiver of fees and costs, statutory attorney fees, and appointment of counsel. By analogy to Title VII, attorney fees are awarded in Fowler v. Schwarzwalder.[58]

Section 1981 reads:

> All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes licenses, and exactions of every kind, and to no other.[59]

Whenever discrimination occurs in a public agency or in a private organization whose activities can be classified as "state action," the United States Constitution provides an avenue of relief under the Fourteenth amendment. Claims under this right are filed directly in Federal

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[56]Page v. Curtis Wright Corp., 332 F. Supp. 1060 (D.N.J. 1971).

[57]42 U.S.C.A. Sec. 2000e (g) (b) and e-16.

[58]Fowler v. Schwarzwalder, 498 F.2d 143 (8th Cir., 1974).

[59]42 U.S.C.A., Sec. 1983.

Court without having to exhaust Title VII's administrative remedies.[60] This remedy exists in addition to the opportunity to sue state governments or agencies under Title VII in the same manner as private employers. Officers of fire departments,[61] police departments[62] and transportation authorities cannot engage in discriminatory employment policies. Public boards of education[63] and public or semi-public hospitals[64] are similarly barred. Moreover, since all arbitrary classifications and actions are barred by the Fourteenth Amendment, not just race, sex, religion, or national origin, the potential extent of a constitutional cause of employment discrimination is somewhat greater in scope than a similar charge under Title VII.

The courts, in deciding racial discrimination cases under the Fourteenth Amendment, have basically used a Title VII analysis to reach a decision with regard to determining that the plaintiffs are victims of unconstitutional discrimination even before the 1972 amendment to Title VII made that law directly applicable to state and governmental employ-

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[60]Bureau of National Affairs, The Equal Employment Opportunity Act of 1972, p. 1845

[61]Carter v. Gallagher, 452 F.2d 315 (8th Cir., 1971), cert. denied 406 U.S. 950 (1972).

[62]Penn v. Stumpt, 308 F. Supp. 1238 (N.D. Cal., 1970), and NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala., 1972).

[63]Jackson v. Wheatley School District No. 28, 430 F.2d 1359 (8th Cir., 1970); Chance v. Board of Examiners, 458 F.2d 1167 (2nd Cir. 1972).

[64]Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970).

ees. For example, in Morrow v. Crisler[65] and in NAACP v. Allen[66] the courts held that where no black has ever been a member of the Mississippi or Alabama highway patrols, a prima facie case is established. No business necessity justification could be offered by the respondents.

The coverage of Title VII of the Civil Rights Act of 1964 is broad, but the changes made by the Equal Employment Opportunity Act of 1972 increased the coverage to many more persons including public school employees.

Section 701 defines who is covered. The 1972 change added the inclusion of "governments, governmental agencies and political subdivisions". 'Government' means states and local governments as the federal government is covered by section 717, a new section added to the Civil Rights Act of 1964.

Section 703 (a)(2) is amended to add the qualifiers "or applicants for employment" and Section 703 (c)(2) is amended to add the qualifier "or applicants for membership". In Phillips v. Martin Marietta Corp.[67] the United States Supreme Court cleared the way for protection for an applicant when it ruled that the refusal to hire women with children while hiring men with young children was sex discrimination. Employment discrimination based on marital status or the number and age of children was unlawful under federal law because it disqualified women only. This ruling by the Supreme Court in 1971 was an added reason to change

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[65]Morrow v. Crisler, 479 F.2d 960 (5th Cir. 1973).

[66]Supra note 62.

[67]Phillps v. Martin Marietta Corp., 400 U.S. 542 (1971).

Section 701 to include applicants. This case and its companion cases became known as the "sex-plus" cases.

Sex discrimination and a person's right to make personal decisions have been the foundation of the cases taken to court, but the EEOC compliance manual[68] indicates that other bases for discrimination could be involved in rules barring single parents from employment. The EEOC notes that racial or ethnic discrimination might be involved because of adverse impact of a rule against the employment of a single parent. The manual indicates that to the date of the manual there have been no court decisions on the question, but indicates that if a disproportionate number of a minority group are affected by such a policy against hiring single custodial parents, the policy could be shown to be racially or ethnically discriminatory.

Title VII is grounded on the Congressional power derived from the commerce clause of the United States Constitution. The key is the term "industry affecting commerce". Two definitions are implied; one for 'commerce' and one for 'industry affecting commerce'.

Commerce is defined in 701 (g):

> The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.[69]

Industry affecting commerce is defined in 701(h):

> The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute

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[68]EEOC Sex Discrimination Guidelines, 29 CFR 1604, Appendix.

[69]Title VII, Section 701(g).

> would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further ncludes any governmental industry, business, or activity.[70]

Thus, excepting the size of the organization, and the explicit exemptions, the coverage of the act is intended to reach as far as the power of Congress to regulate commerce. Section 701 (h) includes everything defined as affecting commerce in the Landrum-Griffin Act,[71] which includes the National Labor Relations Act. The definition appears to be explanatory rather than limiting. The full definition remains as broad as the courts will be willing to invoke before they apply limiting decisions.

Title VII of the Civil Rights Act of 1964 covers numerous employees, but the 1972 amendment gives further extension to the coverage. In Section 701 (a) the definition of "person" is enlarged by the 1972 amendment to include state and local government, governmental agencies, and political subdivisions, but not the United States Government, corporations wholly owned by the United States Government, or departments of the District of Columbia that are subject to competitive service under 5 U.S.C. Section 2102.

Under the 1964 Act, coverage is extended to employees on the basis of the number of employees, with the number being reduced each year. The schedule is as follows:

(1) From July 2, 1965, to July 1, 1966, the required number is 100.

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[70]Title VII, Section 701 (h).

[71]National Labor Relations Act, Sec. 11 (e), 29 U.S.C. 161 (e).

(2) From July 2, 1966, to July 1, 1967, the required number is 50.

(3) From July 2, 1968, until change is made by 1972 Amendment, the number is 25.

(4) From March 24, 1973, the number is 15.

To be covered under Title VII, an employer needs to have the required number of employees on each working day in each of twenty or more calendar weeks in the current or preceding calendar year. Once the requirement is met it is satisfied for two calendar years.

One of the major changes made by the 1972 Amendment was the extension of the definition of "employer" to include state and local governments, governmental agencies and political subdivisions. However, an exemption was included that involves the following:

(1) Persons elected to public office in any state or political subdivision;

(2) Personal staff of such elected official;

(3) Appointees of such elected official who are on the policy-making level;

(4) Intermediate advisors of such elected official who advise on exercise of the constitutional or legal powers of the office.

Federal employees were not under the jurisdiction of the EEOC in 1964, but the 1972 Amendments added a new section that made clear the obligation of the Federal Government to make all personnel actions wotj-out discrimination based on race, color, sex, religion, or national origin. The authority to enforce equal employment opportunity in federal agencies was assigned to the Civil Service Commission. If a federal employee was dissatisfied wth the action of the Civil Service Commission, appeal appeal lay in the Federal District Court.[72]

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[72]Title VII, Section 717 (b).

Section 701 (j) was added in 1972 and states:

> the term 'religion' indicates all aspects of religious observances 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.[73]

The purpose of this amendment was to create a statutory basis for EEOC to make guidelines on religious-based discrimination and thus resolve questions such as those raised in Dewey v. Reynolds Metal Co. (United States Supreme Court, 1971, 402 U.S. 689, 3 FEP Cases 508).[74] The EEOC's guidelines on religious accommodation state that "religious practices include moral or ethical beliefs as to what is right and wrong if those beliefs are sincerely held with the strength of traditional religious views". This definition is one that was developed by the United States Supreme Court and adopted by the EEOC.[75]

Several changes in exemptions are included in the 1972 amendments, as follow:

(1) Under the 1964 Act, there was an exemption for educational institutions with respect to individuals whose work involves educational activities. This exemption is eliminated. The result will be to bring under Title VII an estimated 120,000 educational institutions, with about 2.8 million teachers and professional staff members and another 1.5 million non-professional staff members.

(2) Under the original Title VII, there was an exemption for religious corporations, associations, or societies with respect to individuals whose work involves the religious aspects of the employing organization. The 1972 amendments broaden

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[73]Title VII, Section 701 (g).

[74]George Cooper, Harriet Rabb, and Howard J. Rubin, Fair Employment Litigation: Text and Materials for Students and Practioners (St. Paul, MN: West Publishing Company, 1975), p. 137.

[75]29 CFR, Section 1605.1.

the exemption to include all activities of such organizations, not merely their religious activities. The provision, however, permits the organization to discriminate solely on the basis of religion. It may not discriminate on the basis of race, color, sex, or national origin.

(3) The new coverage of state and local governments contains an exemption for elected officials, their personal assistants, and their immediate advisors. But it was emphasized during the congressional debate that this exemption was "to be construed very narrowly and is in no way intended to establish an over-all narrowing of the expanded coverage of state and local governmental employees."[76]

One of the exemptions in the 1964 act that was not changed is provided by Section 703 (e)(1). Under this section, there was an exemption to the prohibitions "where religion, sex, and national origin is a bona fide occupational requirement reasonably necessary to the normal operation of that particular business or enterprise."[77]

The anti-discrimination provisions of Title VII are extensive. Those provisions relating to discrimination in employment were not charged to any agencies. This action, in 1972, brought under Title VII prohibitions an estimated 120,000 educational institutions and agencies employing about 2.8 million teachers and professional staff members and another 1.5 million nonprofessional staff members under Title VII coverage.[78]

The 1972 amendment extends coverage to state and local governments and their employers, but provides an exemption for elected officials, their personal assistants, and their immediate advisors.

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[76]Bureau of National Affairs, The Equal Employment Opportunity Act of 1972, pp. 35-36.

[77]Title VII, Section 703 (e)(1).

[78]Cooper, Rabb, and Rubin, Fair Employment Litigation, p. 235.

## The Equal Pay Act and Title VII

Congress, in 1963, adopted the Equal Pay Act as an amendment to Section 6, the minimum-wage section, of the Fair Labor Standards Act.[79] The amendment required equal pay for equal work without regard to sex. As a part of Section 6, the Equal Pay Act was subject to all the exemptions under Section 6. Persons made exempt were employees who are employed in bona fide executive, administrative, or professional capacities or as outside salesmen.

Under Title VII, no such exemption existed for executive, administrative, or professional employees, or outside salesmen. Therefore, any discrimination in employment, including salaries, among that class of employees was a violation of Title VII, if it is based on sex.

The Equal Pay Act, as an amendment to the Fair Labor Standards Act of 1963 fell under the authority of Congress to regulate interstate commerce. The Act included an exemption for state and local govenments and agencies. However, amendments enacted in 1966[80] and 1974[81] extended the application of the Fair Labor Standards Act, and thus the Equal Pay Act, to include government employees in hospitals, institutions, schools, and most state and local government employees. The standards established in the Equal Pay Act for comparing jobs were equality of skill, effort, responsibility and similarity of working conditions.[82]

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[79]Equal Pay Act of 1963, PL 88-38, 77 Stat. 56 (1963).

[80]Public Law 89-601, Sec. 102 (b). 80 Stat. 831 (1966).

[81]Public Law 93-259, Sec. 6, 88 Stat. 55, 58, 60 (1974).

[82]Equal Pay Act, Section 3.

The legislative history of the Equal Pay Act indicated that jobs of the same or closely-related descriptions should be compared in applying the equal pay for equal work. Jobs requiring equal skill, effort, and responsibility within the requirements of the act were not usually the same in every detail. Inconsequential differences in job descriptions were not valid reasons for a pay differential based on the sex of members if both sexes perform equal work on essentially the same jobs in the same organization. The policy of the National War Labor Board gave rise to the practice that if two jobs were substantially different, the Equal Pay Act should not be an index to measure the pay.[83]

According to EEOC, the question is whether a female doing a completely different job than a man is beyond the scope of the Equal Pay Act. The Act does not apply in organizations where only men are employed in one job and only women are employed in a dissimilar job. As an example, if only women are employed as clerk-typists and only men are employed as administrative secretaries the act does not apply.[84]

To determine if job differences are substantial enough to make the jobs unequal, EEOC will inquire into what significance has been given to such differences in setting wage levels for these jobs.[85]

The amount of time employees spend in the performance of different duties is one criterion for determining whether nonidentical jobs are substantially equal. The fact that two jobs are in different departments

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[83]Shultz v. Wheaton Glass Co., (CA-3 1970), 421 F.2d 259.

[84]Ibid.

[85]Ibid.

departments or locations within an establishment would not make otherwise equal jobs unequal.[86]

It is a very complicated process to compare jobs and pay under the Equal Pay Act. To do so, it is imperative to note that sex discrimination, not simple unfairness, is the issue. The two groups compared are to be differentiated by sex. Once it is determined that women in a job are paid less than the men, or vice versa, in the same or another job requiring equal skill, effort, responsibility and performed under similar "working conditions", the next step is to determine whether any of the four exceptions are applicable.

According to the United States Supreme Court, "working conditions" are defined as the surroundings and hazards. Surroundings are the elements such as toxic chemicals or unusual intensity and frequency of such conditions. Hazards include anything likely to bring bodily harm and the extent of injury that can cause. Time of day is not a factor in "working conditions".[87]

The comparison of jobs under the Equal Pay Act involves determining the comparability of the skill, effort, and responsibility required to perform the jobs. Although there are several cases in which the three qualifiers are applied as one, the EEOC and many courts see the standard as three separate tests, each of which are to be met if the equal work principle is to be applied. "Equal" does not mean "identical".[88]

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[86]Ibid.

[87]Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

[88]Ibid.

The skill test involves indices such as experience, training, education, and ability. Each of these is to be measured in terms of the performance requirements of the job. Two jobs requiring the same skills are equal even if the employee in one job is not required to use the skill as frequently as the other. However, possession of a skill cannot make two employees' jobs unequal.[89] The focus is generally on the skill needed to do the job. However, courts have also recognized an employer's right to compensate at a higher level an individual with greater skill even though a person having less skill could do the job.[90]

The effort test is a measure of physical or mental capacity needed to do a job. Differences only in the kind of effort required do not justify wage differences. However, circumstances in which one employee has to perform a lifting function and another does not would be a differential.[91]

The responsibility test is a measure of the accountability expected in the job performance and particularly with emphasis on the importance of the job obligation.[92]

Extra duties are cited most frequently as reasons for different pay in two comparable jobs such as those of janitors and maids. The job assessment must remain on the skill, effort and responsibility, but the extra duties situation brings in new factors where the bulk of the time

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[89]Hein v. Oregon College of Education, (CA-9 1983), 32 EPD Sec. 33,895; 29 CFR, Sec. 800.125.

[90]EEOC v. New York Times Broadcasting Service, Inc., (CA-6, 1976), 542 F.2d 356.

[91]29 CFR Sec. 800.127 and Sec. 800.128.

[92]29 CFR Sec. 800.129 and Sec. 800.130.

spent in the two jobs is on the same task. The courts have argued that higher pay is not justified by extra duties except when any of the following criteria is met:

(1) Female employees also have extra duties calling for the same skill, effort and responsibility as the male employees' extra duties;

(2) The supposed extra duties are not in fact performed; or

(3) The extra duties consume a minimal amount of time and are of peripheral importance.[93]

Title VII of the Civil Rights Act of 1964 prohibits discrimination with respect to compensation on the basis of the individual's race, color, religion, sex, or national origin.[94] Age is covered in the Age Discrimination in Employment Act of 1967, which prohibits discrimination because of an individual's age.[95]

Based on the issues of race, color, religion, or national origin, there are relatively few court cases that have been decided concerning compensation. It may be that the complexity of proving that compensation rates are applied discriminatorily on one of the prohibited bases causes plaintiffs to base their suits in other employment practices such as placement, transfer, promotion, layoff or recall.

In Roman v. EBS, Inc.,[96] the plaintiff's compensation claim was unsuccessful because the court failed to accept the plaintiff's efforts to

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[93]Brennan v. South Davis Community Hospital, (CA-10 1976), 538 F.2d 859.

[94]Title VII Sec. 703 (a)(1).

[95]Age Discrimination in Employment Act of 1967, Section 4 (a)(1), 29 U.S.C. 621.

[96]Roman v. ESB, Inc., (CA-4, 1976), 550 F.2d 1343.

show that wage rates are discriminatory by comparing the average of the salaries paid white workers. The court said that such a comparison failed to account for differences in skill, education, and training. In Calcote v. Texas Education Foundation, Inc.,[97] a white plaintiff was successful in demonstrating that starting salaries had been discriminatory against whites. The beginning salaries for two employees were compared in addition to the two men's respective training and experience.

However, much litigation has occurred in the application of Title VII to sex discrimination in compensation despite the availability of relief under the Equal Pay Act of 1963. The reason that the Equal Pay Act is sometimes not the basis of sex discrimination cases is that the equal pay for equal work approach is limited to those situations in which men and women do comparable work to meet the exacting standards for equal work in the Equal Pay Act. The equal work standard relating to job comparability has been applied in the same manner under Title VII.[98] However, the prohibition against discrimination in compensation in Title VII is broader than in the Equal Pay Act, and may provide a greater possibility of recovery. The United States Supreme Court clearly stated in Gunther v. County of Washington[99] that Title VII provides a theory for recovery separate from the Equal Pay Act. The argument to the Court is centered on the provision in Title VII known as the Bennett Amendment. This amendment states that Title VII does not make unlawful any

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[97]Calcote v. Texas Educational Foundation, Inc., (CA-5 1978), 578 F.2d 95.

[98]DiSalvo v. Chamber of Commerce, (CA-8 1978) 568 F.2d 593.

[99]Gunther v. County of Washington, (CA-9, 1980), 452 U.S. 161 (1981).

employment practice that differentiates on the basis of sex in determining the amount of compensation paid to the employees if the differentiation is "authorized by the Equal Pay Act".[100]

For a full understanding of the Supreme Court's decision, two interpretations of the effect of the Bennett Amendment are considered. The interpretation as applied by some courts and generally accepted is that the Equal Pay Act was intended to set the standard for sex discrimination in pay and that whatever was lawful under it was not changed by Title VII.[101] A second interpretation adopted by the Supreme Court holds that the Bennett Amendment only adopts the Equal Pay Act's four exceptions as cited above as limitations on the application of Title VII to sex discrimination, but it does not adopt the equal work concept of the Equal Pay Act. The Bennett Amendment's use of the word "authorized" is the basis for this interpretation. It is argued that "authorized" must mean more than permitted. Since only the four exceptions in the Equal Pay Act actually "authorize" differentials, the advocates of the second interpretation contend that only the four exceptions are intended to limit the application of Title VII.[102]

The interpretation of the Bennett Amendment which is important to the application of Title VII to sex discrimination in pay, is not supported by an examination of legislative history. Because the amendment was presented for the first time on the Senate floor, and passed with

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[100]Title VII, Section 703 (h), last sentence.

[101]Ammons v. Zia Company (CA-10 1971), 448 F.2d 117 and Molthan v. Temple University, (DC ED Pa. 1977), 442 F. Supp. 448.

[102]Gunther v. County of Washington, Supra.

little discussion or debate there is little pertinent legislative history. What is available is unclear or arguably not relevant because of the timing of the remarks.[103]

The phrase, "wages, hours, and other terms and conditions of employment", has been construed to include a variety of subjects, including fringe benefits, bonuses, company housing, employee stock purchase plans, group insurance, lunch and rest periods, individual merit raises, and employee discounts. Discrimination with respect to any such matters would appear to come within the scope of Title VII.[104]. Peskins stated:

> The key to understanding Title VII of the Civil Rights Act of 1964 (which deals with equal employment opportunity) is to grasp the premise upon which the act is based: that neither race, creed, color, religion, sex, age nor national origin are relevant in determining whether an individual should be given gainful employment, nor should these factors influence treatment during employment to which the individual is entitled. The act is interesting because employers, employment agencies, unions, and joint management and union committees are affected under Title VII by negative prohibitions against becoming involved in such practices as barring employment, prohibiting or restricting promotions, transfers, or pay, or negating any other privilege or condition of employment on the basis of race, creed, color, religion, sex, age, or national origin. (The act indicates what not to do but is silent about what is to be done.)
>
> Another interesting feature of the Civil Rights Act of 1964 is its attempt to ensure state's rights and state self-determination; this is demonstrated in section 708 of the act, which affirms that except where an unlawful practice under Title VII is permitted by a state law, Title VII does not intend to exempt a person from obligation to state statutes. Those persons who were originally suspicious of the act because they believed it showed disproportionate preferential treatment for minorities were unfamiliar with the all-encompassing nature and characterof the act. This most popular misconception about the law should have been set straight with Section 703 (j) of Title VII, which clearly and pointedly assures that the act

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[103] Ibid.

[104] Bureau of National Affairs, The Equal Employment Opportunity Act of 1972.

> seeks to avoid preferential treatment in employment even if such avoidance does not correct imbalances due to past discriminatory practices that were responsible for reducing the percentage of employed minorities in a given area.[105]

## The Equal Employment Opportunity Commission

The five-member Equal Employment Commission (EEOC) as established by the Civil Rights Act of 1964 had virtually no enforcement powers. It received charges of unlawful employment based on race, color, religion, sex, or national origin, but was limited to seeking voluntary compliance through conference, conciliation, or persuasion.

When the commission is not successful in its efforts to bring voluntary compliance, it notifies the charging party or parties that there is reasonable cause to believe a violation has been committed. The aggrieved may then file a suit against the charged party or parties in a federal district court. If a "pattern or practice" of unlawful employment discrimination is found, the Department of Justice is permitted to file an action against the employer, the union, the employment agency, or all three.

When an individual files a suit, the EEOC is permitted to intervene as amious curiae but is prohibited from initiating action on its own. However, in spite of the limitation there has been a substantial volume of litigation under the 1964 Act.[106]

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[105]Dean B. Peskins, The Building Blocks of EEO (New York: The World Publishing Company, 1971), p. 18.

[106]Bureau of National Affairs, The Equal Employment Opportunity Act of 1972, p. 55.

Section 705[107] creates the Equal Employment Opportunity Commission (EEOC) composed of five members. Not more than three of the members may be from the same political party. They are appointed by the President with the advice and consent of the Senate for a term of five years. Persons chosen to fill a vacancy are appointed only for the unexpired term of the member whom the appointee succeeds. The members continue to serve until their successors are appointed and qualified, except no such member shall continue to serve (1) for more than 60 days when Congress is in session unless a nominee to fill the vacancy has been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination is submitted.

The President appoints one member to serve as chairman of the Commission and one member to serve as vice chairman. The chairman is responsible for the admistrative operations of the Commission. With the exception of the provisions of subsection (b), the chairman appoints such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist the EEOC in the performance of its function. These appointments are made in accordance with Title 5, United States Code, governing appointments in the competitive services.

The chairman also sets the compensation of all employees in accordance with the provisions of Chapter 51 and subchapter III of Chapter 53 of Title 5, United States Code, relating to classification and general schedule pay rates. Additionally, the assignment, removal, and compensation of the hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of Title 5, United States Code.

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[107]Title VII, Section 705.

Subsection (b) cited above requires that a General Counsel of the Commission be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel is responsible for the conduct of litigation as provided in sections 706 and 707 of Title VII. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and is to concur with the chairman of the Commission on the appointment and supervision of regional attorneys.

Attorneys appointed may, at the direction of the Commission, appear for and represent the Commission in any case in court, except that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to Title VII.

Three members constitute a quorum. During the latter part of 1981 and early 1982, the EEOC went more than one hundred days without a quorum. Three of the Commission's positions were vacant.[108] The Commission has an official seal which is to be judicially noticed and it files a fiscal year report to Congress and the President reporting action it has taken; the names, salaries, and duties of all employees and the monies it has disbursed. Additionally, it reports on the causes of and means of eliminating discrimination and recommends further legislation.

The principal office is to be in or near the District of Columbia, but it may meet or exercise any or all of its power in any other place. The Commission may establish regional or state offices as it deems necessary. In North Carolina, there are offices as of this date in Charlotte,

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[108]"Clarence Thomas: New Choice for Chairman," Idea and Trends in Personnel, 26 February 1982, p. 62.

Greensboro, and Raleigh. Regional offices are located in Philadelphia, Atlanta, Chicago, Denver, and San Francisco.[109]

Section 705 (g) establishes the powers of the Commission:

> (1) to cooperate with and, with their consent, utilize regional State, local and other agencies, both public and private, and individuals;
>
> (2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;
>
> (3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;
>
> (4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by concilation or such other remedial action as is provided by this title;
>
> (5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;
>
> (6) to intervene in a civil action brought under section 706 by an aggrieved party against a respondent other than a government, governmental agency, or political subdivision.[110]

The major change in enforcement power that was added in 1972 was the authority in section (6) above to bring civil suits in federal district courts for injunctions and other remedies for unlawful employment practices on the part of employers, unions, employment agencies and joint labor-management committees.

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[109]Telephone interview, EEO office, Greensboro, NC, 8 February 1984.

[110]Title VII, Section 705 (g).

Under the 1964 Act, the Justice Department was the sole jurisdiction to prosecute actions involving an alleged "pattern or practice" of unlawful employment discrimination. The 1972 amendment gave the EEOC concurrent jurisdiction with the Justice Department to bring such actions for a period of two years after which the EEOC had exclusive jurisdiction to bring "pattern or practice" actions.

Section 706 (b) of Title VII provides that when a person files a charge alleging employment discrimination, the EEOC shall serve a notice of the charge to include the date, place and circumstance of the alleged unlawful employment practice to the employer, employment agency, labor organization or joint labor-management committee (hereinafter referred to as the respondent) within ten days and shall make an investigation of the charges. Charges are to be written and signed under oath or affirmation using such forms as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines that there is not reasonable cause to believe the charge is true, it shall dismiss the charge and promptly notify the charging party and the respondent of its action.

To determine whether reasonable cause exists, the EEOC shall accord substantial weight to the findings and orders made by state and local authorities in proceedings commenced under state and local law. As cited earlier, public school employees in North Carolina do not have a 706 agency so charges go directly to EEOC.

If the Commission determines after appropriate investigation that there is reasonable cause to hold the charges as true, the EEOC endeavors to eliminate any such alleged unlawful employment practices by

informal methods of conference, conciliation, and persuasion. Nothing said or done in these informal endeavors is made public by the EEOC, its offices or employees nor is it used as evidence in a subsequent proceeding without the written consent of the persons concerned. Persons making such information public in violation of sub-section 706(d) of Title VII shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission is to make its determination on reasonable cause as promptly as possible, and, in so far as practicable, not more than one hundred twenty days from the filing of the charge, or the date upon which the Commission is authorized to take action with respect to the charge, if it has been filed with a 706 local or state agency.

Subsection 706 (c) of Title VII requires the charges occurring in a state, or political subdivision of a state having a state or local law prohibiting the unlawful employment practice alleged, to seek remedy through the appropriate agency before the charges can be accepted by EEOC. This procedure requires a waiting period of sixty days after the proceedings have commenced under the state or local laws, unless the proceedings have been terminated in less time. This time is extended to one hundred twenty days during the first year after the effective date of such a state or local law. Before taking any action on the charge, Subsection 706 (d) requires the Commission to notify the appropriate state and local officials of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a state or political sub-division of a state having a law prohibiting the practice

alleged. The same time limits are required as provided in Section 706 (c) unless a shorter period is required.

Charges are to be filed within one hundred eighty days after the alleged unlawful employment practice occurred, except when the person has initially instituted proceedings with a state or local agency. Then, the time is extended to three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice the state or local agency has terminated the case.

If the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the EEOC within thirty days after it has received a charge or within thirty days after the expiration of any period of reference under subsection (c) or (d), the EEOC may bring civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. When the Commission is unable to secure a conciliation agreement from a respondent which is a government, governmental agency, or political subdivision agreeable to EEOC, the Commission is to take no further action and is to refer to the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The charging party shall have the right to intervene in a civil action brought by the Commission or the Attorney General under these circumstances.

Further, under subsection (f)(1) of Title VII, if a charge filed under the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred eighty days from the filing of the charge or any references under subsection (c) or (d), whichever is

later, the commission has not filed a civil action or the Attorney General has notified a civil action in a case involving a government, governmental agency, or political subdivision, or the EEOC has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General, shall notify the charging party. Within ninety days after the giving of such notice a civil action may be brought against the respondent or if such charge was filed by a member of the Commission, by any person whom the charge alleges is aggrieved by the alleged unlawful employment practice. Upon application by the complaintant and in such circumstances as the court may deem just, the court may appoint an attorney for the complaintant and may authorize the commencement of the action without the payment of fees, costs or security. With timely application, the court may, in its discretion, permit the EEOC, or the Attorney General, to intervene in such civil action upon certification that the case is for general public importance.

Subsection (f)(2) of Title VII provides:

> Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such case to be in every way expedited.

Subsection (f)(3) of Title VII establishes that each United States district court and each United States court of a place within jurisdiction of the United States shall having jurisdiction of actions brought under

Title VII. For purposes of sections 1404 and 1406 of Title 28 of the United States Code, the judicial district in which the principal office of the respondent is located shall in all cases be considered a district in which the action might have been brought.

Subsection (f)(4) of Title VII places the responsibility of designating a judge to hear and determine the case on the chief judge of the district. If no judge is available, the chief judge of the district, or the acting chief judge, shall designate a district or circuit judge of the circuit to hear and determine the case. The judge designated under this section has the duty to assign the case for a hearing at the earliest practicable date and to expedite the case. If failure to schedule the case for trial within one hundred twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.[111]

When the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice as charged, Sub-section (g) of Title VII authorizes the court to enjoin the respondent from engaging in such unlawful practice, and orders such affirmative action as may be appropriate. The Court order may include, but is not limited to, reinstatement or hiring of employees, with or without back pay payable by the employer, employment agency, or labor organization responsible for the unlawful employment practice or any other equitable relief as the court deems appropriate. Back pay liability may not accrue from a date more than two years prior to filing

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[111]Title VII, Section 706 (f)(5).

the charge with EEOC. Any earnings or amounts earnable with reasonable diligence by the charging party will reduce the amount of back pay allowable. This subsection further states that:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704 (a).

Subsections (h) through (k) of Title VII provide other requirements for court cases:

> (h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101-115), shall not apply with respect to civil actions brought under this section.
> (i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.
> (j) Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.
> (k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Subsection 707 (e) of Title VII establishes that "effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission". Thus, EEOC is granted the right to bring a civil action in the appropriate federal district court of the United Stated by filing with it a complaint that is (1) signed, (2) sets forth the facts pertaining to pattern or practice, and (3) seeks relief

to include an application for a permanent or temporary injunction restraining order or other order against the person or persons responsible for unlawful discrimination to insure full rights secured by Title VII.

Subsection (e) of Title VII summarizes the changes made in EEOC in the 1972 amendment to the Civil Rights Act of 1964:

> Subsequent of the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

Section 709 of Title VII covers investigations, inspections, records and relationships with state agencies. Subsection (a) requires that at all reasonable times the Commission shall have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated that relates to unlawful employment practices covered by Title VII and is relevant to the charge under investigation.

A recent court action over the right of EEOC to confidential information is reported in Legal Notes for Education. A black college professor filed an EEOC claim alleging racial discrimination after he was denied tenure by the University of Notre Dame. The EEOC's requested access to all files of faculty members who were eligible for tenure at the time the claimant was eligible was refused by the University unless it could first delete any identifying information of professors who had participated in the University's peer review process. The EEOC refused to sign a nondisclosure agreement for the release of any files and filed a suit in the United States District Court in Indiana which held against the University. On appeal, the United states Court of Appeals, 7th

circuit, held that the need to preserve the integrity of the peer review process necessitated the removal of identifying information. This court ruled that EEOC was not required to sign a nondisclosure agreement. The case was remanded to the district court to issue a protective order assuring that privileged materials would not be disclosed to anyone not directly involved in the EEOC investigation.[112]

Subsection (b) provides that the Commission may cooperate with state and local agencies charged with administering state fair employment practices law, and with consent of such agencies, engage in and contribute to the cost of research and other projects of mutual interest and utilize the services of such agencies and their employers.

Subsection (c) requires every employer, employment agency, and labor organization subject to Title VII to (1) make and keep records relevant to the determiniation of whether unlawful employment practices have been or are being committed; (2) preserve such records for such periods; and (3) make reports which EEOC shall prescribe by regulation or order. EEOC by regulations requires each employer, labor organization and joint labor-management committee which has apprenticeships and other training programs, to keep records including, but not limited to, a list of applicants who wish to participate, including the chronological order in which applications are received, and to furnish EEOC on request a detailed description of the process for selection of participants. The 1972 amendment to this section adds the following:

> If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court

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[112]"Confidentiality of Faculty Files Disputed in Discrimination Suit", Legal Notes for Education, 6 (January 1984): 1.

> for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

Subdivision (d) of Title VII provides for the EEOC, upon request and without cost, to provide information obtained pursuant to subsection (c) from any employer, employment agency, labor organization, or joint labor-management committee to any state or local agency charged with the administration of a fair employment practice law. Such information is not to be made public by the recipient agency prior to the institution of a proceeding under state or local law involving such information. A violation by a recipient agency may result in the Commission's declining to honor subsequent requests pursuant to this subsection.

Section 710 of Title VII requires the use of section 11 of the National Labor Relations Act for the purpose of all hearings and investigations conducted by EEOC or its duly authorized agents or agencies.[113]

Section 711 of Title VII requires every employer, employment agency, and labor organization to post and keep posted conspiciously upon its premises where notices to employees, applicants for employment, and members are customarily posted. These notices are to be prepared or approved by the EEOC. A fine of not more than $100 is assessed for each separate offense.

Section 712 of Title VII states that nothing in Title VII shall be construed to repeal or modify any federal, state, territorial, or local law creating special righs or preference for veterans.

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[113]National Labor Relations Act, 49 Stat, 455, 29 U.S.C. 161 (1935).

Section 713 of Title VII provides the authority for EEOC from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of Title VII. All regulations issued under this section are to be in conformity with the standards and limitations of the Administrative Procedure Act.

Section 714 of Title VII covers the act of forcibly resisting the EEOC or its representatives. The provisions of sections 111 and 1114 Title 18, United States Code, shall apply to all EEOC personnel in the performance of their official duties. The 1972 amendment added the following:

> Notwithstanding the provisions of sections 111 and 1114 of Title 18, United States Code, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.

The 1972 amendment adds an Equal Employment Opportunity Coordinating Council in Section 715. The council is composed of the Secretary of Labor, the Chairman of the EEOC, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates.

The council is responsible for developing and implementing agreements, policies, and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication, and inconsistancy among the operations, functions and jurisdictions of the various departments, agencies, and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders and policies. The council reports to the

President and Congress on or before July 1 annually. The report is to contain activities and such recommendations for legislative or administrative changes the council concludes are desireable.

The 1972 amendments to the Civil Rights Act of 1964 strengthen the enforcement of the prohibition against discrimination in employment based on race, color, sex, religion, or national origin. Following the 1972 amendment, EEOC has the authority to bring civil suits in federal district courts for injunctions and other remedies for unlawful employment practices. Two years after the 1972 amendments, on April 24, 1974, the EEOC has exclusive jurisdiction to bring "pattern and practice" actions to the courts.[114]

Miner and Miner argue that although the improvement of personnel practices is not one of the goals of Title VII, it may well be a result. In the area of selection of employees, the EEOC requirements for compliance with the law contribute to more effective hiring and promotion decisions. Having employment decisions be related to job performance, which is really all EEOC requires, makes the selection process more effective. This is not only in the interest of society; it is in the interest of the organization.[115]

Uniform Guidelines on Employment Selection Procedures (1978)

On Friday, August 25, 1978, uniform guidelines for the Equal Employment Opportunity Commission, the Civil Service Commission, the

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[114]Bureau of National Affairs, The Equal Employment Opportunity Act of 1972, p. 58.

[115]Miner and Miner, Employee Selection Within the Law, p. 369.

Department of Justice and the Department of Labor were adopted. This document set forth the Uniform Guidelines on Employee Selection Procedures.[116] The guidelines were adopted by the Department of Treasury on September 11, 1978.

The guidelines are a common effort by the EEOC to enforce Title VII of the Civil Rights Act as amended by the Equal Employment Opportunity Act of 1972 by the Department of Labor to enforce Executive Order 11246 through the Office of Federal Contract Compliance Program (OFCCP), by the Department of Justice to enforce a variety of equal employment laws, and by the U.S. Civil Service Commission (renamed the Office of Personnel Management under the Civil Service Reform Act of 1978) for federal employees (which is now the responsibility of EEOC) and for state and local governments receiving grant-in-aid funds under various federal statutes. The adoption of the guidelines was followed by the release of ninety explanatory questions and answers on March 2, 1979[117] followed by three additional questions on May 2, 1983.[118].

The Ad Hoc Group on Uniform Selection Guidelines of the American Society for Personnel Administration indicates:

> The Uniform Guidelines on Employee Selection Procedure (the "Uniform Guidelines" or "Guidelines") represent a significant attempt by the federal equal employment opportunity ("EEO") agencies to achieve consistency in interpreting the requirements of equal employment opportunity laws as such laws impact on employer personnel practices. Some provisions are pragmatic and helpful and, if properly interpreted, should discourage unwarranted litigation while encouraging employers to use selection procedures that are job-related and consistent with sound equal employment oppor-

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[116] Federal Register 43, 116, 25 August 1978, 38295.

[117] Federal Register 44, 43, 2 March 1979, 29530.

[118] Federal Register 45, 87, 2 May 1980, 11996.

> tunity objectives. The Guidelines leave many questions unanswered, however, and some crucial terms are professionally or legally unsound, or both. Employers will not only find that attainment of EEO objectives will be enhanced by an understanding of what the Guidelines require, but also that guidance as to the more doubtful, as well as the most positive points in the Guidelines will enable them to deal in a practical way with the realities of compliance.[119]

The Ad Hoc Group includes leaders of personnel management and industrial psychologists from the private sector, the public sector, and the legal profession. The group was organized to develop policies to implement the best professional thinking as to how equal employment opportunity could be implemented without denigrating the concept of merit employment. It has been operating since 1974.[120]

A problem which caused Congress concern at the time the Civil Rights Act of 1964 was adopted was the effect that written pre-employment tests had on equal employment opportunity. The use of these tests appeared to deny employment to minorities in many cases without evidence that the tests were related to success on the job. Congress sought to strike a balance which prohibits discrimination, but otherwise allows the use of tests in the selection of employees. Thus, in Title VII, Congress authorized the use of "any professionally developed test provided that in the administration or action upon the results was not designed, intended or used to discriminate".[121]

Employers contended that they could use any test developed by a professional as long as they did not intend to exclude minorities, even

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[119]Virgil B. Day, Frank Erwin, and Allan M. Koral, eds., A Professional and Legal Analysis of the Uniform Guidelines on Employee Selection Procedures (Berea, Ohio: The American Society for Personnel Administration, 1981), p. 5.

[120]Ibid., p. 14.

[121]Section 703 (h), 42 U.S.C. 2000 e (2) (h).

if such exclusion was the result of testing. In 1966, the EEOC added guidelines to advise what the intent of the law and good industrial psychology practice requires.[122] EEOC's view was that the employer's intent was irrelevant, if the testing resulted in adverse impact on protected groups. To justify a test which screened out a higher proportion of minorities, the employer needed to demonstrate that it measured or predicted performance on the job.[123] Otherwise, it was not considered to be "professionally developed".

In 1971 in Griggs v. Duke Power Company,[124] the Supreme Court insisted that employer practices which have an adverse impact on minorities and are not justified by business necessity constitute illegal discrimination under Title VII. Congress confirmed this in the 1972 amendments to Title VII. The extension of these principles by courts and agencies continued into the mid-1970's.[125] However, differences between EEOC and the Department of Justice, Department of Labor, and the Civil Service Commission had produced two different sets of guidelines by the end of 1976.

In Washington v. Davis,[126] the Supreme Court relaxed the standards for demonstrating job-relatedness in a constitutional and non-Title VII statutory content, although the court seemed to be using Title VII standard to make its determination.

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[122]35 U.S.L.W. 2137 (1966).

[123]Federal Register 43, 116, 25 August 1978, 33290.

[124]Griggs v. Duke Power Company, 401 U.S. 424 (1971).

[125]Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

[126]Washington v. Davis, 426 U.S. 229 (1976).

The Supreme Court's opinion in Washington v. Davis has had its greatest impact for its holding that employers not subject to Title VII are not subject to the same burden of proof concerning selection procedures as employers who are subject to Title VII. The Court applied the constitutional standard requiring intentional discrimination and found that, by that measure, the test used to make employment decisions was proper. The test of verbal ability, vocabulary, reading, and comprehension was designed to select police officers in the District of Columbia. The court also affirmed that the trial court's conclusion that the test was directly related to the requirements of the police training program and that a positive relationship between the test and training performance was sufficient to validate the test. The court applied a less restrictive standard for demonstrating job-relatedness in a Section 1981 case than had been set forth in the 1970 Guidelines. Washington v. Davis held, "It appears beyond doubt . . . There is no single method for appropriately validating employment tests for their relationship to job performance."

The incoming administration of President Jimmy Carter in 1977 caused a movement to produce a unified government position with regard to employment decision and thus the Uniform Guidelines on Employee Selection Procedures (1978) developed.

The legal importance of the guidelines to employees lies both in their scope and the use to which they are put by the EEOC and other Equal Employment Opportunity agencies. The guidelines cover virtually all employee selecton procedures other than recruitment. They mark the likely parameters in enforcement, especially with regard to whether

to prosecute "pattern and practice" or systemic discrimination cases. They are not "regulations" in the strict sense of the meaning. EEOC lacks the authority to issue regulations and the Justice Department does not use its rule-making authority to adopt the guidelines. However, the guidelines have a very important effect on an employer's ability to defend against Title VII charges of discrimination.[127]

The Ad Hoc Group on Uniform Selection Guidelines of the American Society for Personnel Administration summarized the guidelines as follows:

1. If the overall selection rate for any racial, ethnic or sex group is is less than 80 percent of that of the most successful group (typically whites or males), this will generally be deemed to constitute "prima facie" (i.e., initial) evidence of discrimination because the selection process has "adverse impact" on that group. Each component procedure of the overall selection process must then be examined for adverse impact on the group in question, using the same 80 percent rule. Components need not generally be examined if the overall process does not have adverse impact.

2. The employer then has four choices to forestall liability for components having adverse impact:

   a. Demonstrate the job-relatedness of the selection procedure;
   b. Modify the procedure so that the adverse impact is eliminated, or modify the method of use of the selection procedure to eliminate adverse impact;
   c. Abandon the procedure and adopt a different procedure without adverse impact;
   d. Otherwise justify the procedure in accordance with federal law, such as through showing "business necessity".

3. If the employer chooses to demonstrate the job-relatedness of the selection procedure, the Guidelines require:

   a. Validation studies conforming to highly detailed requirements or validity evidence from other users that conform to the Guidelines' rules governing transportability of validity data;
   b. Detailed recordkeeping;

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[127]Day, et al., A Professional and Legal Analysis of the Uniform Guildlines, p. 5.

c. Investigation of alternative valid selection devices that have less adverse impact.[128]

The importance of the guidelines is best approached by clarifying their purpose in the interpretation of federal equal employment opportunity law. Except for certain merit system requirements placed on public sector employers, the government does not require employers to justify job-relatedness, fairness or reasonableness of most employment decisions. Only when employment practices have an apparently discriminatory effect on protected groups of employees or applicants do federal EEO laws require a statistical demonstration of adverse impact. This principle is discussed at length by the Supreme Court in Griggs[129] and it has remained the bedrock of Title VII legal analysis to date.[130]

The guidelines are concerned with defining a certain kind of evidence that employment discrimination exists and the appropriate defenses to such evidence. If no statistically "adverse impact" exists in a protected group, the requirements of the Guidelines do not apply.[131]

While the guidelines appear narrow in that they speak only to a particular kind of discrimination, in reality they cover all steps in the process leading up to employment decisions on hiring, job placement, firing, demotion and layoff. Additionally, the guidelines cover selection for training, transfer, apprenticeships, or educational assistance when

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[128]Ibid., p. 6.

[129]Griggs v. Duke Power Company, 401 U.S. 424 (1971).

[130]Day et al., A Professional and Legal Analysis of the Uniform Guidelines, p. 7.

[131]Ibid.

when their decisions affect job status or promotion. Decisions based on "merit" or experience rather than on strick seniority may be open to charges. Thus, every aspect of the employee-employer relationship is potentially covered within the guidelines if its effects are statistically maneuverable so that "adverse impact" can be identified.[132]

The guidelines are not law.[133] Only the courts can produce definititve interpretations and the guidelines are merely administrative interpretations of what the law requires. However, the guidelines are accorded great weight by the courts since they constitute a majority and recent statement of agency interpretation.

The EEOC in addition to its power to issue procedural regulations, has the authority to issue and publicize its interpretations of Title VII provisions. The United States Supreme Court has held the Commission's interpretative guidelines are entitled to "some deference".[134] However, most courts have failed to interpret the EEOC's guidelines as legal obligations of employers.[135]

The main interpretative guidelines, "the EEOC opinion letters", are written in response to inquiries from employers or unions regarding the applicability of Title VII to a particular situation. The EEOC or its General Counsel issues these letters to give the Commission's point-of-view on the issues raised.

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[132]Ibid.

[133]Guardians Association v. Civil Service Commission of the State of New York, 23 FEP 909 (2nd Cir. 1980).

[134]Trans World Airlines, Inc., v. Hardison, 432 U.S. 63 (1977).

[135]Howard J. Anderson, Primer of Equal Employment Opportunity (Washington: Bureau of National Affairs, 1982), p. 94.

The EEOC has ruled that such letters are germaine to the specific concern of the inquirer and have no effect upon other situations. An additional interpretative document is entitled "EEOC Decisions".

The EEOC began in 1969 releasing selected decisions written by the Commission for publication. These decisions related to whether reasonable cause exists to credit particular charges of Title VII violations. Names and other identifying data were deleted from such decisions to protect the confidentiality of the Commission.

The guidelines apply to "adverse impact" issues of discrimination under Title VII and Executive Order 11246. Even though they do not apply to employment decisions subject to scrutiny under the Age Discrimination in Employment Act of 1967 as amended, The Rehabilitation Act of 1973, the Vietnam Era Veterans Act or various state laws, both the legal concepts and the technical standards in the Guidelines are potentially influential in the administration of all of the statutes. Job-relatedness for the purpose of one statute cannot be very different from job-relatedness for the purpose of another statute. Griggs does not impose affirmative action upon employers, but supports Title VII's demand that employment practices be neutral or otherwise show the job-relatedness of employment decisions. The guidelines are an interpretation of Title VII and are not binding regulations.

It is beyond the scope of this study to analyze in detail the Uniform Guidelines. The basic requirement of the guidelines is that in any selection process where the results are an adverse impact on groups protected by Title VII, the selection process is to be validated and shown to be job-related. The major controversy revolves around what consti-

tutes acceptable evidence of validity. One federal court has argued, "standards for testing validity compromise a new and complicated era of the law".[136] Increasingly the courts have been asked to make judgments of professional nature that previously rested in the exclusive province of industrial psychologists. This issue and other legal issues involving equal employment opportunity will be examined in Chapter III.

North Carolina State and Local Equal Employment Opportunity Laws

In North Carolina public school employees may go directly to EEOC with any charges of discrimination and thus by-pass local and state agencies.

North Carolina has the following Equal Employment Laws:

A. G.S. 126-16 forbids discrimination in state government employment on the basis of race, sex, religion, color, creed, national origin or physical disability.

B. G.S. 143B-391, et seq., is basically like Title VII of the Civil Rights Act. It sets up a Human Relations Council to administer law, but fails to provide enforcement provisions.

C. G.S. 128-15.3 prohibits discrimination against handicapped persons in the hiring policies of State Personnel System.

D. Chapter 168 N.C.C.S. prohibits discrimination in both private and public employment against handicapped persons.

E. G.S. 95-28.1 prohibits discrimination by public and private employees on account of sickle cell traits.

Article II: Fair Employment is an ordinance which the City Council of the City of Greensboro, North Carolina, passed on September 17, 1981, to become effective on October 16, 1981. The purpose of the article is to "secure for all individuals freedom from discrimination in

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[136]U.S. v. Georgia Power Company, 474 F.2d 906 (1973).

connection with employment". It is modeled on the Equal Employment Opportunity Commission's Guidelines.

# CHAPTER III

## LEGAL ASPECTS OF EQUAL EMPLOYMENT OPPORTUNITY

Alexis de Toqueville held that, "scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question".[1]

In 1979, Philip J. Lombardi, Vice-President, Industrial Relations, Hyatt Hotels Corporation, wrote in a foreword to the book, The Equal Opportunity Handbook for Hotels, Restaurants, and Institutions:

> In the last decade, the author and others have attempted to give concise expression and definition to 200 years of legal shadow-boxing with a basic tenet of the Constitution and Bill of Rights that "all men are created equal".
>
> It is essentially true that laws are designed by attorneys--for attorneys--and frequently appear to dare understanding by others. It is difficult to distinquish between laws that satisfy a political system and laws that attack a social disease.
>
> The need to understand both the law and human behavior are inextricably intertwined in the satisfaction of equal opportunity.
>
> The laws governing equal opportunity represent a challenge. For the bigot, the challenge is circumvention. For the enlightened and lawful, the challenge is understanding and compliance.[2]

Title VII of the Civil Rights Act is the primary law used by individuals in asserting their employment rights. The 1972 amendment extends the law's protection to all public and private school personnel. In North Carolina, the Equal Employment Opportunity Commission (EEOC)

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[1]de Toqueville, Alex, Democracy in Education, rev. ed. (New York: Alfred A. Knopf, 1945), p. 280.

[2]Arch Stokes, The Equal Opportunity Handbook for Hotels Restaurants, and Institutions (Boston: CBI Publishing Company, Inc., 1979), p. ix.

is the commission to which charges of discrimination in employment may be referred.

Since the passage of the Civil Rights Act in 1964, many guidelines and regulations have been issued; formal amendments have been added; and court cases have added clarification, interpretation, or confusion to the basic tenets of the Civil Rights legislation.

As defined in Chapter II, an unlawful employment practice is any activity on the part of an employer which is motivated, premised, or conditioned upon race, color, religion, sex, or national origin.[3]

Schlei and Grossman identified four general categories or theories of discrimination which, according to them, are listed in the order of their historical development:

1. Disparate treatment. Examples include an absolute refusal to consider blacks for employment, paying a woman a lower wage than that paid a man for the same work, and discharging Spanish-surnamed employees for an offense for which Anglos are given lessor or no discipline.

2. Policies or practices which perpetuate in the present the effects of past discrimination. A classic example is a departmental seniority structure where the employer has departments of varying desirability. If, prior to the effective date of Title VII, the employer hired minorities only into the least desirable departments, ceased this practice, but at all times thereafter either flatly barred transfers between the departments or required a forfeiture of seniority in order to transfer, a minority employee would be effectively locked into an undesirable department, into which he had originally been placed as a consequence of discrimination.

3. Policies or practices having disparate impact not justified by business necessity. Examples include a general intelligence test as a prerequisite for hire which disqualifies substantially more blacks than whites and which cannot be shown to be job-related in the sense that it accurately predicts successful job performance; a requirement of a high school diploma as a prerequisite for hire where fewer blacks than whits have such

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[3]42 U.S.C. 2000 e, et. seg.

a diploma, and the diploma cannot be shown to be job-related; and a policy of discharging all employees whose wages are garnished a specific number of times, where substantially more black employees than white employee have their wages garnished and the anti-garnishment cannot be shown to be necessary to the safe and efficient operation of the employer's business.

4. Failure to make reasonable accommodations to an employee's religious observances or practices. An example would include discharging a Sabbatarian for refusing to work on the Sabbath where an accommodation to the employee's religious practices would not work an undue hardship on the conduct of the employer's business.[4]

Schlei and Grossman held that Congress passed Title VII of the Civil Rights Act of 1964 solely as a prohibition against disparate treatment based on race, color, religion, sex, or national origin. The most significant developments in laws prohibiting employment discrimination during the first decade of Title VII however, were court decisions affecting the remaining three categories of discrimination. Categories 2 and 3 were especially identified as perpetuating in the present the effects of past discrimination and disparate impact. These two categories assume a lack of intent to discriminate, and that the practices resulting in charges of discrimination are neutral on their face.[5]

The second category had its origins in the first of many seminal court decisions under Title VII. Quarles v. Phillip Morris, Inc.[6] originated the category of discrimination known as perpetuation in the present of the effects of past discrimination. Quarles concluded that

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[4]Barbara Lindemann Schlei and Paul Grossman, Employment Discrimination Law (Washington: The Bureau of National Affairs, Inc., 1976), p. 1.

[5]Ibid., p. 2.

[6]Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (EDVA, 1968).

"Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act".

In a ruling handed down on April 5, 1982, the United States Supreme Court voting 5 to 4 held that Congress meant for the language of Section 703(h) of Title VII, to apply to future seniority systems as well as those in existence in 1965 when the law took effect.[7]

Thus, twenty years after the passage of the Civil Rights Act, the Supreme Court ruled on a basic question of seniority. The Supreme Court made it clear that Section 703 (h) "immunizes" both seniority systems adopted before the Civil Rights Act was passed and those adopted afterward.

The third category of illegal employment practice, disparate impact not justified by business necessity, is generally traced to Griggs v. Duke Power,[8] which is one of the most important court decisions in employment discrimination law.[9]

The fourth category of discrimination, reasonable accommodation to religious practice, originated in EEOC regulations and was confirmed by several court decisions. Some of the litigation involved the attempt to determine what the term "religious" included. In some cases the courts refused to delve into the question because of the resulting entanglement with religion. A few of the religious practices and beliefs

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[7]American Tobacco Co. v. Patterson, (U.S. Sup. Ct., 1982, vacated and remanded to CA-4, 1980), 634 F.2d 744.

[8]Griggs v. Duke Power Company, 401 U.S. 424 (1971).

[9]Schlei and Grossman, Employment Discrimination Law, p. 5.

that have been considered in connection with accommodation duties of employees are religious objection to unionism, the observance of special holidays, patriotic songs, and national holidays.[10]

In addition to Title VII Civil Rights Act of 1964, there are other laws and acts that provide opportunity for suit from employment decisions. These are the Fifth Amendment to the United States Constitution, the Civil Rights Act of 1866, the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1870, the Civil Rights Act of 1871, the National Labor Relations Act, the Equal Pay Act of 1963, the Military Selective Service Act, the Age Discrimination in Employment Act of 1967, the Vocational Rehabilitation Act of 1973, the Vietnam-Era Veteran's Readjustment Assistance Act of 1974, Executive Order 11246, and a myriad of state and local laws. It is beyond the scope of this chapter to examine the litigation surrounding each of these laws with regard to equal employment opportunity in the public schools. Therefore, court cases involving Title VII of the Civil Rights Act of 1964 as amended will be the focus of the remainder of this chapter.

## Litigation and the Equal Employment Opportunity Commission (EEOC)

The initial emphasis in Title VII litigation was basically on charges of racial discrimination. By the early 1970's, an increasing number of unlawful employment charges were based on sex discrimination. Women were demanding opportunities to work in often dirty but higher paid

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[10]Human Resources Management, Equal Employment Opportunity (Chicago: Commerce Clearing House, Inc., 1981), Sec. 186, p. 339.

craft jobs, or to experience the extra stress and rewards of managerial responsibility.[11]

Stoddard held:

> The educational field has been no exception to the on-going discrimination against women in the workforce. There is a wide disparity in the total number of women employed in education and the percentage of these women who have attained higher-level positions. Many argue that those who deserve to be promoted and rewarded are, that those who are not deserving remain at the lower levels, that there is no sex discrimination in educational employment but only an honest recognition of merit. But employment statistics which indicate higher disproportionate respresentation of females in high-level positions constitute strong evidence of discriminatory practices.[12]

It has become apparent that almost any area of personnel administration may be affected by the requirements for equal employment opportunity. Employment discrimination in seniority lists, compensation, benefits, training opportunities, discipline, and other aspects of employee relationships in addition to recruitment, interviewing, and selection are likely to result in litigation.

Early in 1979, EEOC established a program designed to identify and process charges that are likely to end in litigation. These charges that are known as Early Litigation Identification (ELI) have procedures for litigation-oriented investigation and conciliation. ELI is designed from the beginning so that all persons affected by the discriminatory practices are involved in seeking relief.[13]

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[11]Mary Green Miner and John B. Miner, Employee Selection Within the Law (Washington, D.C.: Bureau of National Affairs, 1981), p. 68.

[12]Cynthia Stoddard, Sex Discrimination in Educational Employment: Legal Alternatives and Strategies (Holmes Beach, FL: Learning Publications, Inc., 1981), p. 9.

[13]Human Resources Management Sec. 6090, p. 1774.

ELI is in most cases an individual's charges rather than a charge initiated by the EEOC. The ELI cases are limited investigations. They deal with the allegations made by the charging party and to matters like or related to those allegations. ELI cases are handled entirely within the district offices of the EEOC.[14]

The district offices maintain two lists in order to identify ELI cases: the ELI issues list and the ELI respondent list. According to the EEOC Compliance Manual, the ELI issue list should include the following, in addition to locally identified issues:

1. Issues involving discrimination resulting from an acknowledged policy, such as the use of pen and pencil tests and high school diploma, height and weight requirements that exclude women and minorities;
2. Failure-to-hire issues where EEO-1 data or data supplied by the charging party indicates a very low utilization of women or minorities;
3. Issues involving refusal to admit charging party to, or removal of charging party from formal training programs;
4. Issues involving failure to promote into jobs where the participation rate for women or minorities is very low;
5. Issues involving placement where departments, classifications, or job categories are highly concentrated;
6. Issues regarding treatment of maternity leave arising from practices after October 31, 1978;
7. Issues regarding pay differences between women and men.[15]

The ELI respondent list, which is developed by the top management committee at each district office, is based on varied information, but includes the following:

1. EEO-1 reports showing low overall representation of women and minorities;
2. EEO-1 multi-year data analysis showing persistent low utilization rates;
3. Information from state and local agencies or from the OFCCP, Occupational Safety and Health Administration, Wage and Hour

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[14]EEOC Compliance Manual, Sec. 12.1.

[15]Ibid., Exhibit 12-A.

Division, National Labor Relations Board, Federal Communications Commission, or similar organizations that have an opportunity to observe utilization;

4. Information supplied by organizations representing members of protected groups.[16]

The ELI respondent list is carefully guarded to prevent disclosure. According to the EEOC Compliance Manual:

> When a person files a charge, identified through either of the ELI lists, special counseling will be given informing the charging party of the different handling given ELI cases. The charging party is asked whether he or she knows of other situations at the respondent's place of business that might indicate discriminatory practices. If the charging party responds in the affirmative, further questioning is appropriate.[17] An individual's charge will not be designated as ELI case solely on the basis of the ELI issues list or ELI respondent list; the charging party must also state that he or she has some reason to think that others in the organization are being subjected to discriminatory practices.[18]

The decision to handle a charge as an ELI case is made by the district office's top management on the recommendation of the supervisor of the continuing investigation and conciliation (CIC) unit. If the charge is selected, the ELI handling procedure is instituted. The fundamental difference between an ELI case and other charges by individuals is that the scope of the investigation is expanded to include a possible class.[19]

The approach to investigations of ELI charges is the same as the full investigation approach conducted by the CIC. However, there are some special provisions applicable to ELI cases:

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[16]Ibid., sec. 12.3.

[17]Ibid., sec. 12.5 and 12.6.

[18]Ibid., sec. 12.7.

[19]Ibid., sec. 128.

1. Notification and deferral: As with systemic cases, agreements are sought in all ELI cases, from state and local agencies ("706 agencies") waiving the 60-day period of exclusive jurisdiction . . . If a waiver is in effect, the investigation . . . begins with a request for information. If no waiver . . ., the investigation must begin with notice to respondent of the charge and its deferral to the 706 agency. In a non-deferral jurisdiction, the case is begun with a request for information.[20]

2. Planning and investigation: A justification memorandum must be prepared, demonstrating why the case has been selected as an ELI case. The ELI case may include other charges against the respondent, but they must be so directly related to the ELI charge that a finding of reasonable cause . . . would justify a similar funding on the consolidated charge(s). The investigation will be conducted as other CIC unit cases, but deadlines must be set up for completion of each phase of the investigation . . . Periodic reports are submitted by the CIC unit supervisor to the top management committee as each major milestone in the investigation is met.[21]

3. Conducting the ELI investigation: Because of the possibility of litigation if discrimination is found and conciliation is not successful, the investigator in an ELI case works closely with a designated attorney to ensure that the evidence is gathered in the best form possible . . .[22]

4. Predetermination interview: In ELI cases, the entire case file must be reviewed for litigation-worthiness prior to the predetermination interview held with the respondent and charging party.[23] Litigation-worthiness is decided by the regional attorney . . . The standard for litigation-worthiness cannot be formed into precise guidelines, but the Commission does require that the legal proofs--the relationship of the applicable law to existing and obtainable evidence--be dealt with precisely and thoroughly.[24]

For any Title VII charge that has been investigated and not dismissed for any reason prior to the close of the investigation, a determi-

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[20]Ibid., sec. 12.9.

[21]Ibid., sec. 12.10.

[22]Ibid., sec. 12.11.

[23]Ibid., sec. 12.12.

[24]Ibid., sec. 4.5(d).

nation must be made as to whether or not there is reasonable cause to believe that the charge of discrimination is true. If the EEOC determines that there is reasonable cause, and the case has sufficient merit to warrant litigation if conciliation is not reached by the Commission or the charging party, litigation may occur.[25] If no reasonable cause exists to believe that the Title VII charge is true, the case will be dismissed. Notice is sent to the charging party and the respondent.[26]

At any time prior to the issuance of a determination by the EEOC, the parties in the case may settle the charge on terms that are mutually agreeable. When conciliation appears impossible, both the charging party and the respondent will be notified. Notification of unsuccessful conciliation is particularly important if the time limit for filing private court action is drawing close.[27]

Upon failure of conciliation, the file is forwarded to the EEOC Regional Litigation Center. If the case is not deemed appropriate for EEOC litigation, the parties are sent notice that the charging party is issued the statutory notice of right-to-sue letter.[28] Statutory notice of the right to sue may issue at any of four junctures in the EEOC process:

1. Possibly upon a finding of no jurisdiction;
2. Upon request of a charging party before the completion of the administrative process;
3. After a finding of no reasonable cause; or

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[25]Ibid.

[26]Ibid., sec. 4.2(c).

[27]Ibid., sec. 166.2 and 166.3.

[28]Title VII, Section 706 (f)(1) and 29 CFR, Section 1601.25 (a).

nation that the case will not be litigated by the EEOC (or Justice in a case involving a government agency) as a part plaintiff.[29]

Section 706 (f)(1) of Title VII states that a civil action must be filed with the federal district court within ninety days of receipt of the statutory notice of the right to sue.

Once the notice of the right-to-sue has been issued, the commission will automatically cease processing a charge except under the following conditions:

1. The charge was a commissioner charge;
2. The EEOC is considering filing a civil action against the respondent;
3. The case is not within the definition of a "current Commission Decision Precedent" (CDP) and it is decided that the case should be pursued;
4. A petition to revoke or modify a subpoena in the case is pending;
5. The charge has been consolidated into a systemic case.[30]

The issuance of a right-to-sue does not preclude the commission from offering assistance in pursuing the case.[31] Each EEOC district office has a district counsel responsible to assist with private litigation of civil actions under section 706. The responsibility is limited to civil actions where the plaintiff is not the EEOC or the Attorney General. Most EEOC offices have a legal services program to assist those charging parties who wish to pursue their case where there has been a cause finding, a failure of conciliation with no reasonable offer of settlement, and a decision by EEOC not to litigate.[32]

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[29]Schlei and Grossman, Employment Discrimination Law, p. 808-809.

[30]EEOC Compliance Manual, Section 6.3.

[31]29 CFR, Section 1601.28 (b)(4).

[32]Schlei and Grossman, Employment Discrimination Law, p. 809.

Individuals may pursue their case in court even though a right-to-sue notice has not been received. However, it must be demonstrated that the individual is entitled to such a notice. In one case, EEOC had refused to issue the notice because a settlement agreement had been conciliated between the charger and the respondent. However, the employer did not honor the agreement. The requested notice should have been issued, the federal appellate court ruled. The employee was entitled to notice, the court continued, and could press the claim in court. It is not receipt of the notice that is the jurisdictional prerequisite to court action, but entitlement to the notice.[33]

To bring a suit under Title VII of the 1964 Civil Rights Act, the plaintiff must have a stake in the outcome of the suit. A person must have been damaged or threatened with damage by each alleged unlawful employment practice of the defendent to challenge the practice under Title VII. The 1972 amendment which intended Title VII to cover state and local governmental employees was enacted pursuant to the Equal Protection Clause of the Fourteenth Amendment[34] and provided a change to Title VII which in 1964 was passed pursuant to the Commerce Clause of the Constitution.[35]

The plaintiff's "standing" is based on injury or threat of injury that is real and immediate and not conjectural or hypothetical. The plaintiff must be at least arguably within the zone of interests intended to be protected by Title VII. The type of injury that can be redressed

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[33]Perdue v. Roy Stone Transfer Corp., (CA-4, 1982), 690 F.2d 1091.

[34]Fitzpatrick v. Bitzer, 12 FEP 1586 (1976).

[35]110 Congressional Record, 7202-12, 8453-56, (1964).

and, therefore, can be the basis for a plaintiff's standing have been expanded by some courts beyond economic injury. Unfair discipline and route assignments that created an atmosphere of discrimination which resulted in psychological damage to plaintiffs was a sufficient allegation to support an action in Gray v. Greyhound Lines-East.[36]

The injury may be less than immediate when the alleged discrimination is part of the employer's established policies or regulations.[37] Many employment discrimination cases lend themselves to class action treatment because the alleged unlawful employment practice affects other employees. Rule 23 of the Federal Procedure provides:

> (a)Prerequisite to a class action. One or more of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joiner of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Schlei and Grossman noted:

> The Supreme Court has never ruled on the requirements of Rule 23 as applied to Title VII class actions. However, many lower courts, and particularly the Fifth Circuit, have treated Title VII cases more leniently under Rule 23 than other types of cases. Such courts have permitted the named plaintiff to act as a kind of "private attorney general" to raise "across-the-board" charges of employment discrimination throughout an employer's work force, and to represent persons who have materially different employment situations from the named plaintiff.

There appear to be at least three rationales upon which courts have readily certified class action in Title VII cases:

1. Where the Court finds that actions involving discrimination are "necessary" class actions;

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[36]Gray v. Greyhound Lines-East, (CA D.C., 1976), 545 F.2d 169.

[37]Bartmess V. Drewrys U.S.A., Inc., (CA-7, 1971), 44 F.2d 1186 cert. denied (U.S. Sup. Ct., 1971), 404 U.S. 939.

2. Where there are allegations of "across-the-board" discrimination;
3. Where the court focuses on preventing discrimination as to future employees and applicants whose identity is unknown.[38]

When individuals or organizations learn of a suit initiated by someone else is of interest to them, the Federal Rules of Civil Procedure govern the decision to permit intervention into the suit. Intervention is permitted by "right" when a statute gives an unconditional right to intervention or when the applicant claims an interest and is so situated that the disposition of the suit may impair or impede the applicant's ability to protect that interest. Intervention is "permissive" and granted at discretion by the court when a statute gives a conditional right to intervene or when the applicant's claim or defense and the main action have a question of law or fact in common. In all cases the application for intervention must be timely filed.[39]

Intervention of right is available by statute under Title VII, but only for suits brought under Section 706. The two primary issues that arise when a court receives an application for intervention in Title VII action have been timeliness and interest in the outcome.

Intervention has been considered to be untimely when applications are filed at the following points in litigation:

1. After discovery is complete, but before trial;
2. Just prior to entry to judgment;
3. Just prior to signing of the consent decree;
4. After entry of the consent judgment;
5. Just before order of dismissal.[40]

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[38]Schlei and Grossman, Employment Discrimination Law, p. 1086-1087.

[39]Federal Rules of Civil Procedure, Rule 24, 28 U.S.C. Appendix.

[40]Human Resources Management, Section 6160, p. 1809.

Plaintiffs in a class action must fulfill all the requirements for suit such as filing a charge with EEOC, but it is not necessary for others of the class to have done so.[41]

Some courts appear to presume that Title VII cases are class actions. The view that "racial discrimination is by definition class discrimination . . . " in Oatis is an example. Oatis is the leading decision holding that it is not necessary for members of the class to file a charge with EEOC as a prerequisite to joining as plaintiffs in litigation, so long as there is one named plaintiff who has filed a valid charge with EEOC. The court in Oatis did not abandon the Rule 23 requirements. It permits class action "within the following limits: First, the class action must, as it does here, meet the requirements of Rule 23(a) and (b)(2)".[42]

Schlei and Grossman concluded:

> In our view, the doctrines that Title VII cases are "necessarily" class action and appropriate for "across-the-board" treatment have been loosely used and frequently misunderstood. The essence of both doctrines is the same: that discrimination manifesting itself in a particular manner against a particular individual on the basis, for example, of race is merely one indicium of discrimination against an entire class, namely those of the same race. This does not mean that any particular Title VII lawsuit should, under these doctrines, be certified as class action, since the requirements of Rule 23 must still be met . . . The common question of fact and law in this example is the existence of racial discrimination; the claim of a plaintiff who has suffered racial discrimination may be typical of the claims of the class since all members are claiming adverse effects from racial discrimination, and in such case the employer would have acted on grounds generally applicable to the class. The fact that

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[41]Wetzel v. Liberty Mutual Insurance Co., (CA-3 1975), 508 F.2d 239, cert. denied (U.S. Sup. Ct., 1975), 421 U.S. 1010.

[42]Oatis v. Crown Zellerback Corp., 398 F.2d 496, (5th Cir., 1968).

> these doctrines, peculiar to Title VII cases, aid plaintiffs in meeting such requirements should nevertheless not obscure the necessity of compliance with Rule 23.[43]

Equal Employment Opportunity - Court Action

It is beyond the scope of this chapter to examine more than selected representative cases of Title VII litigation. A list of cases relating to equal employment opportunity would exceed a thousand based on a counting of those listed by Clearing House Publishers in their series entitled Human Resource Management.[44] Miner and Miner held that, "the courts, particularly the United States Supreme Court, have made it very clear that equal employment opportunity is the law of the land and a matter of high priority". The courts have supported EEOC's efforts and have made it expensive to be found in violation.[45]

An important question that arises in a suit under Title VII is, who is the fact finder? Is the fact finder a trial judge or a jury? Title VII, Section 706(g) reads:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

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[43]Schlei and Grossman, Employment Discrimination Law, p. 1095.

[44]Editorial Staff, Human Resources Management, pp. 101-127.

[45]Miner and Miner, Employee Selection Within the Law, p. 15.

From this language it is clear that Congress intended that the trail judge make the necessary findings of fact in a Title VII action. However, the right to trial by jury is guaranteed by the U.S. Constitution. Virtually every court that has considered the question of trial in Title VII action has concluded that there is no right to trial by jury. The reasoning varies from court to court.

If a Title VII suit calls for injunctive relief, an "equitable" remedy, it is clear this is no jury question. However, Title VII suits generally expect both injunction and back pay remedies, raising the concern of whether the involvement of money must be heard by a jury. The court soundly rejected the theory that the back pay award issues were merely ancillary to the equity claim because such a rule would emasculate the Seventh Amendment's quarantee,[46] but have generally held that back pay award in a Title VII case is not "damages" in the traditional sense but are a monetary form of equitable relief. Thus, there is no right to trial by jury.[47]

Suits brought under Title VII and one or more other statutes complicate the right to trial by jury due to the differences between the statutes cited. If any of the statutes cited provide monetary damages and provide a right to jury trial such as the Age Discrimination in Employment Act of 1967, a jury must consider only those issues related to the damages. Other issues are still decided by the court.[48] If none

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[46]Ocha v. American Oil Company, (D.C., S.D., TEX, 1972), 338 F. Supp. 914.

[47]Grayson v. The Wickes Corporation, (CA-7, 1979), 607 F.2d 1194.

[48]Hodgin v. Jefferson, (D.C. Md., 1978), 447 F. Supp. 804.

of the statutes give a right to trial by a jury, or if none of the statutes is applicable to the case,[49] there is no right to tria by jury.

The burden of advancing a civil action always rests with the plaintiff.[50] The plaintiff must present what is known as a prima facie case so that the defendent is obligated to defend. Without prima facie evidence the defendent can have the case dismissed without presenting evidence. The McDonnell Douglas[51] burden of proof rules require the plaintiff in a single-plaintiff Title VII suit alleging illegal employment discrimination to present the following facts:

1. That the plaintiff belongs to a racial minority;
2. That the plaintiff applied and was qualified for a job for which the employer was seeking applicants;
3. That, despite plaintiff's qualifications, he or she was rejected, and;
4. That, after plaintiff's rejection, the position remained open and the defendent employer continued to seek applicants from persons of plaintiff's qualifications.

According to Morton[52] the plaintiff must prove the prima facie case by a preponderence of the evidence in order to prevail in this phase. In Morton the decrease in the percentage of black school teachers did not constitute prima facie evidence showing discrimination because the percentage of blacks in the general population of the county also decreased.

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[49]Torres v. Clayton, (D.C., S.D., CA, 1978), 18 EPD, Sec. 8936.

[50]Editorial Staff, Human Resources Management, Section 6242, p. 1855.

[51]McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[52]Morton v. Charles County Board of Education, 423 U.S. 1034 (1975).

McDonnell Douglas' proof has been applied to all kinds of cases--discharge, discipline, promotion, transfer, layoff, failure to train and retaliation--which arise under the "disparate treatment" theory of discrimination. This is the theory on which the majority of individual cases proceed. The proof theory has also been held applicable to disparate treatment cases which arise under 42 U.S.C. Section 1981.[53]

In the proof or disproof of a disparate treatment case, the ultimate proof is whether or not the decision or action in question was racially premised. Motivation and intent are the ultimate issues in McDonnell Douglas. Direct proof of discriminatory intent is not necessary to establish prima facie evidence in an individual disparate treatment case.[54] Circumstantial evidence such as was presented in McDonnell Douglas is adequate. However, the ultimate issue in the disparate treatment case is discriminatory motivation or intent. The plaintiff has the ultimate burden of making that showing by a preponderance of evidence.[55]

Absolute use of the McDonnell Douglas four-point burden of proof is not always possible. In a situation where another person is chosen for the position and therefore the position did not remain open, a federal trial court erroneously dismissed the case because the plaintiff failed to prove the fourth point. The appeals court ruled it was not necessary to adopt a new fourth prong of the McDonnell Douglas test, but that

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[53]Long v. Ford Motor Co., 496 F.2d 500, (6th Cir. 1974).

[54]411 U.S. at 805, (1973).

[55]Naraine v. Western Electric Corp., Inc., 507 F.2d 590 (8th Cir. 1975).

something more should be required than a showing that a member of a different racial, ethnic, or sex group was hired. The appeals court left the proper standard to the trial court's discretion.[56]

Employees discharged for disciplinary reasons can often establish a prima facie case of illegal employment practices by showing that they were discharged while a person belonging to a protected group was retained under apparently similar circumstances.[57]

When the Title VII plaintiff has established a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's rejection. The United States Supreme Court holds that the defendant need not convince the court that it is actually motivated by pro-offered reasons. If the defendant's evidence raises a genuine issue of fact as to whether the defendent discriminated against the plaintiff, that is sufficient evidence. The explanation must be legally sufficient to justify a judgment for the defendant. If the defendant is successful, the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.[58]

The plaintiff has an opportunity to show that the defendant's reason was not true for the employment decision. The plaintiff must persuade the court that a discriminatory reason more than likely motivated the employer or that the defendant's explanation is not credible.

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[56]Hagans v. Andrus, (CA-9, 1981), cert. denied (U.S. Sup. Ct., 1981), 102 S. Ct. 313.

[57]Davin v. Delta Airlines, Inc., (CA-5, 1982), 678 F.2d 567.

[58]Texas Department of Community Affairs v. Burdine, 101 U.S. 1089.

An unlawful employment suit will not always conform to the three steps--establishment of prima-facie case, defendant's rebuttal, and plaintiff response. As the United States Supreme Court noted in Texas Department of Community Affairs v. Burdine:

> There may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.[59]

The burden of proof rule for single-plaintiff Title VII actions is not directly applicable to class action. Other factors must be considered. The class must be certified. Then the class representative has the burden of showing by positive proof, not by speculation, that all prerequisites for class action are met. The plaintiff at this juncture need not establish a prima facie case.[60]

In class action, there must be a showing that the defendant's employment practice was unlawful and resulted in a recognized deprevation to the class, and that the class has suffered from unlawful employment practices.[61]

When it has been determined that a liability for discrimination against the class exist, the focus of the class action centers on the individual claimants who seeks redress. Each member of the class must show sufficient evidence exists to show his or her claim comes from within the circumstances of the class liability. The court specifies in each

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[59] Ibid.

[60] Western Electric Company, Inc. v. Sterm, (CA-3, 1976), cert. denied (U.S. Sup. Ct. 1979), 12 EPD 11,233.

[61] Baxter v. Savannah Sugar Refining Corp., (CA-5, 1974), 459 F.2d 437, cert. denied (U.S. Sup. Ct., 1974), 419 U.S. 1033.

case the facts that must be proved. The evidentiary burden on each member is lighter than the burden on the class.

## Timeliness

The 1964 enactment of Title VII was a product of an intense and extended legislative struggle as discussed in Chapter II. This legislative struggle resulted in an administrative and enforcement scheme that was far different and more complicated than the original drafters envisioned. In Miller the process of the enactment was characterized as "Title VII's tarred conception, its turbulent gestation, and its frenzied birth".[62]

The procedure outlined in Section 706, with various and varying time limitations for filing with EEOC and going to court, has been an exceedingly fruitful source of procedural litigation. Between 1965 and the amendments in 1972, the courts were generally unreceptive to the numerous procedural defenses asserted to Title VII actions. The prevailing judicial attitude was perhaps most straight forwardly expressed in Culpeper v. Reynolds Metal:

> Title VII of the Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the act works, and that the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics.[63]

The 1972 amendments increased some of the time periods for filing, but left the procedural structure basically as it was in 1964.

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[62]Miller v. International Paper Co., 408 F.2d 283 (5th Cir., 1969).

[63]Culpeper v. Reynolds Metal, 421 F.2d 888 (5th cir., 1970).

The section-by-section analysis of the 1972 amendments states in the preamble:

> In any area where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.[64]

In McDonnell Douglas, the Supreme Court as a part of its rationale in holding that the absence of a EEOC determination of a particular issue could not prevent a plaintiff from suit,and stated two jurisdictional prerequisites:

> Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue.[65]

The timely filing of charges with EEOC presents different deadlines depending on whether the jurisdiction in which the case arises is a deferral jurisdiction. Holding to the deadlines is a prerequisite to a Title VII suit. However, the United States Supreme Court has indicated that there are times that the timely filing requirements might be waived and the suit proceed without the time limit being satisfied.[66]

The courts have been asked to determine when the period for filing a charge begins and whether reason exists to forgive late filing. Title VII, Section 706(e) states only that a charge must be filed within the specified number of days after the alleged unlawful practice occurred. In some circumstances, this date is determined by an event such as the

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[64] 118 Congressional Record, 7166 (1972).

[65] 42 U.S.C. Sections 2000e-5(a) and 2000e-5(e).

[66] Zipes v. TransWorld Airlines, Inc., (U.S. Sup. Ct., 1982), 28 EPD 132,432.

date a test was administered or when an employee is notified that a promotion has been denied. However, not all situations are so well dated. For instance, when does a dismissal occur? Is it the day it is announced, the last day on the job, or the last pay date? When does discriminatory failure to promote occur if the employer never discusses the possibilities for advancement? The theory of continued violation has arisen to cover these kinds of problems, but other situations involving timeliness must be determined by the courts.

When the employee is not aware of the alleged violation for a period of time after if occurs, there may be a special problem. Some courts have held that the statutory period for filing a charge does not begin to run until the facts that would support the charge are apparent to the charging party or should be apparent with a reasonable prudent regard for his or her rights.[67]

The date of the alleged incident must be established before the deadline for charges can begin. In Ricks v. Delaware State College,[68] the question is raised whether the deadline for filing a charge with EEOC begins on the day the tenure decision is announced or on the last day of employment. The United States Supreme Court ruled that the 180-day filing period began on the day the college professor received notice that he would be denied tenure.

If Title VII violations continue up to the time a charge is filed with EEOC and even to the time of suit, the EEOC charge would clearly

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[67]Rebb v. Economic Opportunity Atlanta, Inc., (CA-5, 1975), 516 F.2d 924.

[68]Ricks v. Delaware State College, (U.S. Sup. Ct., 1980), 24 EPD, 31,392.

be timely. The claim of continued violation is often heard when the timeliness of EEOC is challenged. The United States Supreme Court ruled in United Airlines, Inc. v. Evans[69] that the emphasis should not be placed on continued discrimination, but whether there is any present violation.

The law of continuing violation is both complicated and confusing. There are a variety of theories under which the courts have established violations. The employment decision does not necessarily determine whether a continuing violation will be found, although some generalizations are possible. Continuing violations are rarely found in discharges, but have usually evolved from promotions where a pattern of discrimination exists.[70]

Section 6196 of the Equal Employment Opportunity Handbook speaks to state statutes of limitations:

> It has been argued in some Title VII cases that the plaintiff's right to bring an action in court was barred by state statutes of limitations. The courts that have heard the argument have generally agreed that Title VII does not borrow state statutes of limitations and, thus, that the only statute of limitations on Title VII suits is the 90-day filing period . . . While the state statute of limitations controls the plaintiff's access to state remedies, it connot be permitted to limit federal remedies.[71]

The EEOC may bring an action in federal court under Title VII if, within thirty days after a charge is filed, the agency has been unable to secure an acceptable conciliation agreement. This power is limited to respondents that are not a government, governmental agency,

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[69]United Airlines, Inc. v. Evans, 431 U.S. 533 (1971).

[70]Kohn v. Royal, Koegel and Wells, 59 FRD 515, 5 FEP 725 (SD, NY, 1973).

[71]Human Resources Management, pp. 1821-5.

or political subdivision. The United States Supreme Court has ruled that there is no statute of limitations on EEOC suits.[72]

## Court Actions Under Title VII

In certain cases, the Title VII plaintiff does not have to wait until final adjudication to obtain some relief from the alleged unlawful employment practices of his or her employer. The federal court hearing a Title VII case has the power to order preliminary relief pending resolution of the case.[73] Section 706(f)(2)'s provision for preliminary relief is granted to the Commission to prevent irreparable hardship to a charging party and interference with the EEOC processes.[74] Each request for a preliminary injunction or temporary restraining order is individually assessed by the trial court so the importance of the ruling in other cases is limited.

To date the courts have approached Title VII enforcement cases independently. Thus, it appears that a practice ruled as illegal employment practice in one organization by one court may not be so ruled in another court. The basic questions which the courts have asked are these:

1. Is there proof of discrimination? Whether discrimination is defined as an evil intent, unequal treatment, or adverse impact, this proof must be shown by the party charging a violation of Title VII.

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[72]Occidential Life Insurance Company of California v. EEOC, 432 U.S. 335 (1977).

[73]Culpeper v. Reynolds Metal Company, Supra.

[74]EEOC v. Liberty Mutual Insurance Co., 475 F.2d 579 (5th Cir. 1972), cert. denied 414 U.S. 854 (1973).

2. What employment practices are causing the discrimination? If the court is convinced that there is in fact discrimination in employment, it has to be shown that certain practices are causing discrimination.
3. Can the employment practice in question be justified on the grounds of business necessity that is related to job performance? The burden of proof at this point is clearly on the employer to show a relationship between the practice in question and job performance.[75]

Basically, the courts appear to have two tenets of equal employment opportunity to satisfy: What is the adverse impact? And, what are the standards for job-relatedness or business necessity?

The scheme for allocating the burden of proof in all adverse impact cases has been expressed by the Supreme Court in McDonnell Douglas.[76] The proof or disproof of a disparate case, the ultimate focus of the inquiry, and thus the proof, is whether or not the decision or action in question was racially premised.

In Gates v. Georgia-Pacific Corp.,[77] the court recognized that "direct evidence of discrimination is virtually impossible to produce." The use of comparative evidence which is crucial to most disparate treatment cases is based on comparing the person filing the charge with a similarly situated person. Thus, if,

1. persons of one race, sex, or ethnic group receive different treatment from persons of another race, sex, or ethnic group who are otherwise similarly situated, and
2. there is no adequate non-racial, explanation for the different treatment,

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[75]Miner and Miner, Employee Selection Within the Law, p. 21.

[76]McDonnel Douglas v. Green, supra.

[77]Gates v. Georgia-Pacific Corp., 326 F. Supp. 397, (DC 1970), affirmed 7 FEP 416 (9th Cir. 1974).

then it is reasonable to infer that race was a factor in the disparate treatment.[78]

Disparate treatment may be classified into three areas of illegal employment practices. The first area is in the obvious areas of race, color, national origin, sex, religion, or age. The second rests in the policies and/or regulations of an organization which rule against applicants or employees of a protected group. The third area is sexual harassment.

The responsibility for the violation of Title VII involving sexual harassment is placed on the employer. The doctrine of respondent superior, which places the responsibility for an agent's actions on the employer, permits recovery even when the charge violates the employer's policies and regulations.[79]

Disparate impact may occur when an employment practice or policy which appears neutral by its standards causes a disproportionately adverse impact on a protected group. As used in EEO litigation, adverse impact refers to a selection process which causes a higher percentage of protected class to be rejected for hiring, promotion, or other employee benefits.

Miner and Miner argued that in most situations employers can use the four-fifth's rule with some confidence. If the selection rate for a protected group is eighty percent of the rate of the applicant group with the highest selection rate, enforcement agencies will not consider that

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[78]EEOC Decision 72-1089, 2 CCH Employment Practices Guide, Sec. 6382 (1982).

[79]Miller v. Bank of America, (CA-9, 1979), 600 F.2d 211.

adverse impact exists. Their support is based on the standards found in the Uniform Guidelines.[80]

The courts have tended to endorse the use of statistics in adverse impact decisions. In the landmark case Griggs v. Duke Power Company,[81] the company's high school education requirement was found to have an adverse impact based on the educational statistics for the state of North Carolina. Thus, the United States Supreme Court did not rely on Duke Power's work force data. Miner and Miner held that there is no way to predict what "relevant" geographic area will be used to define the appropriate labor market for comparison and that employers should use the labor market area with the largest percentage of available protected personnel.[82]

Disparate impact cases in most situations require the employer to submit statistical proof. The foundation of the theory of disparate impact is that a higher percentage of protected groups are adversely affected by an employment policy or practice. Such cases require an examination of the employer's employment records, applications, test records, discipline records, hiring and offer records, advertisements and notices of vacancies, to be used as court exhibits.

Employment selection does not end with hiring. Promotions and selection for training are also areas of possible adverse impact. Dis-

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[80]Miner and Miner, Employee Selection Within the Law, p. 669.

[81]Griggs v. Duke Power Company, 401 U.S. 424.

[82]Miner and Miner, Employment Selection Within the Law, p. 71.

cipline layoff, termination, or demotion are subject to the rules of disparate impact.[83]

The United States Supreme Court ruled in International Brotherhood of Teamsters v. U.S.[84] that statistics alone provide the necessary initial showing that an employer is guilty of illegal employment practices. However, statistical evidence needs to be evaluated in view of the surrounding circumstances.

Discrimination on the basis of sex is frequently a source of litigation under the disparate treatment theory. The treatment of males and females with regard to compensation and fringe benefits is an area of concern. Other areas of litigation have been pensions, retirements, insurance, bona fide occupational qualifications, hair, grooming, and pregnacy to name a few of the more common ones.

Sex discrimination in compensation may be remedied under the Equal Pay Act of 1963 or under Title VII, and sometimes under both statutes. The Equal Pay Act prohibits differential treatment in the wages paid to men and women doing substantially the same work.[85] Title VII's prohibitions are less clear. The courts have only recognized Title VII discrimination in compensation suits involving comparable jobs where there has been a showing of intentional discrimination on the part of the employer.

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[83]Uniform Guidelines on Employee Selection Procedures (1978), sec. 2.B, 43 Federal Register 38290, August 25, 1978.

[84]International Brotherhood of Teamsters v. U.S., (U.S. Sup. Ct., 1977), 431 U.S. 324.

[85]Equal Pay Act of 1963, Section 3, 71 Stat. 56.

Loften wrote in February, 1983:

> Equal pay for jobs of comparable worth is likely to be one of the most hotly debated employment issues of the 1980's. But as yet, we have little guidance in case law as to what comparable worth means in a concrete way. Future litigation will obviously tell the story.
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> In theory, there are two types of comparable worth that can be argued in a sex-based wage discrimination case. These are "pure" comparable worth and "common" comparable worth. In "pure" comparable worth, one argues that workers of one sex (or race) in one job category (for example, nurses versus tree-trimmers) are paid less even though the two groups are performing work that is of the same value or worth to the employer. In the "common" type of comparable worth, workers of one sex in the same general job classification receive less than the other sex where the content of the two jobs is different but assertedly of the same worth to the employer. (An example would be the case discussed in the next paragraph.)
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> The U.S. Supreme Court has not yet decided any case directly involving the comparable worth doctrine. However, in County of Washington v. Gunther, decided in the summer of 1981, the Court seems to have explicitly left the door open for the theory to be used in the future. That case involved female jail matrons who argued that their Title VII rights were violated because of intentional sex discrimination in that they were paid less than the male jail guards. The District Court found that the jobs the female matrons performed were not substantially equal to those performed by the male guards. It ruled that a sex discrimination claim cannot be brought under Title VII of the Civil Rights Act if equal work is not alleged. But the Court of Appeals and the U.S. Supreme Court both agreed that a claim of sex-based wage discrimination can be brought under Title VII without an allegation of equal work, although it will be subject to the four affirmative defenses contained in the Equal Pay Act. Thus, after Gunther, a claim of sex-based wage discrimination may be brought under either the Equal Pay Act or Title VII.[86]

In Gunther, the United States Supreme Court stated:

> Respondent's claim is not based on the controversial concept of "comparable worth," under which plaintiff might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community.[87]

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[86]Lofton, Fred B., "Comparable Worth: The New Issue in Employment Discrimination," Bulletin, American Association of School Personnel Administrators, February, 1983, p. 5.

[87]Gunther v. County of Washington, 452 U.S. 161 (1981).

On December 19, 1983, a comparable worth decision in the American Federation of State, County and Municipal Employees (AFSCME) v. State of Washington[88] was made in United States District Court in Tacoma, Washington. In this long-awaited comparable worth decision, Judge Jack Tanner ordered the State of Washington to make $300 million in back pay. The state has also been ordered to implement the ruling "right now", immediately, even though the state does not have funds and its treasury by law cannot run a deficit.

This ruling comes as a result of a comparable worth case that has been in and out of courts for years. The court found that the state's compensation plan is an example of "direct, overt, and institutionalized discrimination". It found a wage disparity of approximately twenty percent between male and female jobs scoring equally in the state's own evaluation system.[89]

The suit was a culmination of a ten-year battle between AFSCME and the State of Washington to raise the wages of women employees. A 1974 comparable worth study commissioned by the state revealed that women employees received less pay than men doing work requiring comparable skill, knowledge, mental demands, accountability, and working conditions. Subsequent studies in 1976, 1979, and 1980 indicated the gap continued. The state failed to make pay scale adjustments to remedy the situation. AFSME filed an EEOC charge against the state in 1981,

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[88]American Federation of State, County and Municipal Employees v. State of Washington, USDC, W. Wa., No. C. 82-465-T, (December 14, 1983).

[89]"Comparable Worth, Now! Court Orders Immediate Remedy in Washington State", Personnel Manager's Report, 173 (January, 1984): 7.

and filed a Title VII suit in July, 1982. The union sought changes in the current pay schedule for state workers and back pay for those employees currently occupying traditional, sex-segregated female jobs, which include clerical, nursing, and library positions (1982 DLR 146: 4-6).[90]

The suit was filed by AFSCME and nine state employees claiming that sex-based differences in pay were violations of Title VII, the state's equal rights amendment, and the state civil service law.[91] One of the nine state employees was Terry Emerson who after fifteen years of "women's work" took a new job and took the state to court. She worked as a counselor for severely retarded people at Interlake School in Medical Lake, Washington, but quit to take a job as a supply clerk, a state job traditionally held by men, at about $150 a month increase in salary.[92]

Washington's Governor John Spellman signed into law a comparable worth bill for Washington State's 47,000 civilian employees. The bill was signed on June 14, 1974. It was the first time a comparable worth law had directly resulted from request from, and then a lawsuit filed by, a public employee union to remedy decades of pay inequities between male and female state government jobs of comparable skill and worth. The

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[90]Bureau of National Affairs, "Trial Begins on AFSCME Title VII Charge that Washington Underpays Female Workers", Current Developments, 30 August 1983, p. A2.

[91]Op. cit.

[92]Ken Sands, "Workers Sue State for Comparable-Worth Pay, The Spokane [Washington]/Regional, 20 August 1983, p. B1.

law stipulated that sex-based wage discrimination be ended over the next decade.[93]

Comparable worth started to be an issue in Washington in 1973. The union requested by letter that then Governor Daniel Evans take a leadership role in dealing with the problem. Governor Evans asked the heads of the two personnel systems in the state, the Higher Education Personnel Board and the Department of Personnel, to study job classifications filled by men and women having comparable levels of skill requirements and job responsibility.[94]

A preliminary study completed in December, 1973, covered twelve classes of jobs filled predominantly by men and twelve classes of jobs filled predominantly by women. This study confirmed the possibility of discrimination between males and females. In September, 1974, Norman D. Willis and Associates, a Seattle-based consulting firm, was hired to conduct a study of 120 job classes. The classifications were divided between jobs held predominantly by seventy percent of either sex, fifty-nine male-dominated classes involving 4,497 employees, and sixty-two female-dominated classes involving 9,115 employees.

The study used a position questionnaire sent to 1,600 state employees selected at random in the one hundred twenty-one classes. A trained task force interviewed 800 incumbents of the 1,600 employees.

Four components were used to rate the positions: knowledge and skills, mental demands, accountability, and working conditions. The

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[93]"Washington State, Delaware Enact Equal Pay Laws for Public Workers", Government Employee Relations Report, Bureau of National Affairs, 11 July 1983, p. 1423.

[94]Ibid., p. 1424.

study revealed that women received about twenty percent lower pay than men in comparable work which amounted to about $175 per month.

In spite of this documentation, the 1975 legislature did nothing. In 1976 at the Washington Federation of State Employees' (WFSE) request, an update study documented wage discrimination again. Outgoing Governor Evans made a budget proposal asking for $7 million to begin implementing comparable worth.

In spite of campaign pledges to support comparable worth, incoming Governor Dixie Lee Ray ignored the study and her campaign pledges and deleted the seven million dollars from the state budget. No funding was ever budgeted to implement the comparable worth. In 1977, language was added to state law mandating that comparable worth be included as a supplemental component of the biennial salary survey. Because of the lack of action by the governor and the legislature, WFSE filed a complaint with EEOC on September 16, 1981.

In 1982, after EEOC failed to act, the WFSE filed its lawsuit in a United States Federal District Court. Meanwhile, a comparable worth bill was introduced in the 1982 legislature by Senator Eleanor Lee (R.-Burien). Both the House and Senate were Rupublican controlled, and the bill failed.

In 1983, both houses were controlled by Democrats and S.B. 3248[95] introduced by the same senator in January cleared both houses with relatively little controversy. The ways and means committee held a hearing in February, 1983, at which the bill received the endorsement

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[95]S.S.B. 3248, C 75 L 83E1 (California), 23 August 1983.

of WFSE, the Washington State Nurses Association, and the League of Women Voters.

The Senate approved S.B. 3248 thirty-seven to nine on April 15, and the House passed it on May 10. During debate, some legislators tried to change the language of the bill to say employee's pay could be "adjusted" down, but as passed the version sent to the governor on May 22 called for increases only.

The $1.5 million appropriated for the 1983-85 biennium would give pay raises of $100 a year to approximately 14,000 state employees in job classifications with the greatest disparities between what they earn and what comparable worth studies indicate they should earn. Setting salaries according to comparable worth could conflict with state law requiring personnel boards to adopt salary schedules that reflect prevailing rates in private industry.[96]

S.B. 3248 requires four actions by personnel agencies of the state:

1. To adjust salary and compensation plans to reflect similar salaries for positions that require or impose similar responsibilities, judgment, knowledge, skills and working conditions.
2. Salary changes to rectify differences are to be implemented in the 1983-85 biennuim.
3. Adjustments will be made annually to achieve comparable worth.
4. Comparable worth will be fully achieved not later than June 30, 1983.[97]

Even with the comparable worth bill, the AFSCME refused to be deterred from pursuing its comparable worth lawsuit. The trial was bifurcated. The first phase was to determine if the judge agreed that

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[96]Ibid., pp. 1424-1425.

[97]Ann Davis, "Comparable Worth Update", Interact (Governor's Committee on Status of Women), October 1983, p. 2.

Washington State was guilty of violating the Civil Rights Act of 1964, the State Equal Rights Amendment, and the State Civil Service Acts. A second phase was to determine a remedy. Judge Jack Tanner ruled on September 16 that the state government was guilty of pervasive wage discrimination against many of its female workers and set a second trial date of November 14 to establish the compensation the state must pay.[98]

Classified advertisements for male-only and female only-only jobs were run in the state's newpapers prior to 1973. These ads were introduced by AFSCME as pivotal evidence of deliberate job discrimination. The statistics, assembled according to Mann, were devastating. In comparing jobs of similar classification the monthly wage dropped $4.52 for every percentile increase in the number of women working in the job category. Evidence showed that half of all job categories were exclusively male, and only 3.5 percent of the women employed worked in integrated jobs.

Mann editorialized:

> The Washington case is a model of how systematic wage discrimination came into being. But more significantly for the future, the suit is a model of how unions and women's organizations can use existing laws to destroy it.[99]

The state's main defense was that its pay system was based on a survey of about 2,700 private employers in the state. The state maintained that its system's legality rested in the legislative's power to decide

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[98]"Ruling Against Washington is a Battle Won for Equal Pay", The Herold [Everett, Washington], 26 September 1983, p. 7A.

[99]Ibid.

what system to use.[100] Deputy Attorney General Chris Gregoire said that the salaries were set "without regard to sex".[101]

On September 8, 1983, Judge Tanner narrowed the scope of the "comparable worth" lawsuit. He told union attorneys seeking back pay and promotions for women who claimed sex discrimination that he is dismissing portions of the lawsuit involving alleged violations of the two state laws.

He announced:

> The issue is sex discrimination under Title VII. I just want to know if there is sex discrimination, and if there is, can the state explain it? A very simple Title VII case.[102]

Judge Tanner ruled September 18, 1983, that the state was guilty of "direct, overt and institutionalized" wage discrimination against thousands of female employees. His ruling was the first in the nation regarding sex discrimination by an entire state government, and involv ing wages.[103]

On December 14, 1983, the United States District Court in Tacoma, Washington, issued a written opinion explaining why it was ordering the State of Washington to revise its pay scales so state employees will be given equal pay for doing work of "comparable worth" to the state. The court ordered the state to extend the remedy back four years for seve-

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[100]Don Tewkesbury, "Judge Says Women Will Win Lawsuit If Pay Bias Exists", Seattle Post-Intelligencer, 31 August 1983, p. A3.

[101]"Washington State in Court on Women's Pay", The New York Times, 1 September 1983, p. A25.

[102]"Judge Dismisses Part of Pay Suit", Spokesman-Review, Spokane/Regional [Washington], 3 September 1983, p. 1.

[103]"Pay Bias: Legislators Admit Concern over Ruling by Tanner", The News Tribune, [Tacoma, Wasington], 17 September 1983, p. B3.

ral thousand employees. The projected cost to the State of Washington was estimated to be more than $600 million in wage adjustments and back pay.

Strictly speaking, the court never found the State of Washington had or violated any legal duty with regard to giving women equal pay for doing comparable work.[104]

The court ruled that the state violated Title VII by establishing first that its own pay policies were having a discriminatory effect and then failing to take corrective action. Therefore, its continued refusal to offer a remedy must have been intentional or it would have ceased.

The Washington State decision does not mandate that "public sector employers must pay equal wages to employees of both sexes for performing work of comparable value". The decision indicated that Washington State determined that its pay policies were underpaying women who worked in "women's" jobs, and having decided that its own policies amounted to unlawful sex discrimination, the court held, the state's failure to change its policies is unlawful.[105]

The court continued throughout its opinion to speak of "disparate impact" not comparable worth. The court concluded its opinion by writing:

> The court's finding of discrimination based on the theories of disparate impact, and disparate treatment, requires formulation of a remedy. Defendents' preoccupation with its budget constraints

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[104]"Comparable Worth", Ideas and Trends in Personnel, No. 56, 13 January 1984, p. 1.

[105]Ibid., p. 2

> pales when compared with the invidousness of the impact ongoing discrimination has upon the plaintiffs herein.[106]

Justice Tanner's decision will cost the state $800 million. The state is appealing, but "the Reagan Justice Department is hot to back Tacoma's challenge."[107]

Assuming the decision is sustained, the decision will apply not only to Washington's subdivisions, but far beyond the boundaries since it was a federal case.

The case is the kind attorneys are fond of calling "landmark cases". It is the first to test a relatively new legal theory called "comparable worth".

The big question remaining is, does this case open up all employers, private and public, to comparable worth lawsuits?

## Summary

Even though the Equal Employment Opportunity Commission was established in 1964 with bright hopes that it would be a viable force to reduce illegal employment practices under Title VII, it was unable to operate in the prescribed method due to improper enforcement powers. Thus, as EEOC was unable to gain conciliation and establish remedies for violations, persons having alleged discrimination practice charges asked for and gained access to the courts. Court decisions between

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[106] American Federation of State, County and Municipal Employees v. Washington, U.S.D.C., W. Wa., No. C82-465T, December 14, 1983, 33 EPD 33,376.

[107] Ilene Barth, "Comparable Worth: Basing Pay on Skill, Not Sex", Greensboro [North Carolina] Daily News and Record, 12 February 1984, p. E7.

1964 and 1972 were instrumental in the changes made in the 1972 amendments to the Civil Rights Act of 1964 and its component Title VII. Court decisions between 1972 and 1978 were instrumental in the adoption of the Uniform Guidelines in 1978. Litigation since 1978 has shaped the structure and power of EEOC.

As an example, the decision in AFSCME v. State of Washington, being the first of its kind in interpreting Title VII's statutory power in sex discrimination in wages paid, has certain implications for other employers:

1. Management should not complete a comparable worth study unless it is prepared to make the necessary remedies.

2. When a comparable worth study concludes that some employees holding "women's jobs" are paid less, there is sufficient data for a finding that the employer's policies discriminate because there is a disparate impact on females.

3. If the employer concludes that its pay policies have a disparate impact on women, the court will order that comparable worth be used to remedy that impact.

4. This case does not stand for the principle that employers must conduct a comparable worth analysis and pay their employees accordingly.

In commenting on whether the case is a "comparable worth" case or not, the court had this to say:

> This is a case of first impression insofar as it concerns the implementation of a comparable worth compensation system.
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> However, it is more accurately characterized as a straight-forward "failure to pay" case . . . The plaintiffs herein are challenging the State of Washington's failure to rectify an acknowledged disparity in pay between predominantly female and predominantly male job classifications.[108]

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[108] American Federation of State, County and Municipal Employees v. State of Washington, supra.

Anne Bridgman said:

> The impact of applying that concept in education could be dramatic. In public schools, 90 percent of support-staff employees, including clerical and maintenance workers, are women, and approximatley 27.5 percent of administrative staffs are women, according to figures from the American Federation of State and Municipal Employees (AFSCME) and the National Center for Education Statistics . . . According to a recent survey by Ms. Perlman's organization, the National Committee for Pay Equity (NCPE) a total of eighty-five state, local and school-district surveys of comparable worth in twenty-six states have been conducted in the last few years. As part of such studies, the employers conducted job evaluations of support and administrative personnel in which they assigned points to job responsibilities and ranked positions by salary.
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> The studies, according to an NCPE report, "uncovered a consistent pattern of undervaluation of 'women's' work in every workplace examined."
>
> School systems' evaluation practices vary, but most periodically review job classifications and pay scales, educators say . . . it is not clear, those familiar with the comparable-worth concept say, how or whether it can be applied to teachers, as opposed to administrative and support-staff employees.
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> It is easier to show, said Ms. Stein of the NEA,[109] that salary inequities among support personnel are part of the district's pay system. But with regard to teachers' salaries, she noted, "in most school districts, it's more likely or possible that the sex discrimination is taking place vis a vis the rest of society."[110]

Chapter IV will specifically address the court rulings involving Title VII relating to equal employment opportunities of public school employees.

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[109]Barbara Stein is a specialist in human and civil rights for the National Education Association (NEA).

[110]Anne Bridgman, "Comparable Worth Tested in Major Pay-Equity Suit", Education Week 111 (28 September 1983): 16.

# CHAPTER IV

## EQUAL EMPLOYMENT OPPORTUNITY IN PUBLIC EDUCATION

In Brown v. Board of Education[1] in 1954, the United States Supreme Court held that maintaining separate, but equal, facilities for races in the public schools, is inherently unequal. In the period of ten years following this decision, some seventeen states had to adjust their practices that discriminated against students and teachers. During this time period, the idea of racial equity in public schools became sufficiently entrenched within the legal processes to enable the United States Congress to make this idea "majoritorian" in the Civil Rights Act of 1964.[2]

Many Court decisions have emanated from the Fourteenth Amendment which ensures in part that states must provide each person with equal protection of the laws. Other decisions have been based on federal statutes that prohibit discrimination on the basis of race, color, national origin, religion and sex. Litigation involving discriminatory practices against persons protected by the statutes has been extensive under both the Federal Constitution and statutory provisions.[3]

Between 1953 and 1969, the United States Supreme Court handled thirty-six school cases. These cases were about equally divided between

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[1]Brown v. Board of Education, 347 U.S. 483 (1954).

[2]Chester M. Nolte, Nolte's School Law Desk Book (West Nyack: New York, Parker Publishing Company, 1980), p. 24.

[3]Martha M. McCarthy, and Nelda H. Cambron, Public School Law: Teacher and Student Rights (Boston: Allyn and Bacon, Inc., 1981), p. 75.

church-state, loyalty and desegregation issues. The litigation that began with Brown continues into the 1980's and will greatly change the way that Americans manage their schools for years to come.[4]

Nolte held there are practical limits to which the courts can go in solving school problems by means of litigation. To support his reasoning, he cited the limitation stated by Judge Coleman in U.S. v. Jefferson County Board of Education, 380 F.2d 385, 419, 1967:

> The decree is not as I would have written it if I had been charged with sole responsibility for the effort. No offense is intended where I doubt that it is perfect . . . The school official cannot win. In one breath, he is told to act; in the next, he is immobilized.
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> . . . Judges, like other human beings, do not always write in granite; they often find that they have only marked in the sand.[5]

This chapter will review some judicial decisions regarding equal employment opportunity in public education, applicable to the areas of racial discrimination, sex discrimination, age discrimination, and discrimination based on handicaps.

## Litigation Based on Race

Schlei and Grossman indicated that the greatest number of employment discrimination cases arise in the area of racial discrimination.[6] The courts continue to interpret the protection afforded to minorities. These decisions have implications for public school personnel in the areas of employment, promotion, training, discipline, and discharge.

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[4]Notle, Nolte's School Law Desk Book, p. 24.

[5]Ibid., p. 25.

[6]Barbara Lindemann Schlei, and Paul Grossman, Employment Discrimination Law (Washington, D.C.: Bureau of National Affairs, 1976), p. 235.

The protection of minority rights in employment decisions has resulted in court-ordered remedies to restore individuals to their rightful status had they not been victims of past discrimination. Some of these remedies have caused charges of "reverse" discrimination when they have affected the status of majority applicants or employees.

Three of the bases of discrimination prohibited by Title VII are race, color, and national origin. Whether discrimination is on the basis of race or color, or both, is a potentially difficult question, but is rarely an issue in a discrimination case. When an individual is identified as a minority, there is no need for fine anthropological distinctions.

National origin discrimination may involve a person with roots in any country. However, in EEOC's definitions for reporting purposes, it is Hispanic.

The EEOC issued an administrative guideline providing that discrimination on the basis of citizenship is unlawful under Title VII if it has the effect of discriminating on the basis of national origin.[7] The United States Supreme Court in Espinoza v. Farah Manufacturing Company[8] holds that an individual's status as an alien is not a status protected from discrimination under Title VII. The refusal to employ a Mexican citizen is discrimination on the basis of alienage, but is not illegal as national origin discrimination.

EEOC's racial/ethnic classifications are:

1. White (not of Hispanic origin) - all persons having origins in any of the original peoples of Europe, North Africa or Middle East.

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[7]Preamble to EEOC order 45 F.R. 85632, December 29, 1980.

[8]Espinoza v. Farah Manufacturing Company, Inc., 414 U.S. 811 (1973).

2. Black (not of Hispanic origin) - all persons having origins in any of the Black racial groups in Africa.

3. Hispanic - all persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

4. Asian or Pacific Islander - all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. These include, for example, China, Japan, Korea, the Phillipine Islands, and Samoa.

5. American Indian or Alaska Native - all persons having origins in any of the original peoples of North America and who maintain cultural identification through tribal affiliation or community recognition.[9]

The protection provided under Title VII extends beyond the immediate characteristics identified above. The EEOC contends such protection includes individual characteristics generally associated with the protected class through religion, membership, ethnic stereotypes, and food irrespective of that individual's ethnic origin. The EEOC guidelines include the following examples:

a. Marriage to or association with persons of a national origin group;
b. Membership in, or association with an organization identified with or seeking to promote the interests of national origin groups;
c. Attendance or participation in schools, churches, temples, or mosques, generally used by persons of a national origin group; and
d. Because an individual's name or spouse's name is associated with a national origin group.[10]

However, it is unclear after Baker v. California Land Title Company[11] whether national origin protection extends to mutable

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[9]EEO-1 Report, Instruction Booklet, Appendix, Section 4.

[10]29 CFR Section 1606.1 (1975).

[11]Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974), cert. denied 422 U.S. 1046 (1975).

(language, dress, religion, etc.) as well as the "immutable" (physical traits) characteristics of one's national origin.

Application, interview, and hiring practices have been challenged as racially discriminatory because of the selection criteria upon which the employment decision are made. The major issue has been, can an employer have a criterion for employee selection that disqualifies a disproportionately number of protected applicants? Griggs v. Duke Power[12] addressed this issue and became a landmark case. However, the question of constitutional infringement was not addressd in Griggs. The decision was based solely on Title VII. The court did not prescribe the use of selection criteria, but ruled that the selection criteria must be related to job performance to satisfy Title VII.

The 1975 decision by the Supreme Court in Albemarle Paper Company v. Moody[13] clarified some of the job-related requirement advanced in Griggs and established the principle that once discrimination is proven, the trial judge in a Title VII case ordinarily does not have the discretion to deny back pay. In neither Griggs nor Albermarle did the employer have a validated job-relatedness of its testing program. The court decisions therefore focused on what is permissable rather what is necessary to demonstrate job-relatedness successfully.

Through the mid-1970's, the rulings in Griggs and Albermarle constituted the legal framework for analyzing alleged discriminatory practices under Title VII. The primary focus rested on the adverse impact theory of the practice.

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[12]Griggs v. Duke Power, 401 U.S. 424 (1971).

[13]Albemarle Paper Company v. Moody, 422 U.S. 405 (1975).

The 1976 decision in Washington v. Davis[14] reduced the Griggs test for constitutional analysis by holding that discriminatory impact alone was insufficient to abridge the Federal Constitution. Washington involved a test referred to as "Test 21" developed by the United States Civil Service Commission and used widely throughout the federal government. "Test 21" was designed to test verbal skills, vocabulary, reading and comprehension. The Supreme Court held that employers not subject to Title VII were not subject to the same burden of proof concerning selection procedures as were employers who were subject to Title VII. The Court applied the Constitutional standard requiring intentional discrimination and found the test was proper. The Court also affirmed the trial court's conclusion that the test was related to the requirements of police training and that a positive relationship between the test and training course performance was sufficient to validate the test.

Thus the Supreme Court has said it is only "substantially disproportionate" impact that warrants further judicial scrutiny, but it failed to rule on just what thresholds mathematical showing suffices as substantially disproportionate. The federal appeals courts have had to deal with this question, though not directly ruling on the validity of the EEOC's four-fifths rule of adverse impact.

The basic rational in Washington v. Davis was adopted by a federal district court in upholding the use of the National Teachers'

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[14]Washington v. Davis, 426 U.S. 229 (1976).

Examination for state certification and salary purpose in South Carolina.[15] The required test score disqualified 83 percent of the black applicants for certification, as opposed to only 17.5 percent of the white applicants. Under the revised standards for this test, it was predicted that 96 percent of the new teachers certified in South Carolina would be white. The district court ruled that the plaintiffs did not prove a racially discriminatory purpose and that the state justified its use of the test. Washington v. Davis was used to hold that test validity could be established by showing a relationship with success in job training, which was knowledge of course content of teacher education training programs. In spite of the adverse impact and admonishment by the test's authors that it was not designed for the purpose for which it was used, the Supreme Court affirmed the district court's decision.[16]

When EEOC determines that conciliation will not be achieved in resolving a charge of employment discrimination under Title VII against a government, a governmental agency, or a political sub-division, the EEOC may not itself bring a civil action to compel the resolution of the case. It may refer such cases against public employees to the United States Attorney General who may bring civil action in the appropriate federal district court. The charging party has the right to intervene

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[15]United States v. South Carolina, National Education Association v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), affirmed 434 U.S. 1026 (1978).

[16]McCarthy and Cambron, Public School Law, p. 77.

in the suit.[17] Reorganization Plan Number 1 in 1978 was responsible for this reservation of Title VII authority to the Attorney General.[18]

As provided in the Reorganization Plan, the Attorney General has the authority to bring pattern or practice suits against school districts and other public employees, subject to the procedural requirements in Title VII, without an EEOC referral.[19] Other courts have held to the contrary.[20]

The 1983 Deskbook Encyclopedia of American School Law[21] cites six court cases involving the use of the National Teachers' Examination. In Virginia a number of black teachers challenged their dismissal. The United States District Court enjoined the school district from discriminating on the basis of race and from making use of the National Teacher's Examination (NTE) scores as a sole basis for employment, reemployment or termination of services of teachers or other personnel. The court upheld the termination of two teachers on grounds their discharge was not racially motivated. On appeal, the United States Court of Appeals, Fourth Circuit, affirmed the dismissal of one teacher as not based on racial factors, but reversed the lower court's decision with respect to

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[17]Title VII, Section 706 (f)(1).

[18]43 F.R. 19807 (February 23, 1978).

[19]U.S. v. North Carolina, (CA-4 1978). 587 F.2d 656, cert. denied 442 U.S. 909 (1979).

[20]U.S. v. Board of Education of the Garfield Heights Cith School District (VA-6 1978), 581 F.2d 791, and U.S. v. State of South Carolina, supra.

[21]The 1983 Deskbook Encyclopedia of American School Law (Rosemont, MN: Informational Research Systems, 1983), pp. 63-65.

the other teacher. The Court of Appeals held that the lower court's injunction regarding use of the NTE as the sole basis for employment and discharge of teachers did not comport with the Court of Appeals' prior decision which required that in order for these test results to be used at all, they must be properly validated. The case was remanded to the district court in order to modify its injunction (566 F.2d 1201).[22]

In Alabama, black teachers in a school district sued seeking reinstatement and back pay alleging discrimination against them in instituting a qualification and selection plan that resulted in substantial reductions in black teachers. The controversy arose over the requirement that new teachers obtain a minimum score of 500 of the NTE and placed the same requirement on teachers about to be transferred, regardless of years of experience. The U.S. Court of Appeals held that the evidence failed to show that NTE test scores bore any demonstrable relationship to successful job performance and that the school district's practices were discriminatory (492 F.2d 919).[23]

In Georgia, the Georgia Association of Educators brought suit against the state superintendent of schools and members of the Georgia State Board of Education. The teacher certification procedure in Georgia required that in order to obtain a six-year certificate an educator must obtain a composite score of 1225 on the NTE or be unconditionally admitted to a doctoral degree program. The lawsuit challenged the score of 1225. The U.S. District Court of Georgia held that the

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[22]Ibid., p. 63.

[23]Ibid., p. 64.

use of the 1225 score was a violation of the Equal Protection Clause of the Constitution. The court held that using the test was arbitrary and not rationally related to its purpose. The NTE was designed to test general knowledge of undergraduate course work and not graduate work and there was no evidence that the test was in any way related to performance. The court prohibited the Georgia State Board from requiring Georgia educators to attain a minimum score on the NTE (407 F. Supp. 1102).[24]

In North Carolina, the United States brought a lawsuit aganst the State of North Carolina charging the state, the State Board of Education and its members with invidious discrimination against blacks, Indians, and Orientals in violation of their equal protection rights under the Fourteenth Amendment. The legislated requirement of a score of 950 on NTE for certification was the focus of the litigation. The facts demonstrated that 31.08 percent of the black candidates for certification fell below 950 while only 1.36 percent of the whites fell below 950. The U.S. District Court held that while a state has the right to establish standards of competence, the defect was that the State of North Carolina had failed to validate 950 as a legitimate cut-off score. Since the score was not validated as revealing teacher competency, and since the test has a disparate impact on blacks, the court concluded that the test was not reasonably related to any proper government objective and was therefore, a denial of equal protection under the Fourteenth Amendment (400 F. Supp. 343).[25]

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[24]Ibid.

[25]Ibid.

In another North Carolina case involving NTE scores, the United States Court of Appeals was asked to reverse a decision of a U.S. District Court which held that grades achieved on the NTE to determine salary increase were illegal under the United States Constitution and Title VII. The plaintiffs charged that 38.6 percent of the district's black teachers were denied raises while only two percent of the district's white teachers were denied raises. The Court of Appeals held in favor of the school district stating that the district's purpose in using a pay scale based on proficiency achieved in objective testing bore a rational relationship to a legitimate state--that of giving teachers an incentive to improve their skills--which, in turn, would tend to improve the quality of education in the district's schools (651 F.2d 222).[26]

In a case upholding the validity of NTE test scores, a United States district court held that while the evidence was undisputed that blacks score less well than whites, there must be intent by the state to create and use a racial classification in order for there to be a violation of the Fourteenth Amendment. The use of the test did provide a rational relationship with the legitimate objectives of the state. The objection that graduation from a state-approved school should suffice for employment was dismissed by the court which pointed out the vast disparities between the various teacher-training institutions in the state. The validity of the test was also established through a large scale study which proved the test to be a trustworthy one (445 F. Supp. 1094).[27]

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[26] Ibid.

[27] Ibid.

The six examples of court cases dealing with a specific test, the National Teachers' Examination, illustrate how the courts have varied in their interpretation of the use of the test in various situations. Hence, in order to establish a constitutional or regulatory violation, the burden of proof is placed on the plaintiff to show that an adverse impact is the result of purposeful discrimination by the employer. In the case of the NTE, the validity of the test was established through a large-scale study which proved the test to be a trustworthy one as established by Washington v. Davis.

Most minority employees alleging illegal employment practices in selecton and hiring have relied on Title VII. Under Title VII, the charges must establish a prima facie case of discrimination. The Supreme Court in McDonnell Douglas[28] established the requirements for a prima facie case. Establishing a prima facie case under McDonnell Douglas does not mean that discrimination under Title VII will be established. It only raises an inference of discriminatory hiring practices which, if unexplained by the employer, may be used to substantiate illegal employment practices. To rebut such a claim, the court holds that the employer must show that the decision is based on a legitimate business reason.[29] The plaintiff is then provided with an opportunity to refute the employee's evidence.[30] Relying on McDonnell Douglas, in 1978 the United States Supreme Court concluded that:

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[28]McDonnell Douglas Corp., v. Green, 411 U.S. 792, 802 (1973).

[29]Furnco Construction Corp., v. Waters, 438 U.S. 802 (1973).

[30]McCarthy and Cambron, Public School Law, p. 78.

> it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race.[31]

Further classification of the respondent's burden in showing a nondiscriminatory reason was provided in Board of Trustees of Keene State College v. Sweeney.[32] Sweeney met the McDonnell Douglas requirements and because the employer did not demonstrate sufficiently a legitimate purpose for its action, the appellate court ruled in favor of Sweeney. On appeal, the United States Supreme Court ruled the employer was not required to "prove" a nondiscriminatory reason, but to "articulate" such a reason. Noting that the words "prove", "articulate", and "show" are similar in meaning, the Court established "articulate" as requiring a lesser burden than was required by the appellate court. On remand, the appellate court again found evidence of discrimination, but stated that the employer's burden is "merely a burden of production", and the burden of persuasion remains at all times with the plaintiff. Thus, the ultimate burden to prove discrimination rests with the plaintiff.

To determine illegal employment practices or patterns, statistical anaylsis of racial ratios have been useful to both plaintiff and defendents. Title VII makes no requirement for a workforce analysis of the racial make-up of the local population, but a substantial discrepancy may indicate racial discrimination. The United States Supreme Court acknowledged the importance of statistics in establishing either a pattern or

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[31] Furnca Construction Corp., v. Waters, supra, at 577.

[32] Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106 (1st. Cir. 1979), 444 U.S. 1045 (1980).

practice of discrimination or a prima facie case, but noted that the usefulness of such statistics depends on the circumstances of each case.[33]

The adage that statistics can be used to prove almost any point has been demonstrated in cases where plaintiffs and defendants by comparing different population groups and time periods used the same data to support both discriminatory and nondiscriminatory practices. Through numerous federal court decisions, common points of comparison have evolved such as comparison of the workforce to the composition of the surrounding labor market. As an example, in identifying a pattern and practice of discriminatory hiring practices in Hazelwood, Missouri, school district, the Supreme Court held that the proper comparison should be between the racial composition of the school district's teaching staff and the area's teaching pool.[34]

Hazelwood involved a school district that had not employed a black teacher prior to 1969, but employed twenty-two black teachers by 1973. The lower court had compared the percentage of black teachers employed by the district with the percentage of black teachers in the relevant labor market. For 1972-73, the figures for the district were 1.4 percent and 5.7 percent, respectively. The lower court ruled that this statistical analysis was evidence of discrimination. The Supreme Court held that the lower court was wrong to use these figures solely to establish a pattern of employment discrimination. The school district should have been provided an opportunity to demonstrate, by post-1972 hiring data,

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[33]International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

[34]Hazelwood School District v. United States, 433 U.S. 299 (1977).

pattern of employment discrimination. The school district should have been provided an opportunity to demonstrate, by post-1972 hiring data, that the alleged discriminatory pattern was a product of pre-act hiring rather than unlawful post-act discrimination. The court stated that a public employer that made all its employment decisions in a nondiscriminatory way after March 24, 1972, the date Title VII became effective, would not violate Title VII even if it had formerly maintained an all-white workforce by purposefully excluding blacks.

The case, although limited in its applicability to the question of adverse impact, clarified two principles that are helpful in selection procedure evaluation. First, the effects of pre-Title VII effective date practices should be separated from post-act practices for statistical analysis. Second, hiring statistics can only be understood with reference to some other statistics which will often not be the applicant flow or the general population.

The Supreme Court held that a comparison between the black teaching force and black pupils in a school district was irrelevant. Depending on the geographic area of comparison, black teachers composed 5.7 percent or 15.4 percent of the labor market, whereas only 2 percent of the student population was black.[35]

The current problem of staff reduction in public schools due to a declining student population, school closings, district consolidations and court-ordered desegregation has become litigious. Criteria to use in the identification of teachers for dismissal were articulated by the

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[35]Ibid.

Fifth Circuit Court of Appeals in 1969. In Singleton v. Jackson Municipal Separate School District,[36] the Appellate Court held that professional staff members subject to dismissal "must be selected on the basis of objective and reasonably nondiscriminatory standards from among all the staff of the school district".

To prevent black teachers from bearing a disproportionate burden, Singleton provided that:

1. Race will not be a factor in hiring, assignment, promotion, demotion, salary, or dismissal;
2. A reduction in professional staff must be made on the basis of "objective and reasonable nondiscriminatory standards"; and,
3. Nonracial objective criteria must be developed by the school board prior to any reductions.[37]

The court specifically defined demotion as a reassignment involving less pay, responsibility, or skill than the previous position, or a transfer to a teaching position for which one is not certified or does not have substantial experience.

To use the Singleton criteria, courts consistently have held that dismissals must be related to reductions occurring as a result of court-ordered desegregation where an actual arithmatical reduction in positions is caused by a desegregation plan. If the number of professional positions remain the same or increase, Singleton is inapplicable.[38] It is also inapplicable if a district has entered into a voluntary desegregation

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[36]Singleton v. Jackson Muncipal Separate School District, 419 F.2d 1211 (5th Cir. 1970).

[37]Ibid. at 1218.

[38]Barnes v. Jones County School District, 544 F.2d 804 (5th Cir 1977).

effort[39] or after a district has operated as a unitary system for several years.[40]

According to Singleton, teachers released because of the implementation of a reduction-in-force policy must be given preference in reappointment. This principle has been strictly construed as entitling qualified "riffed" teachers preferential treatment when vacancies occur.[41] As long as "riffed" teachers possess minimum qualifications, they must not be rejected on the basis that other applicants hold better credentials.[42]

When unitary school systems were established, a number of districts sought to hold the racial ratio existing at the date of desegregation. Thus, as vacancies occurred, whites replaced whites and blacks replaced blacks. Such employment procedures have been held unvalidated. The Fifth Circuit Court of Appeals ruled in Carter v. West Feliciana Parish School Board:

> Once a unitary system has been established the system-wide racial ratio may thereafter change from time to time as a result of nondiscriminatory application of objective merit standards in the selection and composition of faculty and staff.[43]

The objective of Singleton and similar rulings was not to freeze the existing minority/majority ratio. Thus, a decrease in minority

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[40]Barnes v. Jones County School District, supra.

[41]Kelly v. West Baton Rouge Parish School Board, 517 F.2d 194 (5th Cir. 1975).

[42]United States v. Jefferson County Board of Education, 380 F.2d 385 (5th Cir. 1970).

[43]Carter v. West Feliciana Parish School Baord, 432 F.2d 875 (5th Cir. 1970).

teachers does not substantiate discriminatory practices when equal employment opportunity practices are employed in the selection of staff.[44]

For whatever reasons, changes from one position to another have resulted in litigation based on demotion. Singleton established factors to guage demotions as level of responsibility, skill, salary, and certification. The level of responsibility has been a key index in establishing demotion. In Lee v. Macon County Board of Education[45] the court held that Lee was demoted. Lee, a black, was transferred from a principalship to a classroom teaching position. However, when a black high school counselor was reassigned as an elementary school counselor with the same title and salary, the court held the transfer was not a demotion.[46] The court indicated there was no compelling reason for complete congruency of responsibilities between two positions.

Singleton addressed reduction-in-force related to court-ordered desegregation. However, the reduction-in-force necessitated by declining enrollments and financial exigency have become more pressing issues in the late 1970's and 1980's. Minorities often have fewer years of experience due to past employment practices, especially pre-Title VII employment. When simple seniority has provided a last hired, first riffed system; a system basically neutral on its face may act to maintain

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[44]Lee v. Walker, 594 F.2d 156 (5th Cir. 1979).

[45]Lee v. Macon County Board of Education (Muscle Schoals), 453 F.2d 1104 (5th Cir. 1971).

[46]Lee v. Russell County Board of Education, 563 F.2d 1159 (5th Cir. 1977).

earlier discrimination. To protect seniority rights and avoid reverse adverse impact, Congress specifically exempted bona fide seniority systems from operation of Title VII:

> It shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race.[47]

Based on this provision in Title VII, the courts must determine what is a bona fide seniority system and to what extent a school system must go to remedy any results of past practice and pattern of illegal employment decisions.

With a high level of attention on the South, the Fifth Circuit Court of Appeals was active in addressing cases seeking remedies to provide minority employees equal employment opportunities in a seniority system. In a case involving seniority rights and promotions in a paper mill, employees were given seniority based on jobs rather than time employed.[48] Positions were organized hierarchically in functional production lines which were segregated by race. Black employees were restricted to certain low-paying jobs prior to the implementation of Title VII and were not allowed to compete for vacancies in the white lines because of lack of job seniority. Applying the "rightful place" doctrine, the court of appeals held that the future awarding of vacant positions should not lock in past discrimination. The court did not advocate

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[47]42 U.S.C. Section 2000 e-2(h), (1976).

[48]Local 189, United Papermakers and Paperworkers v. U.S., 416 F.2d 980 (5th Cir. 1969).

granting fictional seniority or bumping white employees, but stated that seniority must be based on total years in the company, not in a particular job line.

The "rightful place" principle has been applied by other courts and has been extended by the United States Supreme Court to award retroactive seniority.[49] The Court held that black employees who had been victims of unlawful discrimination could be granted constructive seniority to put them in their rightful place where they would have been had they not suffered discrimination. Those who had sought position in other departments or jobs from which they had been excluded were permitted to transfer with seniority retroactive to the date of the original unlawful discrimination

A second Supreme Court decision pertinent to reduction-in-force that would adversely affect recently hired women and minorities held that a seniorty system is not in "bad faith" merely because it had the effect of perpetuating past discrimination. If the system was established with no intent to discriminate, it was protected by the exception in Title VII.[50]

Thus, it appears from these decisions that employers who give constructive seniority to actual victims of discrimination can proceed with a reduction-in-force that respects constructive, or retroactive, seniority of the recently hired protected classes of employees.

In a school desegregation case, the Federal Court of Appeals upheld an order barring a school board from making layoffs of teachers

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[49]Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

[50]International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977).

and administrators strictly on the basis of seniority. Although the court ruled that the school district had discriminated against the professional staff, the real victims were found to be the black children who had unconstitutionally been denied the teaching faculty necessary to bring them fully into the school community. According to the court of appeals, the layoff order was designed, insofar as possible, "to make the school children whole".[51]

The Second Circuit Court of Appeals held a "rightful place" seniority system for the layoff of supervisory personnel in a New York school district. A disproportionate impact on minority supervisors did not invalidate the seniority system. The court acknowledged that certain minority supervisors might be entitled to "constructive or fictional" seniority because they had been denied their "rightful place" on the seniority list by a discriminatory examination.[52]

Without a demonstrated case of past discrimination, an employer cannot circumvent an established seniority system by using a reduction-in-force to alleviate racial inbalance in the school's staff. As an example, a Pennsylvania school district's riffing of white teachers with greater seniority than black teachers was held to constitute racial discrimination and was impermissable because there had been no past discrimination in employment practices.[53]

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[51]Morgan v. O'Bryant, (CA-1 1982), 28 EPD 32,544 cert. denied U.S. Sup. Ct., 1982.

[52]Chance v. Board of Examiners and Board of Education of the City of New York, 534 F.2d 996 (2nd Cir. 1976).

[53]Bacica v. Board of Education of the School District of the City of Erie, PA, 451 F. Supp. 882 (WD Pa., 1978).

With public school systems facing declining enrollments, district reorganizations and financial problems, reduction-in-force will intensify as a area of concern. A bona fide seniority system is a legitimate mechanism for staff layoffs, but prior discriminatory employment practices may require modification for certain protected employees who are not in their "rightful place". This does not abrogate the seniority system itself. "Make whole" remedies, including retroactive seniority for protected classes, do not diminish the rights of other employees".[54]

The rights of other employees have surfaced in recent years in charges of "reverse discrimination". "Reverse discrimination" is not a new class of employment discrimination, but the term is used to identify majority discrimination resulting from attempts to remedy minority discrimination. According to Title VII, illegal employment opportunities are impermissable without regard to majority or minority.

The United States Supreme Court held unconditionally that the provisions of Title VII "are not limited to discrimination against members of any particular race".[55] The doctrine of reverse discrimination was the central focus of the landmark case, Regents of the University of California v. Bakke.[56] As in Brown, the questions in Bakke were seen on the legal horizon long before they came to the Supreme Court.

Bakke entered a new area of case law. It was the first Supreme Court decision addressing when voluntary measures intended to remedy

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[54]McCarthy and Cambron, Public School Law, p. 83.

[55]McDonald v. Sante Fe Trail Transportation Co., 427 U.S. 273 (1976).

[56]Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

the present efforts of past discrimination may themselves take race into account. Its lack of unanimity was its most important and confusing aspect. Six separate opinions were published, two of which were supported by four other justices apiece. The swing vote was cast by Justice Powell.

This split in the Court produced one 5 to 4 majority that ordered Allen Bakke admitted to the Medical School of the University of California at Davis and found its affirmative action program illegal. However, by another 5 to 4 majority, the Court held that at least some form of race-conscious admissions procedures are constitutional. Consequently, it is very difficult, if not impossible, to predict how the court will respond when dealing with a different set of facts in another affirmative action case.[57]

With regard to equal employment opportunities in the public schools, the case provides more questions than answers. Doubts are raised about the legal status of affirmative action plans in the absence of prior discriminatory practices. In Weber[58] in June, 1979, the United States Supreme Court did not address what Title VII requires or what a court might order, but

> whether Title VII forbids private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preference.

In Weber, the court did not attempt to delineate permissable and impermissable affirmative action programs. It merely found the Kaiser plan permissable. Although Weber involved a private employer and a voluntary

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[57]United States Commission on Civil Rights, Toward an Understanding of Bakke, Clearinghouse Publication 58 (Washington, D.C.: U.S. Government Printing Office, 1979, p. 1.

affirmative action plan favoring blacks, the principles set forth in the decision have been specifically found applicable to programs implemented by public employers and to voluntary affirmative action programs which discriminate on the basis of sex.[59]

The litigation surrounding reverse discrimination are complex and many questions remain unresolved by the courts. Some general principles have evolved to guide public school systems in planning for affirmative action. All employees are protected from illegal employment decisions. If a district without a history of past discrimination is faced with a reduction-in-force, white teachers with greater seniority cannot be suspended while minority teachers with less seniority are re-employed to achieve a better racial balance. In recruitment, selection, promotion, and training, it is unlawful to use rigid quotas. The more defensible approach is to establish a flexible plan with desirable ranges and to include race as a factor in screening, but not as the determinate of selection. An acceptable plan might include one that is temporary which avoids specific quotas or the maintenance of a specified racial balance.[60]

## Litigation Based on Sex

Initially, the prohibition of discrimination on the basis of sex was referred to as a "sleeper" in Title VII. Although most of the Congressional debate centered on racial discrimination and the provision about sex was introduced by opponents in an attempt to defeat the bill,

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[59]Beatton v. City of Detroit, (CA-6 1983), 31 EDP, 33,497.

[60]McCarthy and Cambron, Public School Law, p. 86.

alleged discrimination based on sex now constitutes a high percentage of the cases filed with EEOC and litigation in the courts.[61]

Along with the equal rights gains of minorities, recognition has been given to equality in employment for women. In litigation sex-based classifications that impose unequal employment burdens on female employees have been challenged. However, sex has not been designated as a "suspect class" as has race. This distinction is vital in judicial review. If sex were elevated to a "suspect class", a compelling justification would be necessary for any governmental classification based on gender. Recent United States Supreme Court decisions have determined that classifications based on sex must bear a "close and substantial relationship to important governmental objectives"[62] and require "an exceedingly persuasive justification to withstand a constitutional challenge".[63] Therefore, most litigation has occurred under Title VII.

In light of the problems of sex discrimination in the 1970's and 1980's it is interesting to note the up-to-date statement of Thorndike in a 1915 book:

> The individual differences within one sex so enormously outweigh the differences between the sexes in these intellectual and semi-intellectual traits that for practical purposes the sex differences may be disregarded. So far as ability goes, there could hardly be a stupider way to get two groups, than to take the two sexes. As is well known, the experiments of the past generation in educating women have shown their equal competence in schoolwork of elementary, secondary, and collegiate grade. The present genera-

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[61]Wendell L. French, The Personnel Management Process: Human Resources Administration and Development (Boston: Houghton Mifflin Company, 1978), p. 207.

[62]Craig v. Boren, 429 U.S. 190 (1977).

[63]Personnel Administrator of Massachusetts v. Fenney, 442 U.S. 256 (1979).

> tion's experience is showing the same fact for professional education and business service. The psychologist's measurements lead to the conclusion that this equality of achievement comes from an equality of natural gifts, not from an overstraining of the lesser talents of women.[64]

It is important to note that Title VII is violated on a sex-plus basis when one sex is required to meet additional criteria such as not having children. If only women have to meet this employment requirement, while men do not, there is a Title VII violation.[65]

With more and more women in the labor force, the question of how employers treat pregnancy and related conditions has received much attention. Pregnancy-related disabilities are often excluded from employee disability programs. One argument in support of the exclusion is related to the so-called voluntariness of the condition.[66] Another legal argument rests on the principle that pregnancy-related conditions are not sex discrimination because pregnancy is significantly dfferent from the typical disease covered by disability plans. Exclusion of some risks from such plans does not create a sex-based discriminatory effect.[67]

The arguments were eventually ended when Congress passed the Preganancy Discrimination Act of 1978,[68] which amended Title VII to specify that pregnancy, childbirth, and related medical conditions must

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[64]E. L. Thorndike, Educational Psychology (New York: Briefer Course, Teacher's College, 1915), cited in Professional Psychology, 5 (August, 1974):263.

[65]Cynthia Stoddard, Sex Discrimination in Educational Employment, (Holmes Beach, Fla.: Learning Publications, Inc., 1981), p. 37.

[66]Gilbert v. General Electric Company, (CA-4 1975), 519 F.2d 661, reversed 429 U.S. 125 (1976).

[67]General Electric Company v. Gilbert, 429 U.S. 125 (1976).

[68]Title VII, Section 701(k).

treated the same as other medical conditions for purposes of employment benefits. In school systems the greatest effect is on sick leave. If the district permits sick leave for other disabilities, it must accord the same for pregnancy-related absences.[69] As of April 29, 1979, all employers were to be in compliance with the amendment.

Like maternity benefits, school systems' mandatory leave policies have been litigated. The Supreme Court in Cleveland Board of Education v. LaFleur[70] ruled that a compulsory maternity leave violated due process rights. Women were required to leave their teaching jobs at the end of their fifth month of pregnancy, regardless of their health or the school schedule. The court held that arbitrary cut-off dates did not serve the school's stated purposes which were to assure the continuity of classroom instruction and to preclude the presence in classroom of physically incapacitated teachers. Thus, while the court "recognizes that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the due process clause", this decision does not state that pregnancy leave was a "sex-plus" case of sex discrimination.

LaFleur does not prohibit boards of education from establishing maternity leave policies. A reasonable leave policy was upheld in the Ninth Circuit Court of Appeals.[71] The San Diego school board's policy required all teachers to take maternity at the ninth month of pregnancy. It was adequately demonstrated that this was a business necessity based

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[69]Education U.S.A., vol. 21, no. 9, October 30, 1978, p. 20.

[70]Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

[71]deLaurier v. San Diego United School District, 588 F.2d 674 (9th Cir. 1978).

on obtaining a replacement teacher given the unpredictability of childbirth. By contrast, the Fourth Circuit Court of Appeals invalidated a school board's policy of nonrenewal of teacher contracts where a foreseeable period of absence could be anticipated for the next school year. As female teachers were required to give notice to the school administrators of their pregnancy and expected delivery date, this policy was determined to place a disproportionate burden on female teachers.[72]

Board of education employment policies which place a substantial burden on women and not on men have been litigated in the courts. When the policies cannot be established as a business necessity, they have been found to constitute unlawful employment practice under Title VII. Leaves taken because of pregnancy, like other leave, do not affect the accumulated seniority upon return from maternity leaves.[73]

The general principle that "sex-plus" cases are grounded on a showing that an employment policy is applied differently to one sex than to the other is particularly troublesome in cases involving unwed mothers. This is true, even in those cases where the policy is stated as opposing hiring or retaining persons who are unwed parents. The application of the rule against men is so much more difficult than against women. It has been held that the plaintiff failed to prove that a man would have been treated differently.[74] The dissenting opinion in Grayson v. Wicks Corp. stated that to ask the plaintiff to prove that male

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[72]Mitchell v. Board of Trustees of Pickens County School District, 599 F.2d. 182 (4th Cir. 1979).

[73]Nashville Gas Company v. Salty, 434 U.S. 136 (1977).

[74]Grayson v. Wicks Corp., (CA-7 1979), 607 F.2d 1194.

employees who engaged in premarital sexual relationships and produced offspring would be treated differently was to ask the impossible. The equating of pregnancy with the condition of expectant parenthood in a man was sophistry because pregnancy is a condition unique to females, and men and women cannot be considered to be similarly situated in this regard.[75]

Neither case cited above was decided with reference to Title VII which seems to lay this question to rest. The amendment states that discrimination on the basis of pregnancy is considered to be sex discrimination. However, the argument supporting policies against unwed parents is based on morality and, especially in the case of school personnel, example to others. Even with the Pregnancy Discrimination Act, the argument might be made that these policies do not discriminate on the basis of pregnancy or marital status, but that they merely apply the employer's moral code to the employees' conduct.

In a case involving teachers, the question of morality was directly addressed by the court in Andrews v. Drew Municipal Separate School District.[76] The case was heard under the Equal Protection and Due Process Clause of the United States Constitution. The court held that it was a violation of both to institute an irrebuttable presumption that a person who has had a child out of wedlock is thereby proved to be immoral. The court stated that constitutional principles require that other considerations be recognized, such as subsequent marriage, length

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[75]Jacobs v. Martin Sweet Co., (CA-6 1977), 550 F.2d 364, cert. denied (U.S. Sup. Ct. 1977), 431 U.S. 917.

[76]Andrews v. Dres Municipal Separate School District (CA-5 1975), 507 F.2d 611 cert. denied (U.S. Sup. Ct. 1976), 426 U.S. 559.

of time elasped since the birth, reputation for good character, possibility of force or deception, or the effects of drugs or alcohol. The court also pointed out that, although the obvious aim of the rule was to discourage premarital sexual relations, one result would be to encourage abortion, considered by many to be morally objectionable. Finally, the court noted that a rule against unwed parents ignores the occurrence of extramarital sexual relations which is thought by many to be of a more serious moral concern than premarital activity. The court asked that a hearing opportunity be provided so that teachers suspected of immorality would be heard. That would satisfy the constitutional requirement of due process.[77]

Illegal employment patterns and practices related to sex-based actions in recruitment, salary, promotion, training, compensation, and working conditions have all been adjudicated under Title VII using the same procedure as in racial discrimination suits.

Although several courts have held that Title VII and the Equal Pay Act are extensive, the Third and Ninth Circuit Courts of Appeals concluded that Title VII is broader in scope than the Equal Pay Act.[78] The Equal Pay Act was ruled determinative only when equal salary was an issue. An individual was not prevented from challenging other sex-related compensation differences under Title VII. The Ninth Circuit Appellate Court advised,

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[77] Ibid.

[78] International Union of Electrical Radio and Machine Workers v. Westinghouse Electrical Corp., 631 F.2d 1094 (3rd Cir. 1980) and Gunther v. County of Washington, 452 U.S. 161 (1981).

> if we were to limit Title VII's protection against sexually discriminatory compensation practices to those covered by the Equal Pay Act, we would in effect insulate other equally harmful discriminatory practices from review.[79]

These court rulings could advance challenges to some traditional salary differences among educational personnel in areas such as male and female coaches and maids and custodians.

Splitt wrote:

> School systems are natural targets for legal action to adjust discriminatory pay differences between male and female employees. One Pennsylvania school system already has been charged by AFSCME under Title VII of the 1964 Civil Rights Act. That action was brought before the Equal Employment Opportunity Commission on behalf of several dozen school system workers who claim that women holding non-teaching jobs in clerical and food service areas are paid substantially less for the same level of work that men perform in custodial and maintenance positions.
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> School executives who want to get the jump on possible litigation should examine the wage scales of all employees carefully--especially those for nonprofessional personnel, such as office and library workers, nonspecialist maintenance workers, and custodians. If there are substantial--or unexplained--gaps between the pay levels for jobs held mostly by men and those in which female workers predominate, you might want to recommend changes before you must defend yourself in a sex-bias lawsuit.
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> The Washington and Pennsylvania actions are direct fallout from a U.S. Supreme Court decision handed down in 1981. In County of Washington v. Gunther, the high court ruled that sex discrimination in employment is necessarily limited to equal pay for equal work in the same job. As long as the qualifications and necessary skills are similar, and as long as the jobs require essentially the same amount of effort and responsibility, the fact that the types of work performed are different does not justify lower salaries for positions held predominately by women.[80]

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[79]Gunther v. County of Washington, Supra.

[80]David A. Splitt, "School Law", The Executive Educator 12 (December, 1983): 11.

## Litigation Based on Age

In public school employment one of the greatest problems with respect to age discrimination has been mandatory retirement ages. Compulsory retirements systems have been challenged as violations of the equal protection and due process guarantees of the Fourteenth Amendment. With few exceptions these systems have been upheld as constitutional.[81]

Persons between the ages of forty and sixty-five years are in a protected class as provided in the Age Discrimination in Employment Act of 1967.[82] When age is used as a factor in making employment decisions, an employer must consider many of the same situations that are involved in analyzing cases of racial or sex discrimination. However, the Uniform Guidelines on Employee Selection Procedures do not apply to age discrimination.[83] In 1978, the Age Discrimination in Employment Act of 1967 was amended to include persons between sixty-five and seventy years of age.

A 1974 amendment included most employees of state and local governments under the Age Discrimination in Employment Act.[84] The rule for public employees not covered by the act is a constitutional standard; the mandatory retirement rule must have a rational relationship to a legitimate governmental purpose.

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[81]McCarthy and Cambron, Public School Law, pp. 94-95.

[82]Age Discrimination in Employment Act of 1967, Section 4(d), 29 U.S.C. Section 621-634.

[83]Uniform Guidelines on Employee Selection Procedures (1978), 43 FR 38297, August 25, 1978.

[84]Public Law 93-259, effective May 1, 1974, 88 Stat. 74.

The constitutional standard has been applied to teachers' cases. In Palmer v. Ticcione,[85] a seventy year old kindergarden teacher alleged that compulsory retirement violated her civil rights and created an irrebuttable presumption of incompetence. The court found the state statute to be rationally related to fulfilling a legitimate state objective and therefore, not subject to due process proceedings. Stressing that the rational basis must not be too narrowly defined, the court concluded that legitimate reasons for a mandatory system might include providing employment opportunities for young people and minorities, creating openings for new ideas and techniques, and assuring predictability in the managemant of retirement systems. The court also held that a rational system should not be invalidated because it may include a presumption of employee incompetency at a predetermined age.

In contrast to Palmer, in Garret v. Garrison,[86] the appellate court upheld a teacher's right to a trial on an age discrimination charge involving mandatory retirement. The court reasoned that fitness to teach should be determined on an individual basis and that mandatory retirement per se violated an individual's rights, whether the cut-off age was sixty or eighty. No evidence was introduced in Garret to demonstrate a rational relationship between age and fitness to teach. The appellate court ruled that in the absence of a valid justification, the mandatory retirement age deprived the affected teachers of their due process rights to an individual determination of teaching competency. Other

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[85]Palmer v. Ticcione, (CA-2 1978), 576 F.2d 459, cert. denied (U.S. Sup. Ct., 1979), 440 U.S. 945.

[86]Garret v. Garrison, (CA-7 1977), 569 F.2d 993, cert. denied (U.S. Sup. Ct., 1979), 440 U.S. 945.

courts have not viewed mandatory retirement as narrowly as the Seventh Circuit Court of Appeals.[87]

The Age Discrimination in Employment Act's coverage prohibits any form of employment discrimination based on age. Decisions related to such matters as promotions, transfers, and discharges cannot be premised on age. An Alabama federal district court ruled in Polstorff v. Fletcher,[88] that to establish an age discrimination case, a discharged employee does not have to be replaced by an individual outside the "protected group" who is below forty years of age. That is, if age is the only factor in discharge, a sixty year old employee is entitled to reinstatement, if displaced by a younger individual--whether forty-five or thirty years old.

The EEOC issued age discrimination guidelines[89] on September 28, 1981. These guidelines do not make substantial changes in the law, but refine long-established rules and definitions. The coverage remains age forty to seventy years and the prohibition extend to hiring, promotions, and retirement. The EEOC takes the position that employers cannot favor the younger of two individuals, both of whom are within the protected age group.

The guidelines particularly take aim at want ads which use phrases to attract either the young or old. Although the guidelines state that these terms are not always illegal, they make it clear that those using

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[87]McCarthy and Cambron, Public School Law, p. 95.

[88]Polstorff v. Fletcher, 452 F. Supp. 17 (N.D. Ala., 1978).

[89]EEOC/Age Discrimination; 46 Fed. Reg. 188, p. 47724, September 28, 1981.

them do so at their own risk. If an employer can prove that only individuals of a given age are capable of performing the duties required of the job, then age may be specified as a bona fide qualification. To use this exception, the employer must prove that (1) the age limit is reasonably necessary to the essence of the business; and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained by reference to age.

The guidelines provide that the extra cost of employing older workers is not a valid justification for discrimination either in hiring or compensation.

Seniority systems are exempt from the Age Discrimination Act unless they are a "subterfuge to evade the purposes" of the act. To qualify as bona fide, a seniority system must provide for the equitable allocation of available employment opportunities and prerogatives among older and younger workers. Such factors as merit, capacity, or ability may be incorporated into the seniority systems so long as they are not primary factors.

The act does not make it illegal to have employees elect early retirement at their own option; nor is it unlawful to require early retirement for reasons other than age. The problem is that someone may become too zealous about encouraging early retirement. If an employer goes too far, the EEOC could charge him with age discrimination.[90]

The February 24, 1984, issue of Ideas and Trends reported:

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[90]"EEOC Issues Age Discrimination Guidelines," Personnel Managers Legal Reporter, 147, November, 1981, p. 3.

> In addition, the EEOC says, an employee under 70 who accepted incentives to retire early also must be considered if he or she asks to return to work; and a policy-maker required to retire before 70 must be considered if he or she asks to return in a non-policy-making function.[91]

Employers have no obligation to take affirmative action to hire, promote, or protect in a reduction-in-force workers protected by the Age Discrimination in Employment Act (ADEA) according to a ruling from the Fifth Circuit United States Court of Appeals. In the court case the plaintiffs charged that the criteria used to make layoffs was discriminatory, that they were willing and qualified to perform the work, and that the employer was under an affirmative obligation to transfer them to those jobs available.[92]

The court rejected both claims. The judges ruled that there is no affirmative obligation to find alternative work under ADEA. In other words, older workers do not have to be treated specially; they need only to be treated equally. Two principles evolved regarding age discrimination: (1) that the employer consciously refused to consider other alternatives because of age; or (2) that age was considered a negative factor in the employment decision. Public school systems faced with reductions in force should examine their criteria in light of these two principles.

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[91]"Retirees Still under 70 Must be Considered for Rehire," Ideas and Trends: Human Resources Management, no. 59 (24 February 1984): 25.

[92]Williams v. General Motors Corporation, U.S.C.A., 5th; nos. 79-2857 and 80-7192; September 14, 1981.

## Litigation Based on Handicaps

A handicapped person is protected to some degree by the Rehabilitaton Act of 1973.[93] The protection is not as extensive as that given minorities, women, and members of religious sects by Title VII.

According to the Rehabilitation Act of 1973, a "handicapped individual" is any person who has a physical or mental impairment that substantially limits one or more of the person's major life activities, or who has a record of such an impairment, or who is regarded as having such an impairment. Specifically excluded are alcoholics and drug abusers.

The key legislation is Section 504 of the Rehabilitation Act of 1973.[94] It provides in part that "no otherwise qualified handicapped individual" shall be excluded from participation in a program receiving federal financial assistance "solely by reason of his handicap".

Discriminatory practices occurring prior to the implementation of the Rehabilitation Act of 1973 were litigated on Constitutional grounds. A blind teacher challenged the Philadelphia School District's refusal to permit her to take the Philadelphia Teacher's Examination as a violation of her due process rights.[05] The court concluded that the school district violated the teacher's due process rights by refusing to give her an opportunity to demonstrate her competence. It awarded her

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[93]Rehabilitation Act of 1973, 93-112, 87 stat. 355, 29 U.S.C. Section 701 and following.

[94]29 U.S.C. Section 794 (1976).

[95]Gurmankin v. Constanzo, 556 F.2d 184 (3rd. Cir. 1977).

retroactive seniority dating from 1970 and in a subsequent appeal the appellate court alsc awarded back pay for the same period.[96] However, the court refused to grant tenure reasoning that tenure must be based on the system's evaluation procedures.

In employment decisions, courts have reiterated that Section 504 regulations require "reasonable accommodation only for handicapped persons who are otherwise qualified". In a California case, a blind teacher challenged school officials for failure to appoint him to an administrative position because of his blindness.[97] To be eligible for administrative positions, candidates were required to complete a written examination and have an oral interview. During this process, an administrative team determined that the teacher was not qualified for an administrative position and further expressed reservations about the teacher's ability to cope with his blindness. The federal court concluded that aside from the teacher's disability, he was not qualified for the position. The court also noted that it was permissable for the committee to inquire as to how the teacher would cope with his blindness in meeting the job requirements.

A handicapped person cannot be eliminated from employment consideration solely on the basis of a disability. In the employment process an employer is not required to ignore the handicap or make substantial accommodations for the special needs of the individual. Under current legislation and judicial interpretation, an "otherwise qualified individual" must be accorded an equal opportunity for employ-

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[96]Gurmankin v. Costanzo, 626 F.2d 1118 (3rd. Cir. 1980).

[97]Upshur v. Lone, 474 F. Supp. 332 (N.D. Cal. 1979).

ment. There is much confusion surrounding the rights of handicapped workers.

Sections 503 and 504 apply to different kinds of employers. Employers receiving direct financial assistance from the United States Government are covered by section 504. Employers who are government contractors are covered under 503.

The only employers who are legally required to offer equal employment opportunity to the mentally or physically handicapped are the following:

1. employers in the public sector
2. companies holding federal contract worth over $50,000,
3. employers covered by state laws that specifically protect the handicapped

## Summary

In Connecticut v. Teal[98] the United States Supreme Court held on a 5 to 4 vote that having acceptable employment figures overall is not a defense to a charge of discrimination against one or more individuals.

A Connecticut agency ruled that several black employees were not eligible for promotion to supervisor because they failed a written examination which was failed by more blacks than whites.

The state defended its position by demonstrating that 22.9 percent of the black candidates were promoted among those eligible while only 13.5 percent of the eligible white employees were promoted.

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[98]State of Connecticut v. Teal, (U.S. Sup. Ct. 1982), aff'g and rem'g (CA-2), 457 U.S. 440. 645 F.2d 133.

As the "bottom line" result was favorable to the blacks, the state argued, it could not be said that the state had discriminated against the individuals who failed the written test.

The Supreme Court, however, noted that the Civil Rights Act of 1964 guarantees equal employment opportunity to individuals. Therefore, an individual cannot be told, ruled the court, that he or she has not been wronged because others have achieved what the individual seeks. In other words, there is no claim that a selection procedure is made lawful by "getting the numbers up".

The argument in favor of the bottom line approach is that the intent of the laws requiring equal employment opportunity in the public sector is to give members of all minority groups, men and women equal access to jobs and to eliminate the practices that excluded protected persons from employment.

Accordingly, to suggest that the "bottom line" is a defense to a claim of discrimination against an individual employee confuses unlawful discrimination with discriminatory intent. Furthermore, to measure adverse impact only at the bottom line ignores the fact that Title VII guarantees protected individuals the opportunity to compete equally with others on the basis of job-related criteria.

Personnel officers in the public schools must work with their superintendents and boards of education to ensure that equal employment opportunities are available to all individuals who apply or are hired by a public school system. To do any less is to perform in an unlawful manner and risk making employment decisions made on inappropriate data.

# CHAPTER V

# SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

## Summary

This study has reviewed the legal aspects of equal employment opportunity for public school employees. In the process, a study was made of the federal laws, state laws, case law, decisions of regulatory agencies, executive orders, and the guidelines of regulatory agencies. Each was analyzed in relation to applicability to employment in the public school setting. Chapter IV specifically addressed some of the major issues in equal employment opportunities in the public schools.

From the date of the passage of the Civil Rights Act in 1964, which includes Title VII, and the 1972 amendments, the Equal Employment Opportunity Commission (EEOC), the courts, and Congress have increased their influence on the employment decisions of public school administrators and boards of education. EEOC guidelines now cover all areas of pre-employment procedures as well as post employment activities. Legislative mandates and executive orders have intruded into the employment process as safeguards of individual rights in the public schools.

## Answers to Questions

Several key questions were answered in this study:

1. What are the Equal Employment Opportunity laws that cover public school employees and who is covered?

Title VII of the Civil Rights Act of 1964 as amended in 1972 is the basic law covering employment in public schools. With the 1972 amendments, all employees in the public schools have the protection of Title VII. Public school employees, like other citizens, decide where they will take their charges of discrimination that arise in the work place. Litigation may also occur under other laws: the fifth and fourteenth amendments to the Constitution; the Civil Rights Acts of 1866, 1970, and 1971; the Equal Pay Act; the Age Discrimination in Employment Act; the Vocational Rehabilitation Act, and certain other federal, state, and local laws that may apply.

2. How are the Equal Employment Opportunity laws enforced?

Employees of the public schools in North Carolina are required to take their charges of illegal employment practices or patterns to the Equal Employment Opportunity Commission (EEOC). The EEOC procedures as outlined in the Uniform Guidelines on Employee Selection Procedures (1978) are to be followed. Once the procedures of EEOC have been satisfied, but reconciliation has not occurred, the aggrieved may sue in a federal court. Employees not choosing to use EEOC may go directly to court to seek remedies if the charges are on some basis other than Title VII. Therefore, enforcement of Equal Employment Opportunity laws rests with EEOC and the federal courts.

3. What is the legal status of the Equal Employment Opportunity Commission and how does it function?

Title VII of the Civil Rights Act of 1964 gives legal status to the Equal Employment Opportunity Commission. The EEOC operates under the laws it has been designated to enforce and through its own guide-

lines, opinions, and answers to questions. All activities of the EEOC are subject to review by Congress.

4. What legal principles of equal employment opportunities have been established through case law?

The following legal principles of equal employment opportunities have been established by law: (1) equal employment opportunity has been supported in the courts as the right of all persons and especially those in the protected classes; (2) employers must provide equal employment opportunities to all applicants and employees; (3) when litigation is involved the plaintiff must establish a prima facie proof of discrimination as outlined in McDonald Douglas; and (4) employers are responsible for ensuring that equal opportunities in employment are not denied to anyone.

5. What are the current trends in Equal Employment Opportunity laws and rulings?

Recently, laws and rulings affecting equal employment opportunities have been more focused on age discrimination, sexual harassment, maternity benefits and comparable worth than on racial/ethnic issues. However, there is no less need for appropriate employment practices involving all employees and especially those in protected classes. There appears to be a continued escalation of court cases and EEOC charges.

6. Based on this study, what are the legally acceptable standards which are most likely to prevent charges of discrimination in public school employment?

Personnel officers, employment decision-makers, and boards of education must be aware of the legal requirements of equal employment opportunity for all employers. These decision-makers should make

their decisions based on job-related criteria and use acceptable recruiting, interviewing, and selection procedures as outlined in the case laws, guidelines, and rulings of the Equal Employment Opportunity Commission. Seminars, college and university courses and publications abound to assist employers with appropriate procedures.

## Conclusions

This study has resulted in the following conclusions:

1. Local boards of education hold only those discretionary powers conferred by state law, but school board policies are legally binding on the employers and the employees.

2. School board policies that might result in unlawful employment discrimination may have to be proven by the employers to be bona fide occupational qualifications to stand muster in the courts.

3. Practices and patterns of equal employment opportunities must not disadvantage protected classes of individuals.

4. Administrators and boards of education who make employment, promotion, benefit and compensation decisions need to act with well reasoned procedures and anticipate the potential adverse impact of their decisions.

5. Personnel officers in public school systems, aided by legal counsel, must be familiar with the Equal Employment Opportunity Laws and regulations applicable to public school employees.

6. Personnel officers must understand and be prepared to respond appropriately to the Equal Employment Opportunity Commission (EEOC) by having a working knowledge of Title VII and the EEOC Guidelines, questions and answers and commission opinions.

7. School attorneys need to advise personnel officers regularly regarding the legal ramifications of employment practices.

8. Personnel officers in the public schools need to avail themselves of special training to understand equal employment opportunity procedures as a preventive measure against litigation.

9. Politics and litigation are constantly in a change mode and the impermissable and permissable rise and fall on political and judicial decisions. These usually have predictable trends, but have been somewhat irregular in the rulings based on Title VII.

10. Sexual harassment has not been faced realistically by most school systems. Few policies exist to handle the issue of sexual harassment.

11. Maternity benefits are still in litigious limbo. The United States Appellate Courts have handed down conflicting decisions on the employer's responsibility. Complaints taken to court are subject to individual decisions.

12. Comparable worth is the newest area of major litigation and is likely to be the subject of many lawsuits in the 1980's. These cases will be built on strong "equity arguments" and our cultural values of "fairness."

13. Salary and benefits conflicts arise when policies are not clear and specific.

## Recommendations

As a result of this study the following recommendations are made to school board members, personnel officers and other administrators:

1. All employment practices in the public schools must be based on the principle of equal employment opportunity for all.

2. Legal counsel should be an on-going process to the employment decision-makers.

3. Employment decisions should be based on legitimate job responsbilities.

4. Job descriptions must be developed for all jobs in the school district.

5. Recruitment, and especially advertising, must state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin. A file of all recruitment and advertising materials should be maintained.

6. Personnel who interview and make employment decisions must be skilled in procedures that ensure equal employment opportunities to all applicants and employees. This in-service will focus on the legal ramifications of Title VII and other state and federal laws, executive orders and regulatory guidelines.

7. Wage and salary range for each job title should be a part of the job description and identified on the school district's salary schedule. There must be objective standards for setting compensation that can be applied equally.

8. Detailed records should be maintained of all employment activities.

9. The top level decision-makers should establish a geographical labor market for developing comparative data to assess possible adverse impact. The Standard Metropolitan Statistical Area (SMSA) is often acceptable.

10. Employee benefits must be applied equally to all employees and needs relating to pregnancy are to be treated like any other medical condition. Clearly defined policies on benefit administration are essential.

11. All promotional opportunities are to be posted or advertised.

12. Develop an internal communication system advancing the obligation to provide equal employment opportunity without regard to religious or ethnic group.

13. Develop and implement a formal employee evaluation system that is an assessment of job functions, not personal traits.

14. Establish grievance procedures for all employees.

15. Keep employees informed of the Equal Employment Opportunity Commission (EEOC) and of laws and regulations affecting them. This includes the posting of appropriate informational posters from EEOC.

16. Issue strong policy statements opposing sexual harassment in the work place and post the statement in prominent locations.

17. Investigate thoroughly all employee complaints and take appropriate action to remedy any discriminatory conduct.

## Recommendations for Future Study

The determination of discriminatory effects on all persons, but especially on protected groups, is a complex and unending task. Although Title VII requires employers to be neutral with respect to color, religion, and sex, fulfillment of the requirements of Title VII is determined by interpretation of the courts and EEOC.

The writer believes that a continuing study of equal employment opportunity in public schools is needed because the escalation of litigation is producing new case law with high frequency.

The following are major areas of possible future litigation under Title VII:

1. Maternity benefits including those available to wives of male employees, unwed parents, and child care benefits.

2. The theory of equal pay under the rubric of sex discrimination will be a continuing source of misunderstanding between employer and employee. The courts may be asked to adjudicate a procedure to determine the relative worth of all gainful work in society.

3. Title VII is not all-inclusive in its coverage as it exists today. As court cases between 1964 and 1972 directly affected the 1972 amendments, the courts may make new rulings that result in the need for additional changes in Title VII.

4. The changes in national politics as advanced by President Ronald Reagan will have adverse impact on employee rights and there will be additional arguments on the employment at will concept.

Future study is needed on the evolution of Title VII with careful attention being given to the interpretation of Title VII issues by the new Supreme Court justices appointed by President Reagan.

## Concluding Statement

One purpose of this study was to present in one volume a review of all facets of the legal aspects of equal employment opportunity relating to employment practices in the public school setting. A study such as this one is only current until new legislation, guidelines, or court cases have provided new laws, rules, and case laws. It is a litigious area and changes occur often. The study will need constant up-dating for future effectiveness.

A second purpose was to provide help to public school personnel officers and other decision-makers in understanding that courts will not sustain unlawful employment practices or patterns; however, when employers have adequately documented efforts at fairness, the courts

have generally supported the public school employers. Courts and legislative bodies have usually not forced any decisions or laws upon school administrators and boards of education that fair-minded educators and boards of education would not impose on themselves, if they understood all the ramifications of equal employment opportunities.

Courts have ruled against school systems that have made arbitrary and capricious decisions that have violated the rights of individuals. These decisions have been ruled in favor of protected and nonprotected individuals and groups.

# SELECTED BIBLIOGRAPHY

## A. Primary Sources

### 1. Federal Court Cases


Albemarle Paper Company v. Moody, 422 U.S. 405 (1975).

American Federation of State, County and Municipal Employees v. State of Washington, USDC, W.WA., No. C. 82-465T, (December 14, 1983), 33EPD 33,376.

American Tobacco Company v. Patterson (U.S. Sup. Ct., 1982, vacated and remanded to CA-4, 1980), 634 F.2d 744.

Ammons v. Zia Company (CA-10, 1971), 448 F.2d 117.

Andrews v. Dres Municipal Separate School District (CA-5, 1975), 517 F.2d 611 cert. denied (U.S. Sup. Ct, 1976), 426 U.S. 559.

Bacica v. Board of Education of the School District of the City of Erie, PA, 451 F. Supp. 882 (WD PA, 1978).

Baker v. California Land Title Company, 507 F.2d 895 (9th cir. 1974), cert. denied 422 U.S. 1046 (1975).

Barnes v. Jones County School District, 544 F.2d 804 (5th cir. 1977).

Bartmess v. Drewrys U.S.A., Inc., (CA-7, 1971), 44 F.2d 1186 cert. denied (U.S. Sup. Ct., 1971), 404 U.S. 939.

Baxter v. Savannah Refining Corp., (CA-5, 1974), 459 F.2d 437, cert. denied (U.S. Sup. Ct., 1974), 419 U.S. 1033.

Beatton v. City of Detroit, (CA-6, 1983), 31 EDP 33,497.

Brennan v. South Davis Community Hospital, (CA-10, 1976), 538 F.2d 859.

Brown v. Board of Education, 347 U.S. 483 (1954).

Cafeteria and Restaurant Workers Union 473 AFL-CIO v. McElroy, 36 U.S. 886.

Calcote v. Texas Educational Foundation, Inc., (CA-5, 1978), 578 F.2d 95.

Caldwell v. National Brewing Company, (CA-5, 1971), 443 F.2d 1044, cert. denied (U.S. Sup. Ct., 1972), 405 U.S. 916.

Carter v. Gallagher, 452 F.2d 315 (8th cir. 1971), cert. denied 406 U.S. 950 (1972).

Chance v. Board of Examiners, 458 F.2d 1167 (2nd cir. 1972).

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

Connick v. Myers, 103 SCT 1684.

Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

Craig v. Boren, 429 U.S. 190 (1977).

Davis v. Delta Airlines, Inc., (CA-5, 1982), 678 F.2d 567.

deLaurien v. San Diego United School District, 588 F.2d 674 (9th cir. 1978).

DiSalvo v. Chamber of Commerce, (CA-8, 1978), 568 F.2d 593.

EEOC v. Liberty Mutual Insurance Company, 475 F.2d 579 (5th cir. 1972), cert. denied 414 U.S. 854 (1973).

EEOC v. New York Times Broadcasting Services, Inc., (CA-6, 1976), 542 F.2d 356.

Espinoza v. Farah Manufacturing Company, Inc., 414 U.S. 811 (1973).

Fitzpatrick v. Bitzer, 12 FEP 1586 (1976).

Fowler v. Schwarzwalder, 498 F.2d 143 (8th cir., 1974).

Frank v. Bowman Transportation Company, 424 U.S. 747 (1976).

Furnco Construction Corp. v. Waters, 438 U.S. 802 (1973).

Garret v. Garrison (CA-7, 1977), 569 F.2d, 993 cert. denied, 440 U.S. 945.

Gates v. Georgia Pacific Corp., 326 F. Supp. 379 (DC 1970), affirmed 7 FEP 416 (9th cir. 1974).

Gilbert v. General Electric Company, (CA-4, 1975), 519 F.2d 661, reversed 429 U.S. 125 (1976).

Gray v. Greyhound Lines-EAST, (CA D.C., 1976), 545 F.2d 169.

Grayson v. The Wickes Corporation, (CA-7, 1979), 607 F.2d 1194.

Griggs v. Duke Power Company, 401 U.S. 424 (1971).

Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th cir. 1974).

Gunther v. County of Washington, 452 U.S. 161 (1981).

Guardian Association v. Civil Service Commission of the State of New York, 23 FEP 909 (2nd. cir. 1980).

Gurmankin v. Costanzo, 556 F.2d 184 (3rd. cir. 1977),

Gurmankin v. Costanzo, 626 F.2d 118 (3rd. cir. 1980).

Hagans v. Andrus, (CA-9, 1981), 25 EPD 31,585, cert. denied, (U.S. Sup. Ct., 1981), 102 SCT 313.

Harkless v. Sweeney Independent School District, 388 F. Supp. 738 (SD Tex., 1975).

Hazelwood School District v. United States, 433 U.S. 799 (1977),

Hein v. Oregan College of Education, (CA-9, 1983), 32 EPD 33,895.

Hodgin v. Jefferson, (DC MD, 1978), 447 F. Supp. 804.

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

International Union of Electrical Radio and Machine Workers v. Westinghouse Electrical Corp., 631 F.2d 1094 (3rd. cir. 1980).

Jackson v. Wheatley School District No. 28, 430 F.2d 1359 (8th cir. 1970).

Jacobs v. Martin Sweet Company, (CA-6, 1977), 550 F.2d 364, cert. denied (U.S. Sup. Ct., 1977), 431 U.S. 917.

Jones v. Alfred H. Mayer, 392 U.S. 409 (1968).

Keely v. West Baton Rouge Parish School Board, 517 F.2d 194 (5th cir. 1975).

Kiser Aluminum and Chemical Corporation v. Weber, 443 U.S. 153 (1979).

Kohn v. Royal, Koegal and Wells, 59 FRD 515, 5 FEP 725, (SD, NY, 1973).

Local 189, United Papermakers and Paper Workers v. United States, 416 F.2d 980 (5th cir. 1969).

Lee v. Macon County Board of Education (Muscle Schoals), 453 F.2d 1104 (5th cir. 1977).

Lee v. Russell County Board of Education, 563 F.2d 1159 (5th cir. 1977).

Lee v. Walker, 594 F.2d 156 (5th cir. 1979).

Long v. Ford Motor Company, 496 F.2d 500 (6th cir. 1974).

McDonnell v. Santa Fe Trail Transportation Company, 427 U.S. 273 (1976).

McDonald Douglas Corp. v. Green, 411 U.S. 792 (1973).

Miller v. Bank of America, (CA-9, 1979), 600 F.2d 211.

Miller v. International Paper Company, 408 F.2d 283 (5th cir. 1969).

Miranda v. Clothing Workers, Local 208, 8 EDP 9601 (DC, NJ, 1974).

Mitchell v. Board of Trustees of Pickens County School District, 599 F.2d 182 (4th cir. 1979).

Mizell v. North Broward Hospital District, 427 F.2d 468 (5th cir. 1970).

Molthan v. Temple University, (DC ED PA, 1977), 442 F. Supp. 448.

Morgan v. O'Bryant, (CA-1, 1982), 28 EPD 32,544, cert. denied U.S. Sup. Ct., 1982.

Morrow v. Crisler, 479 F.2d 960 (5th cir. 1973).

Morton v. Charles County Board of Education, 423 U.S. 1034 (1975).

Naraine v. Western Electric Corp., Inc., 507 F.2d 590 (8th cir. 1975).

Nashville Gas Company v. Salty, 434 U.S. 136 (1977).

Oatis v. Crown Zellarback Corp., 398 F.2d 496 (5th cir. 1968).

Occidental Life Insurance Company of California v. EEOC, 432 U.S. 355 (1977).

Ocha v. American Oil Company, (DC, SD, TX, 1972), 388 F. Supp. 914.

Page v. Curtis-Wright Corp., 332 F. Supp. 1060 (D.N.J. 1971).

Palmer v. Ticcione, (CA-2, 1978), 576 F.2d 459, cert. denied 440 U.S. 945 (1979).

Penn v. Stumpt, 308 F. Supp. 1238 (ND, CA, 1970).

Perdue v. Ray Stone Transfer Corp., (CA-4, 1982), 690 F.2d 1091.

Personnel Administrators of Massachusetts v. Feeney, 442 U.S. 256 (1979).

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

Polstorff v. Fletcher, 452 F. Supp. 17 (ND Ala., 1978).

Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (ED VA., 1968).

Rebb v. Economic Opportunity Atlanta, Inc., (CA-5, 1975), 516 F.2d 924.

Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

Ricks v. Delaware State College, (U.S. Sup. Ct., 1980), 24 EPD 31,392.

Rios v. Reynolds Metal Company, (CA-5, 1972), 467 F.2d 54.

Roman v. ESB, Inc., (CA-4, 1976), 500 F.2d 1343.

Shultz v. Wheaton Glass Company, (CA-3, 1970), 421 F.2d 259.

Singleton v. Jackson Municipal School District, 419 F.2d 1211 (5th cir. 1970).

State of Connecticut v. Teal, (U.S. Sup. Ct., 1982), affirmed and remanded (CA-2), 457 U.S. 440, 645 F.2d 133.

Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106, (1st. cir. 1979), 444 U.S. 1045 (1980).

Texas Department of Community Affairs v. Burdine, 101 U.S. 1089 (1981).

Torres v. Clayton, (DC SD CA, 1978), 18 EPD 8936.

TransWorld Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

United Airlines, Inc. v. Evans, 431 U.S. 533 (1977).

United States v. Board of Education of the Garfield Heights City School District, (CA-6, 1978), 581 F.2d 791.

United States v. Georgia Power Company, 474 F.2d 906 (1973).

United States v. Jefferson County Board of Education, 380 F.2d 385 (5th cir. 1970).

United States v. North Carolina, (CA-4, 1978), 587 F.2d 656, cert. denied 442 U.S. 909 (1979).

United States v. South Carolina, National Education Association v. South Carolina, 445 F. Supp. 1094 (D SC, 1977), affirmed 434 U.S. 1029 (1978).

Washington v. Davis, 426 U.S. 229 (1976).

Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th cir. 1970), cert. denied 400 U.S. 911 (1970).

Western Electric Company, Inc. v. Sterm, (CA-3, 1976), cert. denied (U.S. Sup. Ct. 1979), 12 EPD 11,233.

Wetzel v. Liberty Mutual Insurance Company, (CA-3, 1975), 508 F.2d 239, cert. denied (U.S. Sup. Ct. 1975), 421 U.S. 1010.

Wieman v. Undergroff, 344 U.S. 183 (1952).

Williams v. General Motors Corp., U.S.C.A. 5th, no. 79-2858 and 80-7192; 14 September 1981.

Zipes v. TransWorld Airlines, Inc., (U.S. Sup. Ct. 1982), 28 EPD 132,432.

2. EEOC Decision

72-1089, CCH Employment Practices Guide, 6382 (1982).

3. Other Primary Sources

Age Discrimination Act of 1967, 29 U.S.C. Section 621-634, As amended by P.L. 93-259, 88 stat. 74, effective 1 May 1974; P.L. 95-256, 92 stat. 189, effective 1 January 1979; P.L. 97-248, 96 stat. 190, effective 1 January 1983.

Civil Rights Act of 1866 and 1870, 42 U.S.C. 1981 and 1983.

Civil Rights Act of 1960, P.L. 86-449, 6 May 1960, 62 Stat. 86.

"Civil Rights Legislation - Message from the President," 109 Cong. Rec. 11079 (1964).

EEOC/Age Discrimination, 46 Fed. Reg. 188, 47724, 28 September 1981.

EEOC Procedural Regulations, 29 CFR 1601, Sec. 1601.70.

EEOC Sex Discrimination Guidelines, 29 CFR 1604, Appendix.

Employee Retirement Income Security Act of 1964, P.L. 94-406, 88 Stat. 829, 2 September 1974.

Equal Employment Opportunity Act of 1972, P.L. 92-313, 86 Stat. 235, 23 June 1972.

Equal Pay Act of 1963, P.L. 88-38, 77 Stat. 56 (1963).

Executive Order 8587, 5 Fed. Reg. 445 (1940).

Executive Order 8802, 6 Fed. Reg. 7183 (1943).

Executive Order 9346, 8 Fed. Reg. 7183 (1943).

Executive Order 10308, 16 Fed. Reg. 12303 (1951).

Executive Order 10479, 16 Fed. Reg. 12303 (1951).

Executive Order 10925, 18 Fed. Reg. 1977 (1961).

Executive Order 11114, 20 Fed. Reg. 6485 (1966).

Executive Order 11141, 29 Fed. Reg. 2477 (1966).

"Interpretation of Hatch Political Activities Act," Congres. Rec. 85, Part 2, Appendix p. 712.

National Labor Relations Act, 29 U.S.C. 161(e), 49 stat. 455.

National Industrial Recovery Act of 1933, Title II, 48 stat. 200.

North Carolina General Statute 95-28.1.

Pendleton Act (Civil Service Act), 22 stat. 404 (1983).

P.L. 92-261, 86 stat. 103 (1972).

Ramspeck Act, 545 stat. 1211 (1940).

Rehabilitation Act of 1973, P.L. 93-112, 87 stat. 355 (1973).

S.S.B. 3248, C 75 L 83 E1 (California) 23 August 1983.

Uniform Guidelines in Employee Selection Procedures (1978), 43 Fed. Reg. 38297 25 August 1978.

## B. Secondary Sources

### 1. Books

Anderson, Howard J. Primer of Equal Employment Opportunity. Washington, D.C.: Bureau of National Affairs, 1982.

Arvey, Richard D. Fairness in Selecting Employees. Reading, Massachusetts: Addison-Wesley Publication Co., 1979.

Bolmeicer, Edward C. The School in the Legal Structure. Cincinnati: The W.H. Anderson Company, 1973.

Bureau of National Affairs. The Equal Opportunity Act of 1972. Washington, D.C.: Bureau of National Affairs, 1973.

Cooper, George; Rabb, Harriet; and Rubin, Howard J. Fair Employment Litigation: Text and Materials for Students and Practicioners. St. Paul, Mnnesota: West Publishing Co., 1975.

Day, Virgil B.; Erwin, Frank; and Koral, Allen M., eds. A Professional and Legal Analysis of the Uniform Guidelines on Employment Selection Procedures. Berea, Ohio: American Society for Personnel Administrators, 1981.

de Toqueville, Alexis. Democracy in Education, Revised edition. New York: Alfred A. Knopf, 1945.

Eastland, Terry. Counting by Race: Equality from the Founding Fathers to Bakke and Weber. New York: Basic Books, 1979.

French, Wendell L. The Personnel Management Process: Human Resources Administration and Development. Boston: Houghton Mifflin Company, 1978.

Friberg, Robert, ed. The Manager's Guide to EEO. New York: Executive Enterprises Publishing Co., Inc., 1977.

Fullinwider, Robert K. The Reverse Discrimination Controversy: A Moral and Legal Analysis. Totowa, New Jersey: Rowman and Littlefield, 1980.

Gruefield, E.F. Promotion Practices, Policies and Affirmation Action. Ithaca, New York: Cornell University, 1975.

Harris, Bern W.; McIntyre, Kenneth E.; Littleton, Vance C., Jr.; and Long, Daniel F. Personnel Administration in Education: Leadership for Instructional Improvement. Boston: Allyn and Bacon, Inc., 1979.

Jain, Harish C. Equal Employment Issues. New York: Praeger Publishers, 1981.

Kanter, Rosabeth Moss. A Tale of "O" on Being Different in an Organization 1st ed. New York: Harper and Row, 1980.

Lester Richard Allen. Reasoning About Discrimination. Princeton, New Jersey: Princeton University Press, 1980.

Marshall, Ray. Employee Discrimination: The Impact of Legal and Administrative Remedies. New York: Praeger Publishers, 1978.

McCarthy, Martha M., and Cambron, Nelda H. Public School Law: Teachers' and Students' Rights. Boston: Allyn and Bacon, Inc., 1981.

Miner, Mary Green, and Miner, John B. Employee Selection Within the Law. Washington: Bureau of National Affairs, 1979.

Nolte, Chester M. Nolte's School Law Desk Book. West Nyack, New York: Parker Publishing Company, 1980.

Norwick, Kenneth P. Your Legal Rights: Making the Law Work for You. New York: The John Day Company, 1975.

Peres, Richard. Preventing Discrimination Complaints, A Guide for Supervisers. New York: NcGraw Hill Book Company, 1979.

Peskin, Dean B. The Building Blocks of EEO. New York: World Publishing Company, 1971.

Player, Mack A. Cases and Materials in Employment Discrimination Law. St. Paul, Minnesota: West Publishing Company, 1980.

Rosenbloom, David H. Federal Equal Employment Opportunity: Politics and Public Personnel Administration. New York: Praeger Publishers, 1977.

Schlei, Barbara Lindeman, and Grossman, Paul. Employment Discrimination Law. Washington, D.C.: The Bureau of National Affairs, 1976.

Schaeffer, Ruth C. Non-discrimination in Employment: Changing Perspective. New York: The Conference Board, 1973.

Stoddard, Cynthia. Sex Discrimination in Educational Employment: Legal Alternatives and Strategies. Holmes Beach, Florida: Learning Publications, Inc., 1981.

Stokes, Arch. The Equal Opportunity Handbook for Hotels, Restaurants, and Institutions. Boston: CBI Publishing Company, Inc., 1979.

Thorndike, E.L. Education Psychology. New York: Briefer Course, Teacher's College, 1915. Cited in Professional Psychology 5 (August 1974): 263.

United States Commission on Civil Rights. Toward an Understanding of Bakke. Clearinghouse Publication 58. Washington, D.C.: U.S. Government Printing Office, 1979.

Understanding EEO: The Supervisor's Case Book. New York: Executive Enterprises Publishing Company, 1975.

Vander-Waerdt, Lois. Affirmative Action in Higher Education: A Source Book. New York: Garland Publishers, 1982.

Women in the World: A Ford Foundation Position Paper. New York: Office of Reports, Ford Foundation, November, 1980.

Yoder, Dale and Heneman, Herbert G. (eds.). Staffing Policies and Strategies. Washington, D.C.: Bureau of National Affairs, 1979.

2. Journals, Periodicals, and Newspapers

Barth, Ilene. "Comparable Worth: Basing Pay on Skill, Not Sex." Greensboro [North Carolina] News and Record, 12 February 1984, p. E7.

Bridgman, Anne. "Comparable Worth Tested in Major Pay-Equity Suit." Education Week. 111 (28 September 1983): 16.

Bureau of National Affairs. "Trial Begins on AFSCME Title VII Charge that Washington Underpays Female Workers." Current Developments, 30 August 1983, p. A-2.

Bureau of National Affairs. "Washington State, Deleware Enact Equal Pay Laws for Public Workers." Government Employee Relations Report, 11 July 1983, p. 1423.

"Clarence Thomas: New Choice for Chairman." Ideas and Trends in Personnel, 26 February 1982, p. 62.

"Comparable Worth." Ideas and Trends in Personnel, 13 January 1984, p. 1.

"Comparable Worth, Now! Court Orders Immediate Remedy in Washington State." Personnel Manager's Report, 173 (January 1984): 7.

"Confidentiality of Faculty Files Disputed in Discrimination Suit." Legal Notes for Education, 6 (January 1984): 1.

Davis, Ann. "Comparable Worth Update." Interact, Governor's Committee on the Status of Women, October 1983, p. 2.

Education U.S.A. 21 (30 October 1978): 20.

"EEOC Issues: Age Discrimination Guidelines." Personnel Manager's Legal Report, 147 (November 1981): 3.

"EEOC's New Chairman Says Commission Will Examine Use of Statistics, Other Old Assumptions." Ideas and Trends in Personnel, 23 July 1982, pp. 141-2.

"Judge Dismisses Part of Pay Suit." Spokesman-Review, Spokane/Regional, [Spokane, WA], 3 September 1983, p. 1.

Lofton, Fred B. "Comparable Worth: The New Issue in Employment Discrimination," Bulletin, American Association of School Personnel Administrators, February, 1983, p. 5.

"Pay Bias: Legislators Admit Concern Over Ruling by Tanner." The News Tribune [Tacoma, WA], 17 September 1983, p. B3.

Peterson, D.J. "The Impact of Duke Power on Testing." Personnel, 51 (1977): 16-21.

"Retirees Still Under 70 Must Be Considered for Rehire." Ideas and Trends in Personnel, no. 59, 24 February 1984, p. 25.

"Ruling Against Washington Is a Battle Won for Equal Pay." The Herold [Everette, WA], 26 September 1983, p. A7.

Sands, Ken. "Workers Sue State for Comparable Worth Pay." The Spokane/[Washington] Regional, 20 August, 1983, p. B1.

Splitt, David A. "School Law." The Executive Educator, 12 (July 1983): 8.

Tewkesbury, Don. "Judge Says Women Will Win Lawsuit If Pay Bias Exists." Seattle [Washington] Post-Intelligencer, 31 August 1983, p. A3.

"Washington State in Court on Women's Pay." The New York Times, 1 September 1983, p. A25.

3. Legal Research Aides

1983 Deskbook Encyclopedia of American School Law. Rosemount, Minnesota: Information Research Systems, 1983.

1984 Deskbook Encyclopedia of American School Law. Rosemount, Minnesota: Information Research Systems, 1983.

Human Resources Management: Equal Employment Opportunity. Chicago: Commerce Clearing House, Inc., 1981.

The Supervisor's EEO Handbook: A Guide to Federal Antidiscrimination Laws and Regulations. New York: Executive Enterprises Publishing Company, 1973.

West's Education Law Reporter, 12:3. St. Paul, Minnesota: West Publishing Company, 24 March 1983.

West's Education Law Reporter, 8:4. St. Paul, Minnesota: West Publishing Company, 22 September 1983.