Equal Employment Opportunities:
Case Law Overview†

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I. THE SOURCES OF LEGAL PROTECTION OF EQUAL EMPLOYMENT OPPORTUNITY

A. The Civil Rights Act of 1866

Following the Civil War and the passage of the Thirteenth and Fourteenth Amendments to the Constitution, Congress sought to specify its intent that the newly freed blacks be accorded full and complete equality under law with white citizens of the United States. Through a series of Civil Rights Acts in 1866 and subsequent years, Congress established the principle of equal rights and equal protection for all citizens of the United States. Although the initial interpretation of these Acts construed them to apply only to governmental discrimination, courts have since held that the Civil Rights Act of 1866 affords a remedy for racial discrimination by a private employer. Recently, the Supreme Court held that this Act proscribes discrimination because of race against whites as well as blacks. At least one court has held that discrimination against an employee because of his alien status and the foreign residency of his family is actionable under the 1866 Act. While the courts are split on whether the Act prohibits discrimination against Spanish-surnamed Americans, it clearly does not bar discrimination by a private employer on the basis of sex, religion, or

national origin. The Supreme Court has held that a citizenship requirement for employment does not violate Title VII.

B. Title VII of the Civil Rights Act of 1964

Title VII makes it unlawful for covered employers to discriminate with respect to any condition of employment, or against any applicant for employment, because of race, color, sex, religion, or national origin, except where religion, sex, or national origin is a bona fide occupational qualification which is reasonably necessary to the conduct of a particular business. Title VII applies to all employers who employ 15 or more employees (including executives and supervisors) for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

The vast majority of employment discrimination claims are brought under Title VII, which is administered by a five-member Equal Employment Opportunity Commission in Washington, D.C., and regional and district offices throughout the country.

C. The Federal Age Discrimination in Employment Act of 1967

This Act makes it unlawful to discriminate on the basis of age against employees, or applicants for employment, who are between 40 and 65 years of age. The Act, which is administered by the Wage-Hour Administrator of the U.S. Department of Labor, applies to all employers who employ 20 or more employees (including executives and supervisors) for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

D. The Equal Pay Act

This Act makes it unlawful to pay employees of one sex at a different rate than those of the other sex for equal work on jobs which require equal skill, effort and responsibility under similar working conditions in the same establishment. The Equal Pay Act is administered by the Wage-Hour Administrator of the U.S. Department of Labor and applies to all employ-
ers and employees covered by the minimum wage and overtime provisions of the Fair Labor Standards Act. Moreover, the Equal Pay Act protects employees of covered employers even though such employees may be exempt from overtime pay requirements as executive, professional, or administrative employees.

E. Executive Orders 11246 & 11141: Nondiscrimination Under Federal Government Contracts

Executive Order 11246 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin by all employers having contracts or subcontracts with the U.S. Government in amounts over $10,000. In addition, covered contractors and subcontracts have an affirmative obligation to promote equal employment opportunity. The Executive Order, which imposes requirements similar to — although in some instances, more severe than — those imposed by Title VII and the Equal Pay Act, is enforced by the Office of Federal Contract Compliance Programs in Washington, D.C., and, if applicable, applies regardless of the number of employees on the payroll of the employer. Executive Order 11141, administered by federal agency and department heads, prohibits federal contractors and subcontractors from discriminating against persons because of age except upon the basis of bona fide occupational qualification, retirement plan, or statutory requirement.

F. The National Labor Relations Act

Although primarily designed and applied to protect employees' rights to engage in, or refrain from, self-organization and union-type activities, the Act has been interpreted to prohibit discrimination in certain circumstances against employees because of race, alienage or national origin. The Act is administered and enforced by the National Labor Relations Board, headquartered in Washington, D.C., with regional offices throughout the United States.

G. The Vocational Rehabilitation Act of 1973

This Act requires that any contractor who holds contracts with the fed-

eral government in excess of $2,500, or any subcontractor holding subcontracts in excess of $2,500 entered into with a prime contractor covered by the Act, take affirmative action to employ and advance handicapped individuals. A written affirmative action program must be developed by employers who hold federal contracts or subcontracts of $50,000 or more and who have 50 or more employees.

H. The Vietnam Era Veterans Readjustment Act of 1974

This Act requires employers who hold federal contracts or subcontracts in excess of $10,000 to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era. Written affirmative action programs must be developed by employers who hold federal contracts or subcontracts of $50,000 or more and who have 50 or more employees. The Office of Federal Contract Compliance Programs enforces this Act's affirmative action requirements.

I. State Fair Employment Practices Laws

Forty-six states, the District of Columbia, and Puerto Rico have their own statutes prohibiting discrimination in employment. Most of these statutes cover sex discrimination, as well as discrimination based on race, color, religion, and national origin. In addition, 35 states have statutes prohibiting age discrimination. These laws are generally administered by state commissions, and may impose additional requirements of record-keeping, reporting, and administrative compliance. In addition to these state statutes, certain local agencies have been established to combat employment discrimination. Some of these local agencies also have enforcement powers within their municipal or other geographic jurisdiction.

23. E.g., Philadelphia, Pittsburgh, St. Louis, and New York City.
II. EMPLOYMENT PRACTICES, POLICIES, AND PLANT RULES AFFECTED BY THE EEO OBLIGATION

A. Advertising, Recruiting, Referral, Preemployment Inquiries, and Hiring Standards

1. Advertising for Job Applicants. Under Title VII, an employer is prohibited from printing or publishing job notices or advertisements indicating any preference or limitation based on race, color, religion, sex, or national origin except where religion, sex, or national origin is a bona fide occupational qualification. Obviously in conflict with the Title VII prohibition would be advertisements for “colored” or “white” help or ads published in racially or sexually segregated listings.

Ads dealing with common job categories such as “salesman,” “pressman,” “waitress,” or “waiter” may be suspect under the above prohibition as well, particularly if the male-oriented job title advertisements are placed in a “help wanted male” column and the female-oriented job title advertisements are placed in a “help wanted female” column of a newspaper or other publication. Thus, in one case a violation of Title VII was found for an advertisement requesting a “stewardess” where the ad was placed in the “help wanted female” column of a newspaper. The violation was found even though the man challenging the advertisement had not applied for a job with the employer (the court ruled that he had been inhibited from applying for a job because the type of advertisement challenged was an effective deterrent to men in the industry, particularly in view of the man’s demonstrated inability to obtain a steward-stewardess job with another airline which utilized a similar advertisement) and even though the employer had included in the advertisement the slogan, “An Equal Opportunity Employer.” The court noted that an injunction restraining publication of the advertisement could be obtained to remedy the violations found.

To avoid the risk of illegal advertising under these Title VII standards, the use of neutral job titles, such as “salesperson” for “salesman,” should be considered. Alternatively, if non-neutral job titles, “pressman,” “waiter,” “waitress,” and the like are utilized in ads, the designation “M/W,” prominently defined in the ads as meaning “men or women,” should follow each job listing. Another way to promote nondiscriminatory advertising is to actively and consistently place advertisements for job applicants in newspapers and periodicals published by minority groups or with high minority-group circulation, always using the phrase “An Equal Opportunity Employer.” Furthermore, since the Supreme Court has determined that it is permissible for states and municipalities to ban separate

columns in newspapers for help-wanted male and help-wanted female advertising where such advertising discriminates by reason of sex because of the absence of a bona fide occupational qualification based on sex, extreme caution should be exercised to insure that job advertising is carried in publications which do not violate such a ban.\[26\]

The Age Discrimination in Employment Act prohibits an employer from printing or publishing any notice or advertisement relating to employment which indicates any preference, limitation, specification, or discrimination against persons between the ages of 40-65, unless age is a bona fide occupational qualification or unless the differentiation is based on reasonable factors other than age.\[27\] Executive Order 11141 specifies that contractors and subcontractors of the federal government in solicitations or advertisements for employees to work on government contracts shall not establish maximum age limits for such work, unless the maximum age limits are based on bona fide occupational qualifications, retirement plans, or other statutory requirements.

Under the Age Discrimination in Employment Act, help-wanted ads discriminating in favor of persons between the ages of 40-65 are not prohibited, but advertisements tending to discriminate against persons between those ages are unlawful. The following specifications in advertisements have been ruled to be unlawful under the Age Discrimination in Employment Act:\[28\]

1. "Age 25 to 35"
2. "Young"
3. "Boy"
4. "Girl"
5. "College Student"
6. "Recent College Graduate"
7. "Age 40 to 50"
8. "Age over 50"
9. "Age over 65"
10. "Retired Person"
11. "Supplement your pension"

The following specifications in advertisements have been determined to be lawful under the Age Discrimination in Employment Act:\[29\]

\[29\] 29 C.F.R. §860.92(c) (1976).
1. “College Graduate”
2. “Minimum Age less than 40”
3. “Not under 18”
4. “Not under 21”

Use of the phrase “state your age,” “date of birth,” or the like in help-wanted notices or ads is not, in itself, a violation of the statute but will be closely scrutinized to assure that its use is not for purposes proscribed by the statute.30 One way to advise that the use of such phrases is not for a prohibited purpose is to apprise job applicants of the statutory proscriptions by printing the following language in notices, advertisements, or job applications incorporating the suspect phrases: “The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 but less than 65 years of age.”31

As part of affirmative action programs instituted pursuant to the requirements of Executive Order 11246, as amended, government contractors and subcontractors are obligated to do the following in connection with all advertisements.32

1. State that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin;
2. Use display or other advertising which includes an appropriate insignia prescribed by the Director of the Office of Federal Contract Compliance;
3. A single advertisement which is grouped with other ads must clearly state that all employers in the group assure qualified applicants equal employment opportunity;
4. Use the phrase “An Equal Opportunity Employer.”

Many states also regulate employment advertising.33 The New Jersey Employment Advertising Guidelines34 are an example of a comprehensive state scheme which prohibits employers, unions, employment agencies, and newspapers from printing, publishing, or circulating any advertisement which expresses “overtly or subtly, directly or indirectly” any limitation based on “race, creed, color, national origin, ancestry, age, marital

30. Id.
31. 29 C.F.R. §860.95(a) (1976).
32. 29 C.F.R. §60-1.41 (1976).
status, or sex” in the absence of a bona fide occupational qualification. This scheme not only prohibits the use of such job titles such as “salesman” or “pressman” without a designation that the job vacancy can be filled by a man or woman but also proscribes advertisements specifying “single” or “married” applicants.

2. Recruiting and Referral of Job Applicants. Employer obligations with respect to recruiting and referral of job applicants have been developed under Title VII and Executive Order 11246, as amended. These obligations have been derived from the remedy power of the courts under Title VII and from the concept of goals and timetables required by affirmative action programs under the Executive Order.

Although Title VII specifically provides that no employer shall be required to grant preferential treatment to any individual or to any group because of race, color, religion, sex, or national origin because 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, some courts have ruled that, to correct the effects of past discriminatory employment practices, quotas — or preferential treatment of minority groups — can be ordered to remedy the present effects of past discrimination. Similarly, adherence to goals and timetables establishing minority group participation in an employer’s work force specified at fixed percentages under Executive Order affirmative action programs has been held not to be proscribed preferential treatment, although some recent lower court cases have questioned this practice.

Recruitment procedures should be standardized, objective and centrally determined and reviewed. Allowing individual department heads to publicize and determine how to recruit for specific job vacancies within their departments, as well as to decide subjectively, without review by higher authority, whether an applicant’s qualifications are satisfactory has been held to be violative of Title VII for the reason that unstandardized and subjective recruiting procedures lend themselves to arbitrary and discriminatory action.

Moreover, recruiting and referral sources utilized by an employer must

recruit and refer job applicants in a nondiscriminatory fashion, and it is unlawful for an employer to knowingly utilize a referral source which discriminates or employs discriminatory screening or testing devices in referring prospective employees.

To avoid overreliance on referrals from recruiting sources which may not be adhering to the equal employment opportunity obligations imposed on them, an employer should actively recruit applicants from minority group referral sources and from educational institutions with high minority group enrollment. In this way, an employer's overall recruitment policy should achieve a nondiscriminatory effect.

Methods commonly utilized or frequently recommended to increase recruitment of minority groups are:

1. Use of minority groups, e.g., black, Spanish-speaking, and female recruiters;
2. Use of employment agencies specializing in referral of minority groups;
3. Job advertising in publications aimed at minority group communities;
4. Participation in "job fairs" and similar efforts sponsored by minority groups;
5. Requesting referrals from the Urban League, NAACP, from ghetto job centers, League of United Latin American Citizens, NOW, welfare rights organizations, Women's Equity Action League, Professional Women's Careers, Negro women's sororities; service groups and local community organizations and leaders;
6. Actively recruiting at high schools and colleges with substantial minority group or female enrollments; recruiting at all educational institutions should incorporate special efforts to reach minorities and women;
7. Encouraging minority group employees to refer friends and relatives for job openings;
8. Formal briefing sessions on company premises with, and plant tours for, minority group organizations;
9. Special employment programs for minorities or women, including summer jobs for underprivileged students, and the like;
10. Recruiting brochures should picture work situations which include minority groups and women.

The use of such methods to improve minority group recruiting and referral is particularly important where an employer's past recruiting practices have resulted in a substantially all-white or all-male workforce. Thus, where an employer with a predominantly white supervisory force resulting from past discriminatory recruiting practices has relied primarily on word-of-mouth referrals by existing employees to fill job vacancies, the courts
have not hesitated to find violations of Title VII. Similarly, even where one segment of an employer’s workforce — production employees, for example — has a substantial minority group representation, an employer may still violate Title VII and be required to utilize other referral sources if recruiting for segregated segments of his workforce — e.g., clerical and managerial segments — is confined to word-of-mouth referrals by existing employees. On the other hand, word-of-mouth recruiting is not prohibited if there is no pattern of segregation or past discrimination.

The practice of placing job applications which are not renewed within two weeks of their initial tender as the last ones to be considered is also suspect when an employer relies heavily on referrals by friends and relatives of current employees in an all-white workforce. Such a practice tends to create a priority for those familiar with the practice, who are most likely to be friends and relatives of current employees.

The Vocational Rehabilitation Act of 1973 requires any contractor who enters into a contract in excess of $2,500 with the federal government to “take affirmative action to employ and advance in employment qualified handicapped individuals . . .”. Subcontractors with contracts in excess of $2,500 must also comply with this requirement. This affirmative action obligation entails, for example, active recruitment of and advertising for handicapped job applicants, filing data with the Department of Labor pertaining to employment practices with respect to the handicapped, establishment and publication of procedures and guidelines for encouraging employment of the handicapped, internal communication about the employer’s obligation with respect to the handicapped, and the enlisting of assistance and support from schools, agencies and organizations which deal with the handicapped. Under regulations issued pursuant to the Vietnam Era Veteran’s Readjustment Assistance Act of 1974, federal contractors and subcontractors are subject to the same affirmative action obligation with respect to disabled veterans and veterans of the Vietnam era.

3. Preemployment Inquiries. Although Title VII does not expressly prohibit preemployment inquiries concerning race, religion, sex, color, or national origin, the EEOC has taken the position that it will regard such


42. Lea v. Cone Mills, 301 F. Supp. 97 (M.D.N.C. 1969), aff’d in relevant part, 438 F.2d 86 (4th Cir. 1971).


45. 41 C.F.R. §§60-250.1 to .54 (1977).
inquiries with disfavor except where sex, religion, or national origin is a
bona fide occupational qualification. 46

Inquiries into an applicant's arrest or conviction record are unlawful
absent a showing of business necessity in the particular case, because
certain minority groups experience higher rates of arrests and convictions. 47
It would be lawful, however, to inquire into an applicant's conviction re-
cord when the job vacancy involved is security sensitive and it is shown
that persons with high conviction rates were poor risks for such jobs. 48

It has also been held discriminatory to require job applicants to produce
proof of honorable discharge from the armed services because minorities
receive a higher proportion of general and undesirable discharges. 49
Using similar reasoning, the EEOC has determined that inquiring into job appli-
cants' financial condition discriminates against minorities since more non-
whites than whites are below the poverty level. 50 Moreover, the EEOC has
held that requesting an applicant to state the names of relatives employed
by the employer may be evidence of discrimination if hiring preference is
given to relatives of employees, and minorities are underrepresented in the
employer's workforce. 51 On the other hand, the EEOC allows inquiries as
to “male,” “female,” “Mr.,” “Mrs.,” or “Miss” provided the inquiry is
made in good faith. 52

Under the Age Discrimination in Employment Act, it has been deter-
mined that inquiries into an applicant’s age are not, of themselves, prohib-
ited, unless careful scrutiny shows that an inquiry indicates, directly or
indirectly a preference, limitation, specification, or discrimination based
on age. 53 Similarly, it is not unlawful to require an applicant to “state age”
or “date of birth” on an employment application provided that the inquiry
masks no discriminatory purpose. The absence of such a purpose can be
shown by stating on the application form:

The Age Discrimination in Employment Act prohibits discrimina-
tion on the basis of age with respect to individuals who are at least
40 but less than 65 years of age. 54

46. 29 C.F.R. §1604.7 (1976). See also draft of proposed EEOC Guidelines for Preemploy-
48. Richardson v. Hotel Corp. of America, 468 F.2d 951 (5th Cir. 1972), affirming
50. EEOC Dec. No. 74-02, 2 Empl. Prac. Guide (CCH EEOC Decs.) ¶ 6386 (1973); EEOC
52. 29 C.F.R. §1604.7 (1976).
53. 29 C.F.R. §860.95(a) (1976).
54. Id.
Many states have issued detailed guidelines on preemployment inquiries. Generally prohibited are the following types of inquiries:

1. Change of name by court order or otherwise;
2. Maiden name of applicant's spouse;
3. Previous foreign addresses;
4. Birthplace of applicant, applicant's parents;
5. Applicant's religion;
6. Applicant's complexion, color of skin;
7. Applicant's citizenship or country of national origin;
8. How applicant acquired ability to read, write, or speak a foreign language;
9. Applicant's foreign military service;
10. Name and address of relative to be notified in case of emergency;
11. Applicant's club or organization membership, except those which do not reveal applicant's race, color, national origin, religion, or sex;
12. An applicant's arrest record, and in many states, the conviction record as well;
13. Some states prohibit inquiries into an applicant's height in the absence of a bona fide occupational qualification.

Generally permitted are the following types of inquiries:

1. Whether applicant has ever worked for employer under another name;
2. The language an applicant speaks or reads;
3. Educational background of applicant;
4. Applicant's work experience;
5. Applicant's U.S. military experience;
6. Names and addresses of applicant's parents if in the U.S.A.;
7. Name of person (not relative) to notify in case of emergency;
8. Names of character references;
9. Whether an applicant is a U.S. citizen, and if not, whether applicant has a right to remain in the U.S. to work;
10. Applicant's place of residence;
11. Applicant's length of residence in state;
12. Names of persons with whom an applicant resides;
13. Whether applicant's age exceeds the minimum age requirement of the state's child labor laws.

In compliance reviews, agencies enforcing the Affirmative Action Guide-

lines of the Office of Federal Contract Compliance Programs may demand that preemployment inquiries similar to those generally prohibited by various states be expunged from employment policies as a part of an employer's affirmative action policy.\textsuperscript{54}

4. Hiring Standards. Affirmative recruiting efforts which substantially increase the flow of minority group applicants will not achieve compliance with the substantive equal employment opportunity obligation if, because of unreasonably high standards for hire, few applicants are hired. An employer, therefore, must be prepared to demonstrate that its hiring standards do not automatically screen out minority or female applicants based on their speech, dress, or work habits unless the hiring standards are demonstrably job related.

Most requirements for nondiscriminatory hiring standards have been developed under Title VII and the Age Discrimination in Employment Act. Most important is the mandate that hiring standards be fixed or reasonably objective. Unstandardized and subjective hiring procedures which vest broad hiring discretion in department heads or individual supervisors give rise to an inference of discriminatory conduct.\textsuperscript{57} What follows are some of the most frequently encountered hiring criteria and the pitfalls, if any, connected with their continued use.

a. Police Records—Arrests and Convictions. Preemployment inquiries into arrests and convictions are unlawful, absent a showing of business necessity. Many states have flatly prohibited preemployment inquiries into an applicant’s arrest record. Similarly, the refusal to hire a job applicant because of his arrest record, absent a showing of a reasonable business purpose or a job whose duties require an arrest-free record, would violate Title VII.\textsuperscript{58} Absent a showing of business necessity, the same prohibition would also apply to a hiring practice which allows rejection of an applicant based on his conviction record,\textsuperscript{49} but an employer may discharge an employee who has falsified his application in regard to his arrest record.\textsuperscript{56}

b. High School or College Requirement.\textsuperscript{60} In the absence of a showing

\textsuperscript{54} 41 C.F.R. § 60-60.9 Part B(V)(A)(3) (1976).
\textsuperscript{56} Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975), 4 FEP Cases 718 (1972).
\textsuperscript{50} Jimerson v. Kisco Co., Inc., 542 F.2d 1008 (8th Cir. 1976); McBride v. Delta Airlines, 551 F.2d 113 (6th Cir. 1977).
that the duties of the job which an applicant seeks require a high school education for successful performance, a requirement that the applicant possess a high school diploma is in violation of Title VII. The same may hold true for a college-degree requirement. A mere desire to upgrade overall workforce quality by such an educational requirement or preference is not enough to justify such a requirement or preference.

c. Hiring Standards That Discriminate Against Women — No Marriage Rules, Pregnancy, Children. A hiring standard that requires exclusion of women because they are married when married male applicants for the same job are hired violates the sex discrimination prohibition of Title VII. Similarly, the EEOC has determined that a refusal to hire a woman solely because she is pregnant will also be found to violate the sex discrimination prohibition. Moreover, an employer may not, absent a showing that conflicting family obligations are demonstrably more relevant to job performance for a woman than for a man, exclude women with preschool-age children from employment when no such restriction is applied to men. Finally, the EEOC has ruled that a refusal to hire a woman solely because she is an unwed mother violates Title VII because (1) blacks as a group incur higher rates of illegitimacy than do whites, and (2) there is no evidence that unwed fathers are similarly excluded from employment.

d. Applicant’s Participation in Illegal Activities. Where an applicant has participated in civil rights demonstrations against an employer, which consist of illegally blocking access to the employer’s plant, that employer may lawfully refuse to hire him, provided that the employer’s reliance on the applicant’s illegal conduct is not a pretext for engaging in prohibited discrimination.

e. Preference for Applicants who are Relatives of Current Employees. Restricting hiring to relatives of current employees or to employees who had formerly been on the payroll can violate Title VII, if minority groups are poorly represented in an employer’s workforce.
f. Minimum Height and Weight Requirements. Rigid adherence to minimum height and weight requirements often has a discriminatory effect against women and Spanish-surnamed Americans. Where such an effect can be shown, the standards will be held to violate Title VII, absent a showing that the standard falls within the bona fide occupational qualification (BFOQ) exception of §703(e). Recently the Supreme Court held that minimum height and weight requirements were not BFOQ’s for a position as a prison guard except where, because of the violent physical contact inherent in the job, a woman could be in more danger than a man.70

g. Rejection of Applicants Because of Poor Credit Records. In the absence of a business necessity requiring employees to be good credit risks, it has been held that, because blacks have poorer credit records in proportion to their representation in the population than do whites, a refusal to hire on the basis of a poor credit record is discriminatory.71

h. Differential Pay Rates for Newly Hired Employees. Differentials in pay rates for newly-hired employees will not violate the equal pay requirements of the Fair Labor Standards Act as long as the factors determining the rate to be paid each employee are applied equally to men and women. It is, however, unlawful to pay men at the highest rate of an entry job rate range if no factor other than sex accounts for the differential. Likewise, paying a newly-hired woman less than the rate paid the man whom she replaces, even where there may be no male employees in the establishment who are currently paid a higher rate for the same work, violates the equal pay provisions if no factor other than sex accounts for the rate assigned to the woman.72

i. Hiring Standards Based on Age. An employer cannot refuse to hire an individual between the ages of 40 and 65 because of that applicant’s age unless age is a BFOQ for the particular job73 applied for. Nor can such a refusal to hire be justified by the requirements of any benefit program.74 It is also unlawful for an employer to refuse to hire older persons solely because they do not receive social security benefits because such a policy discriminates against those within the protected age group.75 However,


72. 29 C.F.R. §§800.114(c), 800.115 (1976).


when a job applicant is unwilling to accept the number or schedule of hours requested by an employer because he does not desire to lose his social security benefits, the refusal to hire such an applicant will not constitute a violation of the Age Discrimination in Employment Act.\textsuperscript{74}

j. Hiring Standards Relating to Religion. Under Title VII, an employer may not refuse to hire because of an applicant's religion, which is defined to include all aspects of religious observance and practice as well as belief.\textsuperscript{77} An employer has the burden of proof of showing that any refusal to hire an applicant because of his religion occurred because the employer was unable to "reasonably accommodate" his requirements to the prospective employee's religious observances without undue hardship to his business. Undue hardship in this context has been defined as meaning the unavailability of any other employee to perform the job for which the applicant would be otherwise qualified during the time when the applicant was required to be absent for religious reasons.\textsuperscript{78}

Guidelines issued by the OFCC pursuant to Executive Order 11246, as amended, also require affirmative efforts to provide equal employment opportunities to members of all religious groups and, where necessary, an accommodation between the employer's requirements and the religious beliefs of an applicant.

It would be an "undue hardship," though, for an employer to be required to assign more senior employees to work an undesirable shift in order to accommodate the religious beliefs of a less senior employee in violation of a collective bargaining agreement.\textsuperscript{79}

k. Hiring Standards Based on Citizenship. Although Title VII does not prohibit discrimination based on citizenship, as opposed to national origin,\textsuperscript{80} the Civil Rights Act of 1866 has been held to protect aliens from invidious discrimination.\textsuperscript{81} Thus, in the absence of a bona fide business reason for refusing employment to aliens based on such considerations as the necessity for the aliens to possess work permits or permission to remain in this country, a refusal to hire based on citizenship alone may be held a violation of the Civil Rights Act of 1866.

l. Hiring Standards Representing Avoidance of Burdensome Obligations. An employer may not refuse to hire an individual because it may have to provide separate facilities (e.g., additional rest rooms for men

\textsuperscript{74} 29 C.F.R. §860.104(a)(2) (1976).
\textsuperscript{79} Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974).
and women) unless the expense is unreasonable. Neither may an employer refuse to hire a woman because the requirements of state law restrict the number of hours a woman may lawfully work or the amount of weight a woman may handle or require that certain benefits be paid to members of one sex.

m. Hiring Standards Based on Performance Reports of Other Employers. If a performance report of the previous employer of a job applicant is itself due to prohibited discrimination, a refusal to hire the applicant based solely on that report is unlawful.

B. Testing

1. Regulatory Guidelines. The utilization of tests as a method for screening job applicants and for determining employee promotion qualifications is a well-established employer practice. Because the results of these tests may significantly affect management's decision to hire a job applicant or approve an employee's promotion, and since the testing, grading, and interpretation of test results are entirely under the control of the employer, it is important that all elements of testing discrimination due to race, color, religion, sex, or national origin be eliminated.

Title VII expressly approves the use of testing by employers as a basis for making employment decisions, provided that neither the tests themselves nor their administration results in forbidden discrimination. Thus, Title VII provides:

[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin.

To promote the development and use of nondiscriminatory tests, the EEOC issued first in 1966 and then again in 1970, "Guidelines on Employment Selection Procedures" which enumerate the duties and obligations placed on the employer in administering tests.

Similarly, under Executive Order 11246, as amended, the office of Federal Contract Compliance Programs has issued guidelines on testing which closely parallel, but do not duplicate, the EEOC's guidelines.

In July 1976, the OFCC and the Civil Service Commission, under the auspices of the Equal Employment Coordinating Council, published in the *Federal Register* new uniform federal regulations intended to govern the use of tests under Title VII and Executive Order 11246 and to replace the existing Guidelines. However, due to disagreements within the federal agencies, the EEOC has announced its intention to continue applying its 1970 Guidelines as the applicable standards under Title VII.

The guidelines were adopted for use by other federal regulatory agencies involved in enforcement of equal employment opportunity laws. The Equal Employment Coordinating Counsel is developing new uniform guidelines.

The basic thrust of the Guidelines is to permit the use of a test or other selection device which has the effect of excluding significantly larger numbers of minority groups or females than whites or males from employment or advancement only if the test or selection device has been shown to be a valid predictor of job performance and if alternative hiring, promotion or screening practices which are equally valid are unavailable.

Under the Guidelines, a test is broadly defined as any standardized or formal measure used as a basis for any employment decision. Both sets of Guidelines require that selection techniques other than tests which do not use scores to measure performance, such as interviews, be “validated” by the use of sophisticated statistical methods if different rates of applicant rejection exist for various minority and non-minority groups or if there are disproportionate representations of minority and non-minority groups in the workforce.

Upon a showing that a test operates to exclude more minorities or women than whites or men from employment, the burden of proof is on the test’s user to substantiate the business necessity of the test by showing that its requirements are “job related” — that the test reliably predicts which applicants possess the reasonably necessary job skills and traits to successfully perform the job.

Evidence of a test’s validity should consist of empirical data showing that the tests sufficiently predict and measure those skills and aptitudes necessary for the particular job. This evidence should be based on studies employing generally accepted procedures for determining validity, such as those described in “Standards for Educational and Psychological Tests and Manuals” in the Guidelines.

87. 29 C.F.R. §1607.3 (1976).
89. 29 C.F.R. §1607.4 (1976).
There are several methods recognized by professional psychologists for evaluating the validity of a test, including criterion-related validity, content validity and construct validity, and the Guidelines authorize the use of all three methods, although it states a preference for criterion-related validation. The most accurate but most impractical manner in which to conduct one of the above-cited validation studies is to administer the test to be validated to all applicants but proceed to select new employees without regard to their test performance. After an appropriate period of work experience, the job performance of employees is then evaluated and compared with individual test scores. This procedure, known as predictive validation, is one form of a criterion-related validation study.

Another principal procedure used in conducting criterion-related validation studies is "concurrent validation" by which a representative sample of current employees is rated on job performance, then tested, and their scores compared to their job ratings. Although not specifically condemned in the Guidelines, "concurrent validation" is inadequate where (a) there were few, if any, minority group employees in the representative sample of current evaluated employees, and (b) the supervisory ratings of employees are not the result of a careful job analysis resulting in specific and objective criteria for the ratings. However, it should be emphasized that the Guidelines expressly allow the use of concurrent validation, and EEOC staff psychologists, while preferring predictive validation, accept properly conducted concurrent validation studies.

The use of supervisory ratings to measure an employee's job performance is permissible under the Guidelines. However, because of the possibility of bias inherent in subjective evaluation, supervisory performance rating techniques must be carefully developed for this type of validity study, and the ratings should be closely examined for evidence of possible bias which might affect the validity analysis.

Whenever there is a significant difference in average test scores, passing rates or selection rates among identifiable subgroups of applicants or employees, the Guidelines require that validity be established separately or "differentially" for each minority and female group so that there is assurance that the tests are operating with equal fairness for members of these subgroups. It should be noted that there is much disagreement among psychologists as to the propriety of requiring that tests be differentially validated. Where absence of sufficient numbers of minority groups or

92. 29 C.F.R. §1607.5(a) (1976).
94. 29 C.F.R. §1607.5(b)(4) (1976); Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).
women among those employed makes differential validation infeasible, the
tests in question may be regarded as provisionally valid on the basis of
other evidence until separate evidence of validity for the minority or fem-
aire group is produced.\textsuperscript{94}

It should be noted that the Guidelines also require that cut-off scores
and test standards be related to "normal expectations of proficiency" in
the workforce.\textsuperscript{97}

A test user is permitted to give a new job applicant a test based on
abilities for a job other than the one for which the candidate is being
initially selected, where the test is validly designed to measure ability at
a higher than entry job level. However, this type of testing is only permis-
sible if the new employee will probably progress to such a higher job level
within a short period of time. If job advancement is not highly predictable
or so nearly automatic, then such testing for advanced job levels is not
permitted.\textsuperscript{98}

As a practical matter, where the same test is used at different plants or
locations in a multi-plant company, the employer need only validate a test
at one location where there is no significant difference between units, jobs,
and applicant populations. Additionally, where the validation of a test is
technically impossible, such as where the size of the test group is inade-
quate, the employer is permitted to rely on validity studies conducted by
other organizations, such as those reported in test manuals and profes-
sional literature, if the jobs are comparable and there are no other major
differences.\textsuperscript{99} However, under no circumstances will the general reputation
of a test, its author, or publisher be accepted in lieu of evidence of valid-
ity.\textsuperscript{100}

Tests must also be administered and scored under controlled and stand-
ardized conditions, and copies of the tests and test manuals must be in-
cluded as part of the validation evidence.\textsuperscript{101} The work behavior or other
criteria which the tests are to measure must be clearly identifiable and
described.

The use of validated tests is not, per se, a violation of the Age Discrimi-
nation in Employment Act. However, a vital factor in the testing of em-
ployees between the ages of 40 to 65 is the "test-sophistication" or "test-
wiseness" of the individual. This refers to the supposition that younger
persons have a greater familiarity with taking tests than do older individu-
als and, consequently, where an employee test is the sole determining

\textsuperscript{94} Id. 29 C.F.R. §1607.4(b) (1976); Allen v. City of Mobile, 466 F.2d 122 (5th Cir. 1972);
1287 (5th Cir. 1973).
\textsuperscript{97} 29 C.F.R. §1607.6 (1976). EEOC v. Detroit Edison, 515 F.2d 301 (6th Cir. 1975).
\textsuperscript{98} 29 C.F.R. §1607.4(c)(1) (1976).
\textsuperscript{99} 29 C.F.R. §1607.7 (1976).
\textsuperscript{100} 29 C.F.R. §1607.5(b)(2) (1976).
\textsuperscript{101} 29 C.F.R. §1607.8 (1976).
factor in the employment selection procedure, such younger persons may have an advantage over older applicants. Hence, in such situations, the test questions and administration must be carefully scrutinized to insure that the test is for a permissible purpose and does not prejudice one age group over the other. 102

In sum, an employer must be able to demonstrate that the tests and selection procedures utilized are free from factors which would unfairly depress the scores of any minority group. In this context, the absence of a specific intent to discriminate against a minority group is irrelevant where it is shown that the effect of a selection device having no predictive value for job performance has adversely affected the employment and advancement of minority groups. 103

2. Judicial Interpretation. As noted above, the use of testing by employers as a basis for making employment decisions is expressly approved in Title VII, provided that neither the tests themselves nor their administration results in forbidden discrimination. But in Griggs v. Duke Power Co., 104 the Supreme Court held that the administration of a test which was not “demonstrably a reasonable measure of job performance” violated Title VII where its use operated to exclude disproportionately more blacks than whites from employment or advancement. The Court held that, given a test which operates to exclude more blacks than whites from employment or promotion, the burden of proof is on the employer to establish the business necessity, or job relatedness, of the test by showing that it “bear(s) a demonstrable relationship to successful performance of the jobs for which it was used.” 105

The Court added that in judging whether an employer’s tests were job-related, courts should give “great deference” to the EEOC Guidelines. In its decision in Albemarle Paper Company v. Moody, 106 the Supreme Court reaffirmed and clarified the requirement that an employer can only show the job relatedness of his tests by conducting a proper validation study. In that case, the Court measured the adequacy of the employer’s testing program by referencing specific provisions of the Guidelines. The Court did not state, however, whether it was necessary for an employer to conduct a study in strict adherence to all technical provisions of the Guidelines or whether general adherence was adequate. The degree of conformity with the Guidelines required by the Supreme Court is made more uncertain by the Court’s recent decision in Washington v. Davis. 107 Although that case was not decided under Title VII, the Court did expressly state that under

102. 29 C.F.R. §860.104(b) (1976).
104. Id.
105. Id. at 431.
106. 422 U.S. 405 (1975).
Title VII a selection procedure could be validated in any one of several ways, citing both the Guidelines and the APA Standards. Consequently, many observers believe that the Court in Washington v. Davis backed away from any inference in Albemarle that strict adherence to the Guidelines is necessary.

Although lower court decisions subsequent to Griggs have varied in the strictness of interpretation of an employer's obligations under the Guidelines, all the above-cited aspects of the Guidelines have received general judicial approval. At a minimum, the Supreme Court's decision in Albemarle confirms this approval and the Guidelines thus constitute the basic obligations of employers in their administration of employment tests.

C. Promotions, Transfers, Lines of Progression, and Seniority Systems

Title VII contains an explicit exception from the statutory prohibition against application of different terms, conditions, and privileges of employment for "bona fide" seniority systems in §703(u). Until recently the cases uniformly provided that where a seniority system had a discriminatory effect, it would be subject to broad modification and members of the affected class would be entitled to back pay awards, unless the defendant could show the system's structure was compelled by business necessity. The Supreme Court revolutionized this aspect of equal employment opportunity law in International Brotherhood of Teamsters v. United States. The Court held that the exemption for "bona fide" seniority systems is absolute, and that these systems cannot be modified on the basis that they perpetuate pre-Act discrimination. Under Teamsters, only specifically identifiable victims of post-Act discrimination are entitled to relief, which may include back pay and advanced seniority.

In order to understand the effect of Teamsters on equal employment opportunity law and seniority systems it is necessary to review the prior law. In the past, where the effect of seniority systems was discriminatory, even though neutral on its face, it could be upheld only if it could be shown that the seniority transfer systems are "necessary to the safe and efficient operation of the business." In order to understand the effect of Teamsters on equal employment opportunity law and seniority systems it is necessary to review the prior law. In the past, where the effect of seniority systems was discriminatory, even though neutral on its face, it could be upheld only if it could be shown that the seniority transfer systems are "necessary to the safe and efficient operation of the business." In order to understand the effect of Teamsters on equal employment opportunity law and seniority systems it is necessary to review the prior law. In the past, where the effect of seniority systems was discriminatory, even though neutral on its face, it could be upheld only if it could be shown that the seniority transfer systems are "necessary to the safe and efficient operation of the business." In order to understand the effect of Teamsters on equal employment opportunity law and seniority systems it is necessary to review the prior law. In the past, where the effect of seniority systems was discriminatory, even though neutral on its face, it could be upheld only if it could be shown that the seniority transfer systems are "necessary to the safe and efficient operation of the business." In order to understand the effect of Teamsters on equal employment opportunity law and seniority systems it is necessary to review the prior law. In the past, where the effect of seniority systems was discriminatory, even though neutral on its face, it could be upheld only if it could be shown that the seniority transfer systems are "necessary to the safe and efficient operation of the business."

This business necessity exception was very narrowly construed in its application to seniority-transfer systems. Moreover, such seemingly

110. A defense of "business necessity" was rejected in N.L. Industries, 479 F.2d 354 and Jones, 431 F.2d 245. A similar defense was also discussed at length and rejected in Bing v.
"neutral" seniority systems which involved departmental or job seniority-
transfer schemes, as opposed to plant or company-wide schemes, had been
found to perpetuate or "telescope" the effects of past discrimination where
minority groups or women predominate in a given department or job and
had been denied transfer to other departments, or were granted transfers
only upon the condition that accrued seniority in their old jobs be forfeited
in their new jobs. Such forfeiture schemes were seen as having one of two
present effects made unlawful by Title VII:

(1) Where those persons formerly discriminated against are not willing
to lose their accrued seniority and its concomitant rights and privileges in
transferring to new jobs, they are effectively "locked in" to their present
positions, which have generally been the least desirable jobs;

(2) Where those persons previously the victims of discrimination do
transfer, they are forced to begin in the lowest-paying classification of the
new department although they would be further advanced in that depart-
ment had not the original discrimination occurred.

To correct the unlawful effects described above, the courts devised reme-
dies based generally upon the "rightful place" theory. According to this
theory, the junior majority group of male employees would not be dis-
placed by minority group or female employees with a longer work history.
Rather, future job vacancies are to be filled by those persons with the
Greatest amount of seniority on a plant or company-wide basis.

Injunctions prohibiting future discrimination and requiring plant-wide
seniority to be employed in certain employee job movements over a speci-
fied future time period (such as one or two years) were frequently awarded
in Title VII lawsuits involving seniority systems. Minority group mem-
ers and women would thereby be permitted to bid for jobs in other depart-
ments on the basis of total service with the employer. Other remedies,
including back pay and attorneys' fees, where appropriate, have also been
awarded. It has been held that because of the compensatory nature of

Roadway Express, Inc., 444 F.2d 687 (5th Cir. 1971).

111. E.g., EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); Pettway v. American
Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); United States v. N.L. Indus., 479 F.2d 354
(8th Cir. 1973); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Robinson
v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).

112. This remedy was first employed in Quarles v. Philip Morris, Inc., 279 F. Supp. 505
(E.D. Va. 1968). See also Local 189, United Papermakers & Paperworkers v. United States,

113. In addition to Bethlehem Steel, 446 F.2d 642, Lorillard, 444 F.2d 791 and Local 189,
416 F.2d 980, see, e.g., Rock v. Norfolk & W. Ry. Co., 473 F.2d 1344 (4th Cir.), cert. denied,
modified, 491 F.2d 1364 (1974). In N.L. Indus., 479 F.2d 354, complete abolition of the
departmental job-bidding procedure was not ordered, but was retained for intradepartmental
job movements, and merger of seniority units was not ordered for all departments, although
plant-wide seniority was ordered as the basic remedy.

114. E.g., Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971) (both types of relief
awarded).
back-pay award and the strong congressional policy embodied in Title VII,115 plaintiffs who successfully obtain injunctions should ordinarily be awarded back pay unless to do so would frustrate the central statutory purposes manifested by Congress in enacting Title VII.116 Further, "redcircling" requirements have been imposed so that transferred minority employees who must enter another department at a low wage level because they lack necessary skills or because there are no job vacancies above entry level may maintain their current rates of pay in a new department.117 Affirmative action in the form of informing employees about a court-restructured system may also be necessary to correct past unlawful practices. Similarly, where low-level jobs in better departments do not provide necessary training for more advanced positions or where "residence periods" in such jobs are longer than that required for acquisition of necessary skills, job skipping and shortening of residence periods have been ordered.118

The EEOC has held that an employer who previously discriminated against blacks could not deny a promotion to an employee with long seniority because of his age. But for his race, it appeared that the employee would have received the promotion long ago, and the past discrimination could not be carried forward on the basis of any rule not necessary to the normal and efficient performance of the job.119

Under Teamsters some of the above mentioned remedies may still be utilized by courts where it is shown that specific post-Act victims of discrimination are involved. What Teamsters prohibits is imposition of plant-wide seniority in order to remedy the discriminatory effect of no transfer policies between different lines of progression on an "affected class." Therefore, an order which permits minority group members and women to bid on positions based on total seniority with the employer will no longer be permissible. Only those employees who can show that they applied for and were denied a transfer, or promotion, or those who can show that they would have applied but for the discriminatory policies of the employer are entitled to relief.

This approach significantly cuts down the potential liability of employees. It was foreshadowed by the Supreme Court's decision in Franks v. Bowman Transportation Company.120 The Court held in Franks that ad-
justment of seniority rights would be an appropriate form of relief for an applicant who can show he was discriminatorily denied employment. This means that for purposes of seniority rights, the applicant must be treated as having been fired on the date that he was unlawfully denied employment.

Seniority-related relief on account of discrimination in hiring must be limited to individual applicants who can show that they were specific victims of discrimination. This approach is extended by Teamsters to women and minority group employees who were locked into the least desirable positions by departmental seniority systems.

A plant-wide seniority system is regarded as "bona fide" within the meaning of Title VII, even when minorities and women historically have been excluded from an employer's workforce. Thus, the layoff of employees pursuant to such a seniority system is not unlawful under Title VII or §1981, despite the fact that recently hired minority or female employees may bear the brunt of the reduction in force.121

"Rightful place" modifications to an unlawful departmental seniority system have been required by the Office of Federal Contract Compliance Programs pursuant to Executive Order 11246, as amended, as a condition of doing business with the federal government.122 Moreover, OFCCP standards under Revised Order No. 4123 for affirmative action plans required of governmental contractors include provision of adequate relief for members of an "affected class," i.e., one suffering the present effects of past discrimination under the above analysis. The OFCCP also proposes to issue "Affected Class and Back Pay Guidelines,"124 which contain detailed seniority relief requirements that are generally comparable to the "rightful place" remedy.

It is an open question whether Teamsters applies to Executive Order 11246; no doubt this will be the subject of intense litigation. It can be argued that since the Executive Order contains no exemption for bona fide seniority systems, the Teamsters decision does not alter the principles of affected class violations and relief under the Executive Order.

This line of argument, however, misses the real impact of Teamsters. Teamsters, apart from §703(h), holds that only identifiable victims of post-Act discrimination are entitled to relief. The question is whether the OFCCP or the courts will require the identification of specified post-Act

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121. Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976); Watkins v. Steelworkers Local 2369, 516 F.2d 41 (5th Cir. 1975); Jersey Central Power & Light Co. v. IBEW Local 327, 508 F.2d 687 (3d Cir. 1975), cert. denied, 425 U.S. 998 (1976). Cf. Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974) (holding that the employer's seniority system was racially neutral but collective bargaining agreement restoring contractual seniority rights to white employees was discriminatory).


victims of discrimination. Recently, the Third Circuit in *EEOC v. American Telephone & Telegraph, Co.* held that "entirely apart from Title VII" the "broader governmental interest [embodied in Executive Order 11246] is sufficient in itself to justify relief directed at classes rather than individual victims of discrimination." No other court of appeals has confronted this issue. A strong case can be made for the proposition that relief under the Executive Order must be limited to specified individual victims, since according to the Court in *Teamsters*, that is "the most complete relief possible."126

The Rehabilitation Act of 1973127 and regulations issued thereunder prohibit discrimination by government contractors against handicapped individuals and require affirmative action in hiring and promoting such employees. The Vietnam Era Veterans Readjustment Act of 1974128 imposes comparable requirements with respect to disabled veterans and veterans of the Vietnam era. Where appropriate, contractors may be required to afford seniority relief to avoid noncompliance with the required affirmative action contract clauses.

Pursuant to the Age Discrimination in Employment Act, it is unlawful for an employer to discriminate against employees between 40 and 65 years of age with respect to "compensation, terms, conditions, or privileges of employment because of age."129 The ban covers a wide spectrum of job-related factors, including promotions, demotions, and seniority systems.130

**D. Maternity Leave and Benefits**

Under Title VII, the EEOC has determined that disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery are, for all job-related purposes, temporary disabilities, and should be treated as such under any health or temporary disability insurance or sick-leave plan available in connection with employment. Specifically, such matters as commencement and duration of leave, availability of extension, the accrual of seniority and other benefits and privileges, reinstatement and payment under any health or temporary disability insurance or sick leave plan are all covered by the Title VII prohibition against sex discrimination.131

The EEOC’s general rule is that termination of an employee for temporary disability either in the absence of a leave plan, or pursuant to a formal

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125. 556 F.2d 167, 175 (3d Cir. 1977).
126. 431 U.S. at 364.
130. 29 C.F.R. §860.50 (1976).
plan, will be considered unlawful if the policy of termination has a disparate impact on one sex and is not justified by business necessity. In most instances, discharge as opposed to a leave of absence cannot be justified; furthermore, EEOC policy requires that a leave of absence be granted for pregnancy whether or not it is granted for illness. The rationale of the EEOC's position is that since maternity is a temporary disability unique to the female sex, there must be special recognition for absence due to pregnancy in order to provide substantial equality of employment opportunity. Conditioning eligibility for maternity leaves of absence on a certain period of employment may also violate the law, according to the EEOC, unless the employer can show that the policy is so necessary to the operation of its business as to justify the discriminatory effects of the policy.

Any plan which provides nonoccupational sickness and accident benefits for employees, but excludes from benefit eligibility disabilities due to pregnancy or its attendant circumstances has been determined by the EEOC to discriminate on the basis of sex. Similarly, a policy of making maternity insurance coverage available to spouses of employees but not to employees themselves has been held to violate the ban against sex discrimination. Even where the benefits are made available to both spouses and employees but the waiting periods for eligibility differ, the law is violated. Provisions for maternity benefits only to "heads of households" likewise violates the law. Provisions of maternity leave only to married women has been determined to violate Title VII, because unmarried female employees would be terminated as a result of pregnancy, while unmarried fathers would not be affected by the rule or contract provision in an applicable plan.

The EEOC has ruled that treating female employees who return from a maternity leave of absence as new hires violates Title VII. Such a system perpetuates the effects of past discrimination against female employees because all rights dependent upon seniority are adversely affected as long as they remained in the company's employ. Further, a blanket rule of only one maternity leave for each employee without loss of benefits would appear to violate the law.

The EEOC's rules on pregnancy leave and sickness and accident insurance coverage for pregnancy-related disabilities have been challenged in
a number of court cases and in a number of cases they have not been rejected. In Cleveland Board of Education v. LaFleur, the U.S. Supreme Court held that mandatory maternity leave rules by a government employer were unconstitutional. Although this case was decided under the due process clause of the Fourteenth Amendment of the U.S. Constitution and not Title VII, it does, nevertheless, conform with the position espoused by the EEOC with respect to private employers.

In June, 1974, the Supreme Court decided, in Geduldig v. Aiello, that California's failure to insure normal pregnancies under its state disability insurance program did not constitute invidious discrimination violative of the Equal Protection Clause of the Fourteenth Amendment. The holding in Aiello was that the exclusion of normal pregnancies from sickness and accident insurance coverage did not violate the Constitution. In General Electric Co. v. Gilbert, the Supreme Court decided that the exclusion of disabilities which arise from pregnancy from the employer's disability plan is not a violation of Title VII. The Supreme Court has also recently held that a state statute excluding pregnant women from unemployment compensation for a period commencing twelve weeks prior to the expected date of birth and ending six weeks after childbirth violates the Fourteenth Amendment.

The Office of Federal Contract Compliance Programs has also issued guidelines pursuant to Executive Order 11246, as amended, which expressly address themselves to pregnancy leaves. These guidelines prohibit government contractors and subcontractors from penalizing in any aspect of their employment female employees who take pregnancy leaves. Like the EEOC, the Office of Federal Contract Compliance Programs has stated that where an employer does not maintain a leave policy for temporary disabilities, it must, nevertheless, consider childbirth to be justification for leave of absence for a reasonable time. When the female employee returns to work after her pregnancy leave, she must be reinstated to her original job or to a position of like status and pay, without loss of service credits.

It should be noted that the sex discrimination guidelines put out by the Office of Federal Contract Compliance Programs do not go as far in the protection of pregnant female employees as the EEOC's sex discrimination guidelines. For example, the OFCCP's sex discrimination guidelines do not

142. 429 U.S. 125 (1976). However, resolution of this issue under Title VII will not necessarily be controlling on state fair employment practices laws, under which this same issue may also arise. See, e.g., Wisconsin Tel. Co. v. Department of Indus., Labor & Human Relations, 68 Wis. 2d 345, 228 N.W.2d 649 (1975); Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd., 50 App. Div. 2d 381, 378 N.Y.S.2d 720 (1975), rev'd, 41 N.Y.2d 84, 390 N.Y.S. 884, 359 N.E.2d 393 (1976).
144. 41 C.F.R. §60-20.3(g)(2) (1977).
require that employee medical benefit plans cover pregnancy-related disabilities as long as an employer makes equal contributions to such plans for employees of both sexes.\textsuperscript{145} \textit{Gilbert} does not affect the OFCCP guidelines as it concerned benefit plans which are not covered by the guidelines.

Legislation has been introduced in both houses of Congress which would overrule \textit{Gilbert}.\textsuperscript{146} This legislation would define the terms "because of sex" or "on the basis of sex" in Title VII to include medical conditions related to pregnancy. The legislation adds that pregnant women "shall be treated the same for all employment related purposes," including benefits under fringe benefit programs, as any employee who is not pregnant.

\subsection*{E. Fringe Benefit Programs}

Title VII prohibits discrimination based upon race, color, religion, sex, or national origin in determination of eligibility for fringe benefit programs. The EEOC has held that "terms of compensation . . . and other privileges and conditions of employment" encompasses all such programs.\textsuperscript{147} Benefits under these programs may include hospitalization, or health insurance, sick leave, retirement, pension or life insurance benefits, and many others.\textsuperscript{148}

It is obvious that overt classifications which discriminate on any of the above bases will be found unlawful by both the courts and the EEOC. However, a number of more subtle developments have centered around the ban on sex discrimination in Title VII. Thus, it is an unlawful employment practice for an employer to provide fringe benefits to the wives and families of male employees while the same benefits are not made available to the husbands and families of female employees.\textsuperscript{149} The availability of benefits for spouses and families of employees cannot be conditioned upon the employee's being the "head of household" or the "principal wage earner in the family unit."\textsuperscript{150}

\begin{thebibliography}{99}
\bibitem{145} 41 C.F.R. §60-20.3(c) (1977).
\bibitem{147} EEOC Dec. No. 7075, 2 FEP Cases 227 (1969).
\bibitem{148} 29 C.F.R. §1604.9(a), (b) (1976). Additionally, sick leave, vacation time and pay, classes given on company time, compensatory payments during periods of jury service, and physical facilities are probably included within the meaning of the term "fringe benefits."
\bibitem{149} 29 C.F.R. §1604.9(e) (1976); EEOC Dec. No. 71-1100, 3 FEP Cases 272 (1970). See also Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) wherein the Supreme Court held that a provision of the Social Security Act which granted survivor's benefits to widows but not to widowers violated the equal protection principle of the Fifth Amendment's due process clause.
\bibitem{150} 29 C.F.R. §1604.9(d) (1976). See also Frontiero v. Richardson, 411 U.S. 677 (1973) wherein the Supreme Court held that a military benefit plan, whereby servicemen's wives were automatically covered as dependents but servicewomen's husbands were not covered as dependents, unless it was shown that the servicewoman contributed more than half of the
\end{thebibliography}
Specifically, the EEOC has found that plans which provide maternity benefits to spouses of employees, but deny such benefits to employees themselves on an equal basis, violate Title VII. Plans which allow coverage for spouses of male employees at their own expense but which deny the possibility of coverage to female employees would also appear to fall before Title VII. And, in a recent case, an employer was found to have violated Title VII where, when a female employee married a male employee, it uniformly removed the female employee from its medical protection plan and included her under the husband’s policy even though the female might have more seniority and be entitled to greater coverage.

Any difference in group pension or retirement plans with respect to either the optional or compulsory retirement ages of male and female employees is unlawful under Title VII. Further, a requirement of longer service by one sex in order to obtain the same benefits obtained by the other sex constitutes a violation of the law. Moreover, the EEOC has held that the use of sex-segregated actuarial tables in computing joint and survivor annuity and/or lump-sum pension options discriminates against men in violation of Title VII.

That the cost of providing any of these fringe benefits to one sex is greater than the cost of providing them to the other is not a defense to a charge of sex discrimination filed pursuant to Title VII. This means that the resultant benefits must be equal regardless of the varying amounts of contributions required to achieve such equality. However, under Executive Order 11246, as amended, if employer contributions to benefit plans are equal for male and female employees, or if the resulting benefits are equal, the employer will be considered to be in compliance.

Unlawful racial discrimination under Title VII occurs where an employer enters into and enforces retirement agreements that have the effect of requiring black employees to retire at age 65, while white employees are husband’s support, violated the equal protection principle of the Fifth Amendment.

153. Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), cert. denied, 404 U.S. 909 (1971); Fillinger v. East Ohio Gas Co., 4 FEP Cases 73 (N.D. Ohio 1971); Chastang v. Flynn & Emrich Co., 541 F.2d 1040 (4th Cir. 1976). See also Monhart v. City of Los Angeles, Dep’t of Water & Power, 387 F. Supp. 980 (C.D. Cal. 1975), aff’d, 553 F.2d 581 (9th Cir. 1976) wherein the Court of Appeals held that requiring women to pay higher pension premiums based on actuarial evidence that women on the average lived longer than men was a violation of Title VII.
156. 29 C.F.R. §1604.9(e) (1976).
157. 41 C.F.R. §60-20.3(c) (1977).
forced to retire at age 70. A court has ruled that such an agreement adversely affects the blacks' status as employees by carrying forward the effects of prior racially discriminatory employment practices.\footnote{158}

The Age Discrimination in Employment Act makes it unlawful to discriminate against employees between the ages of 40 and 65 with respect to their terms, conditions or privileges of employment. "Fringe benefit" programs are explicitly included within the ambit of the law's prohibitions.\footnote{159}

Those fringe benefits which typically depend upon the seniority of an employee, such as vacations, would stand or fall depending upon whether the seniority system was "bona fide."\footnote{160} It is not unlawful for an employer to observe the terms of retirement pension or insurance plans which are "bona fide" and do not evade the purpose of the Act.\footnote{161} A profit-sharing plan could not qualify for this exception, unless its purpose was to provide retirement benefits for the employees.\footnote{162}

Where the actual amounts of payment made or cost incurred by the employer under one of the excepted types of plans is the same for younger and older workers, the Act is not violated even though an older worker may thereby receive a lesser benefit than a younger worker.\footnote{163} An employer is not required to provide life insurance in the same amount for older workers as is provided for younger workers. The premium charged by insurance companies on behalf of older workers is typically larger under group policies than the premium which the employer is charged for younger workers. So long as the same amount of money is contributed on behalf of each employee, the size of the resulting policy is dependent upon the calculations of the insurance company providing coverage.\footnote{164} Finally, an employer may provide varying benefits under a "bona fide" plan to employees covered by the Act when such benefits are determined by a formula involving age and length of service requirements.\footnote{165}

Involuntary retirement irrespective of age is permitted, provided that such retirement is made pursuant to a bona fide retirement or pension plan which is not a subterfuge to avoid the purposes of the Age Discrimination in Employment Act.\footnote{166} Involuntary retirement of employees under age 65 may violate the Federal Age Discrimination Act, however, if imposed upon employees who are not covered by an employer's retirement or pension plan which would provide them full benefits at an earlier age were they

\footnotesize{158. Peters v. Missouri-Pacific R.R. Co., 483 F.2d 490 (5th Cir.), cert. denied, 414 U.S. 1002 (1973).}
\footnotesize{159. 29 C.F.R. §860.50(c) (1976).}
\footnotesize{160. See Part III (C) infra, at 731.}
\footnotesize{162. 29 C.F.R. §860.120(b) (1976).}
\footnotesize{163. Id.}
\footnotesize{164. 29 C.F.R. §860.120(a) (1976).}
\footnotesize{165. Id.}
\footnotesize{166. 29 C.F.R. §860.110(a) (1976); Section 4(f)(2), 29 U.S.C.A. §623(f)(2) (1975).}
covered. Some discretion in establishing the dates of involuntary retirement for all classes of employees may be allowed in a "bona fide" plan. For example, requiring an employee to retire on the December 31st which is nearest his 65th birthday is probably legal, although the requirement would compel some workers to retire before reaching 65 and allow others to work for some time past that age. Forfeiture provisions in retirement programs which state that litigation or participation in a formal proceeding by an employee will result in the loss of his benefit rights are unlawful insofar as they may apply to those who seek redress under the Act.

The Equal Pay Act is also relevant to the provision of fringe benefits to male and female employees. Pursuant to this Act, an employer may not discriminate on the basis of sex in providing its employees with any form of compensation in the nature of benefit programs. However, as under the Age Discrimination in Employment Act and Executive Order 11246, as amended, discussed above, equal contributions by an employer for both men and women will not violate the law although resulting benefits may differ. Also, unequal payments will not constitute a violation of the law where resultant benefits are equal. However, regardless of overall pay rates among employees, nothing in the Equal Pay Act allows provision for coverage under any type of benefit plan for one sex, but not the other.

F. Enforcement of Plant Rules and Work Policies Not Related to Job Performance

In your plant, office, or facility there are undoubtedly a number of rules and policies in effect which do not relate directly to job performance, but which nevertheless govern employee conduct. These include grooming standards, garnishment limits, etc. Because enforcement and application of certain of these rules may subject a company to liability under one or several of the discrimination laws, you should review your practices in light of the following comments.

Obviously, a plant rule or employment practice which discriminates against protected minorities on its face is unlawful. For instance, it has been held that a rule forbidding female employees to marry, while no such rule applies to male employees, violates Title VII. Another prime example of this type of rule is in the area of grooming and appearance.

167. 29 C.F.R. §860.110(b) (1976).
168. 29 C.F.R. §860.110(a) (1976).
169. 29 C.F.R. §860.120(c) (1976).
1. Grooming Rules. Grooming and appearance rules or standards violate Title VII if they discriminate against any individual in regard to compensation, terms, conditions, or privileges of employment or if such rules limit, segregate, or classify employees in such a manner as to deprive any individual of employment opportunities or adversely affect employment status because of such individual's race, color, religion, sex, or national origin. Of course, Title VII does not prohibit grooming standards per se. Thus, an employer has every right to adopt dress codes suitable to various job categories, and may insist that employees present a clean and neat appearance. Although a few decisions have held that employers may not establish different dress or grooming standards for male and female employees, recent cases indicate that different standards may be imposed as long as the difference does not place an unreasonable burden on the employment of one sex or the other, or as long as the distinction is not based on some fundamental right.

Most frequently attacked as discriminatory are grooming rules which limit the length of male employees' hair, but place no similar restriction on female employees. Most courts have refused to hold that a long hair policy for men only constitutes unlawful discrimination. However, some lower courts have held that such "males-only" rules unlawfully discriminate against male employees. The EEOC has recently conceded to the

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175. For example, it was not unreasonable to require only male employees to wear ties where the employer had a legitimate interest in the appearance of its employees. Fountain v. Safeway Stores, Inc., 9 E.P.D. ¶ 10,197 (N.D. Cal. 1975). See also Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974), cert. denied, 422 U.S. 1046 (1975); see also Earwood v. Continental Southeastern Lines, 539 F.2d 1349 (4th Cir. 1976), wherein the court held that a maximum hair length requirement which applied only to men did not violate Title VII; Brown v. D.C. Transit System, Inc., 523 F.2d 725 (D.C. Cir.), cert. denied, 862 U.S. 423 (1975), wherein the Court held that grooming regulations prohibiting beards, mustaches, and sideburns were based on a managerial decision that the neatness of the employees would promote the best interest of the business; Wamsganz v. Missouri Pac. R.R. Co., 391 F. Supp. 306 (E.D. Mo.), aff'd, 527 F.2d 1249 (8th Cir. 1975); Tardif v. Quinn, 545 F.2d 761 (1st Cir. 1976) wherein the court upheld the discharge of a school teacher for wearing short skirts.
weight of judicial authority and will no longer attempt to conciliate cases in this area.\textsuperscript{179}

A grooming rule requiring males to be clean-shaven may be permissible. Thus, in one case an Orthodox Muslim employee, whose religion required him to wear a beard, charged that a grooming rule requiring all male employees to be clean-shaven was discriminatory on the basis of religion. A state court held that the employer's policy of having its employees clean-shaven was reasonably necessary to promote business through greater public support, and was not activated by discrimination against any particular religion.\textsuperscript{180} Rules requiring employees to be clean-shaven have also withstood challenges on the bases of race\textsuperscript{181} and sex\textsuperscript{182} as well as religion. However, the EEOC has consistently taken the position that rules which prohibit facial hair violate the Title VII bans on sex,\textsuperscript{183} race, and national origin\textsuperscript{184} discrimination, unless they are justified by business necessity. Moreover, a hair standard which prevented Negro employees from wearing Afro-American hairstyle was held by EEOC to violate Title VII as discrimination against Negroes.\textsuperscript{185}

To help insulate your grooming rules from challenge, therefore, it is essential that whatever rules do exist apply equally to both sexes and do not prohibit standards of dress or grooming which clearly restrict the symbolic expression of an individual's race or national origin. However, it might be noted here that a rule which forbids only women to wear eyeglasses constitutes sex discrimination.\textsuperscript{186} Furthermore, height and weight requirements for the sake of appearance, also discussed elsewhere, have frequently been held unlawful on the basis of sex discrimination.\textsuperscript{187}

\textsuperscript{179} EEOC COMPL. MAN. (CCH) §421.2.


\textsuperscript{183} EEOC Dec. No. 72-0979, 4 FEP Cases 840 (1972); EEOC Dec. No. 72-1380, 4 FEP Cases 846 (1972); EEOC Dec. No. 72-1334, 4 FEP Cases 846 (1972); EEOC Dec. No. 72-1380, CCH EEOC Decs. ¶ 6364 (1972).

\textsuperscript{184} EEOC Dec. No. 72-0979, 4 FEP Cases 840 (1972).

\textsuperscript{185} EEOC Dec. No. 71-2444, 4 FEP Cases 18 (1971); EEOC Dec. No. 72-0979, 4 FEP Cases 840 (1972).


\textsuperscript{187} E.g., Laffey v. Northwest Airlines, Inc., id.; Gerdom v. Continental Airlines, Inc., 8
Just like plant rules which discriminate on their face, disparate enforcement of an otherwise valid plant rule or practice would violate Title VII. Thus, where a black and white employee were caught “singing and hollering” on the business premises, but only the black employee was disciplined, the EEOC found a violation.186

Similarly, where a company discovered an affair between a male and female employee, the EEOC held that it violated the Act in discharging the woman while merely “talking to” the man.189 This is not to say, however, that different punishments may not be administered where there are different degrees of guilt. Thus, a New York State court held that an employer’s discipline of black and Spanish-American employees, who participated in a demonstration at work, was permissible where these employees actively encouraged and fomented the demonstration, while white employees—who were not disciplined—only participated therein.190

A more difficult question is posed by plant rules and policies which on their face do not appear to discriminate against protected minorities, and which are in fact applied evenhandedly and fairly to all employees regardless of race, color, sex, religion, or national origin. The EEOC and some courts have held that even in these cases, enforcement of such rules may nevertheless violate Title VII.

The general principle followed by the EEOC, as enunciated by a federal court, is that an employment practice will violate Title VII when it has the foreseeable effect of denying blacks [or other minorities] an equal opportunity for employment. The policy or practice may be adopted in good faith with no intent to discriminate, may be racially neutral on its face and may be objectively and fairly applied; it is nonetheless interdicted by Title VII if the consequence of the policy or practice is to discriminate and there is no overriding business purpose.191

Some illustrations of this principle follow:

2. Discharge for Conviction of “Serious Crime.” Even though applied equally to white and black employees, such a rule was held to be inherently discriminatory against blacks because statistics showed that blacks made up a disparate proportion of those convicted of such crimes.192 Accordingly, discharge of a black employee under this rule violates Title


188. EEOC Dec. No. 72-0661, 4 FEP Cases 440 (1971).
VII even if the policy is applied evenhandedly. The EEOC has noted, however, that application of the rule in a particular case might be justified if all the circumstances demonstrate that the conviction has a particular effect on the specific individual’s ability to do his job.

3. **Discharge for Several Garnishments.** Even though applied evenhandedly to black and white employees, a policy mandating discharge for several garnishments has been held to be inherently discriminatory against blacks because blacks generally are found in the lower and middle-income classes and account for a disproportionate percentage of wage garnishments. Thus, in the absence of any showing of a harmful effect on the employee’s ability to perform his job, enforcement of such a policy against a black employee violates the Act. Nor will the defenses of inconvenience, annoyance, and expense in coping with numerous garnishments justify such a policy.

This situation should be contrasted with that which arises when an employee is discharged for failure to pay “just debts.” In this case, one court denied relief because the discharged employee could not show that minorities constituted the majority of poor persons, or that the poor failed to pay their just debts more often than other classes. In another case it was held that a refusal to hire because of a prior adjudication of bankruptcy was not racially discriminatory.

It should be noted in this regard that the Federal Consumer Credit Protection Act makes it illegal for an employer to discharge an employee because of garnishment(s) for a single debt. The Consumer Credit Protection Act apparently does not apply to wage assignments, nor does it prohibit discharges for garnishments for more than one debt. However, as noted above, at least two federal courts have held that such a discharge violates Title VII. In addition, state law may prohibit discharge or discipline for garnishment or wage assignments.

4. **Falsifying Employment Applications.** In line with its concept of “inherent discrimination,” the EEOC has held that preemployment inquiries into arrests, convictions, and incarcerations violate Title VII because Negroes account for a disproportionate percentage of such incidents,

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196. Robinson v. City of Dallas, 514 F.2d 1271 (5th Cir. 1975).
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at least when there is no showing of a direct harmful effect upon the individual's ability to perform his job. A district court in Missouri recently rejected this position on the ground that the plaintiff made no showing that blacks falsified their applications at a higher rate than whites or that black applicants were excluded at a higher rate than white applicants for this reason. Following through on this concept, the EEOC has also held that a minority applicant may not be discharged for falsifying, or failing to completely answer, sections of an employment application calling for such information.

For instance, in one case a black employee neglected to note on her application form that she had been indicted for carrying a loaded pistol, and had been convicted of involuntary manslaughter. When the employer later learned of these facts, the employee was discharged. The EEOC held that the discharge violated Title VII because "proportionately, Negroes as a class are arrested and convicted substantially more frequently than Caucasians. . . ." The EEOC did note, however, that a discharge on such grounds might be defended in a particular case if the time, nature, and number of convictions, as well as the employee's immediate past employment record indicated that the employment of that particular person for that particular job was "manifestly inconsistent with the safe and efficient operation of that job."

In a similar case, the EEOC held an employer violated Title VII when it discharged a black employee upon discovering that the employee had falsified the "arrest or contact with police" section of his employment application. The EEOC's reasoning was similar to that indicated above.

On the other hand, the EEOC has not closed the door to enforcement of plant rules such as those described above in cases where the employer can demonstrate a direct connection or relationship to the individual employee's ability to properly perform his or her particular job. Thus, the EEOC has also held that an employer did not violate Title VII when it discharged a black employee after an arrest revealed the employee's long police record, thereby concomitantly revealing that the employee had falsified his employment application. The EEOC commented that the employment application clearly stipulated that falsification may result in dis-

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Similarly, in a recent court case, a district court found no Title VII violation by an employer who discharged a black plaintiff employee for omitting from his employment application information with respect to the employee's conviction for assault with intent to rape and information with respect to four previous employers. The court found that the defendant employer did not consider the conviction as such in its discharge determination; instead, it considered the felony conviction in determining whether the employee had falsified his employment application. Moreover, the court found that white employees had also been discharged for falsifying employment records. Finally, the court found no indications that the discharge was racially motivated.

It is likely that the EEOC would apply the same approach in cases involving falsification, or omission, of data concerning gambling convictions and credit references, since the Commission has held that refusals to hire minority group applicants based on such factors are prima facie discriminatory.

5. Inability to Get Along With Co-Workers. A frequent reason for discharge is the inability of a worker to get along with co-workers. The EEOC will carefully scrutinize such discharges where minority group employees are involved, to determine whether the "personality conflicts" were caused by prohibited discrimination. The employer is under a duty in such cases to investigate the root cause of the conflicts and—if the cause is discrimination by supervisors or other employees—to remedy such discrimination. Thus, where a Spanish-American employee was continually insulted and harassed by Anglo fellow employees, transferred, and then discharged for inability to get along with his co-workers, the EEOC held the company had violated Title VII. However, in another case a discharge of a black employee was held not to be in violation of Title VII because the employer was able to demonstrate that inability to work with other employees, and not race, was the motivating factor for the discharge.

It should also be noted that a minority employee who quits because of discriminatory harassment, insults, or disparagement by either supervisors or employees may be deemed to have been constructively discharged by the employer, where the employer has had notice of the discrimination and

207. EEOC Dec. No. 71-2682, 4 FEP Cases 25 (1971) (gambling); EEOC Dec. No. 72-1176, 5 FEP Cases 960 (1972) (credit references). Whether the courts will support the EEOC is uncertain. See, e.g., Robinson v. City of Dallas, 514 F.2d 1271 (5th Cir. 1975).
has not taken effective action to remedy its effects. This is not to say, however, that friction between white and black, Christian and Jewish, Anglo and Spanish-American, etc., employees must be resolved in favor of the minority group employee. Given a full and fair investigation of the underlying causes, the employer may properly conclude on the facts that the inability to get along with co-workers is due to personality and/or other objective deficiencies in the minority group employee. Discharge on these grounds following such an investigation would not violate Title VII.

6. **Fighting and Discriminatory Provocation.** Care should be taken to investigate claims of discriminatory provocation in situations involving fights between a minority group and nonminority group employee. An employer will be held accountable by both the EEOC and the courts if it fails to properly investigate and/or correct a discharge which is based in some manner on unlawful discrimination. Thus, the EEOC has held that it was a violation of Title VII when a company's supervisor referred to a black employee as a "nigger." And, a state Fair Employment Practices Commission held that a black employee was illegally discharged for fighting when he struck a white employee who had used the same term. On appeal, this finding was reversed, but on the grounds that the use of the term by the white employee was inadvertent, and did not refer to the discharged black employee. The court further noted that the company had conducted a "reasonable, fair and routine" investigation of all the circumstances involved before taking the discharge action.

This is not to say that a minority employee cannot be discharged for violation of valid company rules such as those prohibiting fighting; however, the employer must be able to demonstrate that there were no discriminatory overtones to the incident. Similarly, discipline must be meted out in a nondiscriminatory manner. An excellent way to show such nondiscrimination is through prompt and thorough investigation of any such incidents.

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G. Scheduling Work

1. State Laws Restricting Women With Respect to Overtime, Weight Lifting and the Like. Many states have enacted laws or promulgated administrative regulations with respect to the employment of women. Such laws may prohibit or limit the employment of women in certain occupations such as jobs requiring the lifting or carrying of weights exceeding prescribed limits or jobs requiring work during certain hours of the night or for more than a specified number of hours per day, or per week, or for certain periods of time before and after childbirth. Because these laws are premised upon stereotyped conceptions of a woman’s ability to perform the duties of a job safely and efficiently, and result in the denial of employment opportunity without regard to individual merit, capacities, preferences, and abilities, the EEOC with federal court approval has determined that state female protective legislation conflicts with, is contrary to, and is superseded by Title VII.11 Although under this principle adherence to female state protective legislation will not be considered a complete defense to an otherwise unlawful employment practice, the courts thus far have declined to award damages against employers even though a technical violation of Title VII has been found, when the employer has in good faith adhered to state protective legislation prior to a determination of its having been superseded by Title VII.218

When a specific problem regarding the conflict between state and federal law with respect to the employment or scheduling of women arises, immediately contact your law department for advice. In the meantime, attempt to comply with both state law and Title VII whenever possible. It is not required that the employer extend special benefits under state protective legislation to men. In a recent case the Court of Appeals for the Ninth Circuit held that to interpret overtime laws to require extension of overtime benefits to men in order to avoid conflict with federal law would amount to usurpation of power of the state legislature.219

2. “Accommodation” to Religious Belief. Title VII defines


218. Id. However, it is possible that some courts will hold that once the principle is established that female protective laws violate Title VII, an employer may no longer rely on a good faith defense on a particular state law which has not yet been specifically invalidated.

"religion" to mean all aspects of religious observance and practice, as well as belief, and to include atheism.\textsuperscript{220} It is not necessary that the beliefs involved be a part of a formal, organized religion. Intensely held personal beliefs are protected under Title VII.\textsuperscript{221} Further, sincerely held religious beliefs are included in Title VII's definition of religion no matter how unreasonable or irrational they may seem.\textsuperscript{222}

Under Title VII, an employer is expected to recognize the reasonable religious needs of his employees and applicants for employment, including the special needs of an employee who is a minister of his church,\textsuperscript{223} in scheduling regular and overtime work, in granting time off from work for holidays and vacations, and in observing religious holidays, unless he can show that he is unable to reasonably accommodate an employee's or prospective employee's religious beliefs \textit{without undue hardship} on the conduct of his business. According to the EEOC, such undue hardship may exist "where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of observance of the Sabbath observer."\textsuperscript{224}

Moreover, under this view the employer has the burden of proving that an undue hardship renders the required accommodation to the religious needs of the employee unreasonable.\textsuperscript{225} The question of whether or not an employer intended to discriminate on the basis of religion appears largely irrelevant, the critical considerations having shifted to the undue hardship of accommodating.\textsuperscript{226} Under the EEOC's definition of undue hardship the employer would have to make a significant effort to accommodate the religious beliefs of the employee. Many courts also required the employer to assume added costs, take affirmative steps to procure replacements, and to deviate from the terms of a collective bargaining agreement, if necessary, to accommodate the religious beliefs of the employee.\textsuperscript{227}

The Supreme Court recently rejected this approach in \textit{Hardison v. Trans World Airlines}.\textsuperscript{228} The Court held that a modification of the seniority system or any other accommodation which would require expenditure of funds, other than a \textit{de minimus} amount, would constitute an undue hard-

\textsuperscript{220} Section 70(j), 42 U.S.C.A. §2000e(j) (1974); Young v. Southwestern S & L Ass'n, 509 F.2d 140 (5th Cir. 1975).
\textsuperscript{221} EEOC Dec. No. 76-104, 12 FEP Cases 1359 (1976).
\textsuperscript{222} Cooper v. General Dynamics, 533 F.2d 163 (5th Cir. 1976).
\textsuperscript{224} 29 C.F.R. §1605.1(b) (1976).
\textsuperscript{225} 29 C.F.R. §1605.1(c) (1976).
\textsuperscript{226} Reid v. Memphis Publishing Co., 468 F.2d 346 (6th Cir. 1972).
\textsuperscript{228} 432 U.S. 63 (1977).
Unions also have a duty to accommodate an employee's religious beliefs similar to the one imposed on an employer under Title VII.

The EEOC does not require employers to maintain mathematical exactitude in their religious policies, only that substantially equal treatment to the various religious needs of employees be afforded. Thus, it is not a violation of Title VII to grant Jewish employees paid leave for Jewish holidays although Christian employees do not receive such paid leave for Christian holidays other than legal holidays.

H. Equal Pay for Equal Work

The Equal Pay Act of 1963 was an amendment to the Fair Labor Standards Act of 1938, which sets federal requirements for minimum wages, overtime payments, child labor, and the like. Basically, the coverage of the Equal Pay Act is the same as that for the Fair Labor Standards Act (FLSA). Thus, as a general rule, if an employee is not covered by the minimum wage requirements of the FLSA, he or she is not entitled to the protections of the Equal Pay Act either. It should be noted, however, that employees who are otherwise exempt from FLSA coverage because they fall under exemptions as executive, administrative, or professional employees, or as outside salespersons, are not exempt from coverage of the Equal Pay Act.

The Equal Pay Act makes it illegal for an employer to discriminate between covered employees on the basis of sex, within the establishment, by paying lower wages to employees of one sex than to employees of the other sex for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. The Act makes exceptions for differentials based on seniority systems, merit systems, systems which measure earnings by quantity or quality of production, or differentials based on any other factors except sex.

1. Relationship of Equal Pay Act to Title VII. Title VII, of course, bans employment discrimination based on sex. And, as noted elsewhere in this Manual, Title VII is potentially much broader in its coverage because it encompasses far more than discrimination in wages, and because it may cover employees who are not protected by the Fair Labor Standards Act. However, Title VII itself provides that its provisions must be harmonized with those of the Equal Pay Act, and—as a matter of practice—the

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230. The Equal Pay Act does not require that jobs being compared be performed simultaneously but instead encompasses situations where an employee of one sex is hired for a particular job to replace an employee of the opposite sex. See, e.g., Peltier v. City of Fargo, 533 F.2d 374 (8th Cir. 1976).
EEOC will defer to rulings under the Equal Pay Act where sex discrimination in wages is charged.

2. **Establishment Coverage.** The Equal Pay Act sets up an "establishment" test for determining wage discrimination based upon sex. Thus, comparisons will be made under this Act only between employees of opposite sexes in the same establishment, which is defined as a "distinct physical place of business." To illustrate, an employer who has two places of business located close to one another but each of which has its own building, records, bookkeeping, etc., and minimal or no interchange of employees between each other will be viewed as having two different "establishments" under the Equal Pay Act. The fact that women in one establishment earn a lower wage rate than men working at the same job in the other establishment will not make out a violation of the Equal Pay Act (although such practice could very well violate Title VII).

3. **Standards for "Equal Work."** Illustrations of sex discrimination—both under the Equal Pay Act and Title VII—are discussed elsewhere throughout this Manual, and no worthwhile purpose would be served by repeating such examples here. However, further comments should be made regarding the concept of "equal work" under the Equal Pay Act.

"Equal work" does not mean identical work. Rather, the test is whether jobs require equal skill, effort, and responsibility, and whether they are performed under similar working conditions. The test does not depend on the job classifications or title, but on the job content, consisting of actual job requirements and performance. For example, a male and female employee may both be classified as "stock clerks." However, if the male employee spends the bulk of his work time shifting and moving goods in the stockroom, while the female employee spends most of her work time taking inventory and keeping records, the equal pay standard would not apply. Furthermore, if the pay differential for salesmen and saleswomen is based on economic benefit to the employer from the work performed by each group, there would be no discrimination. If the employer can demonstrate that the sale of one type of merchandise requires a substantially greater amount of skill than sale of another type, the jobs may be considered unequal.

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235. Id. at §800.121. See Brennan v. Owensboro-Daviess County Hosp., 523 F.2d 1013 (6th Cir. 1975), cert. denied, 425 U.S. 973 (1976).
In *Corning Glass Works v. Brennan*, the Supreme Court held that when an employer consistently treats two jobs as equal, that employer cannot later argue that those same two jobs are not equal for Equal Pay Act purposes. Moreover, merely opening the higher base rate job to women will not cure the violation. Instead, the employer must raise the base rate of the lower-rated job to a level equal with the higher base rate job.

4. Equal Skill. The term "skill" includes such factors as experience, training, education, and ability, and is measured by the actual requirements of the job in question. For example, if an employee must have the same skill to perform either of two jobs, the jobs will be deemed to require "equal skill," even though the employee might use his skill less frequently at one job than at the other. On the other hand, the fact that an employee in a given job possesses a certain additional skill is immaterial, if the requirements of the job do not require him to use that skill.

5. Equal Effort. "Effort" entails the amount of physical or mental exertion needed for the performance of a job. As in the case of "skill" and "responsibility," the effort involved in two jobs need not be identical to be substantially equal. Thus, where a male checker in a supermarket is required to spend a portion of his time carrying or lifting heavy items, and a female checker is required to spend an equivalent amount of time in fill-in work requiring greater manual dexterity (such as rearranging displays of small items), the Wage-Hour Administrator deems the jobs to require "equal effort."

On the other hand, the Administrator notes that where a number of employees work on an assembly line, and the last employee on the line—in addition to his other duties—is required to lift the assembly off the line, and place it on a pallet, a higher wage rate to compensate for such additional effort would be justified, as long as this extra duty is a regular one, and takes up a "considerable portion of the work cycle." Note, however, that where higher pay is given solely for additional effort, such premium must be paid to all employees in that job who must exert such effort, regardless of sex. For example, if all the women and some of the men performing a certain job do not engage in heavy lifting, it would be a violation to pay a higher rate to all the men. Only those men who regularly engage in the heavier lifting would be entitled to the extra pay. It should

240. Id.
also be noted that a wage differential is not justified solely because an employee sporadically or occasionally may be required to perform additional tasks not performed by an employee of the opposite sex in the same job.\footnote{246}

The main factor in this inquiry is whether there are additional duties which are more demanding for the higher paid category. In \textit{Shultz v. Kimberly-Clark},\footnote{246} the court compared the duties involved in the two jobs which the Department of Labor contended were equal. The \textit{Cleaner} job which was held by males required lifting heavy boxes, climbing on scaffolding to wash high windows, and heavier work in general than the \textit{Locker Room Cleaner} job which was held by women. The court found that the different effort involved justified the pay differential.

6. **Equal Responsibility.** "Responsibility" entails the degree of accountability required in the performance of the job, "with emphasis on the importance of the job obligation."\footnote{247} As examples of substantial differences in responsibility, which would justify wage differentials, the Administrator cites employees who are designated as "relief" supervisors—expected to fill in for regular supervision in the latter's absence—and salespersons who, in addition to their regular selling duties, have the power and obligation to okay customer checks, order supplies, etc., where other salespersons do not have this authority.\footnote{248} A federal court has also found a wage differential justified where a male bank teller—in addition to doing the same work as female tellers—supervised check-cashing, helped other tellers to balance out, and acted as a "trouble-shooter."\footnote{249} On the other hand, minor additional responsibilities—such as shutting off the lights at the end of the business day—would not justify a finding of unequal responsibility.\footnote{250}

7. **Similarity of Working Conditions.** Again, working conditions need not be "identical" to satisfy this test.\footnote{251} Thus, the fact that employees perform jobs in different parts of the shop or establishment generally will not establish a difference in working conditions. The Supreme Court held in \textit{Corning Glass Works}\footnote{252} that the term "working conditions" only included two factors, \textit{i.e.}, physical surroundings and hazards. For Equal Pay

\footnote{245}{Peltier v. City of Fargo, 533 F.2d 374 (8th Cir. 1976) (extra duties of male officers did not justify pay differential because such duties were insubstantial, consumed a minimal amount of time and were incidental to actually assigned and performed duties). \textit{See also} Wirtz v. Meade Mfg., Inc., 285 F. Supp. 812 (D. Kan. 1968); Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir.), \textit{cert. denied}, 398 U.S. 905 (1970); Hodgson v. Corning Glass Works, 474 F.2d 226 (2d Cir. 1973), \textit{aff'd sub nom.}, Corning Glass Works v. Brennan, 417 U.S. 188 (1974).}

\footnote{246}{315 F. Supp. 1323 (W.D. Tenn. 1970).}

\footnote{247}{Wage-Hour Adm'rs Interp. Bull., 29 C.F.R. §800.129 (1976).}

\footnote{248}{Wage-Hour Adm'rs Interp. Bull., 29 C.F.R. §800.130 (1976).}


\footnote{250}{Wage-Hour Adm'rs Interp. Bull., 29 C.F.R. §800.130 (1976).}

\footnote{251}{Wage-Hour Adm'rs Interp. Bull., 29 C.F.R. §800.131 (1976).}

\footnote{252}{Corning Glass Works v. Brennan, 417 U.S. 188 (1974).}
Act purposes, the time of day worked was held not to be encompassed by the term "working conditions."

However, where the working conditions are different, a pay differential will be justified. For example, where one group of workers must spend a substantial amount of time in an unair-conditioned plant and others do similar work, but in air-conditioned offices, the working conditions are dissimilar and unequal.\footnote{253} Other factors which are considered are whether the work is dirty or disagreeable, whether climbing is required, and whether the work is in a production area.

\section*{8. Physical Facilities and Other Conditions of Employment.} It is unlawful for an employer to maintain company facilities not available to all employees on a nondiscriminatory basis insofar as race, color, religion, or national origin are concerned.\footnote{254} This ban refers to lunchrooms,\footnote{255} snack-bars,\footnote{256} drinking fountains,\footnote{257} or locker room/rest rooms.\footnote{258} Employee preference, custom and usage, or allowance for freedom of choice on the part of employees will not justify the maintenance of separate facilities.\footnote{259} The employer has an affirmative duty to eliminate the segregated use of company facilities and, in order to comply therewith, may be required to assign facilities and oversee their use on an integrated basis.\footnote{260} This means simply that de facto segregation resulting from discriminatory selection and use of physical facilities on the part of employees is the responsibility of the employer.

Segregated payroll lines or badge number identification systems have been held to violate Title VII.\footnote{261} Maintenance or support of segregated social clubs for the benefit of employees also has been determined to violate the Title VII ban; it does not matter that white employees maintain their own club, because the employer has an affirmative obligation to change the character and, where necessary, the physical facilities of the entire employer-employee relationship so as to constitute it totally nonsegregated and as attractive to members of one group as to those of another.\footnote{262} Segregation for purposes of any social function, such as Christmas parties, is also unlawful.\footnote{263}

\begin{itemize}
\item[257.] EEOC Dec. No. 71-359, CCH EEOC Decs. \P 6172 (1970).
\item[259.] EEOC Dec. No. 72-0978, 4 FEP Cases 839 (1972).
\item[261.] EEOC Dec. No. 70-84, CCH EEOC Decs. \P 6046 (1969).
\item[262.] EEOC Dec. No. 71-1418, 3 FEP Cases 580 (1971).
\end{itemize}
Maintenance of segregated housing, church, or other living accommodations in company towns violates Title VII. Whether on or off the job itself, employer maintenance of or contribution toward the maintenance of any type of physical facility or social gathering for his employees must be on a basis which does not discriminate because of race, color, religion, or national origin. As already stated, an affirmative duty to oversee the nondiscriminatory use by employees of all physical facilities also exists, regardless of employee choice.

With respect to the ban against sex discrimination under Title VII, a different series of problems has developed. In this area, an employer is under an affirmative duty to provide separate and substantially equivalent restroom facilities for male and female employees. Further, he may not use the current lack of such facilities as a basis for refusing to hire members of one or the other sex, unless the cost of providing the facilities is prohibitive. A similar rule applies to the provision of living or sleeping accommodations for members of both sexes where such accommodations are a part of the employment relationship. Under the prohibitive cost or business necessity exception, a very narrow exemption exists, so that in most instances installation of facilities will be required.

In addition to such physical facilities as are related to personal hygiene and convenience, an employer is required to provide physical objects which may be used on the job by members of both sexes. For example, providing only men's bicycles for use in travelling around the employer's industrial complex has been found to violate Title VII.

Where Executive Order 11246, as amended, applies to the employer in question, physical facilities must also be maintained on a nondiscriminatory basis. Further, the Sex Discrimination Guidelines issued by the OFCCP contain a provision specifically requiring employers to assure the availability of appropriate physical facilities for both sexes.

Title VII requires an employer to maintain a working environment free of racial intimidation. That requirement includes positive action where necessary to redress or eliminate employee or supervisory harassment. For example, where a black employee is promoted to a formerly all white department, a racially tense situation may result in the new department.

268. 41 C.F.R. §60-1.8(a) (1977). Facilities are defined in the OFCCP regulations to include, "waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, washrooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation and housing facilities provided for employees."
269. 41 C.F.R. §60-20.3(e) (1977).
Extra support may be necessary on the part of the supervisors and the management structure as a whole to insure that deterioration of employment conditions does not prejudice the employee in the new job or force a resignation therefrom.270

The EEOC will find a Title VII violation where discrimination is found in the opportunity for training, promotion, transfer, etc. Thus, the EEOC considered it an unlawful employment practice where supervisory training was offered to male but not to female employees.271 Similarly, a Title VII violation was found where an employer provided an informal, inadequate training program to discourage blacks from bidding upon and receiving assistance in traditionally all white job classifications. When a black employee who had worked for the company for 16 years did bid on such a job, he was given neither adequate supervision nor did he enjoy the “close and harmonious relationship with an experienced” employee necessary to learn the job. The company’s subsequent refusal to promote him on the grounds that he had not learned the job was found to be discriminatory because of the inadequate training period which was designed to maintain the status quo.272

Harassment of an employee because of his race or national origin cannot be allowed as a condition of employment. Tolerance by first-line supervisors of physical and other harassment has been held to violate Title VII.273 Harassment by racial or ethnic epithet from supervisors or fellow workers also has been determined to violate Title VII, and management has been ordered to take steps to correct the situation at all levels within its employment structure.274 For example, where black and Spanish surnamed employees were the object of racially and ethnically derogatory oral and written remarks, the EEOC ruled that the employer had violated its Title VII obligation.275 In that instance, some of the remarks were written by unidentified persons on restroom walls but the remarks were not removed by the employer. Polish or other racial or ethnic jokes directed at minority group employees may also violate Title VII’s ban on discrimination in conditions

272. EEOC Dec. No. 7062, 2 FEP Cases 168 (1969). But see Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974), wherein it was held that inadequate training for minority group members, in itself, is not sufficient to subject an employer to liability under a fair employment practices law. Only if an employer’s failure to train minorities constitutes dissimilar treatment from that given to white employees will the employer be found to have violated the law. Although the Long case was decided under the Civil Rights Act of 1866, its rationale seems equally applicable to Title VII.
of employment.\textsuperscript{276} The EEOC has also held that harassment of an employee by other workers or by supervisors because of his associations with employees of another race violates Title VII.\textsuperscript{277}

Adopting different manners of address to employees depending upon their race or national origin may violate Title VII.\textsuperscript{278} The manner of address to one sex or the other may also be suspect. Where female employees were referred to as "girls" or "counter girls," the EEOC found an implication of female inferiority and held that the employer violated Title VII.\textsuperscript{279} A smoking rule which affects one sex, but not the other, has been held to violate the ban on discrimination in conditions of employment.\textsuperscript{280} Prohibiting the use of a foreign language on the job has been held violative of the national origin discrimination ban in Title VII, unless the rule can be substantiated as a business necessity.\textsuperscript{281} Thus, a Title VII violation was found where an employer's supervisors restricted its Latino employees from speaking Spanish on the premises, both at their work stations and during lunch and other nonworking times.\textsuperscript{282} Similarly, when a Latino employee was discharged in part because he spoke Spanish in the presence of Anglo customers, a Title VII violation was found because the employer did not establish that legitimate considerations required it to forbid its Latino employees from speaking Spanish in the presence of its Anglo customers.\textsuperscript{283} Nor may an employer tolerate employee prejudice against the use of a foreign language.\textsuperscript{284}

The courts have been reluctant to hold a company responsible for the isolated prejudices of some employees. Title VII prohibits discrimination by employers, but no employer can prevent all of his employees from having some prejudice against an ethnic group or racial minority. In cases based on alleged harassment, the courts require a showing that the employer knew that the employee was subject to abuse because of his race or ethnic background and did nothing to prevent continued harassment.\textsuperscript{285}

\begin{itemize}
  \item \textsuperscript{276} See EEOC Dec. No. CL68-12-431EU, 2 FEP Cases 296 (1969).
  \item \textsuperscript{277} EEOC Dec. No. 71-909, 3 FEP Cases 269 (1969). See also EEOC Dec. No. 71-1902, 3 FEP Cases 1244 (1971).
  \item \textsuperscript{278} EEOC Dec. No. 71-32, CCH EEOC Decs. ¶ 6160 (1970).
  \item \textsuperscript{279} EEOC Dec. No. 72-0679, 4 FEP Cases 441 (1971).
  \item \textsuperscript{280} EEOC Dec. No. 70-503, CCH EEOC Decs. ¶ 6113 (1970); EEOC Dec. No. 71-109, CCH EEOC Decs. ¶ 6165 (1970).
  \item \textsuperscript{281} EEOC Dec. No. 71-446, 2 FEP Cases 1127 (1970).
  \item \textsuperscript{282} Id.
  \item \textsuperscript{283} EEOC Dec. No. 72-0281, CCH EEOC Decs. ¶ 6293 (1971). See also EEOC Compl. Man. (CCH) §466.3, ¶ 6123.
  \item \textsuperscript{284} EEOC Dec. No. 71-1532, EEOC Compl. Man. (CCH) §466.4, ¶ 6124.
\end{itemize}
III. THE ELEMENTS OF PROHIBITED DISCRIMINATION

A. Is Discriminatory Intent Required?

In *Griggs v. Duke Power Co.*, the Supreme Court held that the purpose of Title VII is the removal of artificial, arbitrary, and unnecessary barriers to employment where the barriers operate invidiously to discriminate on the basis of race, religion, nationality, or sex. The Act thus proscribes not only overt or intentional discrimination, but also practices which are fair in form but discriminatory in operation.

The Supreme Court in *Griggs* found that an employer's adoption of a diploma and test requirement in its hiring procedure operated to exclude blacks in the context of past discriminatory practices against that minority group. Although the employer was without any present intent to discriminate, and had even offered to help the undereducated employees through the financing of education, the court found that in the absence of "business necessity," good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that perpetuate the effects of past discrimination and operate as "built-in headwinds" against minority groups.

In *Albemarle Paper Co. v. Moody*, the Supreme Court expanded the *Griggs* decision, holding that an employer's absence of "bad faith" in perpetuating present effects of past racial discrimination through testing procedures and a previously segregated seniority system "is not a sufficient reason for denying backpay" to individuals adversely affected by such discrimination. Backpay awards and other remedies under Title VII are designed to "make whole" employees who have suffered from discrimination. The remedies are not designed to be a punishment for the employer's moral turpitude or bad faith.

Even before the Supreme Court's decision in *Albemarle Paper*, numerous courts of appeals had held that discriminatory "intent" is not a necessary element of proof in Title VII case. Moreover, although *Griggs* and *Albemarle* involved racial discrimination, it has been held that discrimination because of religion or sex can also violate Title VII without proof.

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287. 422 U.S. 405 (1975).
288. See, e.g., Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972). In its recent decision in Washington v. Davis, 426 U.S. 229 (1976), the Supreme Court held that under the Fourteenth Amendment, a showing of adverse impact is not sufficient to make a prima facie case, but rather plaintiff must show that a public authority intentionally discriminated. This ruling, however, presumably does not affect the Court's prior decision with respect to alleged discrimination in private employment under Title VII. Muller v. United States Steel Corp., 457 F.2d 923 (10th Cir. 1975).
of bad faith.\footnote{291} Lower courts have found various terms and conditions of employment violative of Title VII although no bad faith on the employer's part was shown. For example, a negotiated retirement agreement,\footnote{292} promotion policies,\footnote{293} applicant arrest record inquiries,\footnote{294} a "no marriage rule" for women,\footnote{295} and a discharge for garnishments policy\footnote{296} have been held to be unlawful despite a lack of bad faith in their adoption or implementation.

Although none of the above-cited cases have been overruled, the Supreme Court has in some recent cases placed a great deal of emphasis on the absence of a showing of discriminatory intent in denying relief to alleged victims of discrimination. In Washington v. Davis,\footnote{297} the plaintiffs challenged the use of a civil service test which had a highly discriminatory impact in screening out black candidates. The Supreme Court held that under the constitutional standard which was applied, there had to be a showing of discriminatory intent. It should be noted that the standard for showing invidious discrimination under the Constitution is different than the standard applicable under Title VII.

B. The Use of Statistics in Litigation

In cases concerning employment discrimination, "... statistics often tell much and Courts listen."\footnote{298} The Supreme Court has said that its cases "make it unmistakably clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue."\footnote{299} As a matter of law, where gross statistical disparities can be shown, they alone may constitute a prima facie case of discrimination.\footnote{300} An example of such statistical proofs would

\footnote{291} Presumably, the same principle applies to all the prohibited bases of discrimination.
\footnote{293} Gates v. Georgia Pac. Corp., 492 F.2d 292 (9th Cir. 1974); Bolton v. Murray Envelope Corp., 493 F.2d 191 (5th Cir. 1974).
\footnote{294} Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972); Green v. Missouri-Pacific R.R., 523 F.2d 1290 (8th Cir. 1975).
\footnote{296} Wallace v. Debran Corp., 494 F.2d 674 (8th Cir. 1974).
\footnote{297} 426 U.S. 229 (1976); General Electric v. Gilbert, 429 U.S. 125 (1977); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). But see Dothard v. Rawlinson, 433 U.S. 321 (1977) where the Court did not require a showing of discriminatory intent under Title VII.
\footnote{300} Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).}
be a showing that disproportionately small numbers of minority groups or women exist in an employer's workforce as compared with their representations in the relevant labor force population of the geographic area.\textsuperscript{301}

Another example would be statistics showing that employment criteria exclude a disproportionate number of minority group members or women.\textsuperscript{302} When discrimination is alleged with respect to testing, some courts have held that a showing of differential pass rates sets forth a prima facie case.\textsuperscript{303} Similarly, a showing of a disproportionate distribution of employees within a company's workforce or a disproportionate transfer, assignment or promotion rates may establish a prima facie case of discrimination.\textsuperscript{304} A prima facie case of discrimination with respect to discharge or other disciplinary actions may also be established statistically.\textsuperscript{305}

Statistics also may be used to rebut a prima facie case of discrimination. For example, a defendant might show that during the period for which a timely Title VII charge could be filed, it had hired new minority or female employees or admitted minority or female members at a rate comparing favorably to the hiring or admission of white males.\textsuperscript{306} Or, a defendant might present its own statistics comparing the distribution of all its em-


\textsuperscript{303} E.g., Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1976); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); Hester v. Southern Ry., 497 F.2d 1374 (5th Cir. 1974).


\textsuperscript{306} EEOC v. International Union of Operating Engineers, Locals 14 & 15, 553 F.2d 251 (2d Cir. 1977).
ployees, or perhaps just its new hires, with a relevant population or workforce group.

Consequently, the existing composition of an employer’s workforce and/or applicant, test or other employee group will be critical in any determination of an employer’s compliance with its substantive EEO obligations, as well as in any litigation concerning alleged unlawful employment practices.

C. The Present Effects of Past Discrimination

Because intent is not a necessary element of proof in establishing a prima facie case of discrimination under Title VII, employment practices, may, nevertheless, be found to violate Title VII where the practices act to perpetuate the effects of past discrimination. The most visible employment policy where effects of past discrimination may carry over is the application of seniority, with all its concomitant rights. Prior to the Supreme Court’s most recent decisions, the courts of appeals uniformly held that the application of a seniority system which continued the affects of past discrimination constituted a violation of Title VII. The explicit exemption for “bona fide seniority systems” in Section 703(h) of Title VII was construed not to apply to those systems unless compelled by business necessity. This business necessity exception was narrowly construed.

In International Brotherhood of Teamsters v. United States and United Airlines v. Evans, the Supreme Court greatly reduced the number of persons entitled to relief because of past acts of discrimination. In Teamsters, the Court held that an individual could not obtain relief from the discriminatory effect of a neutral seniority system unless he had been unlawfully refused employment. The Court held that “Section 703(h) on its face immunizes all bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act discrimination.” Plaintiffs who in the past succeeded through attacks on discriminatory effects of seniority systems, may now only prevail by showing a discriminatory refusal to hire or transfer. Only specific post-Act victims are entitled to relief, which may include retroactive seniority.

The requirement that each plaintiff establish that he or she had in fact applied after the effective date of the Act for an all-white/all-male job will

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312. 431 U.S. at 348 n.30.
greatly reduce the number of persons entitled to financial and seniority relief under Title VII. There will, therefore, no longer be a need to dismantle departmental seniority systems since seniority relief can be limited to specifically identified victims of post-Act hiring or transfer discrimination. Back pay will be similarly limited.

In *United Airlines*, the Court went even further in limiting recovery for past violations of the Act. In this case the plaintiff had been discharged in 1968 pursuant to a policy which was later discontinued because it was discriminatory. When Evans was rehired she was not given credit under the seniority system for her prior service. She filed a charge of discrimination with the EEOC more than one year later claiming that the refusal to give her credit for prior service perpetuated her discriminatory discharge in 1968.

The Court rejected her claim first because, as in *Teamsters*, the policy of basing seniority only on current employment was privileged under Section 703(h) and second because she did not file a charge of discrimination within 90 days of her unlawful discharge. This second reason advanced by the Court to reject Evans’ claim greatly reduces the potential number of plaintiffs. Under this holding only those victims of an unlawful discharge or refusal to hire who make a timely complaint are entitled to recovery. Under this theory, since the original discrimination must be actionable, it no longer makes any sense to consider these cases under the “perpetuation” theory.

Where there has been a policy of discrimination in hiring and promotion a charge challenging such discrimination is timely as long as the discriminatory policy exists. To the extent that the policy is thus timely challenged by one person, all post-Act victims of the policy will be entitled to relief. In these cases the “perpetuation” theory still has considerable vitality.

Where Executive Order 11246, as amended, is applicable, perpetuation of past discrimination is also prohibited. Since there is no exemption for seniority systems under the Executive Order, the Office of Federal Contract Compliance (OFCCP) has taken the position that *Teamsters* will not limit attacks on seniority systems. A related question is whether the courts will require the identification of specific victims of discrimination and require that the discriminatory practices be timely challenged, under the Executive Order.

If as the Supreme Court held in *Teamsters*, granting relief only to specified individual victims is “the most complete relief possible,” it would be difficult to argue that the Executive Order requires more. Whether the Executive Order justifies sweeping modifications of seniority systems in light of *Teamsters* and *United Airlines* will no doubt be the subject of intense litigation.

IV. SUBSTANTIVE DEFENSES TO DISCRIMINATION

A. Business Necessity

In *Griggs v. Duke Power Co.*, the Supreme Court held that the defense of “business necessity” would be allowed when an employment practice which operated to exclude a class of individuals could be shown to be “job related.” The lower federal courts have elucidated the meaning of this test indicating that the discriminatory policy or practice must be essential to the *safe and efficient operation* of the business in order to be lawful. Predictably, application of this rule has involved questions as to whether an employer would be placed at a serious economic disadvantage or would confront serious safety hazards if the discriminatory practices were abandoned.

The “business necessity” test is not synonymous with “business convenience.” On the contrary, both the EEOC and courts have emphasized that it is not enough for a business to show that X class was excluded simply because that was the best and easiest way of doing business. Before any such discrimination can be practiced, it must not only be shown that including X class is impractical but also that the exclusion policy is absolutely essential to the business, not merely tangential.

In determining what constitutes essential business considerations, it is clear that the need for preserving or improving the image of the company does not justify discrimination. The objective of catering to the preferences of customers or co-workers is not a valid reason for maintaining discriminatory practices. Having to bear additional expense to eradicate a discriminatory practice will not rise to “business necessity,” and some courts have required the creation of expensive training programs to remedy unlawful discrimination. The costs incurred to eliminate a questionable practice must be extraordinary before the “business necessity” defense can prevail.

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319. 29 C.F.R. §1604.2 (1976); Diaz, 442 F.2d 385.
The Age Discrimination in Employment Act explicitly recognizes the defense of business necessity and allows an employer to take action, otherwise prohibited in an unfair employment practice, where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business and where such action is not a subterfuge to avoid the purpose of the Act. Where the business necessity relates to public safety, the courts are apt to give the company's policy minimal scrutiny. The court in Hodgson v. Greyhound Lines, Inc. stated that "[a company] must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase likelihood of risk of harm to its passengers. [It] need only demonstrate however a minimal increase in risk of harm . . . ."

As under Title VII, this exception is narrowly construed, and the burden of proof to establish it is upon the employer. A "business necessity" exception to the Age Discrimination Act is allowed when federal statutory and regulatory requirements provide for compulsory age limitations for hiring or compulsory retirement, without reference to the individual's actual physical condition at the terminal age, when such conditions are clearly imposed for the safety and convenience of the public.

B. Bona Fide Occupational Qualification

Often, the "business necessity" defense is more appropriately expressed in terms of a "bona fide occupational qualification," which can be based on age, sex, religion, or national origin, but not on race or color. Thus, Title VII makes an exception for discrimination resulting from a "bona fide occupational qualification" (BFOQ) provided it is reasonably necessary to the normal operation of the enterprise.

The Title VII bona fide occupational qualification exception has been interpreted very narrowly by both the EEOC and the courts, and, like the "business necessity" test, is not to be equated with business convenience. Labels such as "men's jobs" and "women's jobs" are suspect, particularly

if they are based on weight-lifting restrictions or maximum hours require-
ments, and the Title VII BFOQ exception is not met by reliance upon as-
sumptions about the characteristics of women as a class of workers. For ex-
ample, the assumption that the turnover rate among women is higher
than among men is unlawful. The assumption that women are less capa-
bile of aggressive salesmanship or are incapable of performing physically
demanding jobs cannot be used to deprive them of jobs. Making job
decisions affecting an individual solely because of the preferences of co-
workers, the employer, clients, or customers also violates the Act, except
where it is necessary for the purposes of authenticity or genuineness as in
the case of actors, actresses, fashion models, and some restroom attend-
ants. The Supreme Court recently held that where there was a require-
ment of contact with dangerous male prisoners, sex would be a BFOQ. Finally,
 provision of separate facilities for persons of one sex only is unlawful,
unless the expense of duplicate facilities would be clearly unreasonable.

In sum, if there is no reasonable cause to believe that all or substantially
all women are unable to safely and efficiently perform certain jobs, the
employer must permit each applicant who desires it the reasonable oppor-
tunity to demonstrate her ability to perform the job sought.

A bona fide occupational qualification defense is also recognized under
the Age Discrimination in Employment Act. As with the defense under
Title VII, the burden of proof is placed upon the employer. As noted
above with respect to the “business necessity” defense, federal statutory
and regulatory requirements establishing compulsory age limitations for
hiring and compulsory retirement can constitute a BFOQ. Thus, it has
been held reasonable to impose a maximum hiring age for bus drivers
based on the risk of harm to passengers. Finally, and again consistently
with the Title VII standards, a BFOQ under the Age Discrimination Act

327. E.g., Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Rosenfeld
v. Southern Pac. Ry., 444 F.2d 1219 (9th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d
711 (7th Cir. 1969).
333. Long v. Sapp, 502 F.2d 34, 40 (5th Cir. 1974). See also Rundle v. Humane Society,
12 FEP Cases 444 (E.D. Mo. 1975) (sex is not a BFOQ for job of night nurse in an animal
hospital).
335. 29 C.F.R. §860.102(b) (1976); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th
336. 29 C.F.R. §860.102(d) (1976); Cf. Massachusetts Bd. of Retirement v. Murgia, 427
U.S. 307 (1976) (compulsory retirement at age 50 without regard to individual's physical
condition does not violate the Fourteenth Amendment).
will also be recognized for authenticity or genuineness, as where actors and other persons are used to advertise products designated for a specific age group. 338

C. Good Faith Reliance Upon State Protective Laws

Many states have enacted laws or promulgated administrative regulations with respect to the employment of women. Such laws prohibit or limit the employment of women in certain occupations, such as jobs requiring the lifting or carrying of weights exceeding prescribed limits or jobs requiring work during certain hours of the night or for more than a specified number of hours per day or per week, or for certain periods of time before and after childbirth. This type of law has been categorized as state protective legislation for women. Both the EEOC and the courts have taken the position that these state protective laws for women will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational exception. 339

But the above cases have recognized that the existence of state protective legislation is relevant when the plaintiff seeks monetary damages in addition to injunctive relief in a lawsuit. Thus, a “limited defense” is allowed based upon the fact that such state legislation often places the employer “on the horns of a dilemma,” and the recovery of monetary relief has been precluded where an employer has in good faith relied upon a state female protective law prior to a determination of the validity of the state protective legislation by the federal courts. 340

D. Good Faith Reliance on EEOC Opinion

A party may not be held liable or be punished for an unlawful employment practice under Title VII if he proves that he acted, or failed to act, in good faith reliance on and in conformity with a written interpretation or opinion of the EEOC. 341 Even if the EEOC subsequently determines that

338. 29 C.F.R. §860.102(e) (1976).
an employment practice it once viewed as lawful is unlawful, the courts may consider the earlier opinion as a valid defense. This holds true even if such interpretation or opinion is later modified or rescinded, or if a court later holds that it is invalid. However, only the following may be considered a "written interpretation or opinion" of the EEOC: (1) a letter entitled "Opinion Letter" and signed by the General Counsel on behalf of the EEOC, or (2) matter published and so designated in the Federal Register.

E. Affirmative Action Plans and Consent Decrees

It is not a defense to a charge of discrimination that an employment practice is permitted or required by an affirmative action plan or a consent decree. In Stevenson v. International Paper Co., the court held that employees could sue under Title VII to challenge a seniority system which had been expressly authorized under Executive Order 11246 by the predecessor of the OFCCP. However, the court did note that an award of backpay might be inappropriate because of the employer's reliance on approval under the Executive Order.

The courts have also held that white male employees who are not hired or denied a promotion because of promotion or hiring goals for minorities or women established in an affirmative action plan or a consent decree may sue under Title VII. Other courts have, however, reached the opposite result; and, at least where there is some evidence of discrimination, numerous courts have approved the use of such hiring or promotion goals. The law on this point is thus highly unsettled. Until the issue is definitely resolved, efforts to meet the goals set up in affirmative action plans should continue to be made. However, in order to reduce the chance of liability, no applicant or employee ought to be totally excluded from consideration for hire or promotion solely because he or she is not a mem-

344. 516 F.2d 103 (5th Cir. 1975).
348. E.g., Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973).
ber of a group for which an affirmative action plan goal has been established.\textsuperscript{349}

V. Remedies

A. Class Actions

The class action is a lawsuit in which a common question of law or fact is presented on behalf of a large number of similarly situated persons who are represented by a few named individuals.\textsuperscript{350} The use of the class action has been approved by the courts in actions brought under Title VII, the Civil Rights Acts of 1866, the Equal Pay Act, and the Age Discrimination in Employment Act. The primary advantage of a class action is that it avoids inconsistent relief for those class members who are similarly situated. The biggest problems with class actions are that they often are too large to be manageable and frequently the rights of absent class members are neglected by the class representatives.\textsuperscript{351} The potential liability of a corporation found to have committed an unlawful practice against a class of similarly situated persons can be huge because a class may include past, present, and future employees.\textsuperscript{352}

Under Rule 23(a) the plaintiff must show (1) that there are so many members of the class that it is impractical to join them all, (2) that a class does exist, (3) that the claims of the named plaintiffs are typical of those of the class, and (4) that the plaintiff will be an adequate representative of the class. If a Title VII plaintiff can show that these requirements are met, the class will be certified under Rule 23(b)(2) or (b)(3)\textsuperscript{353} depending on whether the relief sought is predominately injunctive or monetary.

Some courts of appeals have held that Rule 23 of the Federal Rules will be liberally construed in Title VII class actions. The rationale was that any charge of race or sex discrimination was by definition an allegation of class discrimination.\textsuperscript{354} The Supreme Court recently rejected this "across the board" approach. It indicated in \textit{East Texas Motor Freight System, Inc. v. Rodriguez}\textsuperscript{355} that compliance with the Rule requirements of 23(a) is absolutely mandatory in Title VII cases.

\textsuperscript{349} EEOC Dec. 75-268, 10 FEP Cases 1502 (1975).
\textsuperscript{353} \textit{Fed. R. Civ. P. 23}.
\textsuperscript{354} Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).
\textsuperscript{355} 431 U.S. 395 (1977).
Under Title VII only one member of the class must file a discrimination charge with the EEOC; all potential class members need not do so in order to participate in the action and receive damages if they can show their rights were violated within the statute of limitations triggered by the charge.356

Under the Equal Pay Act and the Age Discrimination in Employment Act a class action may be brought only on behalf of those who file a written consent authorizing their participation in the action.357 Additionally, all participating class members must file a notice of intent to sue with the Secretary of Labor.358

B. Types of Relief Awarded

Under Title VII, if the district court finds that a respondent has "intentionally"359 engaged in an unlawful employment practice, it may, in its discretion, enjoin the respondent from engaging in unlawful conduct and may order such affirmative action as may be appropriate, including but not limited to reinstatement or hiring of employees with or without back pay.360 The prevailing party in a Title VII case may also recover reasonable attorney's fees.361 The Supreme Court has held that individuals establishing a cause of action under the Act are entitled to equitable and legal relief including, if appropriate, compensatory and punitive damages.362 For example, damages for psychic injury caused by unlawful discrimination may be awarded.

The most extensive and imaginative remedies awarded have arisen from attacks on collective bargaining seniority systems. As discussed above, the Supreme Court's decision in Teamsters v. United States363 sounds a death knoll for court ordered reorganization of "bona fide" seniority systems.

The Supreme Court reaffirmed in Teamsters their holding in Franks v. Bowman Transportation Co.364 that identifiable victims of discrimination

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359. See Part III (A) supra, at 728.
may be granted seniority retroactive to the date on which the post-Act
discrimination took place. Depending on the circumstances of the case, a
proper remedy could include a grant of "competitive status seniority" for
the purpose of computing such non-competitive benefits as pension rights
or vacation time. To date, however, courts have refused to "bump" white
or male employees from existing positions on the basis of this seniority.
Additional affirmative remedies include preferential or accelerated hiring
of minorities or women.

Back pay is frequently awarded in all types of Title VII cases. Because
the statutory standard requires some type of discriminatory "intent,"
courts determining the size of the back pay award may evaluate the em-
ployer's good or bad faith in relation to a challenged employment practice
and what affirmative action the employer has taken, if any, to eradicate
discriminatory practices. However, the absence of bad faith does not in
itself insulate the employer from back pay liability.

Under the Civil Rights Act of 1866, the courts possess authority to award
general legal and equitable relief. Liability for back pay under the 1866
Act can extend beyond the effective date of Title VII subject to the applica-
ble state statute of limitations which governs such actions.

Actions under the Equal Pay Act may be maintained by the Secretary
of Labor or the aggrieved employee. In cases maintained by the Secretary,
federal courts are authorized to issue injunctions to restrain violations, and
to require the employer to make employees whole. In individual actions,
an employee may be awarded reasonable attorney's fees, court costs, the
actual amount of wages lost, and an additional sum as liquidated damages.
The liquidated damage award may vary from zero to an amount equal to
lost wages, depending on the employer's good faith. Willful violations of
the Equal Pay Act by an employer are criminal in nature and may subject

365. Id. For other cases involving seniority, see Chance v. Board of Examiners, 534 F.2d
993 (2d Cir. 1976); Acha v. Beame, 531 F.2d 648 (2d Cir. 1976); Waters v. Wisconsin Steel
Works of Int'l Harvester Co., 502 F.2d 1309 (7th Cir. 1974); Watkins v. United Steel Workers
Local No. 2369, 516 F.2d 41 (5th Cir. 1975); Patterson v. American Tobacco Co., 535 F.2d
257 (4th Cir. 1976).

366. The focus has been on awarding seniority to minorities for purposes of qualifying
1976); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); United States v. N.L.
Indus., Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Chesapeake & O. R.R., 471 F.2d
582 (4th Cir. 1972); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971); Local
189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).


369. Id. See also Part V (C) infra at 743.


371. 29 U.S.C.A. §216(b) (Supp. 1977); 29 C.F.R. §800.166(b) (1976); Boll v. Federal
Reserve Bank of St. Louis, 365 F. Supp. 637 (E.D. Mo. 1973), aff'd, 497 F.2d 335 (8th Cir.
1974).
the employer to a fine of not more than $10,000 or, upon a second conviction, to imprisonment of not more than six months, or both.\textsuperscript{372}

In actions initiated by the Secretary of Labor or individuals under the Age Discrimination in Employment Act, courts are authorized to grant such legal and equitable relief as may be appropriate, including compelling employment, reinstatement, or promotion, and requiring payment of lost wages.\textsuperscript{373} Attorney's fees and injunctions may be awarded in appropriate cases,\textsuperscript{374} as well as damages for pain and suffering.\textsuperscript{375} Unless a willful violation is shown, an individual seeking recovery under the Act may only be awarded the actual amount of lost wages, although in some cases, this amount has included sums on account of pension and other benefits.\textsuperscript{374} If a "willful" violation is proven, liquidated damages in amounts up to wages lost, in addition to actual wages lost, may be awarded.\textsuperscript{377}

Sanctions may also be imposed against employers under Executive Order 11246, the Rehabilitation Act of 1973,\textsuperscript{378} and the Vietnam Era Veterans' Readjustment Act of 1974.\textsuperscript{379} Enforcement provisions relating to these requirements differ from those utilized under the other civil rights and discrimination acts in that their focus is primarily on administrative rather than judicial review. Agencies enforcing these requirements need not resort to voluntary conciliation or ultimate judicial action. Each may be enforced by direct order of the agency after a charge has been lodged against an employer and an administrative hearing conducted.

Under Executive Order 11246, the Secretary of Labor may:

1. Publish the names of employers who fail to comply;
2. Recommend to the Department of Justice that judicial action be brought to enforce provisions of government contracts relating to discrimination;
3. Recommend to the EEOC or Department of Justice that proceedings be instituted under Title VII;
4. Recommend to the Department of Justice that criminal proceedings be brought for furnishing the agency with false reports or information;
5. Cancel, terminate, or suspend a government contract or portions of it (this action can be absolute or conditioned on the em-

\textsuperscript{373} 29 U.S.C.A. §626(b) (1975).
\textsuperscript{374} Brennan v. Ace Hardware Corp., 495 F.2d 368 (8th Cir. 1974); Hodgson v. First Federal S & L Ass'n, 455 F.2d 818 (5th Cir. 1972).
\textsuperscript{377} Section 7, 29 U.S.C.A. §626(b) (1975); 29 C.F.R. §800.166(b) (1976).
employer's future adherence to discrimination guidelines); or
(6) Provide that any government agency shall refrain from enter-
ing into further contracts or extensions of present contracts with
the offending employer.\textsuperscript{380}

Administrative remedies available to the Department of Labor under
the Rehabilitation Act of 1973 are similar. The Department may:

(1) Cause withholding of any progress payments due under the
contract;
(2) Terminate the contract; or
(3) Bar the employer from contracting with the government.\textsuperscript{381}

Additionally, the Department of Labor may seek "appropriate judicial
action" which expressly includes specific performance of the affirmative
action clause of the contract.\textsuperscript{382}

The Vietnam Era Veterans' Readjustment Act of 1974 provides that the
Secretary of Labor shall take such action as the facts and circumstances
of the case warrant, consistent with the terms of the contract involved and
with applicable laws and regulations.\textsuperscript{383}

If an employer is found to have violated its obligations under the Veter-
ans' Act, the contracting agency may withhold progress payments, termi-
nate the contract, or bar the contractor from future federal contracts. In
addition, the Director of the Office of Federal Contract Compliance Pro-
grams may seek judicial enforcement of the employer's affirmative action
obligation set out in the contract.\textsuperscript{384}

Executive Order 11246 does not expressly empower the OFCCP, the
compliance review agencies or private parties to bring lawsuits to enforce
its provisions. The majority of decided cases hold that there is no private
right of action directly against an employer under the Order.\textsuperscript{386} However,
two cases have ruled that private parties have a right to sue the OFCCP
and/or compliance agencies to seek a mandamus order requiring that they
enforce the Executive Order.\textsuperscript{387} These cases suggest that a private right of
action may ultimately be found to exist directly against an employer.\textsuperscript{387}

\textsuperscript{380} Exec. Order No. 11,246, 3 C.F.R. 339, 343, §209 (1964-1965 Compilation). For subse-
quent history of No. 11,246 see note 13, supra.
\textsuperscript{381} 41 C.F.R. §60-741.28 (1977).
\textsuperscript{382} Id.
\textsuperscript{384} 41 C.F.R. §60-250.28 (1977).
\textsuperscript{385} Farkas v. Texas Instrument, Inc., 375 F.2d 629 (5th Cir.), cert. denied, 389 U.S. 977
(1967); Braden v. University of Pitts., 343 F. Supp. 836 (W.D. Pa. 1972), rev'd on other
\textsuperscript{386} Legal Aid Society v. Brennan, 381 F. Supp. 125 (N.D. Cal. 1974); Lewis v. Western
\textsuperscript{387} Legal Aid Society v. Brennan, 381 F. Supp. 125; Lewis v. Western Airlines, Inc., 379
F. Supp. 684.
Although cases have not arisen under the Vietnam Era Veterans' Readjustment Act or the Rehabilitation Act, it is probable that affirmative action programs under these statutes will be susceptible to enforcement through the mandamus technique if courts come to accept the holdings in the Alameda and Western Airlines cases.

C. Limitations on Liability

All of the statutes dealing with remedies for discriminatory employment practices are governed by limitation periods with respect to the recovery of monetary relief. Under Title VII, back pay liability may not accrue from a date more than two years prior to the filing of a charge with the EEOC. Under both the Equal Pay Act and the Age Discrimination in Employment Act, the statute of limitations for the recovery of lost pay is two years after the cause of action accrued. If willful violations involving criminal prosecutions are involved, the limitations period is three years after the cause of action accrued. The Civil Rights Act of 1866 has no express limitations period, but the courts have determined that the most analogous state statutes of limitations will govern.

There are other important judicial interpretations which limit liability under Title VII and the 1866 Act. Thus, interim earnings or amounts earnable with reasonable diligence by the person discriminated against reduce any monetary relief awardable. The courts are currently divided on the question whether the amount of unemployment compensation received by the discriminatee should operate to reduce back pay liability. Most important is the fact that an award of monetary relief under Title VII is committed to the sound discretion of the court and may be eliminated or reduced in appropriate cases. Thus, where an employer adhered

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to state female protective legislation in good faith and where the issue of
damages was unsettled with respect to particular issues, refusal to award
monetary relief to discriminatees has been upheld.\textsuperscript{394} A monetary award
has also been reduced when it appeared that the plaintiff had a record of
25\% absenteeism.\textsuperscript{395} The courts of appeals are split on the question of
whether the EEOC's power to obtain relief in the form of back pay is
limited by the 180 day period included in the Act which precludes court
action by the charging party for 180 days so that the EEOC can investigate
the charge and pursue conciliation.\textsuperscript{396} The Fifth Circuit adopted the theory
that when the Commission is bringing suit for the recovery of sums due
individual citizens rather than the treasury, it is a private, not a public
action. The time period under §706(f)(2) was applied to bar an action for
back pay by the EEOC which was instituted more than 180 days after the
EEOC received the charge.\textsuperscript{397}

The Ninth Circuit, on the other hand held that the 180 day period in
§706(f)(1) does not prevent the EEOC from obtaining back pay for individ-
uals. The court adopted the theory that the EEOC acts to vindicate a
public policy regardless of the relief sought. Back pay was considered a
catalyst which spurred compliance with the Act by encouraging unions and
employers to evaluate their employment practices.\textsuperscript{398}

It should be noted that each of the courts of appeals which has decided
the issue has held that §706(f)(1) does not preclude suit by the EEOC after
the 180 day period has run.\textsuperscript{399}

\textsuperscript{394} Kober v. Westinghouse Elec. Co., 480 F.2d 240 (3d Cir. 1973); Manning v. Interna-
tional Union, 466 F.2d 812 (6th Cir. 1972), cert. denied, 410 U.S. 946 (1973); Schaeffer v.
Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972); LeBlanc v. Southern Bell Tel., 460 F.2d 1228
(5th Cir.), cert. denied, 409 U.S. 990 (1972).
\textsuperscript{396} Section 706(g), 42 U.S.C.A. §2000e-5(g) (1974).
\textsuperscript{397} EEOC v. Griffin Wheel Co., 511 F.2d 456, aff'd on rehearing, 521 F.2d 223 (5th Cir.
\textsuperscript{398} EEOC v. Occidental Life Ins. Co., 535 F.2d 533 (9th Cir. 1976).
\textsuperscript{399} EEOC v. Duval Corp., 528 F.2d 945, 949 (10th Cir. 1976); EEOC v. Meyer Bros. Drug
Co., 521 F.2d 1364, 1365 (8th Cir. 1975); EEOC v. E. I. dePont de Nemours & Co., 516 F.2d
1297 (3d Cir. 1975); EEOC v. Kimberly-Clark Corp., 511 F.2d 1532, 1536-59 (6th Cir. 1975);
EEOC v. Louisville & N. R.R., 505 F.2d 610 (6th Cir. 1974); EEOC v. Cleveland Mills, 502
F.2d 153 (4th Cir. 1974).